

# **Comparison of Treatment of Contractual Remedies under FIDIC 1999 Red and Yellow Books and UAE Contracts of Muqāwala**

دراسة مقارنة بين سبل الانتصاف التعاقدية بموجب شروط الكتاب الأحمر  
والكتاب الأصفر من نماذج عقود الفيديك الجديدة لسنة 1999 ووفق أحكام عقود  
المقاوله الواردة في قانون المعاملات المدنية لدولة الامارات العربية المتحدة

by

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of the requirements for the degree of  
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**Prof. Abba Kolo  
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## **ABSTRACT**

When a person enters into a contract with another, both contracting parties are obliged, by contract and by law, to fulfill their respective obligations in accordance with that contract. Either party may, however, fail to carry out, not be able to or decide not to, perform any or all of its contractual obligations, hence it is considered that contract is breached by the defaulting party. The questions then arise: what are the respective obligations of the contracting parties, both under contract and at law? What forms of remedies are available to the aggrieved party to obtain redress or relief?

This study first introduces briefly, the core contractual obligations of the employer and the contractor against each other under FIDIC forms of contract as found in the FIDIC Red and Yellow Books on the one hand, and the UAE Civil Law, in particular the Muqāwala provisions, on the other.

Thereafter it goes on to the main focus of the research, namely the nature of the contractual remedies available to an aggrieved party where there has been a breach of contract. In this research, various remedies are examined within the UAE Civil Law, as the governing law related to construction contracts, and the FIDIC Suite of Contracts, as the most common standard form suite of engineering and construction contracts used for construction projects in the UAE and internationally.

The primary purpose of the study is to assist employers, contractors, engineers, lawyers, international financing organizations and stakeholders in construction projects, using FIDIC forms of contract subject to the UAE Civil Law as the applicable law, to better understand the courses of action available to a contracting party when the contractual obligations of the other party are not complied with.

Since most of the legal systems of the Arab Middle Eastern countries are founded upon Civil Law principles, it is envisaged that this research would support effective and efficient contract administration of construction projects within the region.

## ملخص البحث

عندما يتعاقد طرف مع طرف آخر فإن الأطراف التعاقدية ملزمة بموجب العقد وحسب القانون بالوفاء بالتزاماتها وفقاً لهذا العقد. أما إذا أخل أحد الأطراف من القيام بالتزاماته التعاقدية، أو لم يتمكن، أو امتنع عن تنفيذ أيّاً من هذه الالتزامات، فيعتبر الطرف المقصر قد قام بخرق هذا العقد. وهكذا سوف يتم التساؤل حول: ما هي التزامات كلاً من الأطراف المتعاقدة بموجب العقد وبموجب القانون؟ وما هي أشكال سبل الانتصاف المتاحة للطرف المتضرر في الحصول على التعويض أو الإغاثة؟

تبدأ هذه الدراسة بتمهيد يتناول تعريف الالتزامات التعاقدية الأساسية التي تقع على كل طرف من أطراف التعاقد (رب العمل والمقاول) وفق شروط الكتاب الأحمر والكتاب الأصفر من نماذج عقود الفيديك الجديدة لسنة 1999 من جهة، وقانون المعاملات المدنية لدولة الإمارات العربية المتحدة الصادر بالقانون الاتحادي رقم (5) لسنة 1985 وتعديلاته وبخاصة وفق أحكام عقود المقاوله الواردة في هذا القانون من جهة أخرى.

سيتم التركيز بصفة رئيسية في هذا البحث حول طبيعة ونطاق سبل الانتصاف التعاقدية المتاحة للطرف المتضرر حال حدوث خرق أو إخلال بالعقد. وأيضاً في هذا البحث سوف يتم التطرق إلى فحص مختلف سبل الانتصاف التي يتيحها قانون المعاملات المدنية لدولة الإمارات العربية المتحدة، القانون الواجب التطبيق على عقود البناء، وكذلك نماذج عقود الفيديك والتي تعد من أكثر العقود شيوعاً للعقود الهندسية والإنشائية المستخدمة في مشاريع البناء في الإمارات العربية المتحدة ودولياً.

الغرض الأساسي من هذه الدراسة هو مساعدة أرباب العمل والمقاولين والمهندسين والمحامين ومنظمات التمويل الدولية وأصحاب المصلحة في مشاريع البناء على فهم التدابير المتوفرة لأحد الأطراف المتعاقدة بصورة أفضل في حال عدم امتثال الطرف الآخر بالتزاماته التعاقدية باستخدام نماذج عقود الفيديك الخاضعة للقانون المدني في دولة الإمارات العربية المتحدة.

إن معظم الأنظمة القانونية لدول الشرق الأوسط العربية تركز على مبادئ القانون المدني، ومن المتوخى أن يدعم هذا البحث إدارة العقود بكفاءة وأكثر فعالية لمشاريع البناء داخل المنطقة.

## **DEDICATION**

To my father and the soul of my mother for their endless Love, Support & Encouragement

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*First and foremost, All the praise to Allah...*

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# ***CHAPTER ONE***

## ***Introduction***

This chapter provides an overview of the research by providing the background of the research topic, and then outlines the aim and objectives of this research. Additionally, this chapter outlines the methodology adopted and finally the organisation of the dissertation.

## **1.1. General Statement and Background**

Construction has been one of the most dynamic industries in the United Arab Emirates economy in the most recent years. Construction projects represent a large part of the UAE economy, and comprise of contracts signed between the two main contracting parties: an Employer and a Contractor, and include clauses that govern the relationship between the parties.

Generally, the contract is an expression of a voluntary agreement between the contracting parties with the purpose of establishing legal responsibilities and rights. The primary source of construction law in the UAE is the UAE Civil Transactions Law, No. 5 of 1985 (as amended) (known as the “Civil Code”).<sup>1</sup> Under the UAE Civil Code, the contract as a binding legal agreement, which if it is valid, is one source of the law of obligations which concerns the rights and duties that arise from such agreement.<sup>2</sup> UAE contract law recognizes enforceability of the contracts and provides the enforcement procedure.

The function of the law of contract is to spell out the minimum rights and responsibilities of the contracting parties. Furthermore, in the absence of express provisions in the contract, the provisions of contract law operate to define the parties’ contractual obligations. Generally, all contracts are subject to two types of rules under the contract law; the general contract rules that regulate the formation and termination of contract, validity of contract, remedies in the case of non-performance, transfer of contractual rights etc.; and the special contract rules that deal with problems specific to the legal relationship under particular circumstances.

The Civil Code includes a section of 25 Articles, 872 to 896, which contains a mixture of both general and specific articles that govern contracts for professional services called “Muqawala”. A Muqāwala is, literally, “a contract to make a thing or perform a task”<sup>3</sup> which applies to construction contracts as well. Furthermore, all construction contracts are governed by mandatory provisions of the UAE Civil Code and UAE Code of Commercial Practice<sup>4</sup> applicable to innominate contracts which shall override and take

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<sup>1</sup> UAE Civil Code, Article 1: “As amended by Federal Law No. 1 of 1987”

<sup>2</sup> UAE Civil Code, Article 124

<sup>3</sup> UAE Civil Code, Article 872; “A muqawala is a contract whereby one of the parties thereto undertakes to make a thing or to perform work in consideration which the other party undertakes to provide”; However, Muqawala contracts do not exclusively cover construction contracts as we can see from the definition. They apply generally to any contract for services, like a carpenter being contracted to complete a job or an artist assigned to a painting job.

<sup>4</sup> UAE Commercial Transactions Code [Fed. Law 18 of 1993]

precedence over any contractual stipulation to the contrary. Therefore, any construction contract must comply with the parameters of these mandatory provisions irrespective of what has been agreed contractually.

In the UAE private construction sector, the most commonly encountered standard forms of contract are the FIDIC<sup>5</sup> precedents and more specific the 1999 edition of the Red<sup>6</sup> and Yellow<sup>7</sup> Books which are widely accepted and used. For the public sector contracts, Abu Dhabi<sup>8</sup> and Dubai<sup>9</sup> continue to use stand-alone bespoke forms of contract modelled on the 1999 FIDIC forms for civil construction projects undertaken in these Emirates on behalf of public entities.

Where one of the contracting parties fails, without a legal excuse, to perform any of his contractual obligations, then that party will be in breach of the contract. A breach occurs in a variety of forms: it may be delayed or defective performance, or non-performance, or other non-compliance.<sup>10</sup> When such breach of contractual obligations causes to the other party a certain loss and a direct link exists between that loss suffered and the breach, then the innocent party will have the right to a remedy<sup>11</sup> either under the contract or in the law.<sup>12</sup>

If a contract is breached and an obligation under that contract is not fulfilled, a range of remedies, in response to contractual breach are available under the FIDIC contracts in addition to other remedies provided by the UAE Civil law to ensure fairness among the contracting parties. Generally, there are two circumstances in which the right of

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<sup>5</sup> The conditions of contract prepared by the Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers, FIDIC)

<sup>6</sup> Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1st Edn, 1999) ("the Red Book")

<sup>7</sup> Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor (1st Edn, 1999) ("the Yellow Book")

<sup>8</sup> In 2006 a law was introduced in Abu Dhabi known as Law No. 21 of 2006 which in turn was superseded by Law No 1 2007. These Laws introduced officially for the first time 'new' forms of construction contracts based on the 1999 FIDIC forms, in particular the Red Book.

<sup>9</sup> Dubai Law No. 6 of 1997 Concerning Contracts with Government Departments in the Emirate of Dubai, as amended (the 'Dubai Law No. 6 of 1997'), which concerns the substantive and procedural legal framework for government contracts in Dubai.

<sup>10</sup> A Jaeger and G Hök, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 23

<sup>11</sup> Origins of the word "remedy" can be found in Old French, Latin and Indo-European languages starting from the years 1175-1225 with the medical meaning of "cure", "treatment", "relieve" and "healing". Figurative use of the term begins approximately from the year 1300. In legal science remedy is defined as a principle armoured with different instruments to preserve the right, to prevent wrong and to counteract, as well as to correct and to rectify an evil/ fault/ error, and also to restore and to enforce good. It is further considered as the "means to achieve justice in any matter in which legal rights are involved", Remedy comprises an integral part of each right and is recognized as essential to the concept of "ordered liberty", enabling functioning of rule of law. In other words remedies define exact value of abstract rights and enforce them.

<sup>12</sup> Ashurst LLP, 'Limitation and Exclusion of Liability' (April 2009) 2

a party to a remedy may arise for a party's failure to carry out its obligations under the contract.<sup>13</sup> The first circumstance concerns situations in which a party has a right when the other party fails to comply with its contractual obligation. The second concerns the courses of action available to a party in the event where there is no fault on the part of the other party. Traditionally remedies, both statutory and contractual, played the economic function of altering the behaviour of the party to the contract in order to ensure its performance, which was required irrespective of changes in subjective or objective circumstances.

The contractual remedy aims to set right or relieve any harm potentially accruing to contracting parties. The remedies expressly provided to the parties under both the FIDIC contracts and under the UAE Civil Law are subject to compliance with the required formalities of the claims procedures<sup>14</sup>, and then other formalities in case of a claim in terms of the general law.

Furthermore, generally, the entitlements of the Employer and the Contractor to contractual remedies are subject to the overall limitation of liability terms<sup>15</sup> and are subject to the application of the general law on contract as well. In some situations, the parties' entitlement to or exercise of a contractual remedy may become the subject of a dispute where dispute resolution should then be carried out.

The contractual remedies available to both the Employer and the Contractor will be discussed in this research. Note that, the remedies available to the Employer far outnumber the available Contractor's remedies which reflect on the fact that the latter has more obligations which need to be enforced by the contract than the former.<sup>16</sup>

## **1.2. Research Aim**

This research explores the contracting parties' obligations and focuses in particular on the available compensatory and non-compensatory remedies for breach of these obligations under the FIDIC Red and Yellow Books, the preferred standard form of construction contract in the UAE, and comparing such obligations and remedies with similars under Muqāwala contracts under UAE Civil Law.

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<sup>13</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 402

<sup>14</sup> Procedures under Sub-Clause 2.5 Employer's Claims and under Sub-Clause 20.1 for Contractor's Claims *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 17.6 [Limitation of Liability]

<sup>16</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 403

This dissertation aims to critically review the contractual provisions and the contractual remedies of the FIDIC Red and Yellow Books 1999 and compare them to their counterparts under the Muqāwala contract. The research investigates whether the monetary provisions and the available contractual remedies to the contract parties under the FIDIC Red and Yellow Books 1999 represent improvements and provide better efficiency over their counterparts under the Muqāwala contract.

It is hoped that this dissertation will provide contracting parties and construction industry professionals a deeper awareness towards the importance of available contractual remedies under the FIDIC standard form of contracts and UAE Muqāwala construction contracts.

### **1.3. Research Objectives**

1. Determine the nature and the scope of the contractual obligation and liabilities for the contracting parties under FIDIC Red and Yellow Books and the UAE law.
2. Determine what remedies are available to the parties under FIDIC Red and Yellow Books.
3. Determine how the law involved in the construction contracts provides for legal obligations on the parties to Muqāwala contracts and what legal remedies are available to the parties under Muqāwala contracts.
4. Analyse how the courts have interpreted and applied the contractual remedies under FIDIC and the Muqawala.

### **1.4. Research Methodology**

This dissertation was researched and analysed through doctrinal research methodology. Doctrinal research is concerned with the doctrinal analysis of law through the simple analysis of legal rules, which in the Civil Law system are the legislation that constitute the primary sources of law according to the UAE Civil Transactions Law.<sup>17</sup> Doctrinal research primarily relies on the statutory material for ‘ascertaining’, ‘understanding’, and ‘appreciating’ law and the provisions of the FIDIC standard form of contract.<sup>18</sup>

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<sup>17</sup> T Hutchinson and N Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 Deakin Law Review 84

<sup>18</sup> *ibid* 85

The methodology of doctrinal research is characterised by the study of legal texts of the UAE Civil Law and legislation commentaries. For the FIDIC contracts this will be FIDIC commentaries and relevant articles, which are the most significant sources for this study. Doctrinal research is therefore concerned with the discovery and development of legal doctrines for publication in textbooks, journal articles, refereed conference proceedings, dissertations and theses, technical reports and occasional papers or and government publications. Its research questions take the form of asking ‘What is the law?’ in particular contexts.

The three methods have been applied to the sources identified earlier; the process of inductive reasoning, which entails the reasoning from specific cases to a general rule; the process of deductive reasoning, which entails reasoning from a general rule to a specific case; and the process of analogical reasoning which involves a process of reasoning from one specific case to another specific case.<sup>19</sup>

All research references have been cited in accordance with OSCOLA, Oxford University Standard for the Citation of Legal Authorities, standards.

### **1.5. Summary of the Dissertation Organisation**

This dissertation is divided into three main chapters accompanied by introduction, summary, final conclusion and recommendations.

Frist chapter, titled "Introduction" introduces background of the research. It also presents the research aim and objectives, a short description on methodology, as well as the outline of this research structure.

Second chapter, named "Contractual Obligations and Liabilities of Parties" highlights the key aspects of the parties' general and financial obligations and entitlements under the FIDIC contracts and at the UAE law. This chapter fulfils the first research objective.

Third chapter is labelled “Contractual Remedies under the FIDIC contracts”. This chapter is devoted to the definition and nature of all remedies available to the parties under FIDIC Red and Yellow Books. It also analyses the advantages and drawbacks of each remedy and illustrates the functions and application of each reviewed remedy. This chapter fulfils the second research objective.

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<sup>19</sup> S Naoum, *Dissertation Research & Writing for Construction Students* (3rd edn, Routledge, London 2013)



Fourth chapter is captioned “Contractual Remedies under the UAE Civil Law and Muqāwala construction contracts”. This chapter provides a brief overview of the application of the Muqāwala contract in the UAE construction industry. Then it gives an insight of the definition and nature of each contractual remedy under the Muqāwala construction contract under the UAE Civil Code. It also illustrates its functions and overview of its application of each respective remedy in the context of the UAE Civil Code. The chapter investigates the options of the legal implementation of each contractual remedy in the Muqāwala construction contract in response to contractual breach. This chapter fulfils the third research objective.

Last chapter with the heading “Summary, Conclusion and Recommendations” joins and weaves together the sum total of this dissertation’s outcomes to provide the major findings with a view of recapitulating the research's aims and objectives. The chapter also examines how the dissertation has contributed to the body of available knowledge, and makes suggestions and recommendations for future research. This chapter could be the most important chapter in this research because it fulfils the fourth objective and the main aim of this dissertation.

## ***CHAPTER TWO***

### ***Contractual Obligations and Liabilities of the Parties***

This chapter introduces and discusses the parties' liabilities, general and financial obligations and entitlements under the FIDIC Red and Yellow books and under the UAE law. Finally, it gives an insight of the limitation of liability provisions.

## 2.1. Parties' Contractual Obligations under FIDIC Red and Yellow books

There are some obligations assigned to both the Employer and the Contractor, such as; the obligation of each party under Sub-Clause 19.3<sup>20</sup> to “use all reasonable endeavours to minimise any delay in the performance of the contract as a result of Force Majeure”; the obligations under Sub-Clause 4.6<sup>21</sup> of both parties in relation to co-operation to the extent provided by the contract; and the obligation under Sub-Clause 20.5<sup>22</sup> to attempt to resolve disputes through negotiation by way of amicable settlement before proceeding to arbitration.

### 2.1.1. The Employer's Obligations

#### A. General Obligations

Other than the Employer's financial obligations that will be discussed in details below, the Employer has many other general contractual obligations which the Employer itself should perform under the FIDIC Conditions of Contract, such as:<sup>23</sup>

- Establishing a commencement date which should be notified by the Engineer to the Contractor under Sub-Clause 8.1.<sup>24</sup>
- Giving the Contractor possession of the site and right of access to the site within the time for access stated in the particular conditions.<sup>25</sup>
- Providing to the Contractor the relevant information in the Employer's possession that governs the construction of the works the accuracy of the provided information which the Employer warrants pursuant to Sub-Clause 4.10.<sup>26</sup>
- Assisting the Contractor to obtain copies of the Laws of the Country which are relevant to the Contract<sup>27</sup> and with any applications for permits, licenses or approvals required by these Laws.<sup>28</sup>

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<sup>20</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clause 19.3 [Duty to Minimise Delay]

<sup>21</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clause 4.6 [Co-operation]

<sup>22</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clause 20.5 [Amicable Settlement]

<sup>23</sup> A Jaeger, and Høk G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 177-190; N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 208-221

<sup>24</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clause 8.1 [Commencement of the Works]

<sup>25</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clause 2.1 [Right of Access to the Site]

<sup>26</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clause 4.10 [Site Data]

- Providing approvals, consents, instructions, and certain information and serving notices, as and when they are required directly to the contractor or by the Engineer, in his role as the agent of the Employer.
- Indemnify the contractor under Sub-Clauses 17.1 and 17.3<sup>29</sup> against both the Commercial Risk defined as “a risk which results in financial loss and/or time loss for either of the Parties, where insurance is not generally or commercially available”<sup>30</sup> and the Risk of Damage defined as “a risk which results in physical loss or damage to the Works or other property belonging to either Party, other than a Commercial Risk”<sup>31</sup>.

## **B. Financial Obligations**

### **i. Payment of the Contract Price**

The Employer’s obligation to pay the contract price is the fundamental obligation under all FIDIC forms of contract. As referred to in Sub-Clause 14.1, the Employer shall pay the whole contract price.<sup>32</sup> The contractor is entitled to payments, provided he applies for them in accordance with clause 14.3.<sup>33</sup> In construction contracts, the contract price is typically subject to a variety of adjustments defined in the contract, even where the contract price is expressed as a lump sum.<sup>34</sup>

According to Sub-Clause 1.1.4.1, the “accepted contract amount” is the agreed amount which should be named in the letter of acceptance or, if not stated, in the employer’s acceptance of the estimated tender price in the contractor’s bid. It is indeed a forecast of the total contract price.<sup>35</sup> It is a fixed, not subject to adjustment, predetermined amount for which the Contractor confirms his satisfaction that it covers his obligations under the Contract (including those under Provisional Sums, if any) to execute and properly complete the Works and to remedy any defects; and for the

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<sup>27</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 2.2(a) [Permits, Licences or Approvals]

<sup>28</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 144

<sup>29</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clauses 14.1 [The Contract Price]

<sup>30</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 348

<sup>31</sup> *Ibid*

<sup>32</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clauses 17.1

<sup>33</sup> A Jaeger, and Hök G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 178

<sup>34</sup> W Godwin, *International Construction Contracts; A Handbook* (1st edn, John Wiley & Sons, 2015) 58

<sup>35</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 1.1.4.1 [Contract Price]

Yellow Book, the design.<sup>36</sup> The accepted contract amount is referred to in the Appendix to Tender for the purpose of calculating the amount of Performance Security (Sub-Clause 4.2), the minimum amount of interim payment certificates (Sub-Clause 14.6), advance payment (Sub-Clause 14.2), and limit of retention money (Sub-Clause 14.3), as a fixed percentage of the accepted contract amount.<sup>37</sup>

On the other hand, the nature of the “total contract price” differs between the Red<sup>38</sup> and Yellow<sup>39</sup> FIDIC Books. In general, it is the total amount of money which is determined by the Engineer to be paid by the Employer.<sup>40</sup>

In both Books, the contract price might be intended to be adjusted by remeasurement, variation or by other adjustments in accordance with the Contract. Sub-Clause 14.1(b) clarifies that the contract price includes all duties and taxes and associated administrative fees required to be paid by the Contractor under other provisions of the Contract.<sup>41</sup>

## **ii. Payment of compensations beyond the Contract Price**

The Contractor in addition to his entitlement to the amounts payable for executing the works, is also entitled under many of the provisions, expressly or implicitly, for compensation for costs incurred and /or other financial remedies. The majority of these Sub-Clauses in the FIDIC forms entitle the contractor to payment of “cost” which as defined in Sub-Clause 1.1.4.3 is including overhead charges but

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<sup>36</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 53

<sup>37</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 160

<sup>38</sup> The Red Book FIDIC form of contract is a ‘unit price’ or ‘remeasurement’ contract, according to Sub-Clause 14.1(c). In the context of remeasurement, all of the originally agreed works and any Variations in addition to any subsequently adjusted works will be evaluated and measured according to Sub-Clause 12.3. The contract price then will be determined accordingly when the Works have been completed based on the measurement and valuation of the permanent works actually constructed or performed. The FIDIC Red Book is the only Book refers to a Bill of Quantities. Bill of Quantities is defined under Sub-Clause 1.1.1.10 as the documents which are comprised in the Schedules. Therefore, the Red Book does not require a Bill of Quantities to be part of the Contract documents but allows instead a schedule of prices or rates and method of measurement to be comprised in the Schedules.

<sup>39</sup> In the FIDIC lump sum forms, FIDIC Yellow Book, the contractor agrees an overall fixed, predetermined lump sum price for the execution of the fixed scope of work that is specified in the contract at the time of contract formulation. Payment is paid by instalments by reference to a payments schedule as a portion of the Contract Price. The price is not subject to any adjustment for any reason except for some specific events listed in the Contract. Under this lump sum form of Contract, the contract documents do not include a Bill of Quantities.

<sup>40</sup> L Klee, *International Construction Contract Law* (1st edn, John Wiley & Sons, 2015) 115

<sup>41</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.1(b) [The Contract Price]

excludes profit.<sup>42</sup> However, including an element of profit under some other Sub-Clauses is typically where the Employer is blameworthy, and is subject to the test of reasonableness.<sup>43</sup>

In either case, this Contractor's entitlement for financial compensation is subject to Sub-Clause 20.1.<sup>44</sup> The valuing of such entitlement either deemed to be a Variation or valued under Sub-Clause 13.3.<sup>45</sup>

### **iii. Payments to nominated subcontractors**

The provisions regarding payment of nominated subcontractors are more detailed in the Red Book than the Yellow Book.<sup>46</sup> The Employer may wish to make use of a specialist nominated subcontractor to carry out part of the works rather than the Contractor. The nominated subcontractor could be nominated either by variation under Clause 13 of the Red Book or when stated in the contract as being a nominated subcontractor.<sup>47</sup>

Any payment to nominated subcontractors should be certified by the Engineer as due under the subcontract in accordance with Sub-Clause 13.5(b) which forms part of the contract price.<sup>48</sup> In addition to these amounts due to the nominated subcontractors, the Contractor is to be paid under Sub-Clause 13.5 his overhead and profit.<sup>49</sup> The Engineer before issuing a payment certificate of such sums may request

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<sup>42</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 1.1.4.3 ['Cost']; According to FIDIC conditions the contractor is entitled to additional costs including overhead but excluding profit for the following expenses:

- Encountering unforeseeable physical obstructions or conditions.
- Encountering fossils or other specified objects of archaeological or geological interest.
- Suspensions ordered by the engineer for reasons other than contractor's default or because needed for proper execution of works or by reason of climatic conditions, termination upon outbreak of war.

<sup>43</sup> In other cases the Contractor is entitled to additional costs plus reasonable profit as mentioned hereunder:

- Resulting from tests required by engineer but not provided for in the contract.
- Uncovering work where no defect exists.
- Termination or suspension upon employer's default.
- Employer's failure to give contractor possession.
- Damage to works or contractor's equipment.
- Expenses arising from specified employer's risks.
- Rise in costs of labour or materials and subsequent legislation.

<sup>44</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 20.1 [Contractor's Claims]

<sup>45</sup> *Ibid* Sub-Clause 13.3 [Variation Procedure]

<sup>46</sup> *Ibid* 214

<sup>47</sup> J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 89

<sup>48</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 13.5 [Provisional Sums]

<sup>49</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 225

the Contractor under Sub-Clause 5.4 of the Red Book to provide reasonable evidence that the nominated subcontractor has received all amounts previously certified as due.<sup>50</sup>

Where the Contractor fails to submit the evidence contemplated, then the Employer has an entitlement, but not an obligation, to pay directly to the nominated subcontractor these amounts due in accordance with previous payment certificates.<sup>51</sup> However, the contractor should repay that amount to the Employer.

#### **iv. Employer's financial arrangements**

The Employer has an obligation under Sub-Clause 2.4, upon the Contractor's request in accordance with Sub-Clause 1.3, to provide evidence of his financial arrangements.<sup>52</sup> The main purpose of this Sub-Clause is to provide the Contractor reassurance of the Employer's ability to comply with its obligations to pay the Contract Price.<sup>53</sup> However, whenever the Employer plans to make material changes to his financial arrangements, he is under mandatory obligation to notify the Contractor.<sup>54</sup>

### **2.1.2. The Contractor's Obligations**

#### **A. General Obligations**

Both the FIDIC Red and Yellow Books make clear (in Sub-Clause 4.1) that the Contractor is obliged to "design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract".<sup>55</sup> Furthermore, the Contractor shall be responsible for "the adequacy, stability and safety of all site operations and of all methods of construction of the Works".<sup>56</sup> Sub-Clause 7.1 adds more obligations on the contractor which is responsible to make sure that all works are performed "in the manner (if any) specified in the Contract" and "in a proper workmanlike and careful manner, in accordance with recognised good practice", and "with properly equipped

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<sup>50</sup> *FIDIC Conditions of Contract for Construction, Red Book* (1st edn, 1999) Sub-Clause 5.4 [Evidence of Payments]

<sup>51</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 215

<sup>52</sup> *Ibid* Sub-Clause 2.4 [Employer's Financial Arrangements] and Sub-Clause 1.3 [Communications]

<sup>53</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 78

<sup>54</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 206

<sup>55</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 4.1 [Contractor's General Obligations]

<sup>56</sup> *FIDIC Conditions of Contract for Construction, Red Book* (1st edn, 1999) Sub-Clause 4.1 [Contractor's General Obligations]

facilities and non-hazardous Materials, except as otherwise specified in the Contract”.<sup>57</sup>

The general obligations of the contractor is extended under Sub-Clause 11.1 to the end of the Defects Notification Period to “execute all work required to remedy defects or damage, as may be notified by the Employer on or before the expiry of the said period”.<sup>58</sup>

These contractual obligations of the Contractor to rectify defects, expires with the issue of the Performance Certificate after the end of the Defect Notification Period as per Sub-Clause 11.9 which states that “Performance of the Contractor’s obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed his obligations under the Contract”.<sup>59</sup> However, Sub-Clause 11.10 provides that “After the Performance Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation which remains unperformed at that time”.<sup>60</sup>

## **B. Time Obligations**

The Contractor’s time obligations under the FIDIC Red and Yellow Books can essentially be divided into three separate ones; an obligation Sub-Clause 8.2<sup>61</sup> to complete the whole of the Work, and each Section (if any), within relevant Time for Completion for the Works or Section which is calculated from the Commencement Date<sup>62</sup>; an obligation under Sub-Clause 8.3<sup>63</sup> to proceed in accordance with the submitted “detailed time programme” and to update that programme and upon the employer’s instruction, to submit a revised programme in the event of failure of the Contractor to follow the programme<sup>64</sup>; and an obligation under Sub-Clause 8.1<sup>65</sup> to

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<sup>57</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 7.1 [Manner of Execution]

<sup>58</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects]

<sup>59</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.9; N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 532; C R Seppala., ‘FIDIC’s New Standard Forms of Contract: Risks, Force Majeure and Termination’ (2000) IBLJ 17(2) ICLR 235

<sup>60</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.10 [Unfulfilled Obligations]

<sup>61</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 8.2 [Time for Completion]

<sup>62</sup> N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 225

<sup>63</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 8.3 [Programme]

<sup>64</sup> A Jaeger, and Hök G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 208

<sup>65</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 8.1 [Commencement of the Works]



proceed “with due expedition and without delay” and to keep up the appropriate level of progress.<sup>66</sup>

### **C. Financial Obligations**

Both the Red and Yellow FIDIC Books contain number of clauses that entitle the Employer for payment from the Contractor in the ordinary course of properly executing the Works. The Contractor under Sub-Clause 4.19 is obliged to make payment to the Employer for certain utilities available on Site or for using any Employer’s Equipment which he is entitled to use. The amounts due for the quantities consumed for such services are subject to Employer’s Claims under Sub-Clause 2.5 and the Engineer determinations under Sub-Clause 3.5. Furthermore, the Employer is entitled to any additional costs incurred by him as a result of specific matters where the Contractor is responsible for or to attribute to, by way of direct reference to Employer’s Claims under Sub-Clause 2.5.<sup>67</sup>

### **D. Other Obligations**

Sub-Clause 14.1 the Contractor is liable for payment of all taxes, duties and fees by application of Sub-Clause 1.13(b) except for changes in legislation under Sub-Clause 13.7. The Contractor is also required under Sub-Clause 1.13 to indemnify and hold the Employer harmless from the consequences of failing to do so. Furthermore, the Contractor is required under Sub-Clause 1.13 to obtain permissions, licenses or approval required by applicable Laws relating to various elements of the Works at his cost.

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<sup>66</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 231

<sup>67</sup> The various Sub-Clauses

- Sub-Clause 5.2: Employer’s costs incurred in the review/approval of a Contractor’s Document which has previously been rejected by the Engineer on the basis that it failed to comply with the Contract.
- Sub-Clause 7.5: Employer’s additional costs incurred due to rejection by the Engineer of any item of Plant, Materials, design or workmanship found to be defective and consequent retesting.
- Sub-Clause 7.6: Employer’s costs arising from failure by Contractor to comply with Engineer’s instructions under Sub-Clause 7.6 [Remedial Work] and the Employer employs and pays other persons to carry out this work.
- Sub-Clause 8.6: Employer’s additional costs incurred due to adoption of revised methods to expedite progress.
- Sub-Clause 9.2: costs of Employer’s Personnel incurred when carrying out Tests on Completion after undue delay by Contractor.
- Sub-Clause 9.3/9.4(a): Employer’s additional costs incurred by the Employer due to failure/retesting after failure to pass the Tests on Completion (by reference to Sub-Clause 7.5).
- Sub-Clause 11.4(a): Employer’s costs reasonably incurred in remedying defects or damage after the Contractor has failed to do so within a reasonable time despite being notified.

Clause 18 sets out the minimum insurances that are required from the Contractor to be provided, affected and maintained under the contract. These insurances can be broadly categorised as: insurance against loss or damage to the Works, Plant, Materials, Contractor's Documents and Contractor's Equipment; insurance against liability for personal injury to third parties and damage to property (other than the Works); Contractor's insurance against personal injury of the Contractor's Personnel.<sup>68</sup>

There are many other Contractor's obligations under both the Red and Yellow Books, such as; Contractor's superintendence under Sub-Clause 6.8; Protection of the environment under Sub-Clause 4.18; Rights of way under Sub-Clause 4.13; Avoidance of interference with public under Sub-Clause 4.14 and to comply with Engineer instructions according to Sub-Clause 7.6.<sup>69</sup>

### 2.1.3. Limitation of Liability<sup>70</sup>

The first paragraph of Sub-Clause 17.6 removes any of either parties' liability to the other for all types of losses in connection with the contract other than for direct costs which include "loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party".<sup>71</sup> The only exceptions to this exclusion of liability are "any claims falling within the indemnity

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<sup>68</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Clause 18 [Insurance]

<sup>69</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 112

<sup>70</sup> The exclusion clauses may aim to exclude or cut down liability of one party altogether or to limit or reduce some liabilities under the contract. Such clauses could be used as effective tools for both parties to define their contractual obligations by exclusion and to provide adequate protection against the allocated risks. But, in most cases it might be used as a defence for the breaching party in case of a breach of an obligation. Generally, the term 'exclusion clause' encompasses both the 'exemption clause' that attempts to remove a liability entirely, and the 'limitation clause' which seeks to merely restrict it. The Exclusion Clauses may take a variety of forms, including but not limited to:

- Imposing a financial cap on liability.
- Restricting or preventing liability to certain types of loss. Like 'indirect' or 'consequential' losses.
- Shortening the claims' time limits or by reducing the liability period.
- Limiting the remedies available to the injured party (Exclusive remedy clauses).
- excluding the liability for any pre-contractual representations and any statements released at the stage of pre-contractual negotiations, and by limiting their liability only to the signed agreement (Entire agreement clauses).
- Clearly describing and specifying the scope of each contract party's obligations (Performance clauses).
- Determining a pre-agreed amount or rate to be payable to compensate the injured party for any specific types of breach (Liquidated damages clauses).
- Adding exclusion clauses for unforeseen events,
- Excluding the affected party from contractual liability in certain exceptional circumstances beyond his control (Force majeure clauses).
- Adding Insurance or/and Warranty Requirements.

<sup>71</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 17.6 [Limitation of Liability]; J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 346

for personal injury or damage to surrounding property pursuant to Sub-Clause 17.1 [Indemnities]” and “the Contractor’s entitlement to loss of profit or other loss or damage sustained as a result of termination pursuant to Sub-Clause 16.2 [Termination by Contractor]”.<sup>72</sup>

The Contractor’s total liability, under or in connection with the Contract, to the Employer is limited under the second paragraph of Sub-Clause 17.6, other than the specific exceptions identified, to the sum which is to be stated in the Particular Conditions which is restricted to the Accepted Contract Amount if a sum is not so stated. There is no similar limitation on the liability of the Employer to the Contractor.<sup>73</sup>

In the Red and Yellow Books, all exclusions and limitations of liability under Sub-Clause 17.6 shall not apply “in any case of fraud, deliberate default or reckless misconduct by the defaulting party”.<sup>74</sup>

In respect to the limitation on the duration of liability, the only limitation is the warranty period of “Defects Notification Period” which by default should be limited to one year under Sub-Clause 1.1.3.7 and may be extended for the period under Sub-Clause 11.3.<sup>75</sup> Although the Employer and the Contractor are relieved of all liabilities in accordance with the Contract after the Performance Certificate has been issued at the end of “Defects Notification Period”, both Parties should remain liable under Sub-Clause 11.10 for any unfulfilled obligations which are unperformed at the time of the issue of the Performance Certificate.<sup>76</sup>

The contractor’s liability for delay damages under the Red Book or for non-performance damages under the Yellow Book are forms of the contractual limitation of liability.

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<sup>72</sup> *Ibid*

<sup>73</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 363

<sup>74</sup> B W Totterdill, *FIDIC User's Guide: a Practical Guide to the 1999 Red Book* (Thomas Telford Ltd, London 2001) 221

<sup>75</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 1.1.3.7 [‘Defects Notification Period’]

<sup>76</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.10 [Unfulfilled Obligations]

## **2.2. Parties' Contractual Obligations under the UAE Law**

### **2.2.1. Liabilities**

The personal obligations or rights are legal ties that emerge out of a variety of sources like: a contract, express or implied, a duty imposed by provision in the law or by judgment of a court, a unilateral disposition, a beneficial act or actions that cause harm.<sup>77</sup>

Contractual obligations are those duties that each party is legally responsible for in a contractual agreement. If either party fails to perform their contractual obligations according to the contract terms, it typically means a breach of contract. In contracts, any liability as a result of breach of contract may be covered under both liabilities, contractual and tortuous<sup>78</sup>.

While the contractual liability and the tortuous liability are similar in that both liabilities are raised by breach of an obligation which caused certain damage, they are different in the type of obligation that has been breached. The contractual liability occurs in case of breaching an obligation that is imposed by contract and it is based on a violation of that contract. On the other hand, tortuous liability deals with the obligations imposed primarily by law and it is based on the violation of another's duty.<sup>79</sup> Since the tortuous liability is out of the scope of this research, it will not be discussed further here.

However, the UAE Law grants considerable scope for discretion by the court to effectively interfere with the contractual freedom in particular cases like for example; redressing the balance between the two contracting parties if the contract is a contract of adhesion and contains oppressive provisions; exemption for an obligated party in cases of unforeseen circumstances; interpretation into the scope of supplementing the missing parts of the contract; breaking the limit of liability or adjusting the remedies that were agreed between the parties and adjusting it to equal the loss incurred; contesting or confirming the validity and enforceability of remedies available for breach of obligation under the contract, or to order a legal remedy for the innocent party of such breach.<sup>80</sup>

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<sup>77</sup> UAE Civil Code, Article 124 and Article 338

<sup>78</sup> The act causing harm (tort) according to Article 124 is one of the sources of obligations. J Whelan, *UAE Civil Code and Ministry of Justice Commentary* (Sweet & Maxwell, 2010) Article 282; The Commentary of the Ministry of Justice clarifies the scope of the tort as following, "The meaning of harm (tort) here is an attempt to go beyond the limit at which one should stop, or to fail to reach that limit to which one should go in acting or in refraining to act, in such a way as to cause harm".

<sup>79</sup> Al Tamimi & Company, 'Law of Tort in the UAE' Law Update 3

<sup>80</sup> Ashurst LLP, 'Limitation and Exclusion of Liability' (April 2009) 2

### **2.2.2. General Contractual Obligations under the UAE Law**

There are various contractual obligations for parties to a construction contract under the UAE Civil Code but outside the scope of the Muqawala Articles 871-896.<sup>81</sup>

#### **A. Compliance with good manners and good faith protection**

The contract is a law that applies to all parties in the contract. Therefore, both contracting parties have an explicit obligation under Article 246 to perform their contractual obligations and to exercise any contractual rights in accordance with the contract contents, and in a manner consistent with the duty of good faith.<sup>82</sup>

Although the good faith doctrine is a distinctive characteristic of UAE Civil Law, there is no precise definition of the duty of good faith.<sup>83</sup> Indeed, that helps in providing the flexibility required for balancing the parties' contractual obligations and rights.<sup>84</sup>

Under the duty of good faith, the contracting parties are required to cooperate and to avoid conflict wherever possible and not to exploit the other or to seek unfair advantage. However, the good faith duty is not a defence for a party to breach of contract claims to prove that the default was not perception of bad faith.<sup>85</sup> The courts may decline a contractual entitlement to an award if the claimant has not acted in good faith.<sup>86</sup>

#### **B. Compliance with liability arises by virtue of the law**

The UAE Civil Code adopts the overall contractual freedom principle<sup>87</sup>, noting that a contract is analogous to a law that applies to the contracting parties and that it can be nullified or amended only with their consent.<sup>88</sup> Thus, contracting parties are entitled to rely on the agreed contractual terms but only to the extent that they do not violate public policy, binding provisions of law or general decency and are not inconsistent with

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<sup>81</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 871-896

<sup>82</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 246

<sup>83</sup> M Grose, *Construction law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons, 2016) 49

<sup>84</sup> *Ibid* 50

<sup>85</sup> Abu Dhabi Cassation No. 859/2010 dated 17 April 2011

<sup>86</sup> M Grose, *Construction law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons, 2016) 50

<sup>87</sup> L Charles, 'Construction & Engineering International - UAE legal issues' Berwin Leighton Paisner LLP [2010] <http://www.blplaw.com/expert-legal-insights/articles/construction-engineering-international-uae-legal-issues> accessed 1 March 2017; J Whelan, *UAE Civil Code and Ministry of Justice Commentary* (Sweet & Maxwell, 2010) Article 126

<sup>88</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 892

mandatory provisions of law which cannot be waived or changed by an agreement.<sup>89</sup> In case of conflict, the provisions of the law must prevail over the conditions of a contract.<sup>90</sup>

Thus, all contracts that are subject to UAE law are not limited to its express terms. Therefore, by conducting a contract; the contracting parties will be under binding contractual obligations which arise out of that contract as well as other contractual obligations imposed on them by the law. In the fourth chapter of this research, all liabilities of the contracting parties are discussed in detail along with the available remedies for breach of these obligations, like for example, liability for major defects (Decennial Liability), liquidated damages, liability for unforeseen circumstances etc.<sup>91</sup>

### **2.2.3. Parties Obligations under the Muqāwala provisions**

#### **A. The Employer's Obligations**

- The employer is obliged under Article 884 to take delivery of the work performed, at the latest “when a contractor has completed the work and placed it at his disposal”.<sup>92</sup>
- The employer is obliged under Article 885 to make payment upon delivery of the work contracted unless there is an agreement or a custom to the contrary.<sup>93</sup>
- The employer is obliged under Article 888 to pay to the contractor a fair remuneration for the performed works, together with any costs incurred and the value of any materials provided as required by the work, if such remuneration is not specified in the contract.<sup>94</sup>
- The employer is obliged under Article 889 to pay to the Engineer the agreed price in accordance with the terms of an appointment. But if the fee has not been agreed, the Engineer is also entitled to a fair remuneration, which is to be determined by reference to practice and custom.<sup>95</sup>

#### **B. The Contractor's Obligations**

- The contractor is liable under Article 875.1 to provide material of good quality and in accordance with the conditions of the contract if any, in case he is supplying material

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<sup>89</sup> L Charles, ‘Construction & Engineering International - UAE legal issues’ Berwin Leighton Paisner LLP [2010] <http://www.blplaw.com/expert-legal-insights/articles/construction-engineering-international-uae-legal-issues> accessed 1 March 2017

<sup>90</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 31

<sup>91</sup> See Chapter Four [Contractual Remedies under the Muqāwala Construction Contracts]

<sup>92</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 884

<sup>93</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 885

<sup>94</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 888

<sup>95</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 889

for the work. And in case the employer is supplying the material for the work, contractor is liable under Article 875.2 to take care of them and to provide work of good workmanship.<sup>96</sup>

- The contractor is liable under Article 876 to provide, at his own expense, any additional tools and equipment as are necessary to complete the work, unless there is a custom or an agreement to the contrary.<sup>97</sup>
- Contractor is liable under Article 877 to perform work in accordance with the contract conditions and also to make good the defective work. But if he fails to do so, the employer can engage another contractor to complete or rectify the work on the expense of the existing contractor.<sup>98</sup>
- The contractor's liability is unlimited according to Article 878 for any loss or damage resulting from his acts or work whether by default or negligence or neither.<sup>99</sup>
- The Decennial Liability imposed jointly on the contractor and the engineer under Articles 880-883 for ten years for any serious structural defects that threaten the stability of building.<sup>100</sup>
- The liability of a contractor under Article 886 in case of a re-measured contract towards the excess quantities.<sup>101</sup>

#### **2.2.4. Limitation of Liability**

Under the UAE Civil Code, there are two types of party's liabilities which cannot be excluded or limited by an agreement between the parties under a contract; any liability in delict, tort based liability, together with any liability arising by virtue of the UAE law, pursuant to mandatory provisions of the UAE Civil Code.<sup>102</sup>

The sole source for the prohibition on excluding or limiting liability in delict is Article 296 which provides that the tort liability cannot be restricted or excluded and any attempts to do so will be void.<sup>103</sup> Limitation or exclusion of liability for fraud or gross mistake is coming under the general scope of tort liability according to the Commentary of the Ministry of Justice on the Civil Code of Article 389 which states that "In the cases of

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<sup>96</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 875

<sup>97</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 876

<sup>98</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 877

<sup>99</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 878

<sup>100</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 880-883

<sup>101</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 886

<sup>102</sup> F Attia, Al Tamimi & Company, 'Can We Really Limit Liability?' Law Update 2012, 254, 3

<sup>103</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 296

fraud and gross error, contractual liability falls under the same category as liability for a harmful act (tort)".<sup>104</sup> In addition it also prohibited by virtue of Article 383(2) of the UAE Civil Code which provide that "In all cases, the obligor shall remain liable for any fraud or gross mistake on his part".<sup>105</sup>

The mandatory provision according to Article 31 of UAE Civil Code and Article 2 of UAE Code of Commercial Practice shall take precedence over any duty created by a contractual agreement. All mandatory laws override any contract provisions to the contrary.<sup>106</sup> According to Article 246(2), any attempt to waive, exclude or limit such mandatory provisions apply to contracts is prohibited and should not exempt the parties from its application.<sup>107</sup>

Generally, The effect of the mandatory provisions is different from the non-mandatory provisions in that the former provides explicitly that "an agreement of a specified type is void" or that it "prohibits any agreement having a proscribed effect", while the later is accompanied by the words "unless the parties otherwise agree".<sup>108</sup> However, the Dubai Court of Cassation linked considerations of mandatory provisions and public order<sup>109</sup> and stated that any legal rule aimed to protect the public interest shall be deemed a mandatory rule related to public order.<sup>110</sup>

Various provisions set out in the UAE Civil and Commercial Codes are mandatory to all contracts. Therefore, any Muqāwala contract must comply with these mandatory provisions, irrespective of what has been contractually agreed.<sup>111</sup>

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<sup>104</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 389

<sup>105</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 383(2)

<sup>106</sup> M Grose, Construction law in the United Arab Emirates and the Gulf (1st edn, John Wiley & Sons, 2016) 44

<sup>107</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 246(2)

<sup>108</sup> D Antonios, 'Foundations are vital when working with UAE Civil Code'

<http://www.constructionweekonline.com/article-1756-foundations-are-vital-when-working-with-uae-civil-code/1/print/> accessed 1 March 2017

<sup>109</sup> In Dubai Cassation No. 280/2008 dated 22 February 2009 it was held that "*rules of public order are those designed to achieve a political, social or economic interest relating to the higher governance of society, above the interests of individuals*".

<sup>110</sup> Dubai Cassation No. 252/1995 dated 28 January 1996; "*If the wording or context of the legislation indicates that the intention of the legislator by introducing a certain legal rule is to regulate a particular situation in a particular way that should not be departed from, so as to protect the public interest over any inconsistent individual interest, then this rule shall be deemed a mandatory rule related to public order.*"

<sup>111</sup> Of these, the most pertinent in the context of construction contracts are those concerning:

- Liability for structural failure or defects [Decennial Liability]; UAE Civil Code, Article 882
- The Contractor's liability for any loss or damage; UAE Civil Code, Article 878
- Agreement of compensation [Liquidated damages]; UAE Civil Code, Article 390
- Force majeure; UAE Civil Code, Article 273
- Circumstances of an exceptional nature; UAE Civil Code, Article 249
- Amendment of prescription period; UAE Civil Code, Article 487
- Unfair contract terms; UAE Civil Code, Article 248



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- Exemption of liability for lack of ownership UAE Civil Code, Article 537
  - Insurance policy conditions; UAE Civil Code, Article 1028

# ***CHAPTER THREE***

## ***Contractual Remedies under the FIDIC Contracts***

This chapter explores the nature of each available contractual remedy under FIDIC Red and Yellow Books. It investigates the functions of each remedy and the application thereof in case of breach of the contract. In addition to that, all remedies are evaluated in terms of their exclusive applications.

### 3.1. Contract Price Adjustment for Variations Remedy

None of the FIDIC Books provide for an overall lump sum price or fixed lump sum price not intended to be adjusted in any way either by variation or re-measurement.<sup>112</sup> All FIDIC Books reflect the idea that the contractor should not be bound to carry out any additional or different work without additional payment.<sup>113</sup>

Once the scope of the works has been defined and the parties agreed that to be implemented within a fixed period of time for a fixed contract price, none can be altered or nullified.<sup>114</sup> Thus, an agreement would be required to be reached between the parties as to any alterations of the scope of the works, the time of completion and the accepted contract price and the associated consequent influence on time and cost. Typically, the FIDIC provides for so called variation clauses to give the employer the right to change the works after the contract has been entered into, by ordering variations. In the absence of such a right to vary, the contractor would be required to execute and complete only the specified works in the contract, and no more or no less.<sup>115</sup>

The power to issue a variation instruction grants to the Employer, not acting by himself but only through the Engineer, a unilateral right to vary without the agreement of the Contractor. However, the Engineer's power to issue an instruction for a variation under Clause 13 is limited to changes to the work to be carried out; not to expand the original scope of the Works or to amend the contract by instructing for additional works unless it is necessary for the originally contemplated works.<sup>116</sup> Conversely, the Contractor under the Red Book, as opposed to the Yellow Book, has no right for making any modification and/or alteration to the Permanent Works except in accordance with variations as specified.<sup>117</sup>

Variation has a different definition under the FIDIC forms. It means: any change to the Works (for the Red Book), or to the Employer's Requirements (under the Yellow Book), from that which was specified in the Contract, which is approved or instructed as a

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<sup>112</sup> N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 547

<sup>113</sup> L Klee, *International Construction Contract Law* (1st edn, John Wiley & Sons, 2015) 118

<sup>114</sup> J Nassar, 'Claims, disputes and arbitration under the Red Book and the New Red Book (Part 1)' (2009) 25(6) CLJ 425

<sup>115</sup> M Sergeant, and M Wieliczko, *Construction Contract Variations* (1<sup>st</sup> edn, Informa Law from Routledge, an imprint of Taylor and Francis 2014) paras 3.314, 5.188; see also *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 225.

<sup>116</sup> M Sergeant, and M Wieliczko, *Construction Contract Variations* (1<sup>st</sup> edn, Informa Law from Routledge, an imprint of Taylor and Francis 2014) para 1.46

<sup>117</sup> B Totterdill, *FIDIC users' guide: A practical guide to the 1999 Red and Yellow Books* (1st edn, Thomas Telford, London 2006) 220

variation under Clause 13 or may also be instructed, in some circumstances, under Sub-Clause 3.3: “If an instruction constitutes a variation, Clause 13 shall apply”.<sup>118</sup> Such variations may include changes, additions<sup>119</sup>, omissions, alterations or substitutions.

Variations can be initiated in three ways: either by the issue of instructions which constitute a variation, or by a request to submit a proposal from the contractor which may be approved as a Variation, or by approval of a value Engineering proposal which may be submitted voluntarily by the Contractor as a variation.

The Contractor is obliged to comply with every instruction to execute a variation unless he gives prompt notice of a valid objection to the Engineer.<sup>120</sup>

However, the Contractor is not obliged to comply with a request from the Engineer to submit a proposal; instead he is obliged only to respond either by making his proposal, or by giving the reasons why he cannot respond to the request.<sup>121</sup> Accordingly, the Engineer is required by the second paragraph of Sub-Clause 13.3 to respond as soon as practicable to any such proposal of the Contractor with approval, disapproval or comments.<sup>122</sup> Until the Engineer responds, the work should not be delayed by the Contractor in either case.<sup>123</sup> If the Contractor refuses to respond or responds with an inadequate response or inadequate reasons for not responding to the request, then the Engineer has the option to issue an instruction for a variation under Sub-Clause 13.1.<sup>124</sup>

According to Sub-Clause 13.2, the Contractor may submit a written value Engineering proposal, at any time and at his option and his cost, which will benefit the Employer in any of the ways listed in that Sub-Clause.<sup>125</sup>

Upon issuing an instruction for variation, the Engineer shall agree or determine adjustments of the Contract Price in accordance with Sub-Clause 3.5 under the Yellow

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<sup>118</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 117

<sup>119</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 13.1(e); Instructions under Sub-Clause 13.1(e) for adding any work, service, material, or plant which is not necessary for the total completion of the permanent works are not included in the scope of the variation mechanism.

<sup>120</sup> The grounds for objection are set out in *FIDIC Conditions of Contract for Construction, Red Book* (1st edn, 1999) Sub-Clause 13.1

<sup>121</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 174

<sup>122</sup> G Rosenberg, and A Tweeddale, ‘Clause 13’[2016], Corbett & Co International Construction Lawyers <http://corbett.co.uk/wp-content/uploads/Clause-13.pdf> accessed 1 March 2017

<sup>123</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 220

<sup>124</sup> G Rosenberg, and A Tweeddale, ‘Clause 13’[2016], Corbett & Co International Construction Lawyers <http://corbett.co.uk/wp-content/uploads/Clause-13.pdf> accessed 1 March 2017

<sup>125</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 13.2 [Value Engineering]

Book, which adjustments are to include reasonable profit.<sup>126</sup> Under the Red Book the Engineer shall measure and evaluate the variation in accordance with Clause 12, unless another price has been instructed or agreed by the Engineer. Said Clause also requires the Engineer to agree with the Contractor on his entitlement to additional payment for the variation in accordance with Sub-Clause 3.5. The FIDIC Red Book, by contrast, does not expressly mention the contractor's entitlement to reasonable profit.<sup>127</sup>

The Engineer, under the Sub-Clause 13.3(c) of the Red Book, may request the Contractor to submit his proposal prior to instructing a variation for evaluation of the variation.<sup>128</sup> In such case the contractor is obliged to respond and the Engineer is obliged to respond thereto with approval, comments or disapproval, which would be referred for measurement and evaluation procedures under Clause 12, or dispute resolution under Clause 20.<sup>129</sup>

If the Engineer approves the Contractor's value engineering submitted proposal under Sub-Clause 13.2 of the Red Book, the saving in the contract value will be shared according with Sub-Clause 13.2(c).<sup>130</sup> And if the Engineer is to agree or determine under Sub-Clause 3.5 a 'fee' payable to the Contractor it shall be included in the Contract Price. The Yellow Book does not contain any provisions describing how to share any contract value saving.

The variations could also be taking the form of omissions.<sup>131</sup> Whenever variations to omit work are ordered under Clause 13 of the Red Book and the valuation of that work omitted under the Variation is not agreed, then Sub-Clause 12.4 would be applicable, which applicability is subject to the three part test stated in this Sub-Clause.<sup>132</sup> If all tests

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<sup>126</sup> A Jaeger, and Hök G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 266

<sup>127</sup> *Ibid*

<sup>128</sup> *FIDIC Conditions of Contract for Construction, Red Book* (1st edn, 1999) Sub-Clause 13.3(c) [Variation Procedure]

<sup>129</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 129

<sup>130</sup> *Ibid* 173

<sup>131</sup> *FIDIC Conditions of Contract for Construction, Red Book* (1st edn, 1999) Sub-Clause 13.1(c) [Right to Vary]; C Jayalath, 'Claims for Loss of Profit on Omitted Works' [2012] CM Guide <http://www.cmguide.org/archives/3235> accessed 27 April 2015 on *Gallagher v Hirsch NY App Division* 467 (1899) N.Y. 45 App. Div 467 ; Instructions under Sub-Clause 13.1(c) for omitting any part of the works for the purpose of carrying it out either by another contractor or by the employer itself are excluded from the scope of the variation mechanism. Such an attempt shall be regarded as a breach of the contract.

<sup>132</sup> *FIDIC Conditions of Contract for Construction, Red Book* (1st edn, 1999) Sub-Clause 12.4 "Whenever the omission of any work forms part (or all) of a Variation, the value of which has not been agreed, if:  
(a) the Contractor will incur (or has incurred) cost which, if the work had not been omitted, would have been deemed to be covered by a sum forming part of the Accepted Contract Amount;  
(b) the omission of the work will result (or has resulted) in this sum not forming part of the Contract Price; and  
(c) this cost is not deemed to be included in the evaluation of any substituted work"

have been met, then the Contractor, after giving a formal notification, would be entitled to compensation for the costs reasonably incurred due to the omission of work by the Variation. Such costs may include direct costs plus profit in some circumstances.<sup>133</sup> Then the Engineer, accordingly, should determine the cost in accordance with Sub-Clause 3.5 and add the determined sum to the Contract Price.

Under the Yellow Book, as opposed to the Red Book, omissions are not expressly addressed.<sup>134</sup> However, as per Sub-Clause 13.3, the omissions should be determined or agreed by the Engineer under Sub-Clause 3.5 as for all other types of variations, and the Contract Price should be adjusted for any reduction arising from these omissions. The only concern here is that Sub-Clause 13.3 does not expressly stipulate whether or not the adjustments to the Contract Price shall include reasonable profit on omissions as it applies to additional work.

### **3.1.1. Claims**

The standard form of contract for construction works is unique in that it seeks to allocate the risk of any event arising out of, and in connection with the contract. FIDIC contracts are no exception. They provide a specific designated remedy in the event of any breach of the contract terms and conditions within its framework.<sup>135</sup> In the meantime, they provide an orderly mechanism for a contractual entitlement in the event of the occurrence of a specified event, the entitlement of which might not be specified in the contract.<sup>136</sup>

Both entitlement and remedy could take the form of a payment of additional monies, or an extension of Time for Completion, or some other benefit, or a combination of all three.<sup>137</sup> Under the FIDIC contracts, however, the claimant party who wishes to avail himself of either entitlement or remedy is obliged to follow a predefined set of procedures, which are referred to as “the claim procedures” that describe how to make and enforce claims for the compensation of both parties.<sup>138</sup> Such

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<sup>133</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 210

<sup>134</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 174

<sup>135</sup> N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 293

<sup>136</sup> *Ibid*

<sup>137</sup> N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 295

<sup>138</sup> L Klee, *International Construction Contract Law* (1st edn, John Wiley & Sons, 2015) 181

claim prosecutions are part of a balanced risk allocation.<sup>139</sup> As a result the risk apportionment claims have been designated in the Contract.<sup>140</sup>

As the FIDIC Guide observes; “Claims should not be regarded as either inevitable or unpalatable, and complying with claims procedures should not be regarded as being an aggressive act. Major projects give rise to major risks, which have to be dealt with if they occur. Whilst the Parties might prefer everything to remain unchanged, they should not instinctively seek to attribute blame if circumstances arise or events occur which give rise to an adjustment of the Contract Price. In these events, the claims procedures are specified so as to provide the degree of formality considered necessary for the proper administration of a building or Engineering project. Complying with these procedures and maintaining a co-operative approach to the determination of all adjustments should enhance the likelihood of achieving a successful project”.<sup>141</sup>

### **Contractor’s Claims**

The Contractor’s entitlement to any additional payment of cost, and profit in some cases, under any contract or otherwise in connection with the Contract is governed by Sub-Clause 20.1.<sup>142</sup> However, the reference to Sub-Clause 20.1 with regard to the Contractor's entitlement to additional payment takes many different ways, either expressly or implicitly.<sup>143</sup>

Sub-Clause 20.1 applies to those Sub-Clauses which expressly state that the Contractor's entitlement to a payment of cost with or without profit is “subject to Sub-Clause 20.1”.<sup>144</sup> Moreover, under other provisions which do not refer expressly to Sub-Clause 20.1 but instead entitle the Contractor to additional payment, the Engineer is

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<sup>139</sup> A Jaeger, and Høk G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 357

<sup>140</sup> *Ibid*

<sup>141</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 88

<sup>142</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 20.1 [Contractor’s Claims]

<sup>143</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 312

<sup>144</sup> As an example of this standard wording, Sub-Clause 2.1 in the Red Book “If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to: (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and (b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters”.

required to agree or determine such entitlement in accordance with Sub-Clause 3.5 in the Red and Yellow Books.<sup>145</sup>

On the other hand, some provisions give the contractor the right to additional payment but without any express reference either to Sub-Clause 20.1 or to Sub-Clause 3.5. On account of the lack of express reference to Sub-Clause 20.1 in these provisions, it is unclear whether Sub-Clause 20.1 nevertheless should apply in these circumstances.

In the Red and Yellow Books, under Sub-Clause 20.1, the Engineer is required to respond either with approval or disapproval to the Contractor's claim within the applicable time period, which may be extended. Such decision of the Engineer on the claim, either with approval or disapproval, would arguably bind the Contractor and the Employer.<sup>146</sup> Nevertheless, this Engineer approval or disapproval of a claim may be revised by him when making a determination in accordance with Sub-Clause 3.5, whenever requested, and any necessary correction or modification to any amounts certified as due to the Contractor could be made under the express power of the Engineer under Sub-Clause 14.6.<sup>147</sup>

Where the Engineer approves a claim under Sub-Clause 20.1, accordingly, any amounts which he considers have been reasonably substantiated as due must be included in the next Payment Certificate even prior to any determination under Sub-Clause 3.5.<sup>148</sup> That's because of Sub-Clause 20.1 that indicates that an interim Payment Certificate regarding any approved amounts should not necessarily wait until these amounts are agreed or determined by the Engineer under Sub-Clause 3.5. The payment mechanism set out in Clause 14 shall further be applied to the Payment of any amounts approved under Sub-Clauses 20.1 or agreed or determined under Sub-Clauses 3.5 as due to the Contractor.<sup>149</sup>

### **Employer's Claims**

Sub-Clause 2.5 applies to the Employer's claims for payment from the Contractor under or in connection with the Contract and sets out the procedure that

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<sup>145</sup> "For example, under the Red Book, if the Contractor considers that the Engineer has under-certified the amount due in response to the Contractor's Statement at completion submitted under Sub-Clause 14.10, the Contractor could be described as considering that he is entitled to 'additional payment'".

<sup>146</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 89

<sup>147</sup> *Ibid*

<sup>148</sup> A Jaeger, and Høk G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 365

<sup>149</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Clause 14 [Contract Price and Payment]



should be followed. In addition, where the Employer has overpaid any amounts due to the Contractor as a result of any adjustment to the Contract Price and where the Employer considers himself entitled to repayment from the Contractor, then Sub-Clause 2.5 will apply.<sup>150</sup>

Throughout the Red and Yellow Books, various Sub-Clauses entitle the Employer to recover from the Contractor any incurred costs which could be the responsibility of or attributable to the Contractor.<sup>151</sup> While several Sub-Clauses expressly state that such Employer's entitlement for payment of these costs is subject to Sub-Clause 2.5, others curiously do not refer expressly to Sub-Clause 2.5.<sup>152</sup>

The Engineer's determination of Employer's claim is then required to proceed in accordance with Sub-Clause 3.5. In addition, Sub-Clause 2.5 is also regulating the Employer's contractual entitlement to set-off or his right to unilaterally withhold payment due to any act or omission of the Contractor, without first informing the Contractor.<sup>153</sup>

## **3.2. The Contractor's Remedies**

### **3.2.1. Entitlement to financing charges**

The Contractor's entitlement to financing charges is a remedy under Sub-Clause 14.8 for late payment or non-payment of sums due from the Employer in accordance with Sub-Clause 14.7.<sup>154</sup> This entitlement arises automatically and the financing charges are considered due 56 days after the Engineer receives the Contractor's Statement and supporting documents.<sup>155</sup> Consequently, these financing charges under Sub-Clause 14.8 do not require the giving of any notice for a claim as additional payment under Sub-Clause 20.1. Accordingly, the financing charges are to be calculated by the contractor as stated in the Particular Conditions on a monthly basis and be included as part of the interim payment process.<sup>156</sup>

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<sup>150</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 2.5 [Employer's Claims]

<sup>151</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 431

<sup>152</sup> *Ibid*

<sup>153</sup> M Robinson, *An Employer's and Engineer's Guide to the FIDIC Conditions of Contract* (1st edn, John Wiley & Sons, 2013) 15

<sup>154</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.8 [Delayed Payment]

<sup>155</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 248

<sup>156</sup> J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 297

### 3.2.2. Entitlement to suspend work or to reduce the rate of work

Contractor's right to suspend and the grounds for exercising it, as well as the procedures to be followed, are found in Sub-Clause 16.1.<sup>157</sup> The Contractor's entitlement to suspend under Sub-Clause 16.1 is limited only to the occurrence of three circumstances: where the Employer fails to provide reasonable evidence in accordance with Sub-Clause 2.4 of financial arrangements, or fails to pay the amounts that were specified and due to be paid within the time specified, or where the Engineer has failed to certify in accordance with Sub-Clause 14.6 and upon giving the required 21 days' notice.<sup>158</sup> Accordingly, as a result of the suspension of work or a reduction in the rate of work under Sub-Clause 16.1, the Contractor should be entitled to payment of any cost incurred plus profit, subject to Sub-Clause 20.1.<sup>159</sup> The Contractor's right to either suspend work or to reduce the rate of work continues unless and until the relevant failure has been cured.<sup>160</sup>

### 3.2.3. Entitlement to termination for cause

In addition to the contractor's rights under Sub-Clauses 19.6<sup>161</sup> to optional termination and under Sub-Clauses 19.7<sup>162</sup> to be released from Performance under the Law in the event of Force Majeure, he also has the right to terminate for cause under 16.2<sup>163</sup>. The circumstances which give rise to the contractor's entitlement to terminate the contract for cause under the FIDIC forms are as follows:

- Failure to provide reasonable evidence of financial arrangements;<sup>164</sup>
- Failure to issue Payment Certificate;<sup>165</sup>
- Failure by Employer to pay amounts due;<sup>166</sup>
- Substantial failure to perform obligations;<sup>167</sup>

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<sup>157</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]

<sup>158</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 265

<sup>159</sup> L Klee, *International Construction Contract Law* (1st edn, John Wiley & Sons, 2015) 156

<sup>160</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 489

<sup>161</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clauses 19.6 [Optional Termination, Payment and Release]

<sup>162</sup> *Ibid* Sub-Clauses 19.7 [Release from Performance under the Law]

<sup>163</sup> *Ibid* Sub-Clauses 16.2 [Termination by Contractor]

<sup>164</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 2.4 [Employer's Financial Arrangements]

<sup>165</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.6 [Issue of Interim Payment Certificates]

<sup>166</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 16.2(c) [Termination by Contractor]

- Failure to comply with Sub-Clause 1.6;<sup>168</sup>
- Failure to comply with Sub-Clause 1.7;<sup>169</sup>
- Prolonged suspension instructed by Engineer;<sup>170</sup>
- Bankruptcy.<sup>171</sup>

The Contractor after his termination under Sub-Clause 16.2 is entitled to prompt payment by the Employer of the amount to be determined in accordance with Sub-Clause 19.6 and of the amount of any loss or damage, including loss of profit, which he suffered as a result of the termination and further to receive the performance security “to the value of work done and any other cost or liability that he has reasonably incurred in expectation of completing the Works, together with the cost of clearing the Site and repatriating any staff”.<sup>172</sup>

#### **3.2.4. Entitlement to extension of time and its associated costs**

The Contractor’s entitlement to an extension of time is an important remedy available to the Contractor under the Contract as well as its associated entitlement to payment of cost. The importance of these entitlements becomes clear in the obligation to pay delay damages under Sub-Clause 8.7 as a result of the Contractor’s failure to comply with his obligation under Sub-Clause 8.2 to complete the Works within the Time for Completion.<sup>173</sup> The entitlement of the Contractor to an extension of time is principally governed by Sub-Clause 8.4 and subject to Sub-Clause 20.1.<sup>174</sup> Many of the provisions that entitle the Contractor to an extension of time also entitle him to recover additional cost or cost plus profit.<sup>175</sup> Generally, profit is not included in the Contractor’s entitlement to compensation in circumstances which are not the fault of either Party.<sup>176</sup>

If any of the qualifying grounds that give rise to an entitlement to an extension of time under Sub-Clause 8.4 has arisen, the procedure under Sub-Clause 20.1 then should be followed, which contemplates the Contractor giving a notice for a claim and then a fully

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<sup>167</sup> *Ibid* Sub-Clause 16.2(d) [Termination by Contractor]

<sup>168</sup> *Ibid* Sub-Clause 16.2(e) [Termination by Contractor]

<sup>169</sup> *Ibid* Sub-Clause 16.2(e) [Termination by Contractor]

<sup>170</sup> *Ibid* Sub-Clause 8.11 [Prolonged Suspension]

<sup>171</sup> *Ibid* Sub-Clause 15.2(e) [Termination by Employer]

<sup>172</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC Contracts: Law and Practice* (5th edn, Taylor and Francis, Oxon 2009) 497

<sup>173</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 8.7 [Delay Damages] and Sub-Clause 8.2 [Time for Completion]

<sup>174</sup> *Ibid* Sub-Clause 8.4 [Extension of Time for Completion] and Sub-Clause 20.1 [Contractor’s Claims]

<sup>175</sup> J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 197

<sup>176</sup> *Ibid*

detailed claim for an extension of time and/or additional payment to the Engineer to be agreed or determined in accordance with Sub-Clause 3.5.<sup>177</sup>

### 3.2.5. Entitlement to Compensation for Damages

The Contractor, in addition to his entitlement to the amounts payable for executing the works, is also entitled under many of the provisions, expressly or implied, to compensation for costs incurred and /or other financial remedies. The majority of these Sub-Clauses in the FIDIC contracts entitle the contractor to compensation for cost which as defined in Sub-Clause 1.1.4.3 includes overhead charges but excludes profit<sup>178</sup>.

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<sup>177</sup> A Jaeger, and H k G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 371

<sup>178</sup> In other cases the Contractor is entitled to additional costs plus reasonable profit as mentioned hereunder:

- Sub-Clause 1.9 (RED) Delayed Drawings or Instructions; Failure of the Engineer to issue the drawing or instruction within notified reasonable time
- Sub-Clause 1.9 (Yellow) Errors in the Employer's Requirements; Error in the Employer's Requirements, where an experienced contractor exercising due care would not have discovered the error when scrutinizing the Employer's Requirements under Sub-Clause 5.1
- Sub-Clause 2.1 Right of Access to the Site; Failure by the Employer to give right of access to, or possession of, the Site within required time unless and to extent Employer's failure was caused by any error or delay by the Contractor
- Sub-Clause 4.7 Setting Out; Execution of work which was necessitated by an error in items of reference and an experienced contractor could not reasonably have discovered such error and avoided this delay and/or Cost
- Sub-Clause 7.4 Testing; Compliance with contract administrator's instructions or as a result of a delay for which the Employer is responsible
- Sub-Clause 9.2 Delayed Tests; Undue delay by Employer to Tests on Completion / Tests on Completion which are being unduly delayed by the Employer
- Sub-Clause 10.2 Taking Over of Parts of the Works; Employer taking over and/or using a part of the Works, other than where such use is specified in the Contract or agreed by the Contractor
- Sub-Clause 10.3 Interference with Tests on Completion; Delay in carrying out Tests on Completion by a cause for which the Employer is responsible
- Sub-Clause 11.8 Contractor to Search; Search for cause of defect required by contract administrator if Employer is liable under Sub-Clause 11.2 (12.2 (G)) for cost of remedying defect
- Sub-Clause 12.2 (Yellow) Delayed Tests; Unreasonable delay by the Employer to Tests after Completion
- Sub-Clause 12.3 (Yellow) Retesting ; Unreasonable delay by the Employer in permitting access to the Works or Plant by the Contractor either to investigate the cause of a failure to pass any of the Tests after Completion or to carry out adjustments or modifications
- Sub-Clause 16.1 Contractor's Entitlement to Suspend Work ; Suspension (or reduction in rate of work) by Contractor if Engineer fails to certify or if Employer fails to pay amount certified or fails to evidence his financial arrangements, and Contractor suspends work
- Sub-Clause 17.4 Consequences of Employer's Risks; Rectification of loss or damage to the Works, Goods or Contractor's Documents due to Employer risks listed in Sub-Clause 17.3

<sup>178</sup> According to FIDIC conditions the contractor is entitled to additional costs including overhead but excluding profit for the following expenses:

- Sub-Clause 4.12 Unforeseeable Physical Conditions; Encountering physical conditions which are Unforeseeable
- Sub-Clause 4.24 Fossils; Compliance with contract administrator's instructions following discovery of fossils etc. on the Site
- Sub-Clause 8.9 Consequences of Suspension ;Compliance with contract administrator's instructions under Sub-Clause 8.8 And/or resumption of work to extent that cause notified (if any) under Sub-Clause 8.8 is not the responsibility of the Contractor and not due to Contractor's faulty design , workman ship or material s or failure to protect, store or secure Works
- Sub-Clause 8.10 Payment for Plant and Materials in event of Suspension; If work on Plant or delivery of Plant and/or Materials has been suspended for more than 28 days and Contractor has marked the Plant and/ or

However, reason for including an element of profit under some other Sub-Clauses would typically be where the Employer is blameworthy, and subject to the test of reasonableness.<sup>179</sup> In either case, this Contractor's entitlement for financial compensation is subject to Sub-Clause 20.1. The valuing of such entitlement is either deemed to be a Variation or to be valued under Sub-Clause 13.3.<sup>180</sup>

### **3.3. The Employer's Remedies**

Naturally, exercising the right to Employer's remedies under the FIDIC rules in all the Books is under the authority of the Engineer as agent of the Employer under Sub-Clause 3. Some other remedies, on the other hand, are expressly reserved to the Employer.

The Employer's remedies under the FIDIC rules provide various courses of action available to the Employer in the event of non-performance of the Contractor in general or

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Materials as the Employer's property in accordance with Engineer's / Employer's / Employer's Representative's instructions

- Sub-Clause 11.6 Further Tests; Repetition of tests required by contract administrator due to work in remedying any defect or damage which affects performance of the Work, if Employer is liable for cost of remedial work under Sub-Clause 11.2
- Sub-Clause 13.7 Adjustments for Changes in Legislation ; Changes in Laws made after the Base Date, which affect the Contractor in the performance of his obligations under the Contract
- Sub-Clause 19.4 Consequences of Force Majeure ; Force Majeure preventing Contractor from performing any of his obligations under the Contract of which notice has been given under Sub-Clause 19.2
- Sub-Clause 19.6 Optional Payment, Termination and Release ; Termination due to prolonged prevention due to Force Majeure of which notice has been given under Sub-Clause 19.2

<sup>179</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Taylor and Francis, Oxon 2009) 471

<sup>180</sup> According to FIDIC conditions the contractor is entitled to additional costs including overhead but excluding profit for the following expenses:

- Sub-Clause 4.12 Unforeseeable Physical Conditions; Encountering physical conditions which are Unforeseeable
- Sub-Clause 4.24 Fossils; Compliance with contract administrator's instructions following discovery of fossils etc. on the Site
- Sub-Clause 8.9 Consequences of Suspension ; Compliance with contract administrator's instructions under Sub-Clause 8.8 And/or resumption of work to extent that cause notified (if any) under Sub-Clause 8.8 is not the responsibility of the Contractor and not due to Contractor's faulty design , workman ship or material s or failure to protect, store or secure Works
- Sub-Clause 8.10 Payment for Plant and Materials in event of Suspension; If work on Plant or delivery of Plant and/ or Materials has been suspended for more than 28 days and Contractor has marked the Plant and/or Materials as the Employer's property in accordance with Engineer's / Employer's / Employer's Representative's instructions
- Sub-Clause 11.6 Further Tests; Repetition of tests required by contract administrator due to work in remedying any defect or damage which affects performance of the Work, if Employer is liable for cost of remedial work under Sub-Clause 11.2
- Sub-Clause 13.7 Adjustments for Changes in Legislation ; Changes in Laws made after the Base Date, which affect the Contractor in the performance of his obligations under the Contract
- Sub-Clause 19.4 Consequences of Force Majeure ; Force Majeure preventing Contractor from performing any of his obligations under the Contract of which notice has been given under Sub-Clause 19.2
- Sub-Clause 19.6 Optional Payment, Termination and Release ; Termination due to prolonged prevention due to Force Majeure of which notice has been given under Sub-Clause 19.2

in the case of specific events or circumstances when the obligations of the contractor are not complied with, and they are the majority of remedies. These are as follows:

### **3.3.1. “Notification to comply” remedy**

Giving a notice to the Contractor requiring him to remedy a default is an initial general remedy available to the Employer under the contract in the event of the Contractor failing to carry out any contractual obligation.<sup>181</sup> This remedy is exercisable only by the Engineer for the Employer’s benefit.<sup>182</sup> In such cases, the Employer, through the Engineer, may require the contractor, by notice, to execute a specific performance or to substitute some performance either in compliance with his contractual obligations or to remedy the defect or damage by a further fixed but reasonable date.

The Red and Yellow Books grant the Engineer a general power to issue instructions, at any time, under Sub-Clause 3.3 to the Contractor, who is expressly required to comply with these instructions.<sup>183</sup> When the Engineer exercises such power, he is acting in a direct agency role on behalf of the Employer. This instruction of the Engineer which falls within this Sub-Clause must be “necessary” and must be relating to “the execution of the Works and the remedying of any defect, all in accordance with the Contract”.<sup>184</sup> Such instructions might be considered as a type of preventive remedy under the contract ordered by the contract administrator. Such order could be made in one of three ways.

Firstly, a “notice to correct” under Sub-Clause 15.1, “If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time”.<sup>185</sup>

Secondly, “notice to make good defects” under Sub-Clause 7.5: Where the contract administrator rejects any defective Contractor’s work or any work that is not in accordance

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<sup>181</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 258

<sup>182</sup> J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 311

<sup>183</sup> N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 523

<sup>184</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 3.3 [Instructions of the Engineer]

<sup>185</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 15.1 [Notice to Correct]

with the Contract by giving notice to the Contractor, and then the Contractor should promptly make good the defect.<sup>186</sup>

Lastly, “notice to carry out remedial work” under Sub-Clause 7.6: when the contract administrator instructs the contractor by notice under that Sub-Clause to “remove from Site and replace any Plant and Materials and remove and re-execute any other work, which is not in accordance with the Contract”.<sup>187</sup>

Any of these notices given by the Engineer must comply with the required formalities under Sub-Clause 1.3. The failure of the Contractor to comply with any notice issued under any of these Sub-Clauses, without reasonable excuse, within a pre-specified period of time should give rise to the Employer's right to pursue other remedies. The Employer has a variety of remedies that are triggered if the Contractor then fails by this notified date to remedy the defect or damage.

### **3.3.2. Self-help remedy**

Under Sub-Clause 11.4 the first option is that the Employer has the right to carry out the remedial work or any work or obligation that the Contractor fails to perform in accordance with the Contract, of which he had been notified by the Engineer, at the Contractor's cost.<sup>188</sup> This entitlement is subject to Sub-Clause 2.5. The ‘Self-help’ remedy would entitle the Employer to recover the reasonable costs incurred by any work required to remedy the defect or damage either where the Employer chooses to carry out the work himself or by engaging another contractor. The Engineer then under Sub-Clause 14.9 is entitled to withhold the Employer's costs for such works from the certification.<sup>189</sup>

### **3.3.3. Contract price reduction remedy**

If the Contractor could not or failed to carry out the remedial work within the time notified, the Employer can choose the second remedy available under Sub-Clause 11.4, and waive his right to require the defective work to be remedied and accept it in return for the Engineer agreeing to or determining under Sub-Clause 3.5 a reduction in the Contract

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<sup>186</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 7.5 [Rejection]

<sup>187</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 7.6 [Remedial Work]

<sup>188</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 424

<sup>189</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.9 [Payment of Retention Money]

Price as a result of this failure.<sup>190</sup> The same remedy is available also under Sub-Clause 9.4 in case of a failure to pass Tests on Completion.<sup>191</sup>

#### **3.3.4. Walk-away remedy**

The Employer would be entitled to the ‘walk-away’ or ‘greenfield’ remedy under Sub-Clause 9.4(c) or Sub-Clause 11.4(c) for a Contractor’s failure to pass Tests on Completion or his failure to remedy defects, only if the failure or defects are such that it substantially deprives the Employer of “the whole benefit of the Works or any major part of the Works”.<sup>192</sup> This remedy, nevertheless, entitles the Employer to reject the works and terminate the Contract in respect of the relevant works or sections thereof, as well as to recover all sums paid to the Contractor for the relevant works or sections plus financing costs and the costs of dismantling the Works (or Section) and the costs of clearing the site.<sup>193</sup>

#### **3.3.5. Suspension of progress of the works**

The Engineer only, and not the Employer, has the power under Sub-Clause 8.8 to instruct the Contractor at any time to suspend progress of his Works or any part of them.<sup>194</sup> That Suspension instruction could be a useful practical remedy in case of a Contractor failure or in circumstances for which the Contractor under the Contract is responsible, for example where the Contractor fails within a reasonable time to remedy any damage or defect, or where the Contractor is responsible for poor design, materials or workmanship or where he is in violation of a stipulation of the insurance contract or in breach of the law. If the suspension is based on such grounds, the Contractor will not be entitled to any compensation for damages caused by the instruction to suspend.<sup>195</sup>

#### **3.3.6. Performance security**

The Employer is entitled under Sub-Clause 4.2(c) in the Red and Yellow Books to make a claim against the Performance Security Bond if he gives notice to the Contractor under the Sub-Clause requiring him to remedy a default, but the Contractor fails to do so

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<sup>190</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.4 [Failure to Remedy Defects]

<sup>191</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 9.4 [Failure to Pass Tests on Completion]

<sup>192</sup> *Ibid* Sub-Clause 9.4(c) & 11.4(c)

<sup>193</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 187 & 199-200

<sup>194</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 8.8 [Suspension of Work]

<sup>195</sup> L Klee, *International Construction Contract Law* (1st edn, John Wiley & Sons, 2015) 156



within 42 days after receiving such notice.<sup>196</sup> However, the main aim of the Performance Security is not intended as a discount on the Contract Price but instead to secure the Contractor's liabilities under the contract.<sup>197</sup>

### **3.3.7. Withholding of amounts from interim payment certificates**

Sub-Clause 14.6 provides the Engineer an express power to withhold an interim payment certificate if the amount to be certified would be less than the stated minimum amount of the interim payment certificate in the contract or if the Performance Security has not been received and approved by the Employer within the agreed time.<sup>198</sup> On the other hand, the Engineer is entitled in terms of Sub-Clauses 14.6 (a) and (b) to withhold on a temporary basis from Interim Payment Certificate certain amounts or costs of remedial works if the Contract works do not comply, until the same has been rectified.<sup>199</sup>

### **3.3.8. Retention money remedy**

The Employer under Sub-Clause 14.3(c) is entitled, prior to completion of the Works, to retain the retention sum as a percentage of the total contract value of the Works executed.<sup>200</sup> The Employer's withholding of such money from sums otherwise due to the Contractor is an additional performance security for completion of the whole of the Works or of a section. In the case of the contractor's failure to complete any work outstanding, the Employer is entitled under Sub-Clause 14.9 to withhold the release of the estimated costs of such works from the Retention Money until it has been executed.<sup>201</sup>

### **3.3.9. Set-off remedy**

Sub-Clause 2.5 regulates the Employer's contractual entitlement to set-off or to unilaterally withhold payment due to the Contractor without first informing the Contractor.<sup>202</sup> In the Red and Yellow Books, the Employer is not entitled to set off against or deduct any amounts certified in a Payment Certificate or to withhold payment due to the Contractor but is required to submit a claim under Sub-Clause 2.5. The Employer under

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<sup>196</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 4.2(c) [Performance Security]

<sup>197</sup> A Jaeger, and H k G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 160

<sup>198</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.6 [Issue of Interim Payment Certificates]

<sup>199</sup> J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 80

<sup>200</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.3(c) [Application for Interim Payment Certificates]

<sup>201</sup> W Godwin, *International Construction Contracts; A Handbook* (1st edn, John Wiley & Sons, 2015) 61

<sup>202</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Taylor and Francis, Oxon 2009) 435

Sub-Clause 14.7 must make payment of the amount certified in full.<sup>203</sup> However, if the Employer considers himself entitled to compensation arising from any claim against the Contractor, the procedure prescribed in Sub-Clause 2.5 must first be followed. The Engineer is then required to agree or determine the Employer's entitlement in accordance with Sub-Clause 3.5. Once the sum due to the Employer has been agreed or determined, Sub-Clause 2.5 provides the Engineer with an express power to include this amount as a deduction from amounts otherwise due to the Contractor, in a Payment Certificate.<sup>204</sup>

### **3.3.10. Liquidated damages remedy**

The Employer's entitlement to liquidated damages for delay is established under Sub-Clause 8.7 of the Red and Yellow Books as damages for delay as a result of the Contractor's failure to comply with the obligation under Sub-Clause 8.2 of completing the Works or Section within the relevant Time for Completion.<sup>205</sup> In addition it is also established under Sub-Clause 12.4 of the Yellow Book as non-performance damages for the Contractor's failure to pass tests after completion.<sup>206</sup>

Generally, there are mutual benefits in having Liquidated damages clauses in the contract to both parties. As for the Employer, they remove the burden to prove damages for breach of contract. The contractor may also use them as indicator of the level of his risk exposure. The sum fixed for liquidated damages is stated in the contract as an amount payable per day. The maximum amount that might be stated in the contract, usually as a percentage of the Contract Price, should cap the contractor's liability for delay damages under the contract.

When the Employer considers himself entitled to damages for delay under Sub-Clause 8.7, he may claim payment of such damages for delay under Sub-Clause 2.5.<sup>207</sup> The Engineer is then required to agree or determine in accordance with Sub-Clause 3.5 the amounts due to the Employer. Then the Employer should be entitled to deduct or set off the agreed or determined amounts as due to him; only through the Engineer.

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<sup>203</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 14.7 [Payment]

<sup>204</sup> M Robinson, *An Employer's and Engineer's Guide to the FIDIC Conditions of Contract* (1st edn, John Wiley & Sons, 2013) 14

<sup>205</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 8.7 [Delay Damages]

<sup>206</sup> *FIDIC Conditions of Contract for Construction, Yellow Book* (1st edn, 1999) Sub-Clause 12.4 [Omissions]

<sup>207</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 178

### 3.3.11. Employer's termination for cause remedy

The Employer's right to terminate the Contract for cause is granted by the FIDIC rules in several circumstances.<sup>208</sup>

Following termination under Sub-Clause 15.2, the Engineer is required under Sub-Clause 15.3 to agree or determine in accordance with Sub-Clause 3.5 the value of the works carried out in accordance with the contract at the date of termination and any other of the sums due to the Contractor prior to termination.<sup>209</sup> Moreover, the Contractor is required to repay the advance payment in accordance with Sub-Clause 14.2 immediately and in full upon termination, as well as any progress payments applicable to undelivered work.<sup>210</sup>

Usually in the case of termination for default under Sub-Clause 15.2, the Employer's obligation to pay is suspended and the Employer is not obliged to make payment for the determined value of the Contractor's work, because Sub-Clauses 15.4(b) and (c) grant the Employer the rights to withhold further payment until the Employer's losses and extra costs incurred resulting from the termination have been established.<sup>211</sup>

The Employer would probably appoint a new contractor for completion of the work and for remedying any defects. In such a case, these costs and any damages for delay may not be ascertainable until the final calculation from the new contractor is submitted.<sup>212</sup> In principle, the Employer is entitled to withhold the contractor's payments after termination, until that time.

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<sup>208</sup> - Termination for Contractor's Default

- Sub-Clause 9.4(b): Failure to pass Tests on Completion
- Sub-Clause 10.7(b): Failure to Reach Production Outputs
- Sub-Clause 11.4(c): Failure to Remedy Defects
- Sub-Clause 11.11(b): Failure to Pass Tests Prior to Contract Completion
- Sub-Clause 15.2(a): Failure to comply with Sub-Clause 4.2 [Performance Security].
- Sub-Clause 15.2(b): Failure to comply with a notice under Sub-Clause 15.1 [Notice to Correct].
- Sub-Clause 15.2(c)(i): Failure to proceed with the Works.
- Sub-Clause 15.2(c)(ii): Failure to comply with a notice under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work].
- Sub-Clause 15.2(d): Sub-contracting the whole of the Works or assigning the Contract without the required agreement

- Termination for Insolvency

- Sub-Clause 15.2(e): Contractor's bankruptcy, insolvency, entering liquidation etc.

- Termination for Unlawful Acts

- Sub-Clause 15.6: Corrupt or Fraudulent Practices; Contractor giving, or offering to give, bribes.

<sup>209</sup> FIDIC Conditions of Contract for Construction, Red & Yellow Books (1st edn, 1999) Sub-Clauses 15.2 [Termination by Employer] & 15.3 [Valuation at Date of Termination]

<sup>210</sup> Ibid Sub-Clause 14.2 [Advance Payment]

<sup>211</sup> FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts (1st edn, 2000) 262

<sup>212</sup> W Godwin, *International Construction Contracts; A Handbook* (1st edn, John Wiley & Sons, 2015) 66

### **3.3.12. Termination for Employer's convenience**

Sub-Clause 15.5 of the Red and Yellow Books gives the Employer the right to terminate the Contract for his convenience at any time for any reason, without needing to show any Contractor default or other justification.<sup>213</sup> In essence, the purpose of termination for convenience clause is to cover circumstances where the project must be abandoned or is no longer required or for some reason whether political, financial or otherwise.<sup>214</sup> However, Employers sometimes terminate the Contract for convenience under sub-clause 15.5 where they consider that the Contractor is performing badly but do not wish to terminate the contract for cause to avoid the risk of a Contractor's complaint challenging the validity of that termination.<sup>215</sup> Otherwise, it also happens where Employers themselves are in breach and terminate the Contract for convenience to prevent the Contractor from bringing a claim for breach of contract. In both cases, that's not what the termination for convenience provision intended. The Employer may also use the right to terminate for convenience under Sub-Clause 15.5 in order to carry out the works himself or to replace the contractor by another, something the Employer is expressly prohibited by the same Sub-Clause.<sup>216</sup>

### **3.3.13. Financial damages' compensation**

Both the Red and Yellow FIDIC Books contain a number of clauses entitling the Employer to compensation from the Contractor for damages caused in the ordinary course of executing the Works. For example, the Contractor under Sub-Clause 4.19 is obliged to make compensation to the Employer for certain utilities available on Site or for using any Employer's Equipment which he is entitled to use.<sup>217</sup> The amounts due for the quantities consumed for such services are subject to the process of Employer's Claims under Sub-Clause 2.5 and the Engineer's determinations under Sub-Clause 3.5. Furthermore, the Employer is entitled to any additional costs incurred by him as a result of specific costs the Contractor is responsible for or attribute to, by way of direct reference to Employer's

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<sup>213</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 15.5

<sup>214</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Taylor and Francis, Oxon 2009) 439

<sup>215</sup> *Ibid*

<sup>216</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 263

<sup>217</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 4.19 [Electricity, Water and Gas]

Claims under Sub-Clause 2.5. These are specified in various Sub-Clauses setting out costs and the procedures to claim for it.<sup>218</sup>

### **3.3.14. Defects liability remedy**

The Defects Notification Period as defined in Sub-Clause 1.1.3.7 in the Red and Yellow Books is a period of time for notifying defects in the Works under Sub-Clause 11.1 during which the Contractor is obliged to remedy defects.<sup>219</sup>

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- <sup>218</sup> • Sub-Clause 2.5 Employer's Claims ; Procedure with which Employer must comply when claiming payment from the Contractor and when claiming an extension to the Defects Notification Period
- Sub-Clause 5.2; Employer's costs incurred in the review/approval of a Contractor's Document which has previously been rejected by the Engineer on the basis that it failed to comply with the Contract.
  - Sub-Clause 4.19 Electricity, Water and Gas; Employer entitled to payment if Contractor uses power, water or other services provided by the Employer, if any, without prior notice under Sub-Clause 2.5
  - Sub-Clause 4.20 Employer's Equipment and Free-Issue Material ; Employer entitled to payment if Contractor uses the Employer's Equipment, if any, without prior notice under Sub-Clause 2.5
  - Sub-Clause 7.5 Rejection ; Employer may claim costs if defective Plant, Materials or workmanship is rejected and subsequently retested
  - Sub-Clause 7.6 Remedial Work ; Employer may claim costs if Contractor fails to carry out remedial work and if he would not have been entitled to be paid for it
  - Sub-Clause 8.6 Rate of Progress ; Employer may claim costs attributable to revised methods which Contractor adopts in order to overcome a delay for which no extension of time is due
  - Sub-Clause 8.7 Delay Damages ; Employer may claim prescribed delay damages if Contractor fails to achieve completion within Time for Completion
  - Sub-Clause 9.2: Costs of Employer's Personnel incurred when carrying out Tests on Completion after undue delay by Contractor.
  - Sub-Clause 9.3; Employer's additional costs incurred by the Employer due to failure/retesting after failure to pass the Tests on Completion (by reference to Sub-Clause 7.5).
  - Sub-Clause 9.4 Failure to Pass Tests on Completion ; Employer may claim costs if Works or Section repeatedly fails Test on Completion
  - Sub-Clause 10.2 Taking Over of Parts of the Works; Employer's entitlement to prescribed delay damages is reduced by a proportion related to the contract value of the part taken over
  - Sub-Clause 11.3 Extension of Defects Notification Period ; Employer may claim extension of the Defects Notification Period if Works or Section or major Plant cannot be used for intended purpose because of any defect
  - Sub-Clause 11.4 (a) Failure to Remedy Defects ; Employer may claim costs if Contractor fails to remedy a defect for which Contractor is responsible
  - Sub-Clause 12.3 (Yellow) Retesting ; Employer may claim costs attributable to repeated failures of Test after Completion
  - Sub-Clause 12.4 P&DB Failure to Pass Tests after Completion ; Employer may claim prescribed non-performance damages in event of failure to pass Test after Completion
  - Sub-Clause 13.7 Adjustments for Changes in Legislation ; Employer may claim payment of reduction in Contractor's Cost attributable to a change in the Laws of the Country
  - Sub-Clause 14.4 Schedule of Payments ; If interim payment instalments were not defined by reference to actual progress, and actual progress is less than that on which the schedule of payments was originally based, these instalments may be revised
  - Sub-Clause 15.4 Payment after Termination ; Employer may claim losses and damages after terminating Contract
  - Sub-Clause 17.1 Indemnities ; Employer may claim cost attributable to a matter against which he is indemnified by Contractor
  - Sub-Clause 18.1 General Requirements for Insurances ; Employer may claim cost of premiums if Contractor fails to effect insurance for which he is the "insuring Party"
  - Sub-Clause 18.2 Insurance for Works and Contractor's Equipment (last paragraph) ; Employer may claim payment of reduction in cost of premiums if the Contractor's insurance of an Employer's risk becomes unavailable at commercially reasonable terms.

The duty to remedy defects and damage is one of the Contractor's core obligations under the FIDIC forms. This duty has been adopted in the FIDIC Conditions to cover the need of the common law construction contracts due to the fact that the only remedy for breach of contract under the common law is not to grant specific performance but rather award damages.<sup>220</sup>

Thus, by providing the duty to remedy defects and damage and the Defects Notification Period, the Contractor is obliged to remedy defects during the carrying-out of the Works, which obligation continues to exist for an additional period of time to be agreed by the Parties.<sup>221</sup>

Though the Contractor is entitled under Sub-Clause 10.1 to a Taking-Over Certificate even if some work remains incomplete, the Contractor is obliged under Sub-Clause 11.1 to complete any work which is outstanding on the date stated in the Taking-Over Certificate within "such reasonable time as is instructed" by the Engineer, in addition to his obligation to execute all work required to remedy defects or damage during the Defects Notification Period.<sup>222</sup>

Defects Notification Period starts after the issue of the Taking-Over Certificate and ends automatically after the expiry of the duration is stated in the Appendix to Tender or the Particular Conditions even though the Performance Certificate is not yet issued.<sup>223</sup> The duration of the Defects Notification Period is subject to extension according to Sub-Clause 11.3 "if and to the extent that the Works, Section or a major item of Plant . . . cannot be used for the purposes for which they are intended by reason of a defect or damage"<sup>224</sup>.

The issue of the Performance Certificate follows the end of the Defect Notification Period and completes the Contractor's contractual obligation to rectify defects according to Sub-Clause 11.9 that states "Performance of the Contractor's obligations shall not be considered to have been completed until the [contract administrator] has issued the Performance Certificate to the Contractor, stating the date on which the Contractor

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<sup>219</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 1.1.3.7

<sup>220</sup> A Jaeger, and H k G, *FIDIC-A Guide for Practitioners* (Springer-Verlag, Berlin 2010) 305

<sup>221</sup> *Ibid*

<sup>222</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clauses 10.1 [Taking Over of the Works and Sections] & 11.1 [Completion of Outstanding Work and Remedying Defects]

<sup>223</sup> N G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell Science, Oxford 2005) 546

<sup>224</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.3 [Extension of Defects Notification Period]

completed his obligations under the Contract” and “Only the Performance Certificate shall be deemed to constitute acceptance of the Works”.<sup>225</sup>

However, the issue of the Performance Certificate does not terminate the obligation of the Contractor to complete the Works and made good all defects as per Sub-Clause 11.10 that provides “After the Performance Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation which remains unperformed at that time”.<sup>226</sup> Thus after issuing the Performance Certificate, the legal defects liability starts running which is exclusively governed by the applicable contract law.

### **3.4. Remedies in Case of Force Majeure**

Clause 19 in the Red and Yellow Books sets out the Parties’ remedies in the event that one of the Parties is prevented from performing his obligations under the contract, practically or legally, by reason of exceptional risks outside their control.<sup>227</sup> The financial Consequences that follow the occurrence of Force Majeure depend on the duration and effect of that event on the parties. However, in order to claim relief the affected party must give notice to the other party under Sub-Clause 19.2. The relief provided under Clause 19 are as follows:

#### **3.4.1. Excuse from performance of the obligations affected**

The party affected by Force Majeure that gave the required notice under Sub-Clause 19.2 is then excused from the performance of the obligations which such event

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<sup>225</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 11.9 [Performance Certificate]

<sup>226</sup> *Ibid* Sub-Clause 11.10 [Unfulfilled Obligations]

<sup>227</sup> *Ibid* Clause 19 [Force Majeure]; *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 292; “For an event or circumstance to constitute Force Majeure, five criteria need to be satisfied: It must be “exceptional”, so the event or circumstance is not merely “unusual”. Note the irrelevance of whether or not it is foreseeable.

(a) It must be beyond the control of the Party who has been affected by it and who, under Sub-Clause 19.2 [Notice of Force Majeure], will need to give due notice in order to be excused performance. For example, this may exclude most deliberate acts by this affected Party's personnel.

(b) This affected Party could not reasonably have provided against it before the Contract was made. For example, this may exclude foreseeable events which had a reasonable likelihood of occurring during the Time for Completion and in respect of which the affected Party could “reasonably have been expected to have taken adequate preventative precautions”.

(c) This affected Party could not reasonably have avoided or overcome it. For example, this may exclude events or circumstances which may be avoided or overcome by making appropriate (but different) arrangements, with some extra cost, delay and/or inconvenience.

(d) It must not have been substantially attributable to the other Party. For example, this may exclude events or circumstances which would normally be a breach of the Contract by such other Party, entitling the affected Party to the (more favourable) relief due to breach of contract. If an event is attributable to the other Party, it would be unreasonable for such other Party's liability to be limited to the consequences of Force Majeure”

prevents it from performing and which are described in the given notice.<sup>228</sup> The parties' obligations in respect of payment to the other party under the Contract are not enforced under Sub-Clause 19.2.<sup>229</sup>

### **3.4.2. Contractor's entitlement to an extension of time and accompanying compensation**

Under Sub-Clause 19.4, if the contractor suffers delay due to Force Majeure of which he has notified the employer under Sub-Clause 19.2, he is expressly entitled to an extension of time.<sup>230</sup> Moreover, by Sub-Clause 19.4(b), the contractor's entitlement to reimbursement of costs incurred by reason of this Force Majeure/Exceptional Event is dependent on which category of event actually occurred from the list at Sub-Clause 19.1 and prevents the Contractor from performing any of his obligations. If the event the circumstance falls within the warlike events in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 and not natural events, the contractor is entitled to payment of costs incurred. The Natural catastrophes that fall within item (v) in the illustrative list of events referred to in Sub-Clause 19.1 or other types of Force Majeure shall not entitle the contractor to any reimbursement of cost.<sup>231</sup>

### **3.4.3. Optional termination in the case of prolonged force majeure**

Sub-Clause 19.6 releases the parties from their obligations under the contract and grants both parties a right to terminate the contract if the Force Majeure has a substantial prolonged effect on the execution of the Works.<sup>232</sup> This Sub-Clause governs the Contractor's entitlement to payment for "any work carried out, the cost of plant and ordered for the Works, any other cost which was reasonably incurred by the Contractor", and the cost of repatriation of the Contractor's staff. The Employer also pays the Contractor the same amounts as are provided for in the event of Contractor's termination

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<sup>228</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 19.2 [Notice of Force Majeure]

<sup>229</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Taylor and Francis, Oxon 2009) 500

<sup>230</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 19.4 [Consequences of Force Majeure]

<sup>231</sup> J Glover, and S Hughes, *Understanding the New FIDIC Red Book: A Clause by Clause Commentary* (Sweet & Maxwell, London 2006) 368

<sup>232</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 19.6 [Optional Termination]



under clause 16.4 except that the Contractor is not entitled to any loss of profit or other loss and damage.<sup>233</sup>

#### **3.4.4. Release from future performance of the contract under the law**

All parties' relief available under the other provisions of Clause 19 are limited only to the occurrence of one of these events of Force Majeure or Exceptional Event that are listed in Sub-Clause 19.1 and which also satisfy conditions (a) to (d) of the Sub-Clause and which prevents a Party from performing its obligations under the Contract.<sup>234</sup>

Sub-Clause 19.7 grants relief for the parties in situations much wider than the Force Majeure provisions of Sub-Clause 19.1 and release them from further performance of the Contract.<sup>235</sup> Those situations can arise where the parties rely on the rights to discharge them from future performance under the Contract under the governing law of the contract or where the occurrence of an event outside the control of both Parties makes it impossible for the Contract to continue whether this impossibility is legal or physical. In such cases, the contractor is entitled to payment in the same way as would be due under sub-clause 19.6 in the event of the Parties' release from performance.

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<sup>233</sup> *FIDIC Contracts Guide to the Construction, Plant and Design-Build and EPC/Turnkey Contracts* (1st edn, 2000) 297

<sup>234</sup> E Baker, B Mellors, S Chalmers, and A Lavers, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Taylor and Francis, Oxon 2009) 503

<sup>235</sup> *FIDIC Conditions of Contract for Construction, Red & Yellow Books* (1st edn, 1999) Sub-Clause 19.7 [Release from Performance under the Law]

## ***CHAPTER THREE***

### ***Contractual Remedies under the Muqāwala Construction Contracts***

This chapter briefly introduces the application of the Muqāwala contracts in the UAE construction industry. Then it illustrates the definition and nature of each contractual remedy under the UAE Civil Code. It also investigates the options of the implementation of each contractual remedy in the Muqāwala construction contracts in response to contractual breach.

#### 4.1. Remedy of Specific Performance

The domestic courts have the power under the UAE Civil Law to order a party to perform its contractual obligations.<sup>236</sup> The performance by compulsion or specific performance remedy under the civil legal system has traditionally been a primary remedy for breach of contract. Thus under Article 380, if it lies within the limits of possibility of the obligation to perform, the obligee has the right to demand performance of it and the obligor has the duty to tender performance exactly as agreed.<sup>237</sup> Neither party has licence to depart from such specific performance in favour of any substituted performance save by the consent of the parties so long as specific performance of the obligation remains feasible.<sup>238</sup>

Specific performance of an obligation will be due only if: the specific performance remains possible and would not be oppressive for the obligor, the obligor tenders performance of it, or the obligee demands performance by giving notice to the obligor; or if the obligee would suffer serious harm or excessive hardship disproportionate to the failure to effect specific performance.<sup>239</sup>

The bounds of possibility of specific performance of an obligation depend on the nature of the obligation.<sup>240</sup> As Professor Al Sanhuri elaborated “Specific performance is regarded as impossible if executing the same requires the personal involvement of an obligor who is not willing to interfere. However, in respect of obligations such as transferring a right in rem or any obligations relating to something in which a judge's order may be enforced by way of direct performance of the obligation such as in case of a promise to sell, specific performance is possible by operation of law or the court judgment”<sup>241</sup>.

Bounds of possibility of specific performance with regard to the time limit for performance: if the time limit for performance has been specified, it is presumed that specific performance should be done within that time limit unless either party gives evidence to the contrary. If the time limit for performance has not been specified, the

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<sup>236</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 389

<sup>237</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 380

<sup>238</sup> A Masadeh, ‘Decennial Liability in Construction: Law and practice in the United Arab Emirates’ (May 2014) International Conference on Construction in a Changing World

<sup>239</sup> M Grose, Construction law in the United Arab Emirates and the Gulf (1st edn, John Wiley & Sons, 2016)

<sup>240</sup> Al-Sanhuri. Abdul Razzag. Al-Waseetfi Shark Alkanoon Almadani, (in Arabic), AlWaseet in Illustration of the Civil Law, part 7, Vol. 2, (Dar An-Nahthah Al-Arabiyyah Cairo-Egypt, 2nd ed., 1990).

<sup>241</sup> *Ibid*

obligee should set a reasonable period of time for performance so long as the circumstances permit it.<sup>242</sup>

The UAE Civil Code expressly provides for the contractor's entitlement to request specific performance. In accordance with Article 380 of the Civil Code, the contractor is entitled to request the court to issue an order that requires the employer to pay the due amount to the contractor.<sup>243</sup> This order of the court is applicable to all of the employer's money and assets including the work executed by the contractor.<sup>244</sup>

On the other hand, the employer may demand performance in specie. The contractor may then show evidence that performance is impossible without prejudice to the innocent party's other right. Until reception of the works the employer is entitled to specific performance. As he did not yet accept the works the contractor must then show evidence that the work is in accordance with the contract. Thus, if, in the course of execution, it is established that the contractor is performing the work in a manner that is defective or contrary to the agreement, the Employer may formally summon him to alter, within a reasonable period fixed by him, the manner in which he is performing the work. If by expiration of such period the contractor has failed to adopt the proper manner of working, the Employer may either demand resolution of the contract or the handing over of the works to another contractor at the cost of the first contractor. After reception of the works the burden of proof shifts to the employer who will then be in charge to show evidence that any purported defect exists.

## **4.2. Remedy of Damages' Compensation**

### **4.2.1. Entitlement to damages**

The basic rule in Islamic jurisprudence and in civil law, in contrast to common law, is that the obligee has a right to demand specific performance from the obligor of his obligation, if it is to perform an act, under the contract and if the obligor does not do so the court may, upon the request of the obligee, compel him to do so but if the obligor refuses to obey such order of the judge then obligor should be liable to damages until he

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<sup>242</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 380 to 385

<sup>243</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 380

<sup>244</sup> In case the employer does not comply with a court's decision to pay, the decision will be enforceable against his assets; S Fawzy, 'Application of time and additional payment provisions to the FIDIC Red Book 1999 on the civil law' <https://tel.archives-ouvertes.fr/tel-01581114/document> accessed 1 November 2017

complies. As a result, damages, as secondary remedy, should not be awarded unless specific performance, as primary remedy, is not possible.<sup>245</sup>

Article 380(2) states that “provided that if specific performance would be oppressive for the obligor, the judge may, upon the application of the obligor, restrict the right of the obligor to a monetary substitute unless that would cause him serious loss”.<sup>246</sup> Article 338 states that “a right must be satisfied when the legal conditions rendering it due for performance exist, and if an obligor fails to perform an obligation, he shall be compelled to do so either by way of specific performance or by way of compensation in accordance with the provisions of the law”.<sup>247</sup>

In such case, the judge may exceptionally, upon the application of the obligor, allow a monetary award in the form of damages for breach of contract instead of granting specific performance in which case the damages can be the only available legal remedy where the obligation is oppressive or impossible to perform.<sup>248</sup> A different application of this exception to the basic rule is where the obligor does not perform its contractual obligation, and then the obligee may perform this obligation at the expense of the obligor by order of the judge.<sup>249</sup>

Furthermore, parties may agree in advance or after the occurrence of breach of contract on damages as the absolute legal remedy. One example is; most standard construction contracts include terms of liquidated damages. However the court can award damages as primary remedy in lieu of performance in kind, or as a supplementary measure, in combination with either specific performance or termination of contract in order to ensure full compensation.<sup>250</sup>

#### **4.2.2. Entitlement to damages under UAE Law**

In the UAE civil courts, a claim for damages may arise in three basic ways; under provisions of applicable law when damages be determined on the basis of the relevant law provision; or pursuant to a contract when damages be assessed by reference

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<sup>245</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 389

<sup>246</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 380(2)

<sup>247</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 338

<sup>248</sup> Federal Supreme Court No. 56/23 dated Court No. 27 March 2001 and Dubai Cassation Nos. 128/2000 dated 18 June 2000 and 128/2000 dated 18 June 2000.

<sup>249</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Specific Performance\_GENERAL OVERVIEW

<sup>250</sup> A Masadeh, ‘Decennial Liability in Construction: Law and practice in the United Arab Emirates’ (May 2014) International Conference on Construction in a Changing World

to the provisions of that contract itself; or finally for breach of contract where the damages will be compensatory damages for a failure to perform.<sup>251</sup>

Under Article 124 of the UAE Civil Code, the contract is one of the sources of obligations.<sup>252</sup> Thus, the contractual liability may arise from breaches to a valid contract<sup>253</sup>. As a result of this fault, there must be proven damages caused to the other contracting party as a direct result of such fault or breach. The Dubai Court of Cassation explains that: “There is contractual liability in the presence of three factors; a fault which occurs when one of the contracting parties does not carry out the obligations stipulated in the contract or if there is delay in performing the same; a proven damage; and the presence of causation between the fault and the damages”.<sup>254</sup>

#### **4.2.3. Assessment of damages**

Damages claimable under the contractual liability include direct damages, consequential damages, loss of profits, loss of opportunity, interests and moral damages.<sup>255</sup>

As per the official commentaries to the UAE Civil Code, that compensation in the case of breach of contract could be for the direct damages that were pre-agreed contractually or expected by the parties at the time that the contract was concluded. However, if that is not the case or where compensation is not assessed by a provision of the law, then the court should assess the quantum of damages to be commensurate with the actual damage sustained.<sup>256</sup>

The UAE Civil Code under Article 389 provides 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”.<sup>257</sup>

The UAE Civil law also recognizes consequential damages. On the other hand, this is only included in tortious liability and not within the scope contractual liability.

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<sup>251</sup> M Grose, *Construction law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons, 2016)

<sup>252</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 124

<sup>253</sup> *ibid*

<sup>254</sup> Dubai Court of Cassation, petition no 41/2007, 15/04/2007; Dubai Court of Cassation, petition no 37/2004, 18/09/2004.

<sup>255</sup> Nassif K, ‘Damages and contracts in the UAE’ [March 2010] *The In-House Lawyer*

<http://www.inhouselawyer.co.uk/legal-briefing/damages-and-contracts-in-the-uae/#one> accessed 1 March 2017

<sup>256</sup> J Whelan, *UAE Civil Code and Ministry of Justice Commentary* (Sweet & Maxwell, 2010) Article 389

<sup>257</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 389

Significantly, recovery of damages is restricted to direct loss in the absence of deceit or serious default.<sup>258</sup>

Lost profits in the course of a contractual liability are recognised under the explanatory note of the Civil Code under article 389 and by article 292 of the Civil Code.<sup>259</sup> However, the general rule for damage is that the injured party is entitled to the loss in fact suffered at the time of the occurrence of a cause of action.<sup>260</sup> Thus, the Courts in the case of the future loss, including loss of future earnings and loss of a chance to earn a profit,<sup>261</sup> do not accept speculative damages because such damages must be certain in the future and the claim must not be based on hypothetical or probable damages<sup>262</sup>.

In addition, the Dubai Court of Cassation recognises the compensation of loss of opportunity as a result of the termination of a contract, holding that: “If the opportunity is hypothetical, however, the loss of such opportunity is an occurrence that should be compensated”<sup>263</sup>.

Interest, where payable, accrues at the agreed rate<sup>264</sup> or if not agreed then at the prevailing market rate, subject to a maximum of twelve per cent annually.<sup>265</sup> The prevailing market rate currently applied by the domestic courts, in general, falls within a range of seven to nine per cent annually.<sup>266</sup> Determination of the applicable rate is a matter for the Court of Merits.<sup>267</sup>

Moral damages are claimable under article 293(1) of the Civil Code. Although it relates to tortious liability, case precedents recognise its application to contractual liability also, providing for the following: “The right to have damage made good shall include moral damage, and an infringement of the liberty, dignity, honour, reputation,

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<sup>258</sup> Dubai Cassation No. 352/1994 dated 22 April 1995

<sup>259</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Articles 389 & 292

<sup>260</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985] Article 389. It has been suggested in relation to the Jordanian Civil Code (1977) that the omission of any reference to loss of profit is purposeful, reflecting the Islamic Shari'ah's distaste of all things speculative or intangible: 'Civil Codes of Arab Countries: The Sanhuri Codes', N. Saleh, ALQ, Vol. 8, No.2 (1993), at pp. 165-166.

<sup>261</sup> Dubai Cassation No. 214/1998 dated 3 January 1999.

<sup>262</sup> Dubai Cassation Nos. 431/2004 dated 4 June 2005, 204/2004 dated 20 March 2005 and 252/1993 dated 26 December 1993.

<sup>263</sup> Dubai Court of Cassation petition no 51/2007, 29/04/200; Dubai Court of Cassation, petition no 46/2006, 08/05/2006.

<sup>264</sup> UAE Code of Commercial Practice, Article 77

<sup>265</sup> UAE Code of Commercial Practice, Article 76

<sup>266</sup> Omer Eltorn (2009). The Emirates Law in Practice. Dubai.181

<sup>267</sup> Federal Supreme Court No. 417/21 dated 20 June 2001

social standing or financial condition of another shall be regarded as being moral damage”.<sup>268</sup>

### 4.3. Liquidated Damages

Construction contracts commonly contractually provide for the consequences of a specific breach of contract and, in particular, failure to complete the works by a pre-agreed date or possibly specific milestones. Liquidated damages are designated monetary compensation for loss, whose amount the contracting parties predetermine during the contract formation, which are to be paid by the contractor as compensation upon a late performance. The level of financial liability is calculated by reference to a pre-agreed formula, in which the principal variable is the duration of the delay.<sup>269</sup>

This remedy is addressed by Article 390, which governs the validity of prior agreements determining the amount of compensation for loss under UAE Law. In principle, Article 390 limits damages in respect to their amount generally and does not address liquidated type damages specifically, Article 390, nonetheless, applies to liquidated damage clause also.<sup>270</sup>

Article 390(1) Civil Code recognizes the validity of liquidated damage provisions by allowing the parties to a contract to agree upon a specific amount of compensation for a specific contract breach (e.g., late performance).<sup>271</sup> Article 390(2) Civil Code introduces a corrective element by affording the courts the authority, upon the application of either of the parties, to align the compensation pre-agreed by the parties with the actual loss sustained by the party invoking the liquidated damage clause.<sup>272</sup>

This court's authority may appear to constitute an incursion on the freedom to contract provided for in Article 126 of the UAE Civil Code and to contradict the main goal of such liquidated damage clauses which is to simplify damage claims for a specific breach by allowing the party to a contract to invoke the clause to claim the compensation agreed upon by the parties without having to quantify the actual losses sustained.<sup>273</sup>

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<sup>268</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 293(1)

<sup>269</sup> 'Making and Defending Claims for Liquidated Damages in the United Arab Emirates', a paper presented to the Society of Construction Law (UAE) by Richard Harding, May 2006, contains a useful review of this topic.

<sup>270</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 390

<sup>271</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 390(1)

<sup>272</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 390(2)

<sup>273</sup> N Bremer, 'Liquidated Damages under the Law of the United Arab Emirates and its Interpretation by UAE Courts'



However, such an approach to liquidated damages constitutes an infringement of the principle of *ḡarar* according to the Islamic Law (Shari'a) as the principle source of UAE Law.<sup>274</sup> As the damage caused by a future breach of contract is unknown and cannot be accurately determined at the time the liquidated damage clause addresses it, the pre-defined amount of compensation owed under this clause may exceed or fall short of the actual losses sustained by a breach of contract. Hence, the party to the contract invoking the liquidated damage clause may sustain loss or benefit from the contract breach which constitutes a conflict with the Shari'a Law principle of *ḡarar*.<sup>275</sup>

Since Article 390(2) Civil Code is a mandatory provision, the court's discretion to reassess such clauses and any contractually-agreed damages is a matter of public order, any agreement to exclude a party's right to request a judge or an arbitrator to reassess the damages will be deemed null and void.

The Commentary on the UAE Civil Code issued by the UAE Ministry of Justice provides that Article 390 should be applicable only when the pre-agreed compensation is in fact due where loss was in fact incurred. Furthermore, the Commentary Article 390(1) allows the parties to agree on liquidated damages for specific breach prior to occurring of such breach and not retroactively.<sup>276</sup>

The actual loss incurred by the party invoking the clause does not have to be substantiated unless that party makes an application to the court to adjust the compensation provided under the liquidated damage clause. Still, only when the party invoking the liquidated damage clause actually sustained loss due to the specific breach then the pre-agreed compensation under a liquidated damage clause will be awarded.

As per Article 1(1) of the UAE Law of Evidence in Civil and Commercial Transactions, the general principle of burden of proof under the UAE Law is “the burden of proof in respect to a specific fact lies with the party asserting it”.<sup>277</sup> According to the

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[https://www.academia.edu/17223052/Liquidated\\_Damages\\_under\\_the\\_Law\\_of\\_the\\_United\\_Arab\\_Emirates\\_and\\_its\\_Interpretation\\_by\\_UAE\\_Courts](https://www.academia.edu/17223052/Liquidated_Damages_under_the_Law_of_the_United_Arab_Emirates_and_its_Interpretation_by_UAE_Courts) accessed 15 January 2018

<sup>274</sup> The Islamic Law principle of *ḡarar* – frequently translated as ‘uncertainty’ or ‘deceptive uncertainty’ – prohibits the conclusion of agreements that comprise the risk of one party benefiting or sustains losses due to circumstances unknown at the time of conclusion of the agreement. This principle commonly associated with the prohibition of gambling and speculation has implications for liquidated damage clauses.

<sup>275</sup> N Bremer, ‘Liquidated Damages under the Law of the United Arab Emirates and its Interpretation by UAE Courts’

[https://www.academia.edu/17223052/Liquidated\\_Damages\\_under\\_the\\_Law\\_of\\_the\\_United\\_Arab\\_Emirates\\_and\\_its\\_Interpretation\\_by\\_UAE\\_Courts](https://www.academia.edu/17223052/Liquidated_Damages_under_the_Law_of_the_United_Arab_Emirates_and_its_Interpretation_by_UAE_Courts) accessed 15 January 2018

<sup>276</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 390

<sup>277</sup> Original Arabic text available at: [www.elaws.gov.ae/EnLegislations.aspx](http://www.elaws.gov.ae/EnLegislations.aspx) (last access 11.04.2015).

Supreme Court this general rule should be also apply in respect to proving that the loss actually sustained deviated from the compensation determined in the liquidated damage clause which means that proof should lie with the party challenging the pre-agreed compensation.<sup>278</sup>

The term “liquidated damages” or “delay damages” as used in the FIDIC 1999 Condition is an alternative to the remedy of damages in case of breach of the requirement to complete the Works or section by the Time for Completion.<sup>279</sup> However, a delay damages provision is different than a penalty provision in that; the former aims to incentivize the Contractor to complete the Works on time by way of a “punitive financial consequence of failure”, while the latter purposes to compensate the Employer.<sup>280</sup> The common law jurisdictions’ decline to enforce a penalty provision of the underlying nature of that provision, is because it is to punish, not to compensate, and does not represent a genuine pre-estimate of loss. Although the domestic Courts in the UAE share the compensatory philosophy of common law, there is no corresponding tradition of rendering penalty provisions void.<sup>281</sup> However, rather than rendering a penalty clause unenforceable in UAE Law as in some common law jurisdictions, the UAE Civil Code instead grants domestic courts an overarching power to adjust all agreements on compensation or penalty by virtue of Article 390 of the UAE Civil Code.<sup>282</sup>

#### **4.4. Specific remedy available against the contractor ‘Decennial Liability’**

The Decennial liability is a form of strict liability that is imposed by law on construction activities where there is no need to prove breach of contract or negligence and where no fault is necessary in order for liability to arise.<sup>283</sup> The Decennial liability is a

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<sup>278</sup> Supreme Court, Case No. 103 of Judicial Year 24, Judgement rendered 21 March 2004. The Supreme Court reaffirmed this position in Case No. 412 of 2009, Judgement rendered 27 January 2010. 208

<sup>279</sup> M Grose, *Construction law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons, 2016) 328

<sup>280</sup> *Ibid* 329

<sup>281</sup> Federal Supreme Court No. 302/21 dated 17 June 2001; “As a delay damages provision is a subsidiary obligation it will lapse if the principal provision is void or ineffective for any reason”

<sup>282</sup> F Attia, Al Tamimi & Company, ‘Liquidated Damages - the bigger picture’ Law Update 2012\_247 2

<sup>283</sup> Since the defective work constitutes a breach of the construction contract, the employer is entitled to pursue an action against the contractor for that breach. The limitation period for such contractual civil claims under the UAE Civil Code Article 473 is 15 years. Under certain circumstances, however, the construction contract is deemed to be commercial transaction. Where this is the case, the Federal Law No. (18) Of 1993 on Commercial Transactions (the Commercial Transactions Code) Article 95 will be applied and the claims will be time-barred within 10 years from the date of breach. This limitation period of 15-year or 10-year run in overlap with the warranty period of the decennial liability. In either case, the responsibility of proof of the contractor’s fault will be on the employer. With regard to the claims against the design engineer, UAE Civil Code Article 473 provides that the limitation period is five years for defects in the plans. In addition, such a claim can be heard up to 15 years in case of the existence of written acknowledgement, which proves the right for that claim as Article

supplemental liability in law imposed jointly and severally on a contractor and Engineer in the event of a total or partial collapse of “buildings or other fixed installations” and any defect endangering the stability or safety of their structure. The decennial liability constitutes a mandatory liability in UAE law, thus any exclusion or limitation of this liability clause will be held invalid.<sup>284</sup>

Pursuant to Article 880 of the UAE Civil Code, decennial liability can only arise in the traditional construction contract (Design-Bid-Build) where the Engineer is required to prepare the design and supervise the whole work and the contractor is responsible for the execution of buildings construction or other fixed installations.<sup>285</sup> In such case both the Engineer and the contractor will be jointly liable for the defective work regardless of whether the design is defective or free of defects. However, according to Article 881, if the Engineer is required to prepare the design and not required to supervise the work, he will be liable for defects in the design and not for defective workmanship where the design is free of defects.<sup>286</sup>

The employer is entitled, without any requirement for proof, to commence legal action upon the occurrence of trigger events of decennial liability, both against the contractor and the Engineer, without being obliged to decide whether the defect is of a construction or design nature.<sup>287</sup> The outcome of such legal action could be that either the architect or the contractor is liable, or that the liability is apportioned between the two parties.<sup>288</sup>

The decennial liability period is a warranty period for ten years from the date the works are taken over on the issue of the defects liability certificate.<sup>289</sup> However, if the partial or total collapse occurs or when defects appear at the end of the 10-year period of liability for structural defects, the client will still have another limitation period for

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477(2); see J Ede, Al Tamimi & Company, ‘Decennial liability in the UAE’ (January 2015) Law Update; see also M Blanksby and A Hall, ‘Constructing railways in the UAE: liability for defective work’ (April 2015) Insight

<sup>284</sup> L Dale and S Hunt, ‘Decennial Liability and Latent Defects - Contractors and Developers Liability in Dubai’ (SEPTEMBER 2009) Law Update 2009, 222, 20

<sup>285</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 880; A Masadeh, ‘Decennial Liability in Construction: Law and practice in the United Arab Emirates’ (May 2014) International Conference on Construction in a Changing World

<sup>286</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 881

<sup>287</sup> H Deen, ‘Understanding Decennial Liability In Relation To Construction Contracts’ [2011]

<http://harisdeen.com/blog/legal/understanding-decennial-liability-in-relation-to-construction-contracts> accessed 27 July 2015

<sup>288</sup> A Masadeh, ‘Decennial Liability in Construction: Law and practice in the United Arab Emirates’ (May 2014) International Conference on Construction in a Changing World

<sup>289</sup> F Attia, Al Tamimi & Company, ‘Can We Really Limit Liability?’ Law Update 2012\_254

decennial liability claims, being a period of 3 years within which he may pursue a civil action before the court.<sup>290</sup> Under UAE Civil Code Article 473, the employer in respect of defects, as typically considered breach of contract, is entitled to pursue a legal claim for a general limitation period for contractual claims of 15 years.<sup>291</sup> The decennial liability period and the statutory limitation periods are matters of public order therefore parties cannot agree on a shorter period, unless the parties agreed that the works was to last for a shorter period.<sup>292</sup>

Under UAE law, in principle, the assessment of compensation is linked to the actual loss in accordance to Article 292 of the Civil Code which states that “In all cases the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that that is a natural result of the harmful act”.<sup>293</sup>

#### **4.5. Contract Price Adjustment for Variations Remedy**

The key component in the construction contracts formation is agreement on the price. In the case of a Muqāwala contract as per UAE Civil Code, Article 874, the price of the contract as well as other key elements like the subject, qualities, type, method of performance, and duration of the contract are the requirements for establishing the existence of a contract.<sup>294</sup>

Notwithstanding that the offer and acceptance are necessary elements of a valid contract according to Article 129 critical to the conclusion of a contract as per Article 130, there is no requirement to include payment or any other form of consideration in the offer and acceptance; the UAE Civil Code requires only a lawful benefit for both parties as a part of the requirement of a valid cause.<sup>295</sup>

No definition is provided for 'price' in the context of a construction contract by the UAE Civil Code, so the price could be the consideration agreed between the parties rather than the amount an item is worth, like in the case of goods.<sup>296</sup>

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<sup>290</sup> H Deen, 'Understanding Decennial Liability In Relation To Construction Contracts' [2011] <http://harisdeen.com/blog/legal/understanding-decennial-liability-in-relation-to-construction-contracts> accessed 27 July 2015

<sup>291</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 473

<sup>292</sup> J Ede, 'Decennial liability in the UAE - a commentary' (DECEMBER 2014) Law Update 2015, 275, 01

<sup>293</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 292

<sup>294</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 874

<sup>295</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 129 & 130

<sup>296</sup> M Grose, *Construction law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons, 2016)

If the price for the work is not specified, the contractor is entitled to fair remuneration, together with the value of materials provided (this is an exception to the general contract rule that a price must be specified).<sup>297</sup>

If a Muqāwala contract is made on the basis of an agreed design, the Civil Code applies the “no extra costs” rule, similar to English law, and do not allow recovery of extra costs for the execution of the design that has been agreed upon.<sup>298</sup>

In principle, any demand for additional costs, remuneration or expense under a lump sum Muqāwala contract is prohibited for the implementation of the originally agreed design as per Article 887.<sup>299</sup> However, where the employer consents to variations or additions to the agreed works in lump sum Muqāwala contracts, the second part of Article 887 implies amending the remuneration and/or the completion time and observing the contract terms in relation with these changes agreed to by the employer.<sup>300</sup>

In a re-measurement Muqāwala contract, if it turns out that a significant increase in estimated quantity is required to perform the agreed design, the contractor should be under immediate obligation according to Article 886 to notify the employer of the effect of such increase on the contract price and time of performance, failing which the contractor loses his right to recover extra costs for the execution of the design over the measured quantity value. The second part of Article 886 protects an employer from price adjustments by giving him the right to suspend the execution, or withdraw from the contract altogether, because of such substantial increases in quantity.<sup>301</sup>

At the same time, there are exceptions to the “no extra costs” rule. These exceptions include where a new agreement between the parties has been reached on variations or additional works to the initial design which, as a result, may entitle the contractor to additional costs or remuneration. Where the construction contract is silent as to the ordering and valuation of variations, the contractor will be entitled under Article 888 to a fair remuneration in addition to the value of the materials provided. Also in cases of unforeseeable exceptional circumstances of a public nature or events of

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<sup>297</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 888

<sup>298</sup> A Kanakri, ‘Legal issues relating to construction contracts in the United Arab Emirates’ | Practical Law [https://uk.practicallaw.thomsonreuters.com/0-619-1946?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-619-1946?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) accessed 1 March 2017

<sup>299</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 887(1)

<sup>300</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 887(2)

<sup>301</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 886

force majeure, the contractor is entitled under Article 249 to claim for relief if performance of its contractual obligation (although being possible) becomes so arduous, as to threaten him with severe loss.<sup>302</sup> It further includes circumstances arising out of the acts of a third party or the employer in connection with the construction contract.

#### **4.6. Set off Remedies**

A set off is the satisfaction, full or partial, of a debt owed to the obligee by a debt due from the obligor.<sup>303</sup> For the Muqāwala contracts, a right of set off is applying back-charges to extinguish a payment obligation. Withholding payment without a valid entitlement constitutes a breach of contract giving rise to a cause of action for damages and other remedies, such as suspension or termination.<sup>304</sup> UAE Civil Code recognises the right of set off in respect of contracting parties' mutual obligations. Statutory set off right in accordance with UAE Civil Code, Article 369 either is "mandatory, occurring by operation of law, or voluntary, occurring by agreement between the parties, or judicial, occurring by order of the court".<sup>305</sup>

A mandatory set off entitlement arises at law without the need for agreement or a court order. For a mandatory set off to apply, there are a number of conditions stated in Article 370 of the UAE Civil Code that must be satisfied; "each of the parties must be in debt to the other, the obligations must be of the same kind and description, must be equally due and of equal strength or weakness, and the set-off must not prejudice the rights of third parties, irrespective of the cause giving rise to the obligation".<sup>306</sup>

The parties to a Muqāwala contract may reach a voluntary set off by agreement before or after the concerned liabilities arise. FIDIC Conditions, Sub-Clause 2.5 [Employer's Claims] is an example for such type, where the employer has a right to make a set off under certain circumstances against a certified sum.

According UAE Civil Code Article 372, a judicial set-off, the third type, takes place by court order either between claim and counterclaim in a single action or between separate and independent legal actions.<sup>307</sup>

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<sup>302</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 249

<sup>303</sup> Abu Dhabi Cassation No. 12/1 dated 14 March 2007

<sup>304</sup> M Grose, Construction law in the United Arab Emirates and the Gulf (1st edn, John Wiley & Sons, 2016)

<sup>305</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 369

<sup>306</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 370

<sup>307</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 372

## 4.7. Self-help Remedies

There are remedies known as self-help remedies that establish qualified rights for contractors to secure payment owed for work under Muqāwala construction contracts by filing priority liens against the project itself in favour of contractors. Generally, such remedies with respect to liens and the physical attachment of property are available in contracts with non-governmental bodies only and not with respect to public property or for work under governmental contracts.

Under Article 110(2) of the UAE Civil Code the priority rights is one type of the general collateral real property rights (liens).<sup>308</sup> A priority right in Article 1504 is defined as a collateral real property right over property conferring upon the creditor in obtaining his right subject to a transaction and in accordance with his status and as determined by law.<sup>309</sup> Furthermore the Article 391(1) provides one of the basic principles of civil law namely that the assets of the obligor stand as a general security for the performance of his obligation in favour of all of his obligees.<sup>310</sup> However, the lien provisions have been adopted in the UAE Civil Code specifically to secure payment to contractors, architects and Engineers. Indeed, with regards to the construction industry there are only two provisions potentially applicable: Articles 897 and 1527 of the UAE Civil Code.

Article 897 of the UAE Civil Code addresses exercising a possessory lien over construction works as a form of ‘self-help’ remedy that may be invoked by a contractor in an effort to secure payments owed. The physical attachment of the property is given statutory recognition by Article 879, Section 1, of the Civil Code in the following terms: “If the work of the contractor produces a beneficial effect on the property in question, he may detain it until the consideration due is paid, and if it is lost in his hands prior to payment of the consideration, he shall not be strictly liable for the loss, nor shall he be entitled to the consideration”. As there are no accompanying provisions governing the application of this possessory lien, the provisions governing general rights of retention, it is submitted, apply.

The UAE Civil Code in addition to statute providing for the physical attachment of property pursuant to Article 879, gives to a contractor or an architect a right under Article

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<sup>308</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 110(2). Also see N.R. Brendel, ‘The Availability in the UAE of Liens to Secure Payment under Construction Contracts’, Arab Law Quarterly 24 (2010) 309-317

<sup>309</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 1504

<sup>310</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 391(1)

1527 to register a priority right over buildings or other works in order to secure payment for the work performed on such building or works.<sup>311</sup> The creation of the priority right in favour of a contractor or consultant to cover payments that are due differs fundamentally from a possessory lien. While the possessory lien or the physical attachment remedy offers tangible security over property like goods, equipment, plant and even the works, the priority right remedy does not, but it rather “entitling a beneficiary to a priority claim against any value added to the proceeds ultimately realised from a sale of the concerned property”.<sup>312</sup>

#### **4.8. Remedy of Suspension / Withholding Performance**

Generally, the parties under common law have no right to suspend or repudiate the contract, unless there is an express right to that effect specifically provided for in their contract.<sup>313</sup>

Although the UAE Civil Code does not recognise the concept of repudiation or expressly provide for a right of suspension for one party towards the other, article 247 of the UAE Civil Code gives a party the right to withhold performance of his contractual obligations if the other party is in breach.<sup>314</sup>

If one of the contracting parties relies on that right, he only suspends the operation of the contract and it is not open to him to rely on it to terminate or cancel the contract.<sup>315</sup> However, this article does not expressly provide for a party's remedy to recuperate the damages suffered due to the other party's breach of the contractual obligation.

This remedy of suspension is of a provisional and temporary nature and any party who withholds his performance should be ready to perform immediately upon the other party's performance.<sup>316</sup>

#### **4.9. Remedy of Termination; Restitution**

Whereas termination and suspension are similar in that they are both statutory remedies which arise in respect of all contracts, they are radically different in that the

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<sup>311</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 1527

<sup>312</sup> Dubai Cassation No. 339/97 dated 23 March 1997

<sup>313</sup> Gould N, 'UAE - Civil Code: Suspension and Termination of Construction Contracts' [December 2012], Fenwick Elliott <https://www.fenwickelliott.com/research-insight/articles-papers/uae-%E2%80%93-civil-code-suspension-and-termination-construction-contracts> accessed 1 March 2017

<sup>314</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Article 247

<sup>315</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 247

<sup>316</sup> M Grose, Construction law in the United Arab Emirates and the Gulf (1st edn, John Wiley & Sons, 2016)



suspending remedy of withholding of performance is a temporary measure, while the terminating remedy of halting of performance is irreversible.<sup>317</sup> Termination at law might be described as a cancellation of the contract at which point generally the obligations of the parties in respect of the contract are frozen in time.<sup>318</sup>

In accordance with the UAE Civil Code Articles 892 and 267, a binding contract of Muqāwala shall be terminated or rescinded in one of only four ways: upon the completion of the work/services agreed, upon the parties' mutual consent or by order of the court or operation of law.<sup>319</sup>

These provisions are clear, and effectively prevent the unilateral right of termination of a contract from having legal effect in the UAE. However, Article 893 provides an exception to this general rule where performance or completion is prevented and therefore allows a Muqāwala contract to be terminated.<sup>320</sup>

The first type of termination, would apply in the event where both parties to a contract render their performance exactly as required by the contract and all contractual obligations come to a natural end. This is how the great majority of contracts of Muqāwala terminate.

Then we have termination by mutual consent, the first of which is through consent of the parties. Such consent could be given in advance at the time of contract formation where they agree to a contractual termination scheme which allows either party to terminate the contract in specified circumstances and when the grounds for termination are met. Thus, when one of the contracting parties exercises his rights in accordance with the contract termination mechanism, such termination on the grounds of the contract provisions takes effect immediately without the requirement of a court order to terminate the contract.

The second mutual consent to termination scenario is with automatic termination. Under Article 271, the UAE Civil Code gives an explicit right for contracting parties to agree that a contract will be considered automatically terminated without the requirement for any prior notice or a judicial order in the event of a breach of the terms of a contract. Should the cancellation condition be fulfilled, the contract will then automatically lapse;

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<sup>317</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 892

<sup>318</sup> D Brand, 'Termination of the contract' [April 2009], Construction Management Guide <http://www.cmguide.org/archives/1294> accessed 1 March 2017

<sup>319</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 892 and 267

<sup>320</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 893

arguably unless the parties agree beforehand that it would not, which can of course then be construed as a variation of the agreement to automatic cancellation.

It is arguable whether the parties' agreement to an express provision entitling a party to unilaterally terminate under a Muqāwala can constitute "mutual consent" to termination for convenience.

Either party will have the right to terminate the contract under article 272, which provides that, if one of the parties fails to discharge his contractual obligations, the other party after giving notice to the obligor may require that the contract be performed or cancelled.<sup>321</sup> The requirement by notice is then followed by an application to court for enforcement of the applicant's right to performance or cancellation.

The court may order the obligor to specific performance forthwith; it may defer performance to a specified time, or order cancellation of the contract and payment of compensation, if appropriate.<sup>322</sup>

Generally, in deciding whether or not to order termination of the contract, the court will consider the following conditions<sup>323</sup>: was there material breach; was it a binding obligation ; are the obligations breached and to be terminated roughly equal and are they mutual; is the obligee itself in breach and is he ready to perform his corresponding obligation<sup>324</sup>; is the obligor in continued material breach of a binding obligation<sup>325</sup>.<sup>326</sup>

Finally, the Civil Code confers on a party to a Muqāwala contract a right to cancel or terminate the contract under Article 893 upon his request "if any cause arises preventing the performance of the contract or completion of the performance thereof".<sup>327</sup> Furthermore, Article 894 provides that if such unforeseen force majeure event prevents the contractor from performing work which is already begun, he shall be entitled to "the value of the work which he has completed and the expenses he has incurred in the performance thereof

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<sup>321</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 272

<sup>322</sup> In Abu Dhabi Cassation No. 859/2010 dated 17 April 2011 the court relied on the UAE Civil Code, Article 272 to cancel a reservation agreement in response to an argument that Article 247 was limited to suspending performance.

<sup>323</sup> Dubai Cassation No. 183/2011 dated 8 January 2012 in which the court stated that there are four conditions but, disappointingly, did not set them out.

<sup>324</sup> Dubai Cassation No. 183/2011 dated 8 January 2012. The court stated that this requirement is the most important.

<sup>325</sup> In Dubai Cassation No. 273/1991 dated 9 February 1992 the court relied on there being insufficient evidence of a breach of mutual obligations to permit an early termination of the lease.

<sup>326</sup> M Grose, *Construction law in the United Arab Emirates and the Gulf* (1st edn, John Wiley & Sons, 2016) 181

<sup>327</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 893

up to the amount of the benefit the employer has derived therefrom”.<sup>328</sup> However, the contract shall be regarded as being automatically cancelled pursuant to Article 273 in the case of unforeseen force majeure events in which neither party plays any part.<sup>329</sup>

#### **4.10. Force Majeure Remedies**

In accordance with the doctrine relating to unforeseen circumstances, a party to a contract has a right to exclude liability for failure or delay of performance of any of its obligations, if that performance has been affected by an exceptional event beyond that contract party's control. The impossibility must be due to causes of an external and public nature and be unavoidable or universal.<sup>330</sup>

Under the UAE civil law there are two different types of the exceptional circumstances classified by their effect on the performance of the contract.

Firstly, the Force majeure events render performance of the obligations under a contract absolutely impossible. Article 273(1) states that when performance of the whole of the obligations becomes impossible due to such event, then the obligations will not be due and the contract will be cancelled entirely.<sup>331</sup> Article 273(2) states however, that if the impossibility is partial and only parts of the contract is affected, then those parts only can be terminated. In either case, the full consequences should not be borne by the obligee.<sup>332</sup>

In terms of Article 894, if an unforeseen emergency event had taken place during the execution of the contract and if it prevented the contractor from discharging his obligations then the cost of any completed work and expenses incurred in the performance of his obligations or the amount derived by the employer from such work and expenses, whichever is the lesser, will be paid.<sup>333</sup>

Article 895 determines that a court may order compensation of an innocent party injured by such cancellation when this would be consistent with custom in the construction industry.<sup>334</sup>

Secondly, in terms of Article 249 a contingent incident which makes the performance of the contractual obligations burdensome and excessive, without making it

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<sup>328</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 894

<sup>329</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 273

<sup>330</sup> J Whelan, UAE Civil Code and Ministry of Justice Commentary (Sweet & Maxwell, 2010) Article 272

<sup>331</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 273(1)

<sup>332</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 273(2)

<sup>333</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 894

<sup>334</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 895

impossible, will result only in the reduction of the contractual obligation to a reasonable level. Thus, the consequences should be borne by both the obligor and the obligee.<sup>335</sup>

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<sup>335</sup> UAE Civil Transactions Code [Fed. Law 5 of 1985], Articles 249

## ***CHAPTER FOUR***

### ***Summary, Conclusion and Recommendations***

This study looked at the obligations of the construction contracting parties and examined and evaluated the rigidity of the available remedies for breach under both the FIDIC Red and Yellow Books, and the Muqāwala contracts under UAE Civil Law. This chapter provides logical conclusions reached with reference to the overall main aim and key objectives of the research, and from the findings outlined in the previous chapters. It also summarises the major findings and elicits the need for further research and studies with respect to legal and contractual remedies.

## 5.1. Summary, Conclusion and Recommendations

In civil law jurisdictions specific performance<sup>336</sup> is the primary relief for breach of contract. It can be granted by a court to entitle a contract party to enforce any rights and the fulfilment of any obligations under the contract. It developed in civil law jurisdictions from the principle of equity, where a contractual party has the option to sue the breaching party for specific performance compelling him to perform his obligations under a contract. However, where the conditions for the granting of an order for specific performance for breach of contract are satisfied, upon the application of the obligor, the court may either grant an order for specific performance, or in exceptional circumstances allow for a monetary award in the form of damages. In addition, there is another application of this exceptional rule where the obligor fails to perform its contractual obligation; then the obligee, by leave of the court, may perform this obligation by himself or may hire a third party to perform it at the expense of the obligor. However, if the court orders specific performance and the obligor fails or refuses to obey this order of court then he is liable to damages until he complies. He may also be held in contempt of court, which allows for fines and/or incarceration; sometimes for an indefinite period until the defaulter obliges with the court order.

The application of the principle of the legal remedy of specific performance has been adopted in the FIDIC contracts, but with different features. The FIDIC Red and Yellow Books give the power to the Engineer to issue a “notice to correct”<sup>337</sup> under Sub-Clause 15.1, for the Contractor's failure to carry out an obligation under the Contract. The Engineer by this notice requires the Contractor to make good the failure or any defective work and to remedy it within a specified reasonable time. During the course of the execution of the Works, prior to completion, the Engineer has also the power by giving notice, under Sub-Clause 7.5, to reject any defective item of the Contractor's work and he has power as well under Sub-Clause 7.6 to instruct the Contractor to repair such defective works. During the Defects Notification period, under Clause 11 the Engineer may give notice to the Contractor of defects or damage on or before expiry of this period and he may instruct the Contractor to complete any outstanding works.<sup>338</sup> The Self-help Remedy<sup>339</sup> under Sub-Clause 11.4 is another form of application of the specific performance remedy

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<sup>336</sup> 4.1. Remedy of Specific Performance

<sup>337</sup> 3.3.1. Employer's “Notification to comply” remedy

<sup>338</sup> 3.3.14. Employer's Defects liability remedy

<sup>339</sup> 3.3.2. Employer's Self-help remedy

under the contract where the employer may choose to carry out the remedial work by other contractors, or by himself, at the Contractor's cost.

Only when specific performance becomes unnecessary or impossible, the breaching party can be relieved of the duty of specific performance. In such instance the other party can of course then claim compensation for any damages he might suffer due to the first party's breach.<sup>340</sup> Defining criteria for acceptable damage compensation for any legal order for breach of a contractual liability are the following: a fault committed by a contracting party, proven damages suffered as a direct result of such breach, and causation between the fault and the damages. The general rule in the UAE Civil Code for the assessment of damages for compensation is that if the direct damages are not pre-agreed under the contract, or is not assessed in a provision of the law, then the court has to assess it to reflect "an amount equivalent to the damage in fact suffered at the time of the occurrence thereof". The UAE Civil Code recognizes in addition to direct damages also the concepts of consequential damages, loss of profits, loss of opportunity, interests and moral damages. However, the consequential damages are considered under tortious liability and excluded from the application of contractual liability. The Civil Code accepts the damages involved in the loss of profits, as well as loss of opportunity in cases where it is certain in the future. Consequently the Civil Code, in order to ensure fairness between involved parties, does not accept speculative damages.

Under the FIDIC, the Contractor's entitlement to an additional payment of costs incurred, and profit in some cases, has different grounds. It is an automatic entitlement without the need to give any notice for a claim for additional payment as is the case with, for instance, entitlement to financing charges under Sub-Clause 14.8.<sup>341</sup> On the other hand, the majority of the Contractor's compensation entitlements are subject to the claims formalities and procedures under the contract.<sup>342</sup> Furthermore, the Employer is entitled expressly under a number of clauses for compensation from the Contractor, e.g.: for any additional costs incurred by him as a result of specific instances where the Contractor is being held responsible for certain utilities available on Site or for using any Employer's

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<sup>340</sup> 4.2. Remedy of Damages' Compensation

<sup>341</sup> 3.2.1. Contractor's Entitlement to financing charges

<sup>342</sup> 3.2.4. Contractor's Entitlement to extension of time and its associated costs & 3.2.5. Contractor's Entitlement to compensation for damages

Equipment.<sup>343</sup> In all cases, however, the Engineer has the required power under the Red and Yellow Books to assess such entitlements in accordance with Sub-Clause 3.5 for both the Employer's Claims and the Contractor's Claims.<sup>344</sup>

Liquidated damages are a pre-agreed amount of money specified in the relevant contract document to compensate the employer for damages suffered because of a breach of contract by the Contractor.<sup>345</sup> It is considered a limitation on the contractor's liability for a specific type of damages, i.e. delay damages. Generally, the delay damages provisions are a useful instrument in construction contracts and serve many principal purposes: they incentivize a contractor to comply with the provisions of the contract and complete on time; they allow the employer to claim damages without having to prove the quantity of the actual losses sustained from a specific breach; they make damage claims foreseeable by predefining the amount to be paid for any delay; and they prevent disputes in regard to compensation owed. Liquidated damages, called delay damages in the FIDIC contracts, are the sole remedy for failure of the Contractor to complete his obligations by the Time for Completion in accordance with Sub-Clause 8.2 and with "due expedition and without delay" that underlies such failure pursuant to his obligation under Sub-Clause 8.1. Liquidated damages also feature in the Yellow Book as non-performance damages under Sub-Clause 12.4 due to the Contractor's "Failure to Pass Tests after Completion".

While the UAE Civil Code allows contracting parties to pre-agree on the amount of compensation for specific loss, the UAE Civil Code contains a mandatory provision under sub-clause 390(2) which affords the courts the authority, upon the application of either of the parties, to align such pre-agreed compensation with the actual loss sustained by the party who is invoking the liquidated damage clause.<sup>346</sup>

The defects liability remedy is a remedy available to the Employer under a contract for a specified period of time stated in the Particular Conditions in which the contractor is obliged to remedy all defects or damages.<sup>347</sup> The period of application of this remedy starts

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<sup>343</sup> 3.3.13. Employer's Financial damages' compensation

<sup>344</sup> 3.1.1. Claims

<sup>345</sup> 4.3. Liquidated Damages

<sup>346</sup> 3.3.10. Employer's Liquidated damages remedy

<sup>347</sup> 3.3.14. Employer's Defects liability remedy



with the issue of the Taking-Over Certificate and ends automatically after the expiry of the agreed duration.

Thereafter the decennial liability remedy begins to apply.<sup>348</sup> The Decennial liability is a strict liability and legal remedy which cannot be excluded or limited. It is imposed by the UAE law for construction activities and binds the contractor and Engineer in the event of total or partial collapse of “buildings or other fixed installations” and any defects endangering the stability or safety of their structure. The warranty period of this remedy is ten years from when the works are taken over on the issue of the Defects Liability Certificate.

While in the Muqāwala contract, the remedy of price adjustment<sup>349</sup> could be only by way of a claim for variations under the contract, it may take many forms under the FIDIC Red and Yellow Books.<sup>350</sup> The contract price under FIDIC can be varied in addition to other variations made. It can be adjusted for changes in unit cost only under the Red book, when a rate is rendered inappropriate; or for the influence of changes in the laws of the country on the cost; or to reflect the escalating costs of labour, equipment, materials, or any other items due to inflation; or to cover any additional allowances which are specified in the Contract as provisional sums or as dayworks.

The statutory right to Set Off in accordance with UAE Civil Code arises from three different bases.<sup>351</sup> A mandatory set off entitlement acquired by operation of law without the need for a court order; an agreement where the contracting parties are indebted to each other and there is a connection between these two obligations; then also a party could withhold its related performance until the other party carries out its connected obligation. The Set off may be voluntary where the contracting parties reach an agreement before or after the concerned liabilities arise to give a party the right to make a set off against the other. Judicial set off occurs by virtue of an order of the court when the necessary conditions are satisfied. It requires a substantial independent court application or summons with claim and counterclaim.

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<sup>348</sup> 4.4. Specific remedy available against the contractor ‘Decennial Liability’

<sup>349</sup> 4.5. Contract Price Adjustment for Variations Remedy

<sup>350</sup> 3.1. Contract Price Adjustment for Variations Remedy

<sup>351</sup> 4.6. Set off Remedies

Under FIDIC, set off can take one of two forms. Firstly, the Engineer under Sub-Clause 14.6 has a right to withhold certain amounts on a temporary basis from Interim Payment Certificates for the cost of remedial work until defects have been rectified.<sup>352</sup> The Engineer also has an entitlement under Sub-Clause 14.9 to withhold from the certification the release of Retention Money for the estimated cost of any rectification of defects or damage to be executed under Clause 11.<sup>353</sup> Secondly the Employer's right to set off or deduct any amounts from Payment Certificates against payments otherwise due to the Contractor is subject to the Engineer's determination in accordance with Sub-Clause 3.5 and after the Employer submission of his claim under Sub-Clause 2.5.<sup>354</sup> This remedy would be applicable in the case of a reduction in the Contract Price following a failure of the work to pass Tests on Completion or a failure of the contractor to carry out any remedial work.<sup>355</sup> Furthermore, the Employer is entitled to make a claim against the Performance Security for the full amount or for some amounts of the Performance Security in certain circumstances.<sup>356</sup>

UAE law provides an Engineer or Contractor with the qualified legal right to "legal Self-help Remedies" to secure payments that are due for works under Muqāwala construction contracts.<sup>357</sup> If payment is not forthcoming, procedures exist to compel a court supervised auction in order to satisfy the claim once the claim is reduced to judgment. Self-help Remedies could take the form of filing priority liens against buildings or other works that are part of the project itself in favour of the contractor or the Engineer. It also may include the remedy of physical attachment that offers a contractor or an Engineer tangible security over properties and further, the priority claim remedy in favour of a Contractor or an Employer, which is a statutory encumbrance "entitling a beneficiary to a priority claim against any value added to the proceeds ultimately realized from a sale of the concerned property". The Employer can apply the Self-help Remedy under the FIDIC Red and Yellow Books by carrying out the work which the Contractor fails to remedy or by engaging other contractors to carry out this work at the Contractor's cost.<sup>358</sup>

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<sup>352</sup> 3.3.7. Employer's Withholding of amounts remedy

<sup>353</sup> 3.3.8. Employer's Retention money remedy

<sup>354</sup> 3.3.9. Employer's Set-off remedy

<sup>355</sup> 3.3.3. Employer's Contract price reduction remedy

<sup>356</sup> 3.3.6. Employer's Performance security

<sup>357</sup> 4.7. Self-help Remedies

<sup>358</sup> 3.3.2. Employer's Self-help remedy

Withholding Performance is a temporary and conditional remedy recognized in the UAE civil law as a self-help legal remedy but it does not expressly provide for a right of suspension except where the contract provides an express power thereto.<sup>359</sup>

This power is granted to the Engineer by Sub-Clause 8.8, upon the request of the Employer, to instruct the Contractor to suspend progress of all or part of the Works.<sup>360</sup> The Contractor is also entitled under Sub-Clause 16.1, upon giving the required notice, to suspend work or to reduce the rate of work in limited circumstances in the event of certain specific failures on the part of the Engineer or the Employer.<sup>361</sup> Suspension usually precedes either termination or provision of performance security or consequential mutual performance.

Under the general provisions of the UAE Civil Code any binding contract may be terminated in one of four ways: upon the completion of the works agreed; upon the parties' mutual consent on the termination mechanism under the contract; by order of court upon request of an aggrieved party; or by operation of law, e.g. under the Muqāwala provisions a party has a right to request terminating a contract "if any cause arises preventing the performance of the contract or completion of the performance thereof".<sup>362</sup>

Under contractual termination provisions of the FIDIC Red and Yellow books, termination of the Contract is available to the Employer for a wider range of events than for the Contractor. While the Contractor is entitled to terminate the contract only for cause in some defined circumstances that relate to failures by the Employer or the Engineer, the Employer has additional grounds for termination other than termination.<sup>363</sup> A cause associated with failure of the Contractor in specific circumstances, the FIDIC rules grant the Employer the right to terminate the Contract for his convenience<sup>364</sup> and also the right to the Greenfield 'walk-away' Remedy<sup>365</sup>. However, both the Employer and the contractor

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<sup>359</sup> 4.8. Remedy of Suspension / Withholding Performance

<sup>360</sup> 3.3.5. Employer's Suspension of progress of the works remedy

<sup>361</sup> 3.2.2. Contractor's Entitlement to suspend work or to reduce the rate of work

<sup>362</sup> 4.9. Remedy of Termination; Restitution

<sup>363</sup> 3.2.3. Contractor's Entitlement to termination for cause

<sup>364</sup> 3.3.12. Employer's Termination for convenience

<sup>365</sup> 3.3.4. Employer's Walk-away remedy

are entitled to Optional termination and to release from performance under the Law in the event of Force Majeure.<sup>366</sup>

In the case of Force Majeure, there are a variety of provisions in the laws of the UAE that, if imported by reference to the law governing the Contract, could render the Parties discharged from their contractual obligations.<sup>367</sup> Pursuant to the UAE Civil Code, a party to a construction contract is entitled to terminate the contract “if any cause arises preventing the performance of the contract or completion of the performance thereof”. As a result of that, the obligation expires upon performance becoming impossible. The corresponding obligation then will cease to exist on expiration because the purpose thereof would not exist anymore, and accordingly the contract will be cancelled automatically by operation of law without the requirement for an order of the court or for mutual consent or notice being given, unless it is disputed by either party. The aggrieved party is also entitled to “relief from grave loss arising in exceptional circumstances of a public nature”.

If the parties anticipated Force Majeure and made contractual provision therefor, the contractual arrangements normally would receive preference over the statutory provisions. If no provision was made, a party’s rights will be exercised in a way similar to the situation where a party would seek to cancel the agreement.<sup>368</sup>

Parties should be more aware of the effect of the remedies available under both FIDIC and the Civil Law applicable in the UAE, which may affect the terms agreed to in the contract e.g. the fact that the amount prefixed in the contract as compensation for delay by the contractor, should not be relied upon, as it can be amended up or down by the court.

By contrast, knowledge of the remedies available, may prevent parties requiring assistance from the court or arbitrators too quickly – before all remedies are exhausted.

Awareness of the remedies and the different problematic scenarios they provide for, should further help in parties’ analyses of their risks before entering into an agreement.

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<sup>366</sup> 3.4.3. Optional termination in the case of prolonged force majeure

<sup>367</sup> 4.10. Force Majeure Remedies

<sup>368</sup> 3.4. Remedies in Case of Force Majeure

Further study should consider an analogous comparison between the UAE Civil Law and other FIDIC Books (Conditions of Contract for EPC/Turnkey Projects “the Silver Book”; Conditions of Contract for Design, Build and Operate Projects “the Gold Book”).

Apart from that, a similar comparison should further be made between the position in Civil Law, and Common Law.

Remedies under the Muqāwala contract should be further developed and enhanced to be brought in line with the remedies under the FIDIC Books as the FIDIC precedents are the most well known and most ubiquitous in the region, used by government and private sectors alike.

**Table of comparative remedies for breach of a contract under the UAE Civil Code and the FIDIC rule;**

Remedies at law	Remedies available to the Parties under the FIDIC forms
4.1. Remedy of Specific Performance	3.3.1. Employer's "Notification to comply" remedy 3.3.14. Employer's Defects liability remedy 3.3.2. Employer's Self-help remedy
4.2. Remedy of Damages' Compensation	3.2.1. Contractor's Entitlement to financing charges 3.2.4. Contractor's Entitlement to extension of time and its associated costs 3.2.5. Contractor's Entitlement to compensation for damages 3.3.13. Employer's Financial damages' compensation
4.3. Liquidated Damages	3.3.10. Employer's Liquidated damages remedy
4.4. Specific remedy available against the contractor 'Decennial Liability'	3.3.14. Employer's Defects liability remedy
4.5. Contract Price Adjustment for Variations Remedy	3.1. Contract Price Adjustment for Variations Remedy
4.6. Set off Remedies	3.3.7. Employer's Withholding of amounts remedy 3.3.8. Employer's Retention money remedy 3.3.9. Employer's Set-off remedy 3.3.3. Employer's Contract price reduction remedy 3.3.6. Employer's Performance security
4.7. Self-help Remedies	3.3.2. Employer's Self-help remedy
4.8. Remedy of Suspension / Withholding Performance	3.2.2. Contractor's Entitlement to suspend work or to reduce the rate of work 3.3.5. Employer's Suspension of progress of the works remedy
4.9. Remedy of Termination; Restitution	3.2.3. Contractor's Entitlement to termination for cause 3.3.11. Employer's Termination for cause remedy 3.3.12. Employer's Termination for convenience 3.3.4. Employer's Walk-away remedy 3.4.3. Optional termination in the case of prolonged force majeure
4.10. Force Majeure Remedies	3.4. Remedies in Case of Force Majeure
<b>Notes:</b> 1. Remedies do not align perfectly as they serve the same function in a different manner. 2. Numbers in this table refer to the numbering of subtitles in this document.	

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