

Design Liability in the UAE Construction Industry

مسؤولية التصميم في صناعة البناء في الإمارات العربية المتحدة

by

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DECLARATION

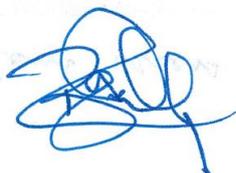
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ABSTRACT

This dissertation explores design liability in the UAE construction industry. First and foremost, design liability in the UAE is a matter of contract between the parties to a construction contract, however, the terms and conditions of the contract are also subject to the laws of the UAE.

The background and the aims and objectives of this dissertation are outlined, and the significance of the research, as well as the research methodology is explained.

In addition to examining the current outlook for the UAE construction industry, this dissertation examines the principles governing the formation and performance of a construction contract and the level of design liability that the parties normally assume. This is examined in accordance with the statutory UAE rules governing contracts.

Not only do parties execute construction contracts in accordance with contract law, but the parties are also subject to laws governing delict and the provisions of delict are examined with respect to the parties' design liabilities and the risks and remedies that whilst not always provided for under a contract are important considerations.

An important facet of the law which is commonly overlooked in contracts in the UAE concerning design liability is decennial liability and this is examined in detail and the risks, liabilities, and remedies available under the provisions of the law are discussed.

The model form of contract most widely used in the UAE, provided by the Fédération Internationale Des Ingénieurs-Conseils (FIDIC), is reviewed in relation to contract law, liability for delict and decennial liability. The model form of contract is discussed to determine if the provisions of the law are well considered and if any inconsistencies can be identified.

This dissertation concludes with a summary of the important factors related to design liability in the UAE, that the parties to a construction contract should consider, and several recommendations are made so the parties may mitigate the risks associated with design liability.

ملخص

تستكشف هذه الرسالة مسؤولية التصميم في مجال الانشاءات في الإمارات العربية المتحدة. أولاً وقبل كل شيء، فإن مسؤولية التصميم في دولة الإمارات العربية المتحدة هي مسألة عقد بين أطراف عقد بناء، ومع ذلك، فإن شروط وأحكام العقد تخضع أيضاً لقوانين دولة الإمارات العربية المتحدة.

في هذه الرسالة تم ايجاز الخلفية والأهداف والأغراض بالإضافة الى شرح أهمية البحث بالإضافة الى منهجية البحث.

بالإضافة إلى دراسة التوقعات الحالية لمجال الانشاءات بدولة الامارات، تبحث هذه الرسالة في المبادئ التي تحكم انشاء وأداء عقد الانشاء ومستوى مسؤولية التصميم التي يتحملها الطرفان عادة. يتم فحص ذلك وفقاً للقواعد القانونية لدولة الإمارات العربية المتحدة التي تنظم العقود. لا تقوم الأطراف بتنفيذ عقود الانشاء وفقاً لقانون العقود فحسب، بل تخضع الأطراف أيضاً للقوانين التي تحكم الفعل الضار ويتم مراجعة أحكام الفعل الضار فيما يتعلق بالتزامات التصميم الخاصة بالأطراف والمخاطر والتعويضات التي لا ينص عليها العقد دائماً وهي اعتبارات هامة.

أحد الجوانب المهمة للقانون الذي يتم تجاهله عادةً في العقود بدولة الامارات ما يتعلق بمسؤولية التصميم هي المسؤولية العشرية ويتم مراجعة ذلك بالتفصيل بالإضافة إلى مناقشة المخاطر والالتزامات والتعويضات المكفولة بموجب أحكام القانون.

تتم مراجعة الصيغة النموذجية للعقود المستخدمة على نطاق واسع بدولة الامارات، والتي يوفرها الاتحاد الدولي للمهندسين المعماريين (فيديك) فيما يتعلق بقانون العقود والمسؤولية عن الفعل الضار والمسؤولية العشرية. يتم مناقشة الصيغة النموذجية للعقد لتحديد ما اذا قد تم مراعاة أحكام القانون بصورة جيدة وما اذا كان يمكن تحديد أي تناقضات.

تختتم هذه الرسالة بملخص للعوامل الهامة المتعلقة بمسؤولية التصميم بدولة الامارات، التي يجب على أطراف عقد الانشاء مراعاتها، ويتم تقديم العديد من التوصيات بحيث يمكن للأطراف تخفيف المخاطر المرتبطة بمسؤولية التصميم.

ACKNOWLEDGEMENTS

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1 INTRODUCTION

On any given project, assuming the traditional construct-only model, the first person the client (or the employer) engages with is the designer. The design is carried out by an architect or an engineer and the contract for building the project is then awarded to a contractor. The contractor simply follows the design provided by the architect or engineer. However, the construction industry has evolved over the last number of decades and given that contractors and subcontractors are specialists in their field and therefore possess the talent to perform a design function, modern construction contracts provide for elements of the works that should be designed by the contractor and specialist subcontractors.

In a construction contract where a party takes on design liability, it is taking on legal responsibility for that part of the design. It is commonplace on a construction project for various parties, including the employer, the designer, subconsultants as well as the contractor and certain subcontractors to develop the design and take on elements of ‘design liability’.

There is a risk that issues may arise concerning the design and the first question that can be asked is “who is the designer?” or “who is responsible for the design of this element?”. When a party performs a design, it is therefore perceived that the party has undertaken a ‘design liability’ to meet a certain standard with the regards to the design.

In each instance, the designer’s obligation is to achieve the standard of design defined in the contract or through the laws of the UAE. Any designer must identify their contractual design liability described in the contract and understand the design liabilities provided under the laws of the UAE.

When the contracting parties are entering into a construction contract agreement, it is important that the parties clearly define their respective contractual obligations. When forming the contract agreement, a key element of this process is that the enforceability of the legal rights and obligations within the agreement is fully considered and complies with the laws of the UAE. This can be a consideration when understanding the parties’ liabilities with respect to the design of the construction project.

WHAT IS DESIGN

The Oxford English Dictionary has defined design as “a plan or drawing produced before something is made”.

It is my view that in a construction context, design for a construction project should follow a design process with the aim of finding the best means of achieving the employer's requirements.

WHAT IS DESIGN LIABILITY

Design liability is when a party to a contract makes a design decision and bears any legal responsibility for their decision.

However, with modern contracts, and new technologies and evolving methods of construction, design liability can be a complex issue due to the amount of specialists and experts involved, even using simple procurement methods.¹

In the construction industry in the UAE, the factors that determine design liability are the contract documents that describe the parties' duties and the liabilities for the design and the laws of the UAE that affect the parties design liability.

BACKGROUND OF THE DISSERTATION

The world-renowned architect Mr. Frank Gehry is quoted as saying *"I don't know why people hire Architects and then tell them what to do"*,² and *"An architect is given a program, budget, place, and schedule. Sometimes the end product rises to art - or at least people call it that"*.³

Frank Gehry's practice has been commissioned to design the long-anticipated Guggenheim Museum in Abu Dhabi which is set to open in 2025.⁴

Reading Mr. Gehry quotes, it can be surmised that he understands that an architect does not have free reign on a construction project, and his practice is subject to project budget constraints as well as time schedules that influence the design of his buildings. Such matters would depend on the terms and conditions of the appointments his architectural practice has

¹ Sarah Lupton, Cornes and Lupton's Design Liability in the Construction Industry (Blackwell Publishing Ltd 2013) 1

² Akhil Sharma, 'The Architect'

<https://www.wsj.com/articles/SB116683600262058277#:~:text=%22I%20don't%20know%20why,the%20aesthetics%20of%20a%20building.>> accessed 23 December 2021

³ Alex Hoyt, 'Project: Design the building for the New World Symphony in Miami'

<https://www.theatlantic.com/magazine/archive/2011/05/frank-gehry/308460/> > accessed 23 December 2021

⁴Lizzie Crook, 'Frank Gehry-designed Guggenheim Abu Dhabi announces 2025 opening date'

<https://www.dezeen.com/2021/10/08/frank-gehry-guggenheim-abu-dhabi-2025/> > accessed 23 December 2021

received for projects. These constraints may also constitute design liabilities, where his practice may be subject to contractual liabilities for not finishing on time and within budget.

In a more local context, in June 2021, it was reported in the media that the Dubai-based developer Emaar Properties PJSC, was to add a new clause to all contracts in response to project delays. The well-respected Emaar founder Mr. Mohamed Alabbar, stated at the time that delays on Emaar projects were of concern and were caused by design changes being made during the construction phases of the projects. Mr. Mohamed Alabbar further added that a new contract clause would be added to all contractor and designer contracts, and no changes would be allowed without his consent.⁵

Such remarks may have been a reaction to recent experience where projects had been delayed due to issues with the design. Emaar are not well known in the UAE construction market for awarding projects to contractors on a design and build basis, so it is curious to see that the new clause preventing design changes on live projects would apply to contracts between the Emaar and the contractor when such a new clause should only be meant for the Emaar's consultant appointments. On a traditional design/bid/build project the contractor is not supposed to make changes to the design. On further analysis, Emaar's reaction, may mean that there were issues with the designs for some of their projects and that considerable design development took place concurrently to the construction work taking place, thus resulting in project overruns and extension of time claims and it can be that ultimately Emaar found itself liable for the design issues, in circumstances where it had not properly procured that risk from its design team.

AIM AND OBJECTIVES

The intention of the research is to offer construction professionals working within the UAE for employers, contractors, and designer alike, with a set of guidelines concerning the use construction contracts and the interpretation of design liability and the application of the relevant laws of the UAE.

⁵ Zainab Fattah, 'Dubai's Emaar Adds New Contract Clause After Project Delays' <https://www.bloomberg.com/news/articles/2021-06-09/dubai-s-emaar-adds-new-contract-clause-after-project-delays> > accessed 30 December 2021

SIGNIFICANCE OF RESEARCH

In the UAE, a large percentage of construction professionals are expatriate and from different part of the world such as the European Union, the United Kingdom, India, the Philippines, and many countries throughout the Middle East and across North Africa. With limited knowledge of the laws of the UAE, construction professionals can assume that the parties are at liberty to agree any of the terms and conditions of the contract and exclude certain liabilities. As a construction professional in the Middle East myself since 2013, I have observed construction professionals that have worked in the UAE for more than two decades stating that it is possible to exclude decennial liability from a tender submission. Apart from legal professionals that work in the construction industry, I have observed that there is an apparent lack of knowledge within the industry concerning design liability and there is a scarcity of literature about design liability in the UAE construction industry, and this can result in construction professionals making incorrect assumptions concerning design liability and the law. This dissertation will explain design liability in simple terms so that a designer, employer, and contractor will understand their rights, obligations, and liabilities under UAE law.

RESEARCH METHODOLOGY

The literature review will involve a study of books, journals, and construction law related literature to explain design liability with respect to contract law, liability for delict and decennial liability. This will also be supported with cases that have taken place in the UAE as well as possible (or probable) circumstances.

STRUCTURE OF THE STUDY

Chapter 1 - Introduction

This chapter will introduce design liability in the UAE construction industry, a summary of the background and the overview of the research. The aims and significance of the research will be discussed.

Chapter 2 - The UAE construction industry and legal system

This chapter will provide a brief introduction with an overview of the UAE legal system. The recent history and an overview of several construction sectors in the UAE construction industry will be discussed. The meaning of design and design liability will also be discussed.

Chapter 3 – Design liability under contract law

This chapter will examine how UAE contract law applies to design liability and the operative provisions will be discussed and several circumstances related to design liability will be laid out to see how the provisions of UAE law operate.

Chapter 4 – Design liability for delict

This chapter will examine how the laws of delict apply to design liability and the operative provisions will be discussed and several circumstances related to design liability will be laid out to see how the provisions of UAE law operate.

Chapter 5 – Decennial liability

This chapter will discuss the Law of Decennial Liability in the UAE. The operative provisions of the law will be examined in detail.

Chapter 6 – FIDIC governance

This chapter will examine the model form of contract and how it applies to UAE contract law, UAE laws of delict and the law of decennial liability in the UAE. The model form of contract that this chapter will focus on is 2017 FIDIC Suite of Contracts.

Chapter 7 – Conclusions

This chapter will discuss some conclusions and recommendations based on the research.

2 THE UAE CONSTRUCTION INDUSTRY AND LEGAL SYSTEM

AN OVERVIEW OF THE UAE LEGAL SYSTEM

The United Arab Emirates was founded on 2 December 1971, and comprised six of the seven emirates (Abu Dhabi, Dubai, Ajman, Sharjah, Umm Al Quwain and Fujairah). On 10 February 1972, Ras al Khaimah, became a member of the federation.

The laws of the UAE are administered by a codified civil law model, or Civil Code⁶ and a Commercial Code,⁷ and this has created a complete suite of laws that cater for all possible eventualities and are made up of the Federal laws of the UAE, combined with the local laws, rules and regulations of the each of the individual Emirates. The laws are based on Shari'ah law, which has an influence in shaping all legislation that is passed.⁸

The laws concerning the regulation of construction contracts are set out under Articles 872 to 896 of the Civil Code which deal with “muqawala contracts” (contract to make a thing or to perform a task), however, there are also other principles prescribed in the UAE law codified in the Civil and Commercial Code. Where applicable, the parties to a contract can agree to contract out of certain provisions, but other provisions are rules of public order and are mandatory and the parties are not allowed to contract out of these provisions.⁹

The UAE has a separate “off-shore” jurisdiction called the DIFC which has its own laws founded on the Common Law system.

THE UAE CONSTRUCTION INDUSTRY

The UAE construction industry has been at the forefront of architecture and construction for several decades, with many ground-breaking landmark developments. The UAE is home to the first seven-star hotel at the Burj al Arab and the world's tallest man-made structure called the Burj Khalifa, along with world renowned resorts, museums, and shopping malls. Along

⁶ UAE Federal Law No. 5 of 1985 amended by Federal Law No.1 of 1987 and

⁷ Commercial Transactions Law No. 13 of 1993

⁸ Hassan Elhais, ‘What You Should Know About UAE’s Legal System’

<https://www.lexology.com/library/detail.aspx?g=bbbe9dc7-9f25-4ca3-a3cd-b7cace12c99c> > accessed 5 January 2022

⁹ Celine Abi Habib Kanakri and Andrew Massey, ‘Legal issues relating to construction contracts in the United Arab Emirates’

<https://www.lexology.com/library/detail.aspx?g=dab36f6f-130e-4432-84d4-5e0bee1dc641> > accessed 5 January 2022

with such world-famous developments, the UAE is now focusing on a sustainable construction model with greener and smarter buildings.¹⁰

According to Mr. David Clifton, the Vice-President for Business Development at the UAE based consultancy Hill International, the UAE construction industry represented 8.1% of the UAE's GDP in 2020 with further room for growth expected in 2021. Construction activity contracted by 4.8% in 2020, but a recovery is expected.¹¹

There is an increasing demand for property in the UAE from foreign investors and whilst this is creating opportunities, this also creates resourcing challenges.¹² The following sectors of construction represent current activity, but also represents areas of sustainability that the UAE is currently prudently striving toward.

HOSPITALITY SECTOR

According to KPMG's Dubai hospitality survey 2021, despite 2020 being a difficult year due to the COVID 19 pandemic, the UAE has the second highest occupancy rate in the world at 54.7%. The hospitality sector has experienced strong local demand for "staycations". The UAE has taken steps to position the country as a popular destination among travellers with new attractions opening on a regular basis, such as the Ain Dubai and the Museum of the Future in Dubai and new attractions are set to appear in Abu Dhabi with SeaWorld Abu Dhabi on Yas Island and the Guggenheim Museum and Zayed National Museum, and Natural History Museum set to open in the future in Saadiyat Island. In Dubai, 16,000 hotel rooms are estimated for handover in 2021, bringing the total to 135,000 hotel rooms. The public beaches are also set to increase by 400% by 2040 as part of Dubai's 2040 Urban Master Plan.¹³ In a surprise move in January 2022, the emirate of Ras Al Khaimah announced that a deal had been made with Las Vegas operator Wynn Resorts to develop a large resort with "a gaming area", however, the meaning of 'gaming' remains unclear. Given that Wynn Resorts is not the first Las Vegas based operator to move into the UAE with Caesars Entertainment

¹⁰ Chebel Bsaibes, 'UAE construction: 50 years of progress'

<https://www.arabianbusiness.com/opinion/comment/uae-construction-50-years-of-progress> > accessed 6 January 2022

¹¹ Manoj Nair, 'UAE construction industry wants banks not to add to their cash problems'

<https://gulfnews.com/business/property/uae-construction-industry-wants-banks-not-to-add-to-their-cash-problems-1.1631507010243> > accessed 6 January 2022

¹² Peyman Mohajer, 'The industry can look forward to 2022 with "increased confidence"'

<https://www.constructionweekonline.com/business/the-industry-can-look-forward-to-2022-with-increased-confidence> > accessed 6 January 2022

¹³ KPMG, 'Dubai hospitality survey 2021'

<https://assets.kpmg/content/dam/kpmg/ae/pdf-2021/05/dubai-hospitality-survey-2021.pdf> > accessed 10 February 2022

operating on Bluewaters Island, there may be some significant changes to the hospitality industry in UAE in the long term.¹⁴

RETAIL SECTOR

According to the Dubai Chamber of Commerce and Industry, the UAE currently has the highest household level of spending on e-commerce in the Middle East region at \$2,554 per household. However, the level of spending on e-commerce has not curtailed the appetite for consumer demand and retail spending is set to grow by 13% and reach \$58 billion by the end of 2021. Retail growth in the UAE is expected to maintain a steady growth of 6.6% annually and is expected to reach sales of \$70.5 billion by 2025. Store based retail is forecast to increase at rate of 5.7% annually.¹⁵ New retail offerings continue to open with Emaar's Dubai Hills Mall opening in February 2022.¹⁶

OFFICE SECTOR

The office sector in the UAE has experienced several changes since 2020. The COVID-19 pandemic resulted in many companies and governmental departments implementing a 'working from home' policy and there has also been the introduction of a new working week in January 2022.

According to the CBRE Q4 Market Review and 2022 Outlook, activity is limited for office space in Abu Dhabi, with occupiers from predominantly organisations with direct or indirect government links preferring, high quality office space. The average rent for Grade A and Grade B units have dropped by 1.5% and 2.4% respectively and with 193,000 square meters of office space to be delivered in 2022, and with limited demand, the market is not expected to see any major changes. In Dubai it is envisaged that 218,000 square meters of office space will be delivered in 2022 whilst the average rent for Grade A and Grade B units have dropped by 0.1% and 4.4% respectively, resulting in a similar subdued outlook being forecast.¹⁷

¹⁴ Dominic Dudley, 'Is Gambling on the Cards for The UAE?' <https://www.forbes.com/sites/dominicdudley/2022/02/07/is-gambling-on-the-cards-for-the-uae/?sh=5cddb1094c02> > accessed 20 February 2022

¹⁵ Dubai Chamber, 'UAE Retail Sales Forecast to Hit \$58 Billion In 2021: Analysis' https://www.dubaichamber.com/whats-happening/chamber_news/uae-retail-sales-forecast-to-hit-58-billion-in-2021-analysis > accessed 8 February 2022

¹⁶ Gulf Business, 'Emaar's Dubai Hills Mall opens' <https://gulfbusiness.com/emaars-dubai-hills-mall-opens/> > accessed 30 February 2022

¹⁷ CBRE, 'UAE Real Estate Q4 Market Review and 2022 Outlook' <https://www.cbre.bh/en/research-and-reports/UAE-Real-Estate-Q4-Market-Review-and-2022-Outlook> > accessed 30 February 2022

INFRASTRUCTURE SECTOR

In terms of developing infrastructure going forward the UAE is making Public Private Partnerships (PPPs) central to its policy. By taking full advantage of this procurement model the UAE will be able to deliver infrastructure for the UAE in an economically viable manner. The UAE is committed to dealing with climate change and, renewable energy projects is an area where PPP has been delivered successfully in the UAE.¹⁸

Another part of the UAE's planning for self-sustainability in the future will include the construction of desalinization plants, the exploitation of renewable resources such as solar and wind energy, as well as investment in nuclear energy. These strategies coupled with the UAE's 'Energy Strategy 2050', which aims by 2050 to invest AED 600 billion, to increase the contribution of clean energy to fifty percent by 2050 and reduce the UAE's carbon footprint.¹⁹ It seems evident that this sector of the construction industry will experience growth over the coming years.

The emirates of Abu Dhabi and Dubai now have a direct rail link courtesy of Etihad Rail. Etihad Rail was established in 2009 to oversee and implement the planning, construction, and operation of the UAE's railway network which will link the rest of the emirates.²⁰

SUSTAINABILITY SECTOR

In 2018, the UAE laid out its strategy for food security, with an aim to increase domestic production capacity and making the UAE the leading country by 2051, on the Global Food Security Index and by 2021, to be one of the top ten countries.²¹

However, the UAE faces several challenges such as the availability of freshwater resources, the high temperatures and land containing a lack of fertile soil.

¹⁸ Amro Al-Ahmar, Anthony Ellis, Charles Oliver, Phil Hanson and Samer Mahjoub, 'A general introduction to public-private partnerships in United Arab Emirates' <https://www.lexology.com/library/detail.aspx?g=d0ab22f0-9fe2-4310-88bd-f3848321a56f#footnote-043> > 10 December 2021

¹⁹ The United Arab Emirates' Government portal, 'UAE Energy Strategy 2050' <https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/federal-governments-strategies-and-plans/uae-energy-strategy-2050#:~:text=The%20strategy%20aims%20to%20increase,AED%20700%20billion%20by%202050.> > accessed 10 January 2022

²⁰ Etihad Rail, 'The UAE's National Rail Project' <https://www.etihadrail.ae/about/about.html> > accessed 10 January 2022

²¹ The United Arab Emirates' Government portal, 'National Food Security Strategy 2051' <https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/federal-governments-strategies-and-plans/national-food-security-strategy-2051> > accessed 11 January 2022

Thanks to new advances in aquaculture, Atlantic salmon is widely available in the UAE, yet the fish are raised in a modern facility located in Jebel Ali, with even larger facilities being planned for development in the future.²² There have been further advance in agricultural technology which are resulting in higher yields. In 2020 the Abu Dhabi Investment Office invested in several agritech companies constructing research facilities and production centres in Abu Dhabi.²³ In May 2021, the Food Tech Valley was launched, which is an initiative with an objective to achieving the emirates National Food Security Strategy 2051 targets.²⁴

RESIDENTIAL SECTOR

According to JLL's report on the UAE Real Estate Market in 2021, residential stock in Dubai reached 639,000 units at the end of 2021 with 40,000 units delivered over the same year. In Abu Dhabi, residential stock reached 273,000 units at the end of 2021 with 7,000 units delivered over the same year. The pandemic brought about a demand for more space among buyers, encouraged a strong recovery in sales with annual prices increasing by 9% in Dubai and 6% Abu Dhabi, by December 2021. There is a strong demand for waterfront developments and villas from investors and end-users alike. After six years of decline, the rental market in Dubai has seen rents rise by 8% over 2021, but Abu Dhabi has seen a decrease of 3% over 2021. With the moderate growth forecast for the population the outlook for growth of the residential market is positive.²⁵

²² Bonnie Waycott, 'A salmon farm in Dubai, because of course' <https://www.globalseafood.org/advocate/a-salmon-farm-in-dubai-because-of-course/> > accessed 11 January 2022

²³ Sara Al-Mulla, 'Middle East's growing role in global food security' <https://www.arabnews.com/node/1952751> > accessed 12 January 2022

²⁴ Varun Godinho, 'Sheikh Mohammed launches Food Tech Valley in Dubai' <https://gulfbusiness.com/sheikh-mohammed-launches-food-tech-valley-in-dubai/#:~:text=The%20Food%20Tech%20Valley%20was,smart%20and%20food%20independent%20cities.> > accessed 13 January 2022

²⁵ Jones Lang Lasalle, 'The UAE Real Estate Market Research A Year in Review 2021' <https://www.jll-mena.com/en/trends-and-insights/research/the-uae-real-estate-market-a-year-in-review-2021> > accessed 30 January 2022

3 DESIGN LIABILITY UNDER CONTRACT LAW

INTRODUCTION TO CONTRACT LAW

Aside from the decennial liability provisions stipulated in the Civil Code, liability for, and the allocation of risk for the design of works in the UAE, is a matter of risk allocation to be negotiated and agreed in a contract. The parties to a contract are allowed to agree the degree of legal responsibility they have for the design of the construction works, the scope of design that they are to undertake, and the remedies, in the event that there are any defects in the design or if the works do not perform as intended. Common features and particular examples of design risk allocation are discussed in further detail in this chapter.

Notwithstanding that a party's liability for design is primarily a function of the bargain struck between the parties, it is of key importance to understand the legal principles of UAE law, which apply to contracts including; the mandatory provisions which will be implied into every contract, and the way in which the interpretation, performance and breach of contracts and the remedies available should a party breach its contractual obligations vis-à-vis design are dealt with as a matter of UAE law.

Terms limiting and excluding liability for certain matters also need to be considered and in certain cases, the parties should take account of clauses which may be unenforceable as a matter of UAE law, or which may need to be added to comply with the laws of the UAE.

FREEDOM OF CONTRACT

In accordance with Article 257, *“The basic principle in contracts is the consent of the contracting parties and that which they have undertaken to do in the contract.”* This means that the parties are allowed to decide on the terms and conditions that will administer their contractual relationship.

However, under UAE law the parties are only allowed to agree the terms and conditions of their contracts based on the premise that there are certain limitations such as:

- (a) the requirement for the contract to be exercised in accordance with the principles of good faith as contemplated under Article 106 and Article 246, or the contract is exercised in an unlawful manner pursuant to Article 106; or

- (b) the requirement that there is no conflict between the contract conditions and any mandatory provisions of the law as set out under Article 31; or
- (c) the enforcement of the contract is contrary to matters of public policy.²⁶

FORMATION OF A CONTRACT

In a construction contract, or any contract that is made between parties in the UAE, for a contract to be valid under UAE law, it must satisfy certain basic requirements. In accordance with Article 129 of the Civil Code, the foundation of a contract is that the parties can agree the “*essential elements*” of the contract and that the “*the subject matter of the contract must be something which is possible and defined*” and the contract has a “*lawful purpose*”. In accordance with Article 130 of the Civil Code “*A contract shall be made by virtue solely of the confluence of offer and acceptance, subject to the specific provisions laid down for the making of the contract by law.*”

Under Article 874 which deals specifically with construction contracts and therefore takes priority over other provisions in the Civil Code, it states that “*In a muqawala contract, there must be a description of the subject matter of the contract,, the manner of performance, and the period over which it is to be performed....*”

In terms of contractual design liability, when combining the above provisions, it is evident that a party’s obligations need to be clearly defined in the contract and the manner of performance must be described.

CONTRACT PERFORMANCE

In relation to construction contracts, the contractor’s obligations to perform the Works in accordance with the contract are set out under Article 877, which provides that the contract shall finish, “*the work in accordance with the conditions of the contract*”. If the construction works are not being carried out properly and in accordance with the contractor’s obligations under the contract, then the employer may, “*require that the contract be terminated immediately if it is impossible to make good the work*”, however, this is not the employer’s only remedy. If the contractor’s breach of its obligations can be rectified, the contractor is obliged under Article 877, to “*abide by the conditions of the contract and to repair the work*

²⁶ Sarah Kadhum, ‘Freedom of Contract: Does it Exist?’ <https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Freedom of Contract Does it Exist /> > accessed 14 January 2022

within a reasonable period". In the case of the design for the project, the contract would be fulfilled once the project was complete and free of any design defects.

The above Articles when combined allow the parties to the construction contract; (i) to agree the level of design liability attributable to each party; and (ii) to be able to discharge the agreement. The contract agreement will state who is responsible for providing the different elements of the design and the standards required.

CONTRACT DESIGN DOCUMENTS

Depending on the type of contract, the contract documents will typically contain the concept, schematic or detailed plans and the specifications, which would indicate the standards of materials and workmanship required by the employer. The design at the beginning of the project may only represent the visual, aesthetic, functional, and performance criteria and this design and this will require coordinated engineering, reviews, and approvals, in order to determine and verify the methods, techniques, details, products, and materials to execute the construction works and comply with the tender design. A review of the terms and conditions of the contracts agreed between the parties, will establish each party's liability for the design, as well as the roles and responsibilities of the employer, the contractor, and the designer. For the contractor, design liability would be set out under the main contract, and for the designer the liabilities would be set out under the consultant appointment. Both contracts would include the employer's design liability.

PRINCIPLE OF GOOD FAITH

Irrespective of the parties' roles and responsibilities with respect to the design liability for a project, the local courts or an arbitral tribunal will place primacy upon and will be likely to support and enforce the terms of a contract, however, this is subject to some restrictions such as the principle of good faith (assuming the law of the contract is stated to be that of the UAE).

Unlike in common law jurisdictions where there is no general set of guidelines or laws obliging parties to act in a manner of good faith concerning commercial contracts (with the exception of the United States),²⁷ the UAE places an overarching duty of good faith into the performance of contracts. In this regard, Article 246 of the UAE Civil Code provides:

²⁷ Amina Jamil and Lucie Barnes, 'O ye, of little [good] faith'

“(1) The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.

(2) The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction.”

This places an obligation on the parties whose contract is subject to the laws of the UAE to act in accordance with the principles of good faith, in an honest and fair manner.²⁸

There is no statutory definition of ‘good faith’ however, Article 106 does provide some guidance. Article 106 provides that a party will not have acted in good faith: *“(a) if there is an intentional infringement (of another’s rights); (b) if the interests which such exercise of right is designed to bring about are contrary to the rules of the Islamic Shari’ah, the law, public order, or morals; (c) if the interests desired are disproportionate to the harm that will be suffered by others; or (d) if it exceeds the bounds of usage and custom”*.

The principle of good faith will only come to bear, as it pertains to a party’s performance under a contract. It is not a tool to amend the terms of the contract to make them fairer and it is not a tool to excuse a party’s poor performance under a contract. Thus, to the extent any liability for design is seemingly unfairly shifted on to the contractor (discussed in further detail below), the principles of good faith will be unlikely to respond, unless and to the extent a party can show that the other party’s performance of the contract itself is in bad faith.

PRACTICAL APPLICATION

Levels of design liability: ‘reasonable skill and care’ & ‘fitness for purpose’

There are two distinct levels of design liability that are typically specified in a construction contract in the UAE. When a contract is drafted the design clause will either place an obligation for the designer to use reasonable skill and care in providing the design services or

[²⁸ Hiba Mahmud and Khalid El Sherif, ‘Hadeef in the Courts: The Principle of Good Faith – How Material is this Principle in Governing Legal Rights and Obligations?’ \[14\]\(https://www.hadefpartners.com/News/499/Hadef-in-the-Courts--The-Principle-of-Good-Faith-%E2%80%93-how-material-is-this-principle-in-governing-legal-rights-and-obligations-#:~:text=According%20to%20the%20principle%20of%20good%20faith%2C%20contracting,interests%20for%20an%20equitable%20result.%20Background%20and%20Judgment> accessed 16 January 2022</p></div><div data-bbox=\)](https://www.lexology.com/library/detail.aspx?g=88dc017d-a7e3-486d-8967-207cb3845e79#:~:text=Good%20faith%20is%20classically%20defined,loyalty%2C%20without%20fraud%20or%20malice.> accessed 22 February 2022</p></div><div data-bbox=)

there will be an obligation to provide a completed construction contract which is fit for the purpose for which it was intended.

The difference between these two levels of design obligations can result in difficulties between the parties to a construction contract.

Where a contract to undertake design work provides for an obligation to perform with reasonable skill and care, the contractor or the designer's performance can be compared with that of a similarly competent professional person or entity carrying out similar work in the UAE.

'Fitness for purpose' is a common law term derived from the Sale of Goods Act 1979 and was never originally meant for design services, however, the English Courts have broadened this to include construction contracts that are designed by the contractor.²⁹ It is well established in common law jurisdictions, that contractors may be held responsible for complying with the employer's design but failing to meet 'fitness for purpose', and this term has since percolated and is commonly found in construction contracts in the UAE.

Where a contract to undertake design work provides for a 'fitness for purpose' obligation, this normally means that the contractor or the designer must achieve a result and provide a design that is in accordance with the employer's requirements. 'Fitness for purpose' clauses can be a particular risk to a contractor or designer undertaking the design of the works. They may perform with reasonable skill and care, but remain liable for breaching the terms and conditions of the contract for not achieving a result.³⁰ This is of particular concern given that the contractor or the designer can end up in breach of contract regardless of the reason why the design does not comply and achieve its intended purpose and this type of risk is uninsurable.³¹ It is in my experience, that designers in the UAE will push back very heavily against agreeing any 'fitness for purpose' type provisions in their consultant appointments as their PI insurance policies will not respond to claims based on 'fitness for purpose'. There is

²⁹ Jafar Khan, 'Fit for UAE?'

https://www.lexismiddleeast.com/magazine/TheOath/2016_July_22 > accessed 16 January 2022

³⁰ Scott Lambert, "'Fit for Purpose' or 'Reasonable Care'? Dealing with Design Liability in the New FIDIC Yellow Book" <https://www.lexology.com/library/detail.aspx?g=fb096c43-75dd-4216-a319-1d71384a1903> > accessed 16 January 2022

³¹ Karen Gidwani, 'Fitness for purpose'

https://www.fenwickelliott.com/research-insight/annual-review/2015/fitness-for-purpose#footnote5_83p2cf5 > accessed 18 January 2022

an insistence by design practices that the parties agree that the design will be carried out with the lessor obligation of reasonable skill and care.

A contractor executing design and construction work in the UAE usually takes on a ‘fitness for purpose’ obligation, if a lesser standard is not agreed.³²

Article 383(1) of the UAE Civil Code provides; *“If that which is required of an obligor is the preservation of a thing, or the management thereof, or the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved”*, however, this is not a strict obligation, and this may be varied through *“an agreement or a provision of law to the contrary.”*³³ This means that the parties are free to agree the lesser obligation to design the construction works with reasonable skill and care, unless there is an express ‘fitness for purpose’ provision in the contract. However, it is also important that the parties to a contract understand that if a contract is silent on the parties’ obligations to undertake the design and supervision of the construction works, then under UAE law it is considered that the parties’ obligations are to achieve a result and is this is akin to a ‘fitness for purpose’ obligation.

The issue of undertaking the design using reasonable skill and care is still not an easy hurdle for designers. There are numerous statutory requirements in the UAE made more complicated as it is a federation of emirates, that a designer needs to be aware of such as local regulations relating to building codes, and a breach of these codes can result in considerable liability for a designer. There are numerous publications relating the regulatory frameworks of the UAE such as the Dubai Building Code,³⁴ and the UAE Fire and Life Safety Code of Practice³⁵ to name but a few, and the different emirates have their own rules, regulations for various regulatory bodies and authorities. It is a designer’s primary obligation to provide a design that is in strict compliance with all codes, relevant statues and building regulations required under UAE law.

³² Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016) 83

³³ David Yates, ‘Technology Contracts: Exercise Care in Choosing a Governing Law’ <https://www.tamimi.com/law-update-articles/technology-contracts-exercise-care-in-choosing-a-governing-law/> > accessed 18 January 2022

³⁴ Government of Dubai, ‘Dubai Building Code’ https://www.dm.gov.ae/wp-content/uploads/2021/12/Dubai%20Building%20Code_English_2021%20Edition_compressed.pdf > accessed 25 January 2022

³⁵ Government of Dubai, ‘UAE Fire and Life Safety Code of Practice’ <https://www.dcd.gov.ae/portal/en/preventive-safety/rules-regulations/uae-fire-and-life-safety-code-of-practice.jsp> > accessed 25 January 2022

The employer would expect nothing less, so if a designer failed in providing a design that followed the relevant laws this would constitute a failure by the designer to act with reasonable skill and care, and may result in an act of gross negligence which will be examined in more detail in chapter 4.

How do employer's shift design liability on to the contractor?

It is said that the model contracts provided by the Fédération Internationale Des Ingénieurs-Conseils (FIDIC), are the dominant form of contract used in the UAE construction industry. In the UAE market the standard risk allocation contained in FIDIC is commonly amended to place more risk on the contractor and less risk on the designer and the employer. This can be done to such an extent that the contract bears little resemblance to FIDIC and is a customised or 'bespoke' set of terms and conditions.³⁶

Under normal circumstances the contractor's design liability is limited to building the project in accordance with the employer's design and specification. However, in today's design/bid/build contracts, where the contractor is under an obligation to build the project in accordance with the employer's design, the contractor may also have an obligation to verify the design and warn of any issues with the design. The contract documents and the technical specifications will contain varying standards of design liability.³⁷

It is my view that in the UAE, risk allocation for design is commonly passed onto the contractor on design/bid/build contracts. I have reviewed several contracts based on the FIDIC Red Book (where the employer provides and is responsible for the design), that have been modified to include provisions stating that the "*Contractor will be responsible for the Employer's design*", or the "*the Contractor will be responsible for any errors in the Employer's design*", "*the Contractor shall warrant the design*" and the "*Contractor will be responsible for any 'buildability' issues*". The risks associated with such provisions can be great, as the contractor has no power over the designer who is contracted to the employer and the designer will not be novated by the employer to the contractor. The contractor can find themselves in a position where they are paying for mistakes in the design, having to

³⁶ Christopher Neal, Jed Savager, Luke Tapp, Mark Raymont, Melissa McLaren and Rita Allan, 'At a glance: construction contracts and insurance in United Arab Emirates'

<https://www.lexology.com/library/detail.aspx?g=49c19e7b-7476-470e-993a-7f091b4ab27f> > accessed 25 January 2022

³⁷ Alexander Grant, Fiona Rossetter and Scott Duncan, 'Managing liability for design in construction contracts'

<https://www.pinsentmasons.com/out-law/analysis/managing-liability-for-design-in-construction-contracts> > accessed 25 January 2022

undertake costly design reviews and design development and bear the costs of any project overruns, prolongation costs, and the imposition of liquidated damages and possibly termination. Moreover, the employer faces the prospect of losing out on the benefit of taking over the project on time, and possible dispute proceedings, so in this type of situation there is no winner.

It is commonplace in the UAE, for employers to seek to transfer as much risk as possible onto the contractor when negotiating the contract for a project. It may be due to the competitive nature of the construction industry in the UAE, but some contractors that are unaccustomed to taking on design liability for projects and are less well placed to manage that risk and are accepting contracts that place the risk of design liability on the contractor.³⁸

So, if a contractor finds that they have signed a contract that places an unreasonable amount of risk for a design that they have no control over, is it possible for a contractor to argue the shift of design liability back to the employer?

The primary stance under the UAE Civil Code, is that the parties shall act in accordance with the conditions of contract that they have agreed upon. This is expressly provided for in Article 257, where a contract is based on the parties' consent.

However, the provisions of these Articles are subject to several Articles of the UAE Civil Code, which provide that the UAE Court or arbitral tribunal may examine other circumstances when interpreting or understanding an unclear contract condition and depending on the circumstances, may also deviate from the wording of the contract conditions.

In this regard the following Articles, deal with such matters of interpretation:

- (a) Article 258 (1) - *"The criterion in (the construction of) contracts is intentions and meanings not words and form"*.
- (b) Article 265(2) - *"If there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties"* and guidance may be sought from current custom.

³⁸ Steven Graham, 'Managing commercial risk in construction contracts' <https://www.tamimi.com/law-update-articles/managing-commercial-risk-in-construction-contracts/> > accessed 25 January 2022

A contractor may have scope for an argument, that notwithstanding the wording of the contract conditions, it was not the intention that the contractor would accept the level of design liability. Under a design/bid/build contract, the contractor has an expectation that the design provided by the employer, will be complete and coordinated. However, if this is not the case and there is significant design development and design changes during the Works, the contractor may feel justified in arguing the shift of design risk in the contract.

However, these types of arguments may face difficulties with respect to clearly drafted contract clauses, as any judge (or arbitral tribunal) would expect an experienced and competent contractor to study and understand the contract conditions and allow for the provisions of the contract in its tender price and programme. If the contractor was unhappy with the risk presented in the contract, the contractor should have insisted on an amendment to the contract, or the contractor should not have signed the contract. Nevertheless, in relation to those clauses where there might be an argument regarding interpretation, these Articles may support such an argument.

Also of potential use to a contractor is Article 264 which provides that known custom shall have the effect of conditions between the parties and Article 246(2) which provides that:

"The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction."

The known "*custom*" of a design/bid/build contract is that the design risk remains with the employer, however, this is a difficult argument that would normally be interpreted to apply to issues about which the contract is otherwise silent; nevertheless, the argument could still be made.

Also of potential use to a contractor is Article 248, and this applies to contracts of adhesion. Such contracts include terms and conditions that are drafted by one of the parties and the other party has little or no ability to negotiate more favourable terms. Article 248 usually applies to standard terms and conditions but may apply to a construction contract if the party drafting the contract adopts a "*take it or leave it*" approach. If a contractor can convince a court or arbitral tribunal that the contract was made by adhesion, then under Article 248, a

judge could change the unfair contract conditions or exempt the contractor from such provisions "in accordance with the requirements of justice".³⁹

Similar arguments can be based on Article 106 and Article 246(1) which provides that a contract must be performed in good faith and in a lawful manner.

Again, by reference to Articles 106 and 246(1), a contractor could refer to the usual arrangements for design risk. Consequently, the argument would run along the lines of:

- (c) No matter how experienced a contractor might be, it cannot be expected to review and check such a design, for any and all design problems that might arise.
- (d) The contractor's role is to build the Works and the architect's role is to design; you cannot fundamentally alter these responsibilities without altering the contractual arrangements, such as in a design and build arrangement with the novation of the designer's appointment to the contractor. This is the long-standing accepted arrangement.
- (e) A contract cannot be performed in good faith if it results in one of the parties suffering significantly due to events for which it was not factually responsible for.

In relation specifically to construction contracts (known as muqawala under the Civil Code), it is specifically stated in Article 878 that a contractor can only be liable for events which he could have prevented i.e., he cannot be liable for those which he could not prevent. Here, a contractor may argue that it could not prevent design flaws (as these were caused by the employer) and therefore it cannot be held liable for them.

Can the contractor become responsible for the design even if the design is not his responsibility?

Even where the contractor has no design liability under the contract, in accordance with UAE law, provision is made which places a responsibility on the contractor to notify the employer of any deficiencies in the design. Article 878 states that the "*contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not*". This implies that a contractor could bear liability for design that he has not undertaken, however, Article 878 further stipulates that the contractor "*shall not be liable if it*

³⁹ Soraya Salem, 'Striking out unfair contract terms in civil law jurisdictions' <https://www.lexology.com/library/detail.aspx?g=92a368ab-d40b-47b8-9e14-0489029f4f50> > accessed 30 January 2022

arises out of an event which could not have been prevented". This would provide the contractor with some protection, where he may argue that he could not have possibly detected issues with the design, however, this Article would be a problem for design issues that are more apparent.

Another area to be considered is construction works, that are subcontracted to specialist subcontractors. Whilst contracts set out the parties' obligations with respect to design liability, a party can find that there are indeed design liabilities that they have overlooked. Where it is stipulated in the contract that the design liability rests with the employer, and the contractor has no design liability and there are also no 'fitness for purpose' provisions, there are elements of a project that the employer cannot design and can only be designed by the specialist subcontractors. Examples include, fire protection systems, post tensioned concrete floors and slabs and structural steel connections. Under the model forms of contracts in the UAE, it is accepted that the contractor shall assume the liabilities and responsibilities for the subcontractor's performance on the project, therefore, the main contractor also assumes liability for the design produced by the subcontractor. This can create problems for a contractor where no allowance has been made for professional indemnity insurance.⁴⁰

LIMITING LIABILITY

As a matter of contract, the parties can agree the elements of the design for the construction work, that they are liable for, and they can also agree the contractual liability caps for compensation. Typically, a contract based on the FIDIC terms and conditions, would include a cap on the level of delay damages being paid by the contractor to the employer, at a maximum of ten percent of the contract price. The parties also typically agree that the parties will not be liable for, loss of profit, loss of any contract or for any indirect or consequential loss in connection with the contract and that the contractor's liability to the employer in connection with the contract will not exceed the contract sum.

As a rule, the courts and arbitral tribunals are averse to the looking beyond, what the parties have agreed with regards to the liabilities set out in the contract and this would only happen if

⁴⁰ Dr. Daniel Brawn, 'Sub-Contractual Methods of Contractual Protections' <https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Sub-Contractual-Methods-of-Contractual-Protections/> > accessed 30 January 2022

the judge or the arbitral tribunal considered that the liabilities set out in the contract were inadequate, or not allowed for in the contract, or unfair, or unlawful.⁴¹

What happens when the parties to the contract have not agreed the level of compensation?

In accordance with Article 389, if compensation is not agreed under the contract, or stated under the laws of the UAE, the Judge is free to assess the actual damage suffered and value the amount of compensation, where it is not fixed by law or the contract.⁴²

Under Article 386 of the Civil Code, if the courts find that a party to the contract is unable to perform their obligations, the court can order that the party unable to perform should pay compensation, unless they can prove that their failure to perform was made impossible, due to factors beyond its control. This can happen, where a party enters into contract to design a building and finds that the performance of their obligation to provide the design is beyond their expertise. In such a case the court will order payment of compensation.⁴³

The UAE Civil code supports that principal where the parties can agree contractual compensation. Under Article 390(1), the parties are free to negotiate and fix the amount of compensation in their contract, as long as it is aligned with the law.

Whilst the parties can agree the contractual liability caps for compensation, depending on the circumstances, the parties may assert that the contractual agreed compensation should be adjusted upwards or downwards to reflect the actual harm or loss suffered. In such circumstances the aggrieved party must apply to the courts and pursuant to Article 390(2), the judge, *“may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.”* This has been confirmed numerous times by the Court of Cassation.⁴⁴

⁴¹ Dr. Daniel Brawn, ‘Common Limits and Exclusions of Liability in Construction Contracts’ https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Common_Limits_and_Exclusions_of_Liability_in_Construction_Contracts/ > accessed 10 February 2022

⁴² Michael Kortbawi and Adam Tighe, ‘UAE Professional Negligence Laws’ https://www.lexismiddleeast.com/legislativeInsight/UnitedArabEmirates/UAE_Professional_Negligence_Laws/ > accessed 10 February 2022

⁴³ Niall Clancy, ‘Prevention is better than cure for building defects in the UAE’ <https://www.lexology.com/library/detail.aspx?g=0f3fb0e1-be4f-4b60-a989-5aae122bd88a> > accessed 12 February 2022

⁴⁴ Dubai Court of Cassation, 222/2005, dated 19 June 2006

4 DESIGN LIABILITY FOR DELICT

INTRODUCTION TO DELICT

As a rule, the laws of the UAE and the UAE Courts support freedom of contract and this allows the parties to a construction contract to agree the allocation of design risk and liability, provided always that the agreed terms and conditions do not contravene the mandatory provisions of the laws of the UAE. The provisions of the laws of the UAE governing the parties' contractual design liabilities have been discussed in Chapter 3. In addition to a party's contractual liability vis-à-vis design, a party can also be held liable under the legal doctrine of delict (akin to the common law theory of tort law)⁴⁵ for its design where they are at fault and cause harm to another party, and this can be applied to design liabilities. Liability in delict arises irrespective of whether a contractual relationship exists between the parties.

The main difference between a contractual liability and a liability in delict, is that a contractual liability places the liability on a specific party to the contract, whereas a liability in delict can depending on the circumstances, arise independently of a contract and is an act that contravenes the laws of the UAE, and gives the injured party the right to claim damages. For a contractual liability, there is a corresponding contractual relief in the terms and conditions of the contract, whereas for a liability in delict, the relief is determined by the law.⁴⁶

The operative provisions for acts causing harm can be found from Article 124 and Article 282 to 317 of the Civil Code.

DEFINITION OF DELICT

Acts of harm and what constitutes gross negligence are not actually clearly defined under the provisions of the laws of the UAE. Article 383 of the Civil Code provides guidance for what constitutes an act of gross negligence and in this regard Article 383(1) states *"If that which is required of an obligor is . . . the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercises all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved,"*

⁴⁵ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016) 18

⁴⁶ Dr. Daniel Brawn, 'Making a Contractor's Claim Count: How to Protect Contractors' rights under a FIDIC Based Contract'

https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Making_a_Contractor_s_Claim_Count_How_to_Protect_Contractors_rights_under_a_FIDIC_Based_Contract/ > accessed 12 February 2022

and Article 383(2) states that *“In all cases, the obligor shall remain liable for any fraud or gross negligence on his part.”*

Article 383 of the Civil Code is the foundation for claims related to professional negligence in the UAE. As gross negligence is not defined in the Civil Code, Article 383 infers that if the performance of an obligation is not exercised with such care as a reasonable man would exercise, then there is the basis for an argument that this may represent gross negligence.⁴⁷

Perhaps the most common types of disputes are caused due to a breach in the terms and conditions of a contract, however, it is possible under UAE law for a party to seek damages in addition to the relief agreed under the contract. In accordance with Article 282, *“Any harm done to another shall render the actor, even though not a person of discretion, liable to make good the harm.”* Article 282 sets out the three rules for liability for an act causing harm. The liability to make good the harm (or pay compensation) must be connected to an act or failure to act, and this must lead to a causation.⁴⁸

In terms of how this applies to design liability, put simply, the harm could be a design error, a miscalculation, or a failure to ensure the works are supervised so that the works are built and complete in accordance with the contract requirements and this has led to a party suffering in terms of delay or incurring losses. However, these elements of harm need to be proven by the party suffering harm in the UAE Courts and the judge has the discretion to determine whether the harm constitutes a delict.⁴⁹

In terms of construction contracts and acts resulting in loss or damage, in accordance with Article 878 of the Civil Code which governs construction contracts, the contractor *“shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented”*. Based on Article 878, the contractor can only be liable for the work of the contractor and any harmful act caused by the execution of the works, however, the contractor cannot be held liable for certain acts outside the contractor’s control. An event that

⁴⁷ Michael Kortbawi, ‘In review: professional negligence law in United Arab Emirates’ <https://www.lexology.com/library/detail.aspx?g=e4e544ab-df0c-4b52-bf1e-752025ca2903> > accessed 15 February 2022

⁴⁸ Danielle O'Brien, ‘Tortious Interference in UAE Law’ <https://www.lexology.com/library/detail.aspx?g=0539ad80-ab0f-4288-9ba9-e736f4b55f64> > accessed 15 February 2022

⁴⁹ Rami Obeid, ‘Damages for Personal Injury in Dubai (Part I)’ <https://www.hadefpartners.com/News/281/Damages-for-Personal-Injury-in-Dubai--Part-I-> > accessed 15 February 2022

could not be prevented would mean an event described under Article 287, where the *“loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary”*.

CONTRACTING OUT OF DELICT

As discussed in Chapter 3, in the UAE, the parties are free to agree the terms and conditions that govern their contractual relationship with respect to their design liability and the remedies and compensation associated with any design failure, and the courts in the UAE will generally uphold the agreed liabilities, however, there are certain types of damages that the parties to the contract cannot limit or exclude.

In accordance with Article 296, *“Any condition purporting to provide exemption from liability for a harmful act shall be void”*. Article 296 does not refer to reducing a party’s liability, and only refers to the limitation of liability for delict. This principal that the parties cannot contract away from liability for delict is significant as the parties are exposed to the possibility of unforeseeable or consequential damages as a consequence of damage negligently caused under a contract.⁵⁰

Article 383(2) also states that *“In all cases, the obligor shall remain liable for any fraud or gross negligence on his part.”*

The UAE Civil Code prevents a party from limiting their liability for fraud or gross negligence. The courts of the UAE have confirmed that limitation clauses cannot apply to losses arising out of fraud or gross negligence.⁵¹

COMPENSATION

With regards to the compensation the law makes a distinction between direct and consequential causation. Article 283(1) provides that if the harm is direct *“it must unconditionally be made good”*, however for compensation relating to an act that causes consequential harm, Article 283(2), provides that there must be a *“wrongful or deliberate element and the act must have*

⁵⁰ Faisal Attia, ‘Can We Really Limit Liability?’

<https://www.tamimi.com/law-update-articles/can-we-really-limit-liability/> > accessed 18 February 2022

⁵¹ Dubai Court of Cassation, 134/2006, dated 10 September 2006

led to the damage”. Article 283 prescribes a higher level of fault for consequential harm, so the party claiming compensation would be required to provide proof of the “*wrongful*” or “*deliberate*” act caused by the tortfeasor.⁵²

Article 290 provides that “*It shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage.*” This means that the judge may consider how the victim contributed to the damage and the judge may order that the level of damages be reduced.⁵³

Article 291 provides that “*If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability.*”

Articles 290 and 291 are especially relevant in circumstances where the contractor has accepted liability for the design produced by the employer and the employer appointed designers. In such instances where the contractor is facing the prospect of having delay damages imposed, the contractor can apply to the courts and the damages payable by the contractor may be reduced accordingly.⁵⁴

Article 292, provides that compensation for harm in all cases “*shall be assessed on the basis the amount of harm suffered by the victim,*” and this shall also include for “*loss of profit, provided that that is a natural result of the harmful act.*” This means that damages are values based on the actual loss suffered and can include the actual damage as well as consequential damage such as loss of earnings.⁵⁵

In addition to compensation for the actual damages that can be ascertained, Article 293 provides for “*moral damage*” and an infringement of the “*reputation*” of a party, this would be subject to the judge’s discretion based on the circumstances of the damage caused. Whilst this form of compensation is more applicable to personal damage,⁵⁶ for such compensation to

⁵² Charles Laubach and Alex Vromans, ‘Breach of Contracts and Remedies’ https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Breach_of_Contracts_and_Remedies/ > accessed 18 February 2022

⁵³ Union Supreme Court, 538/Judicial Year 23

⁵⁴ Abu Dhabi Court of Cassation, 1301/2009, dated 17 January 2010

⁵⁵ Dubai Court of Cassation, 28/2008, dated 16 March 2008

⁵⁶ Union Supreme Court, 322/Judicial Year 23

be applied in the event of a design error, it is in my view this would need to cause significant irreparable reputational damage to the party effected.

If a party has incurred losses because of another party's negligence, then they may apply to the courts of the UAE and claim compensation pursuant to Article 389 which stipulates that, *"If the amount of compensation is not fixed by law or by the contract, the judge shall assess it in an amount equivalent to the damage in fact suffered at the time of the occurrence thereof."*

This provision means that the judge has the discretion to adjudicate the amount,⁵⁷ that is to be awarded to the party suffering harm in respect of harm suffered.⁵⁸

TIME LIMITATION

Of important consideration is the time limit provided for a party to make a claim under delict. The operative provision for the time limit for making a claim is Article 298 of the UAE Civil Code which provides:

"(1) No claim for compensation arising out of a harmful act shall be heard after the expiration of three years from the day on which the victim became aware of the occurrence of the harm

(3) No claim for compensation shall be heard in any case upon the expiration of fifteen years from the day on which the harmful act took place."

This means that a party would have three years to make a claim to the courts from the day the party became aware of the harm, however, if the party was unaware of the harm and a period of fifteen years passed from when the harm took place then the party would have no right to make a claim. This occurred in a court case where a sale of land occurred in 1976 and the plaintiff was unaware that the plot of land was not the same as specified in the contract of sale. This resulted in significant damage to the plaintiff in terms of lost revenue as he could build less buildings than envisaged. The court held that the claim against the seller even though the seller admitted they had made a mistake, on the basis that the harm had taken place after the expiration of fifteen years as prescribed under Article 298(3).⁵⁹

⁵⁷ Union Supreme Court, 118/Judicial Year 21

⁵⁸ Rami Obeid, 'Damages for Personal Injury in Dubai (Part I)' https://www.lexismiddleeast.com/eJournal/2017-09-07_111/ > accessed 15 February 2022

⁵⁹ Dubai Court of Cassation 27, 31, 49/2008, dated 27 April 2008

PRACTICAL APPLICATION

The contractor and the designer would have their obligations with respect to design liability defined under their contracts with the employer. If there is a failure in the design, there would be a corresponding relief under the contract. Where the employer provides the contractor with the design for the construction works and there is a failure, a contract would typically include clauses for providing the contractor with prolongation costs and costs for additional work required to rectify the failure and in a contract where the contractor is to design the construction works and there is a failure, a contract would include clauses where the contractor would be required to pay liquidated damages for delays and costs associated with making good the design failure. The contracts allow for remedying any failure in the design so that there is no damage done to any of the parties once the contract expires.

So, in a contract between the employer and the contractor, how would a liability for delict arise? An action in delict can arise if the contract limits the parties' liabilities or ability to recover losses. In the UAE, it is generally accepted that the level of liquidated damages for delay may not exceed ten percent of the contract sum.⁶⁰ The contract may also include express limitations of liability, such as consequential loss and loss of profit, which can be claimed under an action for delict as stipulated under Article 296. The design liability may also be related to the actions of both the contractor and the actions of a third party not named in the contract but nevertheless involved in the design of the construction works and therefore also responsible for the design failure. An action in delict will give the employer the ability to pursue all parties responsible whether they are named in the construction contract or not.

Can the employer claim the full value of the construction contract from the contractor even if the harm caused to the project is only partial?

Article 301 states that if *"the damage is partial, the person causing it shall be bound to make good the decrease in value,"* however Article 301 further states that if *"the decrease in value is serious (gross) the owner of the property may elect between taking the equivalent of the decrease in value, or abandoning the damaged property and taking the (full) value thereof, subject to the general provisions relating to indemnification."*

⁶⁰ Edward Sunna and Omar Al Saadoon, 'FIDIC in the Middle-East' <https://fidic.org/sites/default/files/FIDIC%20in%20the%20Middle-East.pdf> > accessed 15 February 2022

An example of this type of compensation would apply to instances where the designer or contractor (in a design and build contract) would be required to compensate the employer for not meeting the employer's requirements and through this failure the employer could appraise the decreased value of the project and deduct the decreased value from the responsible party's contract sum. This falls in line with the model forms of contract used in the UAE. When it comes to the employer taking the full value of the project, this would need to be a fundamental failure in the design of the construction works and as there are no published cases regarding Article 301 being invoked it is more probable that such a failure would fall under Article 880 to 883 of the Civil code which is discussed in detail in chapter 5.

Would a contractor be liable to pay damages due to design liability even if the employer suffering harm contributed to the loss?

Article 290 stipulates that, *“it shall be permissible for the judge to reduce the level by which an act has to be made good, or to order that it need not be made good, if the person suffering harm participated by his own act in bringing about or aggravating the damage”*. In terms of a design liability, the employer may interfere with the design to a degree that effects the contractor. For example, an employer instructs the contractor not to carry out certain tests to determine if the design complies with wind loads. If there is a harm caused that may have been avoided if the tests were carried out but did not take place because of the employer's instruction, the contractor can argue that the employer contributed to the loss by his own act by omitting the test. It may then be argued that the employer should not be awarded damages, or the damages may be reduced proportionately. The contractor may also rely on Article 287, where the contractor may argue that the employer played a contributory role in the events leading to the loss.

In the case of a delict caused by more than one party, which party would be liable to compensate for a delict?

In the event the employer appointed several design consultants and the design work to be undertaken involved a degree of coordination as the design disciplines interfaced, then it can be said that the design consultants had a duty of care to coordinate with one another. This type of coordination is very common in modern construction. If through a failure to act with reasonable skill and care the design once complete was uncoordinated and resulted in significant delays and claims from the contractor (in a design/bid/build scenario), then the

employer in addition to the remedies available in the consultant appointments may also be able to claim in delict. Article 291 infers that if harm is attributable to the act which involves a number of parties, then they will be held partially liable for the harm and they will be ordered by the Judge to pay their share of the compensation. The judge could have the faults in the design examined and could apportion the liability accordingly.

If a contractor finds that they have signed a contract that places an unreasonable amount of risk for a design that they have no control over, can a contractor bring a claim against the designer in a design/bid/build contract?

In chapter 3, contractors assuming unreasonable levels of design liability in a design/bid/build was examined. In the same circumstances, in a design/bid/build contract there is no contract between the contractor and the designer, therefore any claim would need to be brought in delict from Article 124 and Article 282 to 317 of the Civil Code.

For a party to the contract to rely on Article 282, there must be a fault, harm, and a causal link between them.

Arguably, if the contractor suffered harm due to the designers faults the circumstances could form the basis of a claim in delict. If the designer is at fault by providing an incomplete and uncoordinated design at the start of the construction of the works, the contractor can suffer harm due to the delays caused by the design and the contractor is exposed to liquidated damages and unrecoverable prolongation costs.

Article 283 provides that harm may be either direct or consequential. It is likely that the harm here would be classified as consequential if it is economic loss.

Consequential loss can, however, only be claimed if the act causing harm was wrongful or deliberate (the deliberate causing of harm by the designer is unlikely). It is therefore unsurprising, that there are no UAE cases relating to claims by contractors against designers.

INSURING AGAINST LIABILITY ARISING FROM DELICT

In the UAE construction industry, there are several different insurance policies that deal with negligence that need to be considered before a construction contract takes place. In terms of insuring against design liability, there are no mandates that exist under UAE Law, however,

the contractor or the designer should obtain Professional Indemnity (PI) insurance from the outset and before they undertake any design services. As the name implies PI insurance relates to professional and intellectual facets of the construction industry. This would include the preparation of designs or other intellectual services related to the design for construction contract.⁶¹

It is accepted that notwithstanding the provisions of the law, it is in the employer's, the contractor's, and the designer's best interest that an adequate level of insurance cover for design liability is in place, that best reflects the level of risk involved in a construction contract from the outset. If the employer wishes to be indemnified as much as possible for losses or damage because of negligence caused due to the contractor or designer's design liability, the employer should request an appropriate level of insurance that will pay any claim made. In the UAE, there are many projects with designs that are of a prototypical nature, therefore, the level of cover for a project is determined based on the complexity of the design and the value of the design services and the value of the completed project.⁶²

IN SUMMARY

It is evident that the main purpose of the provisions of the laws of the UAE that deal with delict, is to discourage persons from interfering with the rights of others, and if there is an act in delict the laws of the UAE have mechanisms in place for compensating those that have suffered loss.

The authorities in the UAE have placed sufficient importance in the provisions of the laws of delict by making void any condition that attempts to provide any relief for the person that commits an act of harm against another person.

⁶¹ Michael Kortbawi, 'Spotlight: regulation of liability for key professions in United Arab Emirates' <https://www.lexology.com/library/detail.aspx?g=d3f8a0f1-adf1-4b64-b7d7-699f2e44f46c> > accessed 16 February 2022

⁶² Kanishka Singh, 'Designing with confidence in the UAE: do you have the right insurance?' <https://www.lexology.com/library/detail.aspx?g=8ed8ad0d-b340-4053-b9b1-21f369d8eb39> > accessed 16 February 2022

5 DECENNIAL LIABILITY

INTRODUCTION TO DECENNIAL LIABILITY

In the UAE contracting parties tend to rely on internationally recognised forms of contract such as FIDIC and the parties are free to agree the liabilities, indemnities, and remedies for design. The parties to a contract in the UAE are also free to base the terms and conditions of the contract on foreign laws. However, the determination of the apportionment of liability or the choice of foreign laws cannot contravene or take precedence over mandatory provisions under UAE law. Mandatory provisions are linked to issues of public order for which the courts consider to be of enough importance so that the parties to a contract do not have the rights to contract out of. In the UAE it is of sufficient importance that any structures built are structurally sound and this is a matter of public order.⁶³

The concept of Decennial Liability has its origins in the French Code Civil. Article 1792 of the French Code Civil is based upon the principle that all contractors that build a structure take on any legal responsibility and are liable to the owner of the building for any damage which also includes damage caused by ground conditions that threaten the structural integrity of the building. This principle also extends to any equipment, or any other components of the building installed by the contractor that results in the building being not fit for its intended purpose. However, the contractor that carries out the construction will not be responsible if the cause of the damage to the building is due to a causation that is outside its control.⁶⁴

This concept was eventually adopted by the United Arab Emirates and Articles 880 to 883 of the of Federal Law No. (5) of 1985 stipulate the provisions governing decennial liability.

STRICT LIABILITY

As the name implies, the contractor and the designer are responsible for the construction of the building for a period of ten years, however, this only applies to defects that effect the stability of the structure.

In this regard, Article 880(1) provides:

⁶³ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016) 91

⁶⁴ Nael G. Bunni, *Risk and insurance in construction* (Spon Press 2003) 195

“(1) If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.

(2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations.

(3) The period of 10 years shall commence as from the time of delivery of the work.”

Under Article 880, decennial liability is a mandatory and strict liability imposed on the contractor and the designer of the works. Interestingly, this provision and the liability to the contractor and the designer does not flow through a fault or a harm caused by the contractor and the designer and is simply a strict liability. There is no burden of proof on the owner of the building to show that the contractor or the designer is responsible for a total or a partial collapse of the building. Since Article 880 is a strict liability the owner of the building is under no obligation to prove that there was any negligence on the part of the contractor and the designer and that either party failed to perform the Works in accordance with the requirements of the contract or the civil code, as would be the requirement when proving a breach of contract or a liability for delict.

The contractor and the designer are jointly liable for a period of ten years, unless the building is to be erected on a temporary basis, which would be defined in the contract by the parties.

The parties are jointly liable for any defect in the Works that may result in a partial or total collapse of the structure of the building. This extends to defects caused because of defects in the condition of the ground itself. This also applies if the owner of the building consents to the construction of the defective building which has been ruled on in the Courts in the UAE.

LIMITATION OF THE DESIGNER'S LIABILITY

The designer's liability may be limited in instances where the designer plays no part in supervising the works and this is stipulated under Article 881 wherein it provides:

“If the work of the architect is restricted to making the plans to the exclusion of supervising the execution, he shall be liable only for defects in the plans.”

It is the normal practice on projects in the UAE to have a different designer for each design discipline. For example, a structural engineer will have the expertise for designing the substructure and superstructure and any concrete and structural steel elements, whilst a separate mechanical engineer will have the required knowledge for designing the HVAC system. There are also instances where there is a designer making the plans for the work and a separate consultant (supervision consultant) undertaking supervision duties and administering the contract between the contractor and the employer to confirm that the contractor is fulfilling its obligations in building the work in accordance with the design. Where the designer does not supervise the works, then their liability only extends to defects in the design itself.

So, what happens if an event causing decennial liability occurs due to a failure in the supervision of the works?

It is commonplace on projects in the UAE for an employer to appoint a supervision consultant to manage and monitor the project on their behalf. The supervision consultant will administer the contract and will ensure that the construction works are complete in accordance with the terms and conditions of the contract and until the issuance of the performance certificate. For the design of the construction works, there will be a design consultant for the relevant design discipline and depending on the type of contract, the design consultants may be employed by the employer or the contractor. The supervision consultant will notify the contractor of any non-conformance between the installed work and the contract requirements.

If the construction works have been complete and there is a partial or total collapse of a building and it is found that a significant factor was the supervision consultant's failure to notify the contractor of a non-conformance in the installation of the works, then the contractor would be exposed to a strict liability for the partial or total collapse of a building. Whilst the contractor may be in breach of contract and has been negligent in performing the

construction works this would be immaterial and Article 880 of the Civil Code would apply. In accordance with Article 881, the designer responsible for that element of the construction work would not be liable, as they are only responsible for “*defects in the plans*”, and as the designer was not involved in the supervision of the works, there would be no implications.

The supervision consultant would not be held liable under Article 880, as he did not prepare the plans for the construction work. Article 880 is clear in terms of the designer’s liability. However, the supervision consultant would find that they are in breach of contract, as the clear failure to notify the contractor of a non-conformance in the installation of the works would be deemed to be a failure by the supervision consultant to carry out its duties with reasonable skill and care. The supervision consultant would be obliged to compensate the employer in accordance with the terms and conditions of the consultant appointment and would also be exposed to a claim in delict under Article 282, 291 and 293 of the Civil Code. This would include a claim by the employer against the supervision consultant’s PI insurance. A good example of this type of scenario transpired in front of the Supreme Court.⁶⁵

What would happen if the partial or total collapse of the building was due to an error in the design?

If the partial or total collapse of a building was found to be due to an error in the design and the designer of the building was found to be entirely culpable, the contractor and the designer would still be jointly liable under Article 880 of the Civil Code. The employer or owner of the building would bring an action against the contractor and the designer, and the contractor would have no defence even though the contractor is not at fault.

The contractor would bring an action against the designer for the contractor’s costs and expenses payable by the contractor to the employer under Article 282, 291 and 293 of the Civil Code and this would include a claim by the contractor against the designer’s PI insurance.

CONTRACTING OUT OF DECENNIAL LIABILITY

It is possible for the parties to a contract to make the incorrect presumption that the parties’ liability for the design is a matter of contract and that the parties are free to agree the degree of legal responsibility they have with respect to the design of the works, and the remedies in

⁶⁵ Union Supreme Court 416, 505, 516/ Judicial Year 27

the event that there are any defects in the design. A reason why the parties may not be aware of this strict liability is that the model forms of contract used in the UAE include defects notification periods of typically not more than twelve months.

In this regard Article 882 provides that *“Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void.”*

Article 882 prevents the contractor and designer from capping the financial implications and the ten-year period imposed under Article 880. This contrasts with Article 390, where the parties are allowed to negotiate and agree the levels of compensation subject to the provisions of the party’s contract and the laws of the UAE

LIMITATIONS

With regards to the types of defects that may apply to Article 880, there is no clear definition and there is little published legislative information. However, the Supreme Court has stated that liability is not only limited to partial or total collapse of the structure, but also any defects that may appear on the building that can have an adverse effect on the stability and soundness of the building.⁶⁶

The only defence against decennial liability is if the partial or total collapse of the building is due to an event that is beyond the contractor’s control as contemplated under Article 287 of the Civil Code.

The only limitation to the liability of the contractor and the designer is in terms of the period for which the owner of a building may make a claim and in this regard Article 883 stipulates the following:

“No claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect.”

Unless the building is a temporary structure with a defined lifespan, the duration of decennial liability is ten years, and the parties cannot agree a reduced period for decennial liability, but the parties may agree an increased period. On a construction project the period for decennial liability would commence upon the issuance of the relevant performance certificate under the contract and upon the occurrence of a partial or total collapse of the structure the owner of the

⁶⁶ Faisal Attia, ‘Can We Really Limit Liability?’ https://www.lexismiddleeast.com/eJournal/2016-05-02_34 > accessed 18 February 2022

building would have three years to make a claim in the courts. This is an important and well established ‘time-barring’ provision under UAE law and was used successfully as a defence by the main contractor before the UAE courts, UAE Case No. 304/1993. An important consideration is that the claim should be brought before the courts within the three-year period prescribed under Article 883, therefore, it is simply not sufficient to notify the parties of the defect as this does not suspend the time bar on the issue.⁶⁷

Is a new contractor responsible for Decennial Liability?

In the UAE there are some notable examples of projects where the contracts have been either terminated or suspended and the projects have been ‘mothballed’ for different reasons such as the 2008 financial crisis.⁶⁸ There are certain projects that have been suspended but are likely to be restarted with different contractors completing the buildings.

Care should be taken when taking over projects that have either been mothballed and restarted or have existing works that the contractor is expected to build upon. As the last contractor on record (with Dubai Municipality etc.), you would be liable under decennial liability.

The designer and the contractor who takes the Project to completion will be subject to decennial liability under the UAE Civil Code. Where the original consultant and contractor has achieved sectional completion, they will remain liable in relation to those sections.

Can the contractor pass decennial liability to the subcontractor?

As Article 880 is a strict liability and applies to the contractor and the designer only, it is not possible for the contractor to pass this risk onto the subcontractor. The contractor and the subcontractor will have a separate contract and the parties to this contract can agree that the subcontractor is responsible for a period of ten years commencing on the date of issue of the relevant performance certificate under the main contract, if the installation of the subcontract works is not in accordance with the subcontract and the workmanship is not in conformity with the requirements of the subcontract and any defects result in partial or total collapse of the works. The subcontract may stipulate that the subcontractor will be liable for all the

⁶⁷ Jalal Kudsi, ‘The Longest-Running Construction Case in UAE Legal History has Finally Ended’ https://www.lexismiddleeast.com/eJournal/2016-04-01_39/ > accessed 20 February 2022

⁶⁸ Hazel Plush, ‘The architectural wonders of Dubai that never happened’ <https://www.telegraph.co.uk/travel/destinations/middle-east/ united-arab-emirates/dubai/articles/amazing-dubai-skyscrapers-that-were-never-built/> > accessed 20 February 2022

contractor's costs, however, the subcontractor would be dealt with differently, unlike the contractor and designer's liability which would not require any proof other than the partial or total collapse occurring. In the case of the subcontractor's liability, this would be subject to the contractor providing evidence and the subcontractor would have the right to dispute the contractor's claim in accordance with the dispute mechanism in the subcontract.

Can the benefit of decennial liability pass from the owner to a third party?

Many new developments in the UAE such as residential and commercial buildings are often sold by the developer to the end user. In relation to the end user's rights, the benefit of decennial liability can only pass to the end user if there is a provision in the construction contract referring to the end user as a third party to the contract. Article 254(1) provides that it is allowed for party to a contract to include a condition in the contract that the party's "*rights are to ensure to the benefit of a third party*". This on the basis that the third party had a significant interest, either personal or material in the successful completion of the construction works. For this provision to be operable there would need to be a contract condition where the contractor agrees that the employer can assign, the employer's benefit, right or interest under the contract to a third party. This would be unlikely where dwellings are being sold since sales of dwelling generally occur after construction contract has been executed.⁶⁹ This type of third-party arrangement is more likely to take place where the developer is constructing the project with a specific end user in mind, such as a hotel, a theme park or a project that includes a third party's branding or intellectual property incorporated into the design.

So, if a third-party is affected by a partial or total collapse can a third-party claim under decennial liability?

An example of a third party being affected by a partial or total collapse may be if a building collapsed and it damaged a neighbouring building. What relief would the owner of the neighbouring building have, and can they claim under decennial liability? Under Article 880 the designer and the contractor are jointly liable to make compensation to the employer only. The owner of the building that collapsed would be exposed to a claim in delict under Article 282, 291 and 293 of the Civil Code from the owner of the neighbouring building. The damages

⁶⁹ Dr. Daniel Brawn, 'Completion, Defects and Decennial Liability' [https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Completion Defects and Decennial Liability/](https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Completion_Defects_and_Decennial_Liability/) > accessed 20 February 2022

that the owner of the building that collapsed would have to pay to the owner of the neighbouring building would form a part of the owners claim against the designer and the contractor under Article 880 to 883.

INSURING AGAINST DECENNIAL LIABILITY

The provisions of the UAE law governing insurance are Article 1026 to Article 1055, The laws of the UAE deals with insurance from Article 1026 to Article 1055, however, there are no specific provisions that apply to the contractor procuring decennial liability insurance. In accordance with Article 1036, a party has three years from the occurrence of the event or from when the insured became aware of the event to make an insurance claim.⁷⁰

There are several types of insurances that contractors, designers, and employers in the UAE typically procure for construction projects.

The parties procure a contractor's all risk (CAR) insurance policy. However, the name of this type of insurance is misleading as it does not actually cover all risks and is meant for insuring against the risk of accidents resulting in physical damage to the construction works and the duration of this type of insurance is normally for the duration of the construction works up until the employer take over the works. CAR insurance does not provide any cover for losses as a consequence of defects in the design for the construction works.⁷¹

Third-party liability insurance will cover the parties in the event of damage or harm caused to third parties outside the contract.

When it comes to the design for the construction project, depending on the type of contract, the contractor, or the designer or both of the parties will need to procure a PI insurance policy. This is to protect against the legal liability and the financial impact of any errors in the design or negligent practice in professional service provided. The duration of cover for a PI insurance policy will typically cover the duration of the construction works, as well as the relevant defects liability period under the construction contract and can in some cases include a ten-year extended reporting period thereafter. PI insurance covers the insured party for negligent acts or omissions with respect to the execution of the design for the construction works. Any claims

⁷⁰ John Barlow and Sam Wakerley, 'Insurance Litigation in United Arab Emirates'

<https://www.lexology.com/library/detail.aspx?g=6697ccf0-e741-4214-88d6-649881935d7b> > accessed 20 February 2022

⁷¹ Chantelle Davis, 'Contractors All Risk Insurance'

https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Contractors_All_Risk_Insurance/ > accessed 20 February 2022

that fall outside of the execution of the design for the construction works will result in the PI insurance policy not responding to that claim.⁷²

Since decennial liability is a strict liability under UAE law and proof of any fault by the contractor and the designer is not a requirement, a PI insurance policy will not respond to a claim made under decennial liability.

As standard CAR and PI insurance policies will not include decennial liability cover; a separate decennial liability insurance policy is required. In the UAE there is no mandatory provisions requiring the contractor to procure decennial liability insurance for a project. This is not the case in the rest of the GCC. For example, in the Kingdom of Saudi Arabia, Inherent Defects Insurance (IDI) has been mandated by Cabinet Resolution No. 509 issued on 21/09/1439AH. On examination of this mandate, it appears that this applies to non-governmental construction works carried out in the private sector.⁷³ It is difficult to understand why this applies to private developments instead of protecting public funded projects, and whether the concerned UAE authorities will bring in similar legislation in the future.

However, due to the substantial levels of compensation payable for such a claim, such policies can be prohibitively expensive. When it comes to submitting a tender for a project, a contractor is faced with the prospect of either pricing decennial liability insurance cover and not being awarded the tender for being too expensive, or not pricing decennial liability insurance and retaining their competitiveness. It is, therefore, rare to see, decennial liability insurance cover being obtained in the UAE.⁷⁴

The costs of premiums, as well as the time and effort required for procuring project specific decennial liability insurance may prove to be very expensive when compared with project CAR and PI insurance policies and ongoing, given that the insurers would appoint a consultant to get involved with the project from the beginning, throughout the design phase and construction of the project and until the end of the contractual defects notification period.

⁷² Justin Carroll, 'Pitfalls for professionals: gaps in local professional indemnity coverage' <https://www.tamimi.com/law-update-articles/pitfalls-for-professionals-gaps-in-local-professional-indemnity-coverage/> > accessed 20 February 2022

⁷³ John Barlow, Thomas Neighbour and Sam Wakerley, 'KSA Inherent Defects Insurance' <https://www.lexology.com/library/detail.aspx?g=e4098693-e923-4d15-86d3-5c932545c2e9> > accessed 20 February 2022

⁷⁴ Beau McLaren, 'Taking Cover – Mandatory Decennial Liability Insurance in the UAE' <https://www.hfw.com/Taking-cover%E2%80%93mandatory-decennial-liability-insurance-in-the-UAE> > accessed 20 February 2022

There would be little appetite on the employer's part to pay for such premiums, given that the policy is meant to cover the risks of the contractor and the designer. Contractor's and designers are also not procuring decennial liability insurance, possibly on the basis that the risks associated with partial or total collapse are remote.⁷⁵

IN SUMMARY

The financial implications of decennial liability can be considerable for the parties. Not only would the parties become liable for the demolition and reconstruction of a building, but the parties could also be liable for consequential losses such as the loss of rental income and other losses and claims from the owner of the building.

The employer or owner of the building is under no obligation to prove that the collapse is the fault of the contractor or the designer. This means that the contractor and the designer may be liable to pay compensation to the employer or owner, even if they are not a fault for the partial or total collapse of a building.

In conclusion, for employer's and building owners in the UAE, the protection given by the laws of decennial liability, means avoiding potentially catastrophic consequences, as decennial liability means that employers and building owners can avoid bearing the costs of repair and rectification themselves as well as lost revenue.

⁷⁵ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016) 112

6 FIDIC GOVERNANCE

FIDIC CONSTRUCTION CONTRACTS:

In the UAE construction contracts between the employer and the contractor are commonly governed by one of the model contracts provided by FIDIC, and this is normally amended to be accordance with the employer's requirements and UAE law.⁷⁶

The choice of FIDIC contract depends on the form of contract the parties wish to agree which is also dependent on the chosen procurement route. When an employer is considering a new development, they should choose the best form of procurement. In the UAE there are three typical arrangements.

The FIDIC Red Book is widely used on 'design/bid/build' projects where the employer provides the design, the FIDIC Yellow Book is commonly used for 'design and build' projects where the design is primarily carried out by the contractor and the FIDIC Silver Book is used for 'turnkey' projects, where the design is provided by the contractor and the contractor assumes a greater risk profile.

The model forms of contract in their unamended states can be summarized as follows:

- (a) Design/bid/build: The employer appoints the designer (whether an architect or an engineer) who undertakes the design for the development. The design is then used to form the basis of the tender documentation, and this is provided to the contractors who then use this information to tender for the work. The successful tenderer (i.e., the contractor) will then execute the work in accordance with the design along with other work that may be implemented under the variation procedures under the contract. The design responsibility rests with the employer and the contractor bears no responsibility for the design. The FIDIC Red Book is often used for these types of projects.
- (b) Design and Build: The employer appoints the designer (whether an architect or an engineer) who undertakes the design for the development. The design is usually at a schematic stage and is incomplete. This incomplete design is used in the tender process to appoint the contractor who takes on responsibility for the design. It is

⁷⁶ Paul Blakeway, 'Common Claims in the Construction Industry' https://www.lexismiddleeast.com/pn/UnitedArabEmirates/Common_Claims_in_the_Construction_Industry/ > accessed 25 February 2022

commonplace for the employer to then novate the designer's contract to the contractor, so the contractor has contractual rights against the designer in respect of any design problems. The FIDIC Yellow Book is often used for these types of projects.⁷⁷

- (c) EPC contracts: The employer appoints the contractor who undertakes the design for the development. The design may be at a schematic stage and is incomplete but sometimes there is no design at all and instead there is a set of employer's requirements. The contractor will take on most of the risk associated with delivering the project and will be almost fully liable for any issues that arise with the design or an any unforeseeable risk. The FIDIC Silver Book is often used for these types of projects

DESIGN LIABILITY UNDER FIDIC CONSTRUCTION CONTRACTS

FIDIC Red Book Second Edition 2017

Under FIDIC Red Book the contractor executes the construction works to comply with the employer's design, however, there may be parts of the construction works where the contractor provides the design. Under Sub-Clause 4.1, the contractor assumes responsibility for the temporary works design. Under Sub-Clause 4.1, when it comes to the construction works the contractor does not take on responsibility for the design or specification. However, Sub-Clause 4.1, allows the parties to the construction contract to agree certain portions of the construction works where the contractor shall bear responsibility for designing, and for such elements of the construction works the contractor shall assume a 'fitness for purpose' obligation.

Under Sub-Clause 13.2, it is possible for the contractor to propose a change to the construction works that may accelerate completion, offer a reduction in the price for the construction works or presents some form of benefit to the employer. If the employer consents to the contractor's proposal the contractor shall provide the design at their own cost; and shall assume a 'fitness for purpose' obligation.

⁷⁷ Hassan Elhais, 'Construction Contract in the UAE: All You Need to Know' https://www.lexology.com/library/detail.aspx?g=79cb78d5-dca3-4112-93cc-8c25c3ef0be4&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2022-02-01&utm_term=> accessed 29 February 2022

Whilst the FIDIC Red Book is intended for projects where the employer is liable for the design and any errors in the design, the parties can agree that the contractor should design certain elements of the construction works and the contractor will be liable for ‘fitness for purpose’ for those elements of the construction works.

FIDIC Yellow Book Second Edition 2017

Under FIDIC Yellow Book the contractor executes the construction works in accordance with the employer’s requirements. In accordance with Sub-Clause 4.1, the Contractor shall install the construction works so that the completed building or development is fit for purpose. Unlike the FIDIC Red Book, Sub-Clause 4.1, does not refer to the contractor’s design obligations. The contractor obligation is simply to achieve a result.

The contractor’s design obligations are dealt with under Sub-Clause 5.1, where it provides for the contractor’s duty to undertake the design for the construction works and be responsible for the design.

However, under FIDIC Yellow Book, the contractor is not fully liable for the design. Sub-Clause 5.1 provides a process where the contractor is to study and analyse the employer’s requirements for any errors in the information provided by the employer. In accordance with Sub-Clause 1.9, the contractor has an opportunity to study and analyse the employer’s requirements identify any omissions or errors in the employer’s requirements within a period of forty-two days of the commencement of the construction works (or otherwise agreed). If the contractor does identify any errors or problems with the employer’s requirements, then the employer’s engineer has an obligation to consider if the contractor should have identified the error or omission before submitting its tender or if the contractor identifies the error after the forty-two-day period whether the contractor “*exercising due care*” should have identified the error.

Based on the premise that any competent contractor at a minimum exercises due care when compiling its tender for the construction works, a contractor is not liable for errors in the employer’s requirements and the employer bears a large portion of the design liability for the construction works. The FIDIC Yellow Book takes a fair approach in the allocation of design liability.⁷⁸

⁷⁸ Andrew Tweeddale, ‘Fitness for Purpose Højgaard and FIDIC’s Yellow Books’

FIDIC Silver Book Second Edition 2017

Under FIDIC Silver Book which is meant for ‘turnkey’ projects, the contractor’s obligations under Sub-Clause 4.1, are like the FIDIC Yellow Book where the contractor has an absolute duty to achieve a result and the contractor assumes a ‘fitness for purpose’ obligation.

Like the FIDIC Yellow Book, the contractor’s design obligations are set out under Sub-Clause 5.1, where it also describes the contractor’s duty to undertake the design for the construction works and be responsible for the design.

However, under Sub-Clause 5.1, the contractor is responsible for the accuracy of the employer’s requirements and any data provided by the employer that contains errors or is inaccurate or will not relieve the contractor from his responsibility for the proper design and performance of the construction works.

There is no provision that is like FIDIC Yellow Book, Sub-Clause 1.9, which provides the contractor with an avenue to claim for prolongation and costs caused by errors a competent contractor “*exercising due care*” could not have identified. It is uncommon for the contractor to take on the risk for the accuracy of the employer’s requirements. As far as the employer is concerned, using this model form of contract a simple procurement method, as the employer does not need to be apprehensive about the probability that there are errors in the information provided to the contractor.⁷⁹

There are certain exceptions to the amount of design liability that the contractor may bear under FIDIC Silver Book. Under Sub-Clause 5.1, there are certain element of the employer’s requirements that the contractor may not be responsible for. This includes where the contract states that the employer will be responsible for providing certain design criteria and other project data as well as the employer being responsible for the description of the intended purpose of the building or development. It is well advised for the contractor to insist on including an extensive list of design criteria and other project data where the employer bears responsibility for its correctness and if the contractor can negotiate successfully during the agreement of the terms and conditions of the contract, this would allow the transfer of additional risk to the employer. It is also well advised for employers to be mindful when they are to providing detailed sets of employer’s requirements, as this can result in the dilution of

<https://www.corbett.co.uk/fitness-for-purpose-hojgaard-and-fidics-yellow-books/> > accessed 29 February 2022

⁷⁹ Sarah Lupton, Cornes and Lupton's Design Liability in the Construction Industry (Blackwell Publishing Ltd 2013) 315

the design liability of the contractor. The preparation of employer's requirements necessitates a high level of professional expertise to provide a document that is balanced and fair and avoids the possibility of contractual disagreements and disputes.⁸⁰

The FIDIC Silver Book places the risk on the contractor to provide cost and time certainty for employers and lenders alike. This form of contract is a popular choice among employers and governments for the procurement infrastructural developments such as power plants, desalinisation facilities and other PPP projects where the employer is dependent on the contractor's design expertise. However, as the risks are placed almost entirely on the contractor the contract price can often become inflated to reflect the risks involved.⁸¹

FIDIC CONSULTANCY CONTRACTS:

The White Book Fifth Edition 2017, stipulates under Sub-Clause 3.3.1, that the designer shall carry out its scope of services exercising "*reasonable skill, care and diligence.*" Under Sub-Clause 3.3.2, the designer has a duty to carry out its scope of services to comply with the proposed function and the purpose of the development. as well as a duty under Sub-Clause 3.3.3, to carry out its scope of service so that it complies with any regulations and laws.

Under the White Book, Sub-Clause 2.1.1, the provision of information from the employer is dependent on the designer's request for information relating to its scope of services and for which the employer can provide. Sub-Clause 2.1.2 goes a step further and stipulates that whilst the employer bears a design liability for the information provided by the employer, the designer has an obligation to use reasonable endeavours to review the information provided within a reasonable time using the same standard of care mentioned under Sub-Clause 3.3.1. In the event the designer identified any errors, or omissions it is obligated to submit a notice of its findings to the employer in a timely manner.

In terms of liabilities for a breach of the contract Agreement, under the FIDIC White Book, Sub-Clause 8.1.1, the designer is responsible for breaching any of the provisions of their appointment.

⁸⁰ Nael G. Bunni, *The FIDIC Forms of Contract* (Blackwell Publishing Ltd 2013) 473

⁸¹ Nikita Lalla, 'Perils of the Silver Book: contractors beware'

<https://www.lexology.com/library/detail.aspx?g=56be359b-aa01-4e80-bd44-045caba1f179> > accessed 29 February 2022

BACK-TO-BACK DESIGN LIABILITY

Whilst the White Book is more suited to employers, there are some issues for contractors to be aware of. Where the contractor bears the responsibility for the design under Yellow Book or Silver Book based contracts, the contractor should be aware that ‘back-to-back’ design obligations do not align. The White Book does not include the express ‘fitness for purpose’ provisions contained in the FIDIC Red, Yellow and Silver Book; therefore, the designer is not held to the same level of design liability as a contractor and is limited to carrying out the design by exercising reasonable skill, care, and diligence. Contractors intending on using the White Book for appointing designers should be aware that the White Book does not adequately place the same design liabilities on the designer.⁸² This has the potential become a major problem with regards to PI insurance and where the designer is novated to a contractor on a design and build contract differing design liabilities between the designer and the contractor may be out of the contractor’s control.

As a result of this discrepancy between the FIDIC White Book and the FIDIC Red, Yellow and Silver Book, the contractor cannot pass on the same level of design liability or duty for the designer to assume a ‘fitness for purpose’ obligation. A competent designer will always endeavour to design the construction works so that they are in accordance with the contract and the employer’s requirements, however, if the designer fails in achieving the purpose of the construction works as defined in the main contract, then the designer will more than likely not be liable if it has exercised due reasonable skill, care and diligence and has adhered to the relevant building regulations and local laws. On the other hand, when the contractor completes the building in accordance with the contract and the employer’s requirements but fails to achieve the purpose as defined and described in the main contract, the contractor will be in breach of contract notwithstanding whether it has exercised due reasonable skill, care and diligence and has adhered to the relevant building regulations and local laws.⁸³

In terms of the allocation of risk with respect to the liability for the design under the FIDIC suite of contracts and the laws of the UAE, the parties are free to negotiate and agree the level of design liability. This is aligned with Article 257 concerning freedom of contract, Article 874 regarding the formation of the contract and Article 129, 130 and 877, relating to contract

⁸² Scott Lambert, ‘New FIDIC White Book: The Key Changes’
<https://www.tamimi.com/law-update-articles/new-fidic-white-book-the-key-changes/> > accessed 29 February 2022

⁸³ Sarah Lupton, Cornes and Lupton's Design Liability in the Construction Industry (Blackwell Publishing Ltd 2013) 107

performance. In the construction industry the parties always have the choice to sign a contract and the courts in the UAE tend to uphold these agreements.

However, the FIDIC suite of contracts does present certain issues with respect to liability for site conditions, the limitation of liabilities for the parties, defects liability periods and compensation.

DESIGN LIABILITY FOR SITE CONDITIONS: UNEXPECTED, UNFORESEEABLE

With the design documentation provided with the tender documents the employer may provide geotechnical information and design information concerning existing utilities.

Under the FIDIC Red and Yellow Book, Sub-Clause 4.12, in the event the contractor discovers any physical conditions which were unforeseeable, when the contractor submitted its original tender and provided the contractor submits a notice under the contract, the contractor will have an entitlement to an extension to the completion date and cost without profit.

However, under Sub-Clause 4.12.5, the contractor's entitlement to claim for additional time and/or cost can depend on the extent the physical conditions were unforeseeable under the contract. The employer's engineer has a right to assess any evidence of the physical conditions that were foreseen by the contractor before the contractor submitted its tender, therefore, a contractor cannot simply claim that the design issued by the employer is completely accurate. The contractor therefore has a duty to not only scrutinise the information provided at tender stage, but before the contractor submits his tender, he must visit the site if permitted and he should assess any other information that he can obtain and keep accurate records of the steps taken to foresee any physical conditions.

Under FIDIC Silver Book, in accordance with Sub-Clause 4.12, the contractor is responsible for any difficulties and the contractor is considered under the contract to have made all necessary investigations into the information and risks associated with the ground conditions. The contractor will take total responsibility for ground conditions, so in the event there are unforeseeable difficulties that delay the construction works the contractor is at risk of being culpable for any delays to the construction works. The contractor therefore has an obligation to check all information in relation to the site and should visit the site and assess the risks

involved based on the nature of the construction work before signing into this type of contract.

In terms of the provisions of FIDIC and decennial liability, under Article 880(2), the contractor and the designer are jointly liable for a period of ten years if there is a partial or total collapse of the building, and this is even the case if the partial or total collapse is linked to the quality and suitability of the land. However, in accordance with FIDIC Red and Yellow Books the contractor is entitled to additional time and/or costs incurred due to unforeseen difficulties, because of unforeseen ground conditions. Does this indicate a contradiction between the model form of contract and the mandatory provisions Article 880?

It appears that the contractor would only have an entitlement to time and/or cost if the unforeseen difficulties were discovered as the execution of the construction works progressed. The contractor would be entitled to make a claim if there was a delay in overcoming the unforeseen ground conditions and any associated costs. If there was a “*defect or collapse*” due to the land itself, then the Contractor would be jointly liable with the designer under Article 880.

With regards to FIDIC Silver Book, in the event the contractor failed to discover any problems with the ground conditions and during the execution of the construction works became delayed due to unforeseeable difficulties, could the contractor argue that there should be no liability due to an extraneous circumstance and rely on Article 287 of the Civil Code for relief? Provided there is no agreement to the contrary, Article 287 can apply, however, if a contractor signs up to FIDIC Silver Book they have in effect agreed to no relief due to unforeseeable difficulties and the contractor is deemed to have priced this risk.

LIMITATION OF LIABILITY

In accordance with FIDIC Red and Yellow Book, Sub-Clause 1.15 and FIDIC Silver Book, Sub-Clause 1.14, the parties are not liable to one another for loss of profit, any consequential or indirect loss and loss of opportunity suffered in connection with the contract. There are several exclusions to this, such as delay damages and other indemnities in the contract and the party’s liabilities shall not exceed the contract amount unless stated otherwise. The parties’ liabilities are also not limited if a party commits a fraudulent act or an act of gross negligence or gross misconduct. This is aligned with Article 296, which stipulates that an agreement to exempt a party from liability for causing harm is rendered void and Article

383(2) which infers that a party is liable if it commits a fraudulent act or an act of gross negligence.

In terms of the provisions of FIDIC and decennial liability, in accordance with Article 880(1), the contractor is liable to pay compensation for a partial or total collapse of the building. It is evident that FIDIC does not address decennial liability, as the contractor is not allowed under the laws of the UAE to limit its liability for loss of profit, any consequential or indirect loss and loss of opportunity suffered by the employer. This contravenes Article 882, where it states that if the contract attempts to relieve the designer or the contractor from liability for a partial or total collapse of the building such provisions will be void. As discussed in chapter 5, the employer has no obligation to prove that any fault took place or that there was any negligence on the part of the contractor, as would be the requirement when proving a breach of contract or a delict.

It is understandable that designers may be unaware that they assuming a large amount of uninsurable risk pertaining to the contractor's performance in constructing a building that is stable and safe. Under the FIDIC White Book, Sub-Clause 3.9.4, it infers that the designer is not responsible to the employer for the performance of the contractor and that the designer is only liable to the employer if they are in breach of the consultant appointment. If the scope of the designer's services includes the supervision of the contractor's work, the designer will be subject to the provisions of Articles 880 to 883 and the designer will be jointly liable for ten years and if there is a partial or total collapse of the building the designer cannot rely on the provisions of Sub-Clause 3.9.4. The employer would not be required to provide evidence to show that the designer is responsible for any total or partial collapse of the construction work.

DEFECTS LIABILITY PERIOD

Under FIDIC Yellow and Red Book. Sub-Clause 1.1.27 and FIDIC Silver Book, Sub-Clause 1.1.24, the "Defects Notification Period" (DNP) is defined as the period in the contract data and if it is not defined then period is one year from the completion date of the construction work.

In terms of any extension to the DNP, the FIDIC contracts state under Sub-Clause 11.3, that a DNP may be extended for a period of no more than two years. In accordance with FIDIC contracts the employer has one year to notify the contractor of any defects, but this can be extended for a part of the construction works suffers a defect for a period of up to two years.

So, are the provisions of FIDIC enforceable under UAE law? This would largely depend on the significance of the defect and the affect it has had on the employer. A defect can be based upon an error in the design or if the design was not prepared to meet the standards of skill and care or ‘fitness for purpose’, as set out in the contract. The defect may also be as a result of the designs non-compliance with the relevant building regulations. FIDIC does not actually define the term “defect” in any of its contracts.⁸⁴

In terms of defects liability periods and contract law, Article 473 infers that, a party can apply to the courts to enforce a right and the courts will only accept and enforce a party’s rights if it is no more than fifteen years old.

In terms of defects liability periods and the laws of delict, if the defect was due to the contractor or the designer not undertaking their design with reasonable skill and care by (as an example) not following UAE building regulations, then under Article 298, the employer would have three years to make a claim to the courts from the day the employer became informed of the harm, and a period of fifteen years to make a claim to the courts from when the harm took place.

In terms of defects liability periods and decennial liability, in accordance with Article 880(1), the designer and the contractor are jointly liable to compensate an owner for ten years if there is a partial or complete collapse of a building. FIDIC does not deal with the concept of decennial liability, as the contractor is unable under the law to agree a period of less than ten years unless it is the owner’s intention that the building has a lifespan of less than ten years, as inferred under Article 880(1).

The DNP in FIDIC contracts are contractual periods where the contractor has an obligation to return and rectify any defects within an agreed amount of time from when the taking over certificate for the construction work is issued until the contractor is in receipt of the performance certificate. It is not the intention for FIDIC to limit the parties’ liabilities with respect to defects liability periods and the law governing the contract. To put it in simple terms, the DNP is the period where the contractor must remedy the defect. Contractors should

⁸⁴Alison Eslick and Roberta Wertman, ‘Defects during the project life cycle: FIDIC and UAE law’ <https://www.lexology.com/library/detail.aspx?g=4f4dd131-07eb-450f-a768-7d8941223b9e>

be aware that after the DNP they will remain liable for the costs of defects for the period set out in the governing law but are not obliged to return and remedy the defects.⁸⁵

COMPENSATION

The FIDIC suite of contracts have mechanisms for compensation for the employer and the contractor due to design liability:

Compensation for a contractor's design liability:

- (a) Under FIDIC Red and Yellow Book, Sub-Clause 1.13 and FIDIC Silver Book, Sub-Clause 1.12, the contractor is liable to compensate the employer for delays in obtaining necessary permits and authority approvals. This can be related to a design liability. The employer is allowed to claim its cost from the contractor.
- (b) Under FIDIC Yellow and Silver Book, Sub-Clause 5.2.2, the contractor is liable to compensate the employer for resubmitting the contractor's design documents due to a failure to adhere to the employer's requirements. The employer is entitled to claim its cost from the contractor.
- (c) For the contractor's failure to return and remedy defects the employer may keep a part of the retention monies deducted over the course of the contract which is typically ten percent of the contractor's interim payments.
- (d) For the contractor's failure to return and remedy defects or perform the design of the construction works the employer may cash a part of the contractor's performance bond which is typically ten percent of the contractor's contract price.
- (e) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 8.8, for the contractor's failure to complete the works on time, which may be related to a design liability, the contractor shall pay liquidated damages for delay to the employer, which is typically agreed at the time of the negotiation of the contract and normally capped at ten percent of the contractor's contract price.
- (f) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 9.4, the contractor is liable to compensate the employer for being unable to pass a required test for the construction works. This can be because of a contractor design liability and the employer will be entitled to a reduction in the contract price, which shall be equivalent to the reduced value of the finished construction work.

⁸⁵ Andrew Burr, *Delay and Disruption in Construction Contracts* (Informa Law from Routledge 2016) 1070

- (g) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 11.4, the contractor is liable to compensate the employer for being unable to remedy a defect in the construction works. This can be because of a contractor design liability and the employer will be entitled to claim costs for having the work carried out by others; or claim a reduction in the contract price, which shall be equivalent to the reduced value of the finished construction work; or if the defect is serious enough to deprive the employer of its use of the finished construction work, then the employer can claim all monies paid to the contractor as well as financing and clearing the site to its original state.
- (h) Under FIDIC Yellow and Silver Book, Sub-Clause 12.4, the contractor is liable to compensate the employer for being unable to pass a required test for the construction works. However, the compensation is in the form of ‘performance damages’, the value of which is calculated, and the performance criteria is defined in the contract.
- (i) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 20.2, the contractor is liable to compensate the employer for any claims made by the employer. This can be related to a design liability. The employer is entitled to claim extension to the DNP and/or cost.

Compensation for an employer’s design liability:

- (a) Under FIDIC Red and Yellow Book, Sub-Clause 1.13, and FIDIC Silver Book, Sub-Clause 1.12, the employer is liable to compensate the contractor for delays in obtaining the necessary building permits. This can be related to a design delay. The contractor is entitled to claim extension of time and cost plus profit.
- (b) Under FIDIC Red Book, Sub-Clause 1.9, the employer is liable to compensate the contractor for delayed drawings or instructions related to the design. The contractor is entitled to claim extension of time and cost plus profit.
- (c) Under FIDIC Yellow Book, Sub-Clause 1.9, the employer is liable to compensate the contractor for errors in the employer’s requirements. The contractor is entitled to claim extension of time and cost plus profit.
- (d) Under FIDIC Red and Yellow Book, Sub-Clause 4.7, the employer is liable to compensate the contractor for errors in the setting out points and levels of reference. This would be provided with the employer’s design documents. The contractor is entitled to claim extension of time and cost plus profit.
- (e) Under FIDIC Red and Yellow Book, Sub-Clause 4.12, the employer is liable to compensate the contractor for any physical conditions that are unforeseeable. This can

relate to inaccuracies in geotechnical report provided with the employer's design documents. The contractor is entitled to claim extension of time and cost, but not profit.

- (f) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 8.5, the employer is liable to compensate the contractor for variations to the construction works, or any delay, caused by the employer, or any of its personnel or other contractors. This can relate to design changes and design delays. The contractor is entitled to claim extension of time.
- (g) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 13.3, the employer is liable to compensate the contractor for instructing variations to the construction works. This would relate to changes to the design running concurrently to the construction works. The contractor is entitled to claim extension of time and cost plus profit.
- (h) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 13.6, the employer is liable to compensate the contractor for any changes in the laws of the UAE. For example, a change in UAE law can result in a design change due to a new building regulation. The contractor is entitled to claim extension of time and cost, but not profit, however, this can also result in a reduction of the contract price if the change in law results in a saving for the employer.
- (i) Under FIDIC Red and Yellow Book, Sub-Clause 17.2, the employer is liable to compensate the contractor for any error in the design provided by the employer. The contractor is entitled to claim extension of time and cost plus profit.
- (j) Under FIDIC Red, Yellow and Silver Book, Sub-Clause 20.2, the employer is liable to compensate the contractor for any claims made by the contractor. This can be related to a design liability. The contractor is entitled to claim extension of time and cost.

It is my view that the mechanism for compensating the contractor under the model form of contract for an employer's design liability satisfies the laws of the UAE, as the contractor is compensated without any apparent limit, however, for the employer when it comes to compensation due to the contractor's design liability, it is not sufficient, as the contractor's design liability under the model form of contract is capped. The contractor has the benefit of negotiating the liabilities for liquidated damages and performance damages and will

understand from the beginning of the project how much liability it has if it is unable to complete the project on time or meet the employer's requirements.⁸⁶

⁸⁶ Alaa Zeineddine, 'Delay liquidated damages and performance liquidated damages: what you should know' https://www.lexology.com/1160003/author/Alaa_Zeineddine/ > accessed 13 March 2022

7 CONCLUSIONS

The UAE construction industry presents major opportunities for contractors, designers, and employers alike. There is significant room for growth in the residential, hospitality, and infrastructure sectors and there are exciting prospects on the horizon for the sustainability sector. However, with the opportunities come the inevitable risks and the industry requires a mature design culture, where the roles and responsibilities of the parties are clearly addressed and understood.

The laws of the UAE allow the parties to agree the allocation of risk with respect to design liability. This includes the level of legal responsibility, the scope of design work that is to be undertaken and the remedies if a party fails in their contractual obligations. An agreement can be made to the extent that it is performed in good faith and not exercised in an unlawful manner. The parties should be aware of the mandatory provisions that apply to their contracts and that there are no contradictions in these terms.

A contractor would be well advised to scrutinise any proposed contract documents in full (including the technical documents which now commonly seek to incorporate contractual and commercial terms) to ensure that the proposed contract documents do not indicate an intention that the exercise of reasonable skill and care will be insufficient to discharge the contractor's design obligations.

Where a proposed contract document mentions that the design of the construction works shall be 'fit for purpose', the contractor should always push heavily towards including a definition in the contract conditions. Such a definition should aim to narrow the definition so that 'fit for purpose' shall mean that the design is suitable for their intended use and complete in accordance with the contract as would normally be expected by a competent and professional company operating in the UAE. The term 'fit for purpose' is not defined under UAE law and is therefore a subjective term, and is also uninsurable, so a contractor is well advised to include a definition that brings the obligation closer to acting with reasonable skill and care.

As seen in chapter 6, with some of the inconsistencies that exist between the laws of the UAE and the model forms of contract used, contracts between contractors and employers and consultancy contracts are arguably more onerous than necessary and it is worth modifying these documents accordingly so that they are better aligned with the design liabilities that are prescribed under the laws of the UAE. If the parties have a good understanding of the legal

framework, they can mitigate the risks involved and they are well positioned to benefit from the opportunities that are present in the UAE construction industry.

In terms of overall design liability for any construction project, this should not be of great concern to the parties if they have the time and the opportunity to remove any design risks that can arise.

In terms of the parties fully understanding their roles and responsibilities, over the course of my research, I have found the best method for dealing for the design process that is currently being utilised in the UAE is the RIBA Plan of Work 2020. I found this of relevance as there is no other architectural institute situated in the Middle East and the Royal Institute of Architects which was established 1834 opened its first office in the UAE in 2019.⁸⁷

I have found that the RIBA Plan of Work 2020, has clear and concise stages where the employer appoints the designers and the contractors at the right time during the design process. All parties will be involved depending on the type of procurement and most importantly the employer will be involved to approve design briefs and budgets, and any coordination with the various design and engineering disciplines, will be resolved and planning permissions will be obtained before the construction works commence.

In summary all the parties have a part to play in the design process and if followed correctly and without accelerated design schedules that can run concurrently to the construction works, the inherent subjectivity (and possible litigation) that comes with exercising reasonable skill and care or achieving a result that is 'fit for purpose' can reduce each party's design liability and it can be a win-win situation for all.

⁸⁷ RIBA Plan of Work 2020

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