

**Delay in Completion and the Employer's Entitlement
for Liquidated Damages under UAE Law and FIDIC
Standard Form Contracts**

حقوق صاحب العمل نتيجة تأخير إنجاز المشاريع الإنشائية بحسب قانون
دولة الامارات العربية المتحدة وبحسب عقود فيديك

by

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**Dissertation submitted in fulfilment
of the requirements for the degree of
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Abstract

The construction field is a complicated system that interfaces all stages of engineering, procurement and assembly. Furthermore, all of these activities interface the legal system (eg regulations, liabilities and entitlements) as bound by contract under the law applicable to the project. In this context, the subject of this master's dissertation is the phenomenon of delayed project completion, the concise meaning of 'completion' alongside the completion types to verify the existence of delays and liquidated damage entitlements for the employer based on the construction project delay under UAE law and International Federation of Consulting Engineers (FIDIC) contracts.

Construction contracts usually contain clauses and conditions; such as articles for the compensation method to be applied in the case of disputes based on losses or damages caused by a party's failure to meet the other party's obligations. The amount of this loss is considered a lump sum and is agreed upon by all parties during the contracting stage, which is ideally prior to the work in question. The aim of such provisions is to financially protect injured parties from damages and losses. This dissertation examines legislation covering the damage liquidation policies of construction contracts and the mechanisms of applying said compensation of liquidated damages under UAE law and the FIDIC. This research also addresses the burden of proof on the injured party in raising a claim for the liquidated damages and the fairness of the applicable UAE laws, especially concerning covering losses not explicitly mentioned in the contract. The author of this work has examined the details of UAE courts and their power to adjust liquidated damages in such cases. To this end, the author provides recommendations to contracting parties to be followed to avoid such losses and to ensure smooth and perhaps unchallenged claims while obtaining appropriate compensation.

المخلص:

تعتمد المشاريع الانشائية على عمليات مختلفة مترابطة بمراحل مختلفة خلال الانشاء والتي تتعلق بالتصميم والتوريد والانشاء والإنجاز حيث تتداخل هذه العمليات بشكل كبير فيما بينها مع عدة جهات من النواحي القانونية يتم تنظيمها من خلال توزيع المهام والمسؤوليات والاستحقاقات بحسب العقد المبرم بين الاطراف وبموجب قانون الدولة السائد.

تتناقش الرسالة موضوع تأخر المشاريع الإنشائية في الإنجاز والاستحقاقات والتعويضات المتعلقة بالأضرار المقطوعة المستحقة لمالك المشروع نتيجة التأخير في أنجاز المشروع من قبل المقاول بحسب قانون دولة الامارات العربية المتحدة وبحسب عقود فيديك النموذجية.

تشمل عقود البناء بشكل عام بنود واحكام واشترطات تعاقدية منها ما يتعلق بموضوع التعويضات المقطوعة التي يتم تبنيها نتيجة الاضرار التي تلحق بأحد الأطراف نتيجة الإخلال في تنفيذ بنود العقد من أحد المتعاقدين، حيث يتم الاتفاق على مبلغ مقطوع بحيث يتم الاتفاق عليه خلال مرحلة التعاقد وبشكل عام قبل حدوث اي نزاعات بين الاطراف بهدف تعويض الطرف المتضرر نتيجة خسارته المالية الناتجة عن عدم استيفاء البنود التعاقدية كالإخلال في تنفيذ المشروع بالوقت المحدد والتأخير في إنجاز أعمال المشروع وتسليمه للمالك. تشمل هذه الدراسة الية اعتماد وتبني بنود التعويضات المقطوعة لمالك المشروع نتيجة تأخر مقاول المشروع في تنفيذ أعمال المشروع حسب قانون دولة الامارات العربية المتحدة وبحسب عقود فيديك، مع دراسة تطبيق هذه البنود التعاقدية بالمقارنة مع حجم الخسار الفعلي للمالك ودراسة آلية إثبات دليل الفروقات بين الاضرار المقطوعة بحسب العقد وقيمة الاضرار الفعلية ومدى إمكانية تحقيق العدالة لكافة الاطراف في تطبيق أحكام العقد وتطبيق قيمة التعويضات المقطوعة بحسب قانون دولة الامارات العربية المتحدة وبحسب عقود فيديك للعقود التي لم يتم تحديد قيمة التعويضات. كما يستعرض البحث مدى عدالة قانون دولة الامارات العربية المتحدة وصلاحيه المحكمة في تطبيق وتعديل قيمة التعويضات بشكل متناسب مع قيمة الاضرار الفعلية الناتجة عن التأخير رغم عدم مطالبة المالك بإثبات قيمة التعويضات عند المطالبة بالتعويضات التعاقدية حيث تم فرض تقديم دليل قيمة الاضرار الفعلية على الطرف المتضرر، كما استعراض البحث الية اعتماد قيمة التعويضات حسب قانون فيديك بتطبيق القيمة المذكورة بالعقد بغض النظر عن قيمة الاضرار الفعلية، كما يستعرض البحث نتيجة دراسة ما ذكر أعلاه مع تقديم التوصيات اللازم اتباعها لضمان تنفيذ التعويضات المقطوعة للمالك وتفادي الطعن من قبل المقاول ولضمان تنفيذ عملية دفع التعويضات لمالك المشروع وبشكل قانوني.

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Terms, Definitions and Abbreviations:

- ❖ Administrative contract: the contract between a government or government agency and a contractor for a public or government project
- ❖ Employer: the owner of construction project
- ❖ Engineer: the employer's representative who designed and/or supervised the project (Consultant)
- ❖ FIDIC: form of contract and acronym for the International Federation of Consulting Engineers
- ❖ ICE forms: form of contract and acronym for the Institute of Civil Engineers
- ❖ JCT : form of contract and acronym for Joint Contracts Tribunal
- ❖ Liquidated damages: a lump sum of money to be paid to recover predicted damages suffered due to a breach of the contract, aiming to return the injured party to the original situation before damages occurred, as compensation
- ❖ UAE: The United Arab Emirates.

1.0 Chapter One: Introduction

1.1 Background of the study

A construction contract governs the rights and obligations of the parties involved, usually the owner of the project (employer) and the contractor, and is binding on both parties. The contract usually includes clauses for payment, the time required for project completion, communication protocols and other support items. It maintains provisions that encourage the parties to perform their obligations and to avoid harm to the other party or to the public. Notably, failure to complete a project on time causes damages, and failure to compensate for those damages may accumulate interest and penalties. Failure to provide notice of delays may also lead to loss of entitlements. Clauses of this nature related to the liquidated damages are designed to force the party breaching the contract and causing harm to the other to compensate for the damages caused. UAE law governs liquidated damages under specific conditions, and the *FIDIC* standard contract has rules and conditions in place for the application of liquidated damages. The value of damages should be estimated and agreed to contractually prior to the work in question.

The dissertation analyses contractual liquidated damage clauses and conditions that commonly conflict with or are limited by the applicable law of the contract where the project is undertaken. For example, according to the *FIDIC Red Book 1999 edition*, in cases where contract breaches conflict with the maintenance of public order (eg government contracts), the contracted estimated damages may fall far short of the real losses.

This dissertation presents examples of cases in which the delay damages were caused by common acts by both parties. The UAE law and the *FIDIC Red Book 1999* deal with these kinds of delays on a case-by-case basis.

This dissertation also discusses the delay damages of government projects in which the damages cannot be adequately estimated, and in which the parties may agree to baseline damages to keep the project on track to completion.

Liquidated damages are usually provided as judgements after the dispute by either arbitration or litigation to enforce liability and award compensation. With cases of litigation or arbitration, the losing party maintains the right to request an appeal against the judgement or tribunal award even though in the later, appeal is only permitted on limited grounds. For such cases, there are principles in the law and in the standard *FIDIC* contract that should be followed to reach a fair judgement, as illustrated in this dissertation.

1.2 Objectives of the study

The objective of this dissertation is to analyse UAE law and the *FIDIC* standard contract principles related to the employer's entitlement for liquidated damages caused by delays in the completion of the works by the contractor. This work also reviews the perspectives of the UAE law and applicable principles with respect to liquidated damages to ensure fairness in cases of delay, while verifying the employer's rights and determining the enforcement of such rights. This work further reviews and analyses the *FIDIC* standard form contract to ensure validity and enforceability of the employer's entitlement. Ultimately, the author provides practical recommendations with guidelines for both employers and contractors to protect their mutual rights in the face of liquidated damages under UAE law and the *FIDIC* standard form contract.

1.3 Significance of the study:

The objective of the research is to help the practical employers and legal practical in the construction field in clarifying the principles related to the liquidated damages under UAE law and *FIDIC* standard form contract. The results of this study will help those practitioners to get

a success claim for liquidated damages due to the loss suffered and the principles of covering the damages suffered and will help them in avoiding challenging the award of the claim under the applicable UAE law and *FIDIC* standard form contract.

1.4 Research Questions

Owing to the huge interface between construction contracts, a full project lifecycle and the legal liability of each party during the contracting and construction stages, the rights and obligations of each party is governed by the contract and the applicable law of the contract. Because the respective legal terms may have vastly different meanings, each party may understand the terms differently, which often results in misunderstanding and sometimes in disputes between the parties. The author seeks to answer the following questions related to compensating for delays in project completion and related liquidated damages under UAE law and *FIDIC* standards:

1. How does *FIDIC* standard form contract address delays and liquidated damages in complex projects? Especially after the delay is caused by joint contractor and employer actions, and how is the entitlement for liquidated damages determined?
2. According to UAE law and *FIDIC* standards, how is it determined that a project is completed or delayed to an extent that requires compensation?
3. According to UAE law, when will an employer be entitled to the liquidated damages caused by delays in project completion; When is the judgment enforceable; What circumstance shall be avoided to ensure the award of compensation is met?
4. What are the valid conditions in the *FIDIC* standard form contract that could lead to conflict with UAE law regarding the matter of employer entitlements for liquidated damages?
5. Is UAE law regarding the awarding of liquidated damages fair in special cases wherein the employer's loss is more than the contractually agreed liquidated

damages; Will the court enforce the baseline contractual agreement, or will they allow for equalization of real damages?

6. Under what principle can a contractor challenge the award of liquidated damages according to UAE law?

1.5 Research method

The author of this dissertation adopted doctrinal research methodology in which law provisions, court and arbitral jurisprudence and academic commentaries are studied and analysed to generate recommendations and conclusions that support an employer's entitlement for liquidated damage caused by delays in construction project completion according to UAE law and the *FIDIC* standard form contract. In the literature review, the author examines the liquidated damage provisions under UAE law and *FIDIC*, investigate the enforceability of liquidated damages in the UAE courts and provide an illustrative perspective and strategic guidance for employers and contractors. The aim of this dissertation is to provide a means of further protecting the rights of employers and to ensure the enforceability of liquidated damages.

1.6 Structure of the study

The dissertation is divided into five main chapters and a conclusion. Chapter 1 introduces the background, objectives, and methodology of the study regarding liquidated damages caused by delays in construction projects based on UAE law and *FIDIC* standard form contract. Chapter 2 provides key definitions and doctrinal interpretations of 'completion' and 'delay' of construction projects and discusses the types of delays that usually lead to damages. Chapter 3 examines the liability statutes and regulations regarding liquidated damages in general and more deeply covers UAE and *FIDIC* interpretations. The main issues faced by employers when filing claims for compensation are examined, focusing on limitations and underestimations of

damages. In Chapter 4, the author explains the possible contractor defence under UAE law and *FIDIC* standards, which may lead to reductions or elimination of the liquidated damages and the difference in the UAE law comparing with the *FIDIC* standard contract while enforce the contractual amount of the liquidated damages in disputes. Finally, chapter 5 showing the conclusion of the study.

2.0 Chapter Two: Delays in Completion of Construction Projects

2.1 Introduction

The most important part of a construction project is the time allotted for completion and temporal planning.¹ The wording of the contract should be specific regarding on-time completion and what constitutes a delay. Delays have many causes that may be related to acts committed by employers, contractors, consultants or other parties. The source of the delay and its reason will either lead to schedule extensions, damages, or both. Notably, construction delays create investment risk, loss of cash flow or losses goodwill.² Contract participants usually agree on the criteria for identifying and handling delays, such as forcing the contractor to increase manpower or equipment or to add other resources.

The time for completion of a project is defined by the '*FIDICI 1999 Red Book*' Sub-clause 1.1.3.3. Project starting time and time of completion occur based upon the sending and receipt of notices. The completion date is to be defined by the employer within 7 days of the letter of intent. The starting date usually occurs after 42 days of receiving the letter of intent, at which time "the contract shall start with the commencement starting date without delay" according to Sub-clause 8.2. If the contractor fails to complete the works within the approved time, they will be liable for the delay damages according to Sub-clause 8.7.³

When the contract starts, the contractor must submit a work plan that contains a detailed schedule. This shall be submitted to the engineer within 28 days of receiving the notice of commencement of the project, according Sub-clause 8.3.⁴ Delays in construction result in several types of damages to the employer, such as:

¹ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 280.

² *ibid* 280.

³ *ibid* 303.

⁴ *ibid* 304.

- Delays in investment or delays in public benefit
- Increased contract price and cost of supervision
- Employer cash flow shortages
- Loss of employer reputation⁵

Construction contracts usually require project completion within a fixed time frame; failure is considered a breach, resulting in liquidated damages. However, if the contractor fails to complete the project due to the employer's actions (eg failure to handover the site or failure to provide instruction), there may be no entitlement for liquidated damages. This is tantamount to an extension of time, especially if it affects the critical path of the project as certified by a specialist.⁶

2.2 Completion date of a project in the construction contract

A construction project usually has a date or period included in the contract as a provision. Project completion uses three terms related to the contractor's obligations and shall be known to the party to avoid misunderstanding:

- Completion
- Practical completion
- Substantial completion

In a building construction contract, completion of work refers to 'practical completion', which in civil engineering terms usually refers to 'substantial completion'. Hence, the features of completion in a construction contract can be illustrated as follows:

- Employer's right to re-use the site of the contract

⁵ ibid 63.

⁶ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 074.

- The expiry date for the employer's entitlement for delay damages
- The defect liability period (usually 1 year unless otherwise agreed)
- Shifting the responsibility and risks of the site from the contractor to the employer

Early completion will normally protect the contractor from delay damages while providing the employer's assets early.⁷

2.2.1 Completion of the project

Fulfilment of the contractor's obligations under the contract provides the legal definition of contract completion, which is substantial to the construction project. However, if there is any ambiguity in the completion requirements of the contract, it may encourage the employer to refuse the payment if there is any minor defect. Hence, the defect or breach of contract must go to the root of the matter.⁸

2.2.2 Practical completion

The principle of practical completion usually requires an affirmation of fitness for purpose and a handover agreement that allows the employer to start using the new asset according to the Institute of Civil Engineers (ICE), notwithstanding any defect or items unfit to be taken for use by the employer considering its practical completion.⁹ In the case of *Emson Eastern Ltd v EME Developments Ltd*. [1991]¹⁰ the court stated that completion shall be a practical completion because the building in question, once built, cannot be restored to the original drawings and specifications. Other two cases *H W Neville (Sunblest) Ltd v. William Press and Sons Ltd*

⁷ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 191.

⁸ *ibid* 192.

⁹ *ibid* 193.

¹⁰ *Emson Eastern Ltd v EME Developments Ltd*. [1991]

(1981), and the case between *Westminster Corporation v. J Jarvis and Sons Ltd* (1970) Practical completion has rules that can be verified to determine completion:

- The construction work shall be completed, and all the works shall be done.
- There is discretion to certify the completion entitlement for the contractor's administrator with acceptance of minor defects.
- The completion certificate shall not be issued in case of patent defects.

The completion certificate will be the start date of the defect liability. However, if there are patent defects, the employer shall not accept the request of the completion certificate to ensure complicity of the defect within the construction stage under the risk of liquidated damages. If a completion certificate is issued, it will stop the period of the liquidated damages.¹¹

2.2.3 Substantial completion

Substantial completion deals with outstanding work where the engineer determines completion per the construction contract using ICE forms (Institute of Civil Engineers forms). Using Joint Contracts Tribunal- JCT forms (Joint Contracts Tribunal forms), the architect investigates the request for the completion certificate.¹²

FIDIC contracts require the engineer to certify and confirm the completion according to Sub-clause 10.2 of the *FIDIC Red Book 1999*, which shall be determined fairly for certificate issuance.¹³

¹¹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 193.

¹² *ibid* 194.

¹³ Jesse Way, 'Completion, Taking Over And The Taking Over Certificate In Construction: Why It's Important' (*Fenwick Elliott*, 2020) <<https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/taking-over-completion-fidic>> accessed 30 July 2021.

2.3 Types of delays in construction projects

Completion delays fall under many criteria based on the reasons, excusable and non-excusable. They can also be judged as critical or non-critical and could be divided in terms of responsibility due to contractor act or employer act or concurrent or both or due to force majeure.

2.3.1 Excusable and non-excusable delays

Excusable delays are those caused by conditions beyond the contractor's or employer's controls, including unforeseen site limitations, new government rules, labour strikes, fire incidents or natural disasters. Non-excusable delays, on the other hand, are attributable to acts of the contractor or employer, such as faulty workmanship, delays in labour, lack of equipment and delays in site handover. Non-excusable delays are normally compensable and result in schedule extensions.¹⁴

2.3.2 Critical and non-critical delays

Critical delays affect activities that impact the critical path and may lead to delays in the delivery date. Otherwise, the delays are considered to be noncritical.¹⁵

2.3.3 Compensable and non-compensable delays

Compensable delays usually cover the non-excusable delays that lead to compensation either to the employer as a cost or to the contractor as an extension of time or both. The compensation will be paid against the damages caused to the injured party.

¹⁴ Michael Lepage, 'Types Of Schedule Delays In Construction Projects' (2020) <<https://www.planacademy.com/types-of-schedule-delays-in-construction/>> accessed 24 September 2021.

¹⁵ *ibid.*

2.3.4 Concurrent delays

A delay caused by the contractor's failure in addition to an independent delay created by the employer in which both parties have liability is concurrent.¹⁶ The best definition of concurrent delay comes from the Scottish judge in the 2010 case of *City Inn v Shepherd* as “a period of project overrun which is caused by two or more effective causes of delay which are of equal causative potency”.¹⁷ Overlapping of the causes of a delay can create confusion and disputes, and it will be difficult to clearly identify the liable parties. As noted, if the delay is caused by the employer, the contractor will have a right for extension, and if the contractor is responsible, the employer will have the right to obtain liquidated damages.¹⁸

2.4 Delay in progress

A delay in progress is noted during the construction stage when comparing the real progress against the planned schedule, but is not considered a breached, lacking provisions of liquidated damages for specific milestones. Otherwise, the liquidated damages will be applicable to that portion only.¹⁹

2.5 Delay and time-at-large

In some circumstances, the contractor may not complete the work on time due to reasons out of contractor's control with no clear mechanism for the extension of time. In other words, if the delay held due to the employer faults and there is no permission to extend the completion date as per the contract. The completion date will remain open, and the contractor will be liable to complete the work within a reasonable time. This is a common-law principle based on a

¹⁶ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 247.

¹⁷ Dean O'Leary (*Al Tamimi and Co.*, 2014) <<https://www.tamimi.com/law-update-articles/dealing-with-concurrency-in-construction-delay-claims/>> accessed 23 September 2021.

¹⁸ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 248.

¹⁹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 190.

determination of reasonable time as agreed between the parties and depending on the circumstances of the project and the professional level of the parties. UAE law does not adopt the time-at-large principle and keeps with the high court decision that if there is delay, the work should be completed within a reasonable time.²⁰

2.6 Identification of delays and analyses of construction law

Delays in a construction project are usually caused by the contractor, employer, or in some cases due to force majeure. Practically, common delays are caused by both the employer and the contractor; this requires analysis to verify the responsible party.

Delay analysis techniques follow principles and methods for calculation to identify the precise delay and those responsible. This is performed by the contract administrator, who reviews the circumstances that led to the delay and verifies the extension of time entitlement for the contractor, including accounting for schedule slippage and new delivery dates. The initiation of delay analysis is subject to contract provision, and the main purpose of delay analysis is to prove or rebut claims related to extensions or accelerations. Occasionally, analysis will be required to choose the appropriate analysis method because different methods may provide differing results. Hence, no one party should unilaterally choose the analysis methods. These issues are usually handled during the programming analysis phase.²¹

Construction law categorises delays based on the critical path, which entails the series of activities connected from start-to-finish of the project for which any failure will directly affect the success or failure of the project. The total sum of the duration of the critical path determines the project duration, and any delays in a critical activity will delay the overall project. A more

²⁰ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 130.

²¹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 315.

complicated project may have more than one critical path, and the contract administrator usually keeps close tabs on those. Float is often added in those cases as a time duration between a critical activity end date and the start of the next one to provide additional time to complete the activities and keep the critical path under control. The amount of time between the early start and early finish of a task without a delay and the early start or early finish of the next activities is called a 'free float'.²²

2.7 Ownership of floats

Construction project planning, especially large projects, involves many activities related to each party, and each activity contains allowance time for start and completion requirements. When delays occur, it is difficult to determine the party entitled to use the float allowances. The Society for Construction and Law has published a protocol for determining the entitled party depending on circumstances and the effect on the critical path.²³

When the conditions for float allowances are not spelled out in the contract, it makes it complex to analyse, particularly when the critical-path method is in play, which interlinks activities with critical time durations. Time extension methods are not governed by the *FIDIC Red Book 1999*; hence, it is a contractual matter that depends on the contract's overall conditions. *FIDIC Red Book 1999* Sub-clause 8.2, 8.3, 8.4 and 10.1 do not mention extension entitlements, but it does provide guidance to evaluate and resolve float ownership. According to Sub-clause 8.2, the contractor may complete the project within the given time frame, meaning that the contractor has freedom in creating free float schedule slack based on the critical path.²⁴

²² *ibid* 316.

²³ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 285.

²⁴ *ibid* 286.

From Sub-clause 8.3, it is stipulated that the contractor shall submit a planning programme and be approved by the employer. After approval, the plan will be binding for the contractor. When evaluating the plan, the engineer may request the contractor revise the planning estimates as such:

“Plan the stages of the works by showing the “order” of the contractor’s activities during the design, construction and commissioning phases accompanied by a supporting report on the contractor’s construction methods and reasonable estimate of resources... must be updated whenever actual progress falls beyond the current programme as may be notified by the engineer”²⁵

Any delay in execution of the works shall be quantified, and the engineer may request the contractor submit the cost and the time effect of any unexpected future delay, which may entitle the contractor’s extension according to Sub-clause 20.1. The contractor must prove the causation of the employer’s risk event or damage (Sub-clause 10.1) to obtain the entitlement (Sub-clause 8).²⁶

2.8 Delay analysis methodology for construction contracts

Project consist of a sequences activates connected to each other as a network with relation from start the activate to finish, summary of the duration of these activities determines the project duration and the network of these activates called a critical path if any delay in the activate leads to delay the project. Critical path analysis (CPA) is a process using to determine the delay

²⁵ FIDIC Red Book 1999, Sub-clause 8.3

²⁶ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018 288.

in the project before during construction stage through tracing the sequences of activities, it is a technique used to determine the delay and it is called critical path method (CPM)

There are common methods for analysing delays in the construction contract:

- Comparing the planning with the as-built at the site: The principle in this method depends on comparing the actual progress with the planned progress. The plan of the project shall be clear and fitted to the project, but sometimes the activities may be delayed without affecting the critical path. This is especially useful for simple projects.
- Impact of activities upon the plan: A comparative method is used to estimate the impact of delays on each activity or activity group, particularly upon the critical path. Such analyses may be conducted without software. This is particularly useful for small projects.
- Collapsed as built: A computerized method is employed to determine the achieved progress to derive a new completion date, from which the delays are accounted for as-built, regardless of the reasons.
- Time impact analysis: The approved project plan is updated frequently while comparing the achieved progress with the plan to determine delays of each activity and the impact upon the critical path. This method is normally applied to more complicated projects comprising many activities that require frequent reviews and updates.²⁷

2.9 Delay in completion per UAE law

Time, progress and completion are the most important obligations in a construction contract.

To apply the terms and conditions of a contract, it should be connected with a fixed period or

²⁷ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 320.

limited time. A contract without a time frame will be considered invalid, according to the UAE Civil Code. Such agreements would inevitably create disputes for the parties involved. Hence, UAE courts consider the completion date of any contractual matter, which therefore provides the opportunity to fix a new time according to the commercial custom of the state according to the circumstances. The court may extend the contractual obligations' appropriate justification. The Abu Dhabi Court of Cassation in 2017 held that an apartment construction project could not be completed and handed over to the employer because of the absence of a completion date in the contract.²⁸

Project delays caused by employer acts or through concurrent delays will not entitle the contractor to extend the time of completion unless there is an agreement in the contract according to Articles 247 and 249 of the UAE Civil Code, which is related to the effects of a contract between parties according to Article 414 of the UAE Civil Code related to the right of retention and Article 472 of the UAE Civil Code related to the impossibility of performance.²⁹

2.10 Delay in completion per *FIDIC Red Book 1999*

To verify a delay in completion, it is crucial to identify what completion means and the time for completion in the project per Sub-clause 8.2 of the *FIDIC Red Book 1999*. Otherwise, the contractor may be liable for damages. Furthermore, minor defects must also be accounted for in the contract.³⁰ Contractual obligations related to project completion are addressed in Sub-clause 4.1 of the *FIDIC Red Book 1999*. Tests for completion are addressed in Clause 9 in the *FIDIC Red Book 1999*. The contractor shall provide notice to the employer or engineer

²⁸ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 123.

²⁹ Dean O'Leary (*Al Tamimi and Co.*, 2014) <<https://www.tamimi.com/law-update-articles/dealing-with-concurrency-in-construction-delay-claims/>> accessed 23 September 2021.

³⁰ Ellis Baker and others, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Routledge Taylor and Francis Group 2009) 241.

regarding completion of the works 21 days prior to the expected date and will begin testing within 14 days unless otherwise agreed upon by the parties. If the test passes in a limited time, the completion certificate will be issued to the contractor by the engineer or the employer. The delay damages to be payable according to the amount of the delay which is the period from the time for completion and the date of the taking-over certificate according to the Sub-clause 10.1.³¹

³¹ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 285.

3.0 Chapter Three: Liability for Liquidated Damages and Applicable Law

3.1 Definition of liquidated damages

Liquidated damages from a construction project may take the form of a lump sum of money or other types of compensation. The main difference between liquidated damages and penalties related to performance is a clause that pertains to the security of the performance. Liquidated damages account for damages that occur due to a breach of contract.³² The liquidated damages provision in a contract is essential, because the consequences of certain breaches have a certainty of loss, and this provision is designed to account for that.³³ Provisions and amounts are agreed upon in advance and apply in good faith as legally covered in civil and common law. The delay damages to be payable according to the amount of the delay which is the period from the time for completion and the date of the taking-over certificate.³⁴

3.2 Categories of liquidated damages:

Liquidated damages are categorised based on how the contract is breached:

1. Time-related damages: The most common stipulation in a construction contract usually refers to delays in completion leading to a loss to the employer. Also known as ‘delay damages’ or ‘delay penalties.’ This type of damage requires:
 - Specification of the part(s) of the project that shall be complete in a specific time.
 - The time of completing the project or a specific partial area or zone.
 - The meaning of completion.

³² Bernado Cremades, 'Liquidated Damages, Penalty Clauses and Punitive Damages Within International Contracts' (2002) 1 Int Bus Law J 329.

³³ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 042.

³⁴ Horizons & Co. Law Firm, 'Liquidated Damages In Construction Contracts/Disputes' (18 August 2020) <<https://www.lexology.com/library/detail.aspx?g=c3311a94-4957-4c28-97fa-10309dca2981>>

- The rule(s) governing the time extension.
- Specification of the actual time unit (eg per day or week).

The above shall be stated clearly to ensure a successful claim against delay damages.³⁵

2. Liquidated damages due to quality: Quality-control failures; the quality of the contract through the agreed identification of a clear key performance plan is usually used in the maintenance contract to ensure progress and quality with fixed key performance parameters in an objective manner.³⁶
3. Liquidated damages due to performance: Common to utility projects, such as power plants. It is verified by comparing the output to the standard specification in the contract.³⁷

3.3 Liability for liquidated damages compared with penalties

It is acceptable to make a provision for a specific amount to be called by one party for a contract breach by the other party, but it is not acceptable to pay an amount to the other party for an event that is not a breach.³⁸ The doctrine of liquidated damages clause shall not apply to a party's right to seek damages for non-breach events. For example, in the development project agreement, there is usually a clause for a lease that gives, for example, a rent-free period to the tenant. The clause may read 'if the proposed project is not completed by the specific target date, then the rent commencement date shall be postponed by 2–3 days for every day's delay from the proposed completion date to the actual completion date'. This conflicts with the main

³⁵ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 63.

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Hamish Lal, 'The Doctrine of Penalties and the "Absurd Paradox" - Does It Really Matter in 2003?' [2003] Soc. Const Law UK, 505.

principle of liquidated damages because the default or delay is not a result of a contract breach; furthermore, the developer can argue that there is no pre-estimation of losses for the tenant.³⁹

To explain in more detail, the difference between liquidated damages and penalties, note that a penalty is connected to an event based on the party's liability connected with the event. If the parties agree to liquidated damages based on the event having occurred, and the event does not occur, a paradox is then presented in which it would grant relief to a man who breaks his contract but would penalise the man who keeps it.

In this case, when the dispute appears, the judge will investigate the case from two points of view. In the first, the parties have an agreement based on freedom of contract. In the second, liquidated damages depend on an event having occurred and are based on breaching agreement principles. The court will use equity against the liquidate damages without effect to the clauses in the contract. The court considers any interference with the compensation mentioned in the contract against the freedom principle; otherwise, if the court uses the equity principle, it will create an unfair award.⁴⁰

3.4 Necessity of the uncertainty of liquidated damages

The motivation for adopting liquidated damages in construction contracts is to avoid litigation, which may still be required to determine the actual damages caused by breaches.⁴¹ In small building projects, delays can cause rent losses for the owners, wherein the main effort will be to identify and apportion the damages, notwithstanding any damages related to the loss of goodwill and profits.⁴² In the case of *Gradco Inc v St Clair County Bd of Educ (1985)*,⁴³ the delay in a construction project reached 192 days, and the liquidated damages in the contract

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ David Raves, 'Liquidated Damages in the Construction Industry' [1992] *Constr Law* 6.

⁴² *ibid.*

⁴³ *Gradco Inc v St. Clair County Bd of Educ* (1985) 477 S.2d 365.

specified USD 83 for each day over the limit, which matched the expenses of planned supervision after the completion date. The court held the actual damages as valid because the damages were also intangible regarding students missing school. Hence, the court included other damages to maintain the uncertainty for the intangible damages.⁴⁴

3.5 Methods of recovering liquidated damages

To avoid suing the contractor for extraneous expenses and to avoid delays in recovery, the employer usually deducts the expected liquidated damages from the contractor's sums due. The contract usually provides a provision for allowing this.⁴⁵ According to *FIDIC Red Book 1999* under Sub-clause 2.5, once the employer is entitled for any payment from the contractor, the employer shall give a notice specifying the basis of the claim to the contractor as soon as the employer became aware of his entitlement. Under Sub-clause 3.5 of *FIDIC Red Book 1999*, the engineer shall determine the right of entitlement and the amount that may be deducted from the payment or from the contract price. The employer under the same Sub-clause can make a deduction from the payment certificate or shall only be entitled to set off from any amount owing to the contractor, otherwise, the employer can claim against the contractor and subject to compliance with the requirements of the claim stipulated in Sub-clause 2.5 under *FIDIC Red Book 1999*.⁴⁶

⁴⁴ David Raves, 'Liquidated Damages in the Construction Industry' [1992] *Constr Law* 6.

⁴⁵ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 200.

⁴⁶ Hogan Lovells, 'Employers' Claims Under FIDIC Contracts' [2016] Hogan Lovells Publications <https://www.hoganlovells.com/en/publications/employers-claims-under-fidic-contracts> accessed 10 November 2021.

3.5.1 Suing the contractor

A claim can be raised by the employer to recover the liquidated damages, especially if the payment is less than the given damages. Sometimes the employer will raise a claim to fix the right of the deduction and to ensure enforcement if the contractor raises a counterclaim.⁴⁷

3.5.2 Deduction from retentions

The purpose of the retention amount in the construction contract is to guarantee contractor compliance with the contracted obligations. In the case of *Rayack Construction Ltd v Lampeter Meat Co Lt (1978)*, the court held that ‘the employer’s interest in retention is as a trustee and not as a beneficiary, and that trust fund is implied’.⁴⁸

3.6 When do liquidated damages become payable?

According to the liquidated damages clause, there are no general rules for the time of the payment because:

1. A contract has many terms and conditions related to delays, extensions and other conditions that are related to delay damages.
2. The liquidated damages may have conditions based on notice from the employer to the contractor.
3. Parties may understand terms of completion and lateness differently.

The employer, according to the contract, will be entitled to the liquidated damages during the contract time without waiting for completion and may start deduction for the delay during the construction stage.⁴⁹

⁴⁷ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 201.

⁴⁸ *ibid.*

⁴⁹ *ibid* 188.

3.6.1 Deduction of a single sum

The deduction of the liquidated damages is an uncertainty issue in the contract. The parties may agree for the sum of a calculation or a rate to be determined. The amount of the liquidated damages under Sub-clause 2.5 of *FIDIC 1999 Red Book* may be deduct from the contract price or payment certificates. The word ‘may’ confusing the employer, there is a right for the employer to withhold further payment as a recover of losses from the contractor under Sub-clause 15.4 (b) and (c) of *FIDIC 1999 Red Book* without any previous notification, in the same time, the employer’s obligation to pay is suspended.⁵⁰ In *Cleveland Bridge v Multiples (2006)*, the court held that the amount of the defective performance of which will be deduct from the interim payment cannot exceed the due payment. An employer usually applies this deduction once the liquidated damages becomes due and after work is completed after finalizing extensions. Deductions beforehand will create further conflict if there is any negligence expressed towards the contractor, especially if changes are made, such as with architects or concurrent delays.⁵¹ This deduction is applied to compensate the contractor against delay damages, and it is applied following the real completion.

3.6.2 Deduction before completion

The liquidated damages applied after meeting the conditions of entitlement where the breach is one of the tripartite tests. Hence, most employers begin deducting payments after the fixed completion date. However, there is a possibility that deductions can take place in advance of the completion date. The employer may argue for this deduction in case the liquidated damages are more than the retention amount. The employer in this case exercises his rights by deducting amounts from interim payments if there is a clear delay with no vision for completing the work

⁵⁰ Ellis Baker and others, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Informa Law by Routledge Taylor and Francis Group 2009) 453.

⁵¹ *ibid* 189.

on time or recovering damages through the deduction amount in addition to the retention amount. The contractor may argue for damages even if the causation may be shared with other parties, such as the employer or the engineer. Regarding the contractor arguing for an amount that could not be anticipated, the employer can seek damages related to the repudiation damages. This situation was held in the case of *Lubenham Fidelities & Investments Co Ltd v South Pembrokeshire District Council (1986)*, where the employer deducted delay damages before the completion date. The contractor then raised a case to the court and clearly showed that the errors in design were the fault of the engineer, who changed the design. Hence, the engineer was designated for damages without considering any negligence of the designer. If the causation of the delay was held due to an error in the design, the engineer and employer could apply their own rules for deducting damages from the contractor without sharing the delay with each other.⁵²

3.7 Liquidated damages under UAE law

Contracts govern the rights and obligations of the parties based on the freedom agreement principle in which the obligations shall be performed per the conditions and clauses of the contract. If one of the obligated parties refuses to comply, the court has the power to order that party to meet the obligation, according to Article 380 of the Civil Code of UAE law. A contract breach may lead to an entitlement for liquidated damages according to the clauses and according to the law.⁵³ UAE law recognizes the principle of liquidated damages in Article 390, wherein the pre-determined compensation is written in the contract:

⁵² *ibid* 190.

⁵³ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 202.

“(1) The contracting parties may fix in advance the damages either in the contract or in a subsequent agreement, subject to the provisions of the law.

(2) The judge may in all cases, upon the request of either of the parties, vary such agreement to make the damages equal to the loss, and any agreement to the contrary shall be void”.⁵⁴

This law governs the compensations between parties and provides the right to the injured party to raise a claim without proving the loss. The fixed amount for the expected damages provides an incentive to follow the agreement. The court may adjust the amount of compensation by equalizing the damages with the actual loss regardless of the agreement between parties. This restriction is based on Islamic law, which is embedded into the Constitution of the UAE.⁵⁵

In Islamic law, liquidated damages are awarded to the injured party once the damage is quantified and substantiated and shall be equalized.⁵⁶ The principle in Islamic law is Shariah, which adopts the freedom of parties in a contract to add conditions within the Islamic rules, including liquidated damages. Islamic Law defines damages as harm that occurs to a person or his property or the financial losses or benefits of assets. Shariah has legal standing in the UAE, whose Constitution references the Prophet Mohammad, who said, ‘Muslims are bound by their stipulation’. Even in an Islamic contract, the stipulated liquidated damages are bound in cases of breach. There are two principles that apply: interest (Riba) and excessive uncertainty (Gharar). In disputes, fairness and equity shall be the principles that govern the relationship of the parties together. Parties shall meet their obligations in good faith, with honesty and dignity.

⁵⁴ UAE Civil Transaction Code Federal Law No. 5 of 1985, Article 390.

⁵⁵ Constitution of the UAE (Const 1971) Article 7.

⁵⁶ Nicolas Bremer, ‘Liquidated Damages under the Law of the United Arab Emirates and its Interpretation by UAE Courts’ (Oct-2015) https://www.alexander-partner.com/fileadmin/downloads/alexander-partner_gair-mitteilungen_2015_nb.pdf
Accessed 16 August 2021

Furthermore, fraud and cheating are prohibited in all transactions according to the Quranic verse (16:90), “Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression”.⁵⁷

Liquidated damages in Islamic law will not be enforceable in the following cases:

- A party acts in bad faith during the conduct of the contractor’s obligations.
- If the employer has been dishonest or if the charges are extremely more than the loss.
- If the employer terminates the contract and does not allow the contractor to complete his obligations. Thus, the employer did not treat the contractor with dignity.
- The liquidated damages mentioned in the contract are forbidden by Islamic law; the Quran considers the interest (Riba) as a principle for unjust enrichment.⁵⁸

UAE law takes the main source of its legislation from Sharia, pursuant to Article 7 of the Constitution of the UAE.⁵⁹ Adjustments to contractual liquidated damages is a legal principle in the UAE, and the burden of proof for the decreasing or increasing said damages is placed on the challenging party. That is, the contractor must prove that the amount of damages or the loss is fair and honest. Similarly, the employer faces the same burden.⁶⁰

Liquidated damages have many sources and types. Delay damages are the most common in construction projects. *FIDIC* defers to the common law with regards to giving the court the right to decide upon damages equitably and reasonably.⁶¹ UAE law categorises the following types of damages:

⁵⁷ Quran (16:90).

⁵⁸ Rayan Assaad and Mohamed-Asem Abdul-Malak, 'Legal Perspective on Treatment of Delay Liquidated Damages and Penalty Clauses by Different Jurisdictions: Comparative Analysis' (2020) 1 Western Sydney University, 8.

⁵⁹ The Constitution of the UAE 1971, Article 7.

⁶⁰ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018).

⁶¹ *Ibid.*

- Moral damages
- Direct damages.
- Loss of profit
- Loss of opportunity.
- Consequential damages.⁶²

Contracts that lack milestone dates will still incur liquidated damages in cases of fraud, negligence, or recklessness, and it may also lead to the employer's right to terminate the contract. If there are no provisions in the contract for liquidated damages, local law will not impose a penalty caused by delays in completion held by the contractor.⁶³

3.8 Claim for liquidated damages in UAE law

The courts always apply the rules based on the contracted terms to resolve any inconsistencies after verifying the intentions of the parties, and the decision should always be based on the governing laws.⁶⁴ The Civil Transaction Law—Federal Law No. 05 of 1985, which was amended by Federal Law No. 1 of 1987 of the UAE Civil Code, governs the construction contracts with arts 872–896.⁶⁵ Liquidated damages are covered under Article 390 of the UAE Civil Code as part of Federal Law No. 05 of 1985, which gives the court the right to decrease or increase the compensation award to cover the actual harm suffered.⁶⁶ When a UAE judge deals with liquidated damages, he may adopt the clause of the contract without proof of loss and harm

⁶² Hassan Elhais, 'United Arab Emirates: What Contractual Damages Are Awarded Under UAE Law?' (2021) <<https://www.mondaq.com/personal-injury/1091336/what-contractual-damages-are-awarded-under-uae-law>> accessed 18 August 2021.

⁶³ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 138.

⁶⁴ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 156.

⁶⁵ Celine Kanakri, Andrew Massey and Baker Al Mulla, 'Legal Issues Relating To Construction Contracts In The United Arab Emirates' (*practicallaw*, 2017) <[https://uk.practicallaw.thomsonreuters.com/0-619-1946?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-619-1946?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 17 July 2021.

⁶⁶ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 69.

caused, or he may modify the clause or consider it unenforceable per the circumstances listed below:

1. Court adopts the contractual clause regarding the liquidated damages: the court will analyse the clause to verify its applicability to justice to avoid leveraging the clause to punish the other party based on Article 265 of the UAE Civil Code, which reads, ‘When the wording of the contract is clear, it cannot be deviated’.⁶⁷ If there are any discrepancies or doubts, the court will construe the contract in favour of the debtor per Article 266 of the UAE Civil Code: “In case of doubt, the construction shall be in favour of the debtor”.⁶⁸ The court will likely adopt the clause and will enforce the payment as a compensation, according to the Articles 258 and 259 of UAE Civil Code. the purposes and meanings are decisive not the wording.⁶⁹
2. Modifying the liquidated damages clause. UAE law allows the judge to modify the amount of the contractual liquidate damages, under Article 390(2) of the UAE Civil Code: “The Judge may in all cases, upon request of either of the parties, vary such agreement so as to make the liquidated damages equal to the loss, and any agreement to the contrary shall be void”.⁷⁰ The courts in the UAE have the discretion to evaluate the harm and damages and to modify the contracted damages clause. The court has stated that the compensation should be balanced according to the actual losses suffered and to ensure that it is fair, matching with Sharia principles.⁷¹ In order to reduce the liquidated damages, the injured party must prove to the court that the compensation mentioned in

⁶⁷ Article 390(2). UAE federal law no 5 of 1985 of Civil Transaction Law.

⁶⁸ *ibid.*

⁶⁹ Horizons & Co. Law Firm, ‘Liquidated Damages In Construction Contracts/Disputes’ (*Horizons & Co. Law Firm*, 18 August 2020) <https://www.lexology.com/library/detail.aspx?g=c3311a94-4957-4c28-97fa-10309dca2981>

⁷⁰ UAE federal law no 5 of 1985 of Civil Transaction Law. Article 390(2).

⁷¹ Faisal Attia, ‘Liquidated Damages – The Bigger Picture’ (*Al Tamimi & Company*, 2012) <https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/> accessed 10 July 2021.

the contract is actually more than the actual damages, as stated by the Court of Cassation in Case No. 138/94,⁷² where there was a dispute between the main contractor and the subcontractor.⁷³ With contractual liquidated damages, the employer will be protected against foreseeable damages, the contractor will not pay to compensate against the loss of profits of the employer as claimed for the liquidated damages.⁷⁴ If the court considers that there is no breach of contract, then the claim will not be awarded at all to the employer.

3. Unenforceable Liquidated Damages Clauses: In some circumstances, the court may consider the liquidate damages clause unenforceable:
 - a. If the employer fails to prove the breach in contract, the court will consider that there is no liability regarding the contractor based on the claim raised from the employer.
 - b. Following the termination of the contract, contractual obligations cease, even with regards to liquidated damages clauses.⁷⁵

The UAE and Dubai are considered global commercial centres dealing with international investors. Thus, to encourage foreign investors, UAE law routinely accepts the foreign laws in disputes between parties according to Article 19(1) of the Civil Code, apart from contract-related language regarding the right in rem and the contract with the government or semi-government agencies.⁷⁶

⁷² The Court of Cassation in Case No. 138/94

⁷³ Justin Ede, 'Liquidated Damages' (*Al Tamimi & Company*, 2013) <https://www.tamimi.com/law-update-articles/liquidated-damages/> accessed 10 July 2021.

⁷⁴ Horizons & Co. Law Firm, 'Liquidated Damages In Construction Contracts/Disputes' (18 August 2020) <https://www.lexology.com/library/detail.aspx?g=c3311a94-4957-4c28-97fa-10309dca2981> accessed 11 July 2021.

⁷⁵ *ibid.*

⁷⁶ Celine Kanakri and Andrew Massey, 'Legal Issues Relating To Construction Contracts In The United Arab Emirates' (2017) 1 practical law <[https://content.next.westlaw.com/0-619-1946?_lrTS=2020111153357934&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/0-619-1946?_lrTS=2020111153357934&transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 30 August 2021.

3.8.1 Liquidated damages and the subcontractor

With most construction projects, the main contractor appoints subcontractors under contractual agreements, unless the agreement between the employer and the main contractor prohibits subcontracting according to Article 890 of the UAE Civil Code.⁷⁷ Contractor responsibility is fixed by the contract agreement with the employer, as is the liability for both.⁷⁸ The main contractor in this case must be mindful of all cascading agreements under his liability and must ensure that there are no conflicting judgments and liabilities from different tribunals amongst the parties. This can be addressed by modifying clauses regarding back-to-back contracts and clearly specifying that any disputes between the main contractor and the subcontractor shall fall under the subcontract agreement and shall not affect the employer.⁷⁹ Similarly, if there is a dispute between the subcontractor and the main contractor, the subcontractor can ask the employer to release payment to the subcontractor directly after obtaining approval from the main contractor with respect to the back-to-back agreement. However, this alignment creates a weak point for liability, owing to damages held at the site for the delay; the contractor may lose control of their managing rights over the activities of the subcontractor, in which case, the main contractor will still be held liable to the employer against any damages and delays at the site.⁸⁰ If the agreement between the employer and the contractor is terminated unilaterally, the subcontractor has full right to claim for the actual losses in addition to losses of profit.⁸¹

⁷⁷ *ibid.*

⁷⁸ Kochi Umarvasilyera, 'Delay Penalty In Construction Contract' [2017] STA Firm <<https://www.stalawfirm.com/en/blogs/view/delay-penalty-in-construction-contracts.html>> accessed 16 August 2021.

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ Celine Kanakri and Andrew Massey, 'Legal Issues Relating To Construction Contracts In The United Arab Emirates' (2017) 1 practical law <[https://content.next.westlaw.com/0-619-1946?_lrTS=2020111153357934&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/0-619-1946?_lrTS=2020111153357934&transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 30 August 2021.

The Dubai Court of Cassation⁸² held in a dispute between an employer and the contractor arising from a delay in a project. The parties agreed to the construction of a tower within a fixed time of 12 months. Then, the employer raised a claim for a delay in the project's completion caused by the contractor's failure to rectify defects within the liability period. The contractor counterclaimed to obtain the balance of payments. However, the court rejected the counterclaim because the contractor was liable for the breach of the subcontractor, and according to experts, the delay was held, owing to delays from the employer and consultants for material selection. In this case, the subcontractor was appointed by the employer; hence, the court held that the delay was a liability of the employer who appointed the subcontractor.⁸³

3.8.2 Claim for loss-of-profit according to UAE law

Losses suffered due to damages are provided to the injured party against the other counter party; the loss includes damages and the loss of profit suffered at the time of breaching the contract. The court in the UAE⁸⁴ gives right to the employer to regain the loss of profit and future earnings. The Dubai Court of Cassation held in the case of an engineer regarding the termination of a contract against the employer, refusing an instant award and compensating the engineer for financial damages and loss of profit where the loss of chance was certain to be considered being payable.⁸⁵

Based on the same principle, the amount of the liquidated damages that is not mentioned in the contract is estimated by the judge or court and covers the damages fairly. In the Federal Supreme Court⁸⁶ regarding the case of a subcontract being terminated, the subcontractor had a

⁸² Dubai Cassation No. 213/2008 dated 19 January 2009.

⁸³ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 129.

⁸⁴ Supreme Court No. 82/21 dated 13 May 2001.

⁸⁵ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 208.

⁸⁶ Federal Supreme Court No. 435 and 516/21 dated 12 June 2001.

letter of intent that did not mention liquidated damages, but he received actual damages and loss of profit.⁸⁷

In UAE law, the injured party is entitled to the loss of profit, which is the future loss including loss of earnings and loss of profit. Domestic courts in UAE entertain claims for loss chance to earn a profit in addition to future earnings, the court considers the chance is uncertain but the loss of the chance is certain. The amount to be paid is left to the discretion of the judge which is included any loss suffered or profit lost.

Dubai Court of Cassation awarded loss of profit to the plaintiff due to breaching of the contract by the defendant and stated:

“In circumstances where neither the law nor the contract provides for the amount of compensation to be paid in respect of contractual liability. The same is left to the discretion of the judge provided that any compensation granted by the judge should include any loss suffered or profit lost provided also that these losses are a natural result of the lack of discharge or delay in the discharge of the obligations”⁸⁸.

3.8.3 Liquidated damages and the good faith principle

Good faith principles are adopted as contract provisions, and UAE law covers this in Article 246 of the Civil Code. The contract shall be conducted in good faith, and this principle did not offset claims of liquidated damages. Good faith refers to the behaviour of the contracting parties during operations while striving to meet obligations to prevent unconscionable advantages or disadvantages.⁸⁹

⁸⁷ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 208.

⁸⁸ Dubai Cassation No. 352/1994 dated 22 April 1995.

⁸⁹ Alex Brightman and Donal Scott, 'SUSPENSION AND TERMINATION UNDER THE CIVIL LAW, P Article 2' (*K&L Gates construction law*, 2021) <<https://www.klconstructionlawblog.com/tag/uae-civil-code/>> accessed 3 September 2021.

3.8.4 Liquidated damages for a public project

The UAE public sector usually uses bespoke contracts parallel to *FIDIC* standards. Abu Dhabi Executive Decision No. 01 of 2007 determined a form of contract for the building and operation (BO) of and design-build (DB) of structures. According to Dubai Law No. 06 of 1997 regarding Contracts of Governmental Departments in Dubai, probates can impose *FIDIC* conditions without requiring approval from His Highness the Rule of Dubai.⁹⁰

Contractual liquidated damages in public contracts are incalculable. Hence, the government will have to recite the public damages to request compensation wherein the public is a third party. The government will inevitably be responsible for compensating the public due to damages held by the contractor; later, the contractor must pay for those damages.⁹¹

Owing to project complexity, which exacerbates the uncertainty of damages, determining damages is complex. Hence, damages stipulated in the contract will face thresholds of evaluation for the court to verify against losses.⁹²

Specific laws govern liquidated damages of public and government projects because they are 'non-revenue' projects. The contracts are 'administrative contracts', which are established between a government entity and a contractor. The Federal Supreme Court allows delayed damages and penalties for administrative contracts depending on the evidence and without checking the losses and causes of a breached contract. These conditions apply to the main contractor dealing with the administrative contract. The subcontractor is liable to the main

⁹⁰ Thanos Karvelis and Niel Coertse, 'United Arab Emirates: Legal Guide To Construction & Engineering Law' [2017] Mondaq <<https://www.mondaq.com/construction-planning/615376/legal-guide-to-construction-engineering-law39>> accessed 2 August 2021.

⁹¹ David Raves, 'Liquidated Damages In The Construction Industry' (1992) 1 The Construction Lawyer 6.

⁹² *ibid.*

contractor for any damages under commercial and civil transactions; the administrative contract does not apply between the main contractor and the subcontractor.⁹³

Applying delays in damages with UAE public projects is governed by UAE Ministerial Decision No. 20 of 2000 Article 86, which specifies related actions as:⁹⁴

- Appoint another contractor to complete the works in case the original does not start on time or fails to achieve progress, and the employer is certain that the contract will not be met during the agreed time frame. This also applies if the contractor suspends work for more than 15 days or abandons the project. The contractor will be liable in these cases for all damages and penalty in addition to 10% for the incomplete work to cover administration costs during finalization. Furthermore, the employer can appoint another contractor to complete the work without objection from the first contractor, even if the original contractor's equipment's is used to complete the works and without liability for damages to the contractor's equipment.⁹⁵ A fine of 1% will be applied for the first week of the delay, 2% for the second, up until 5% according to UAE Ministerial Decision No. 20 of 2000, article 91. The contractor can petition for an extension to avoid delays within 15 days.⁹⁶
- The Dubai government governs delays under Dubai Law No 6 of 1997 article 36, allowing delay damages of a maximum 10% of the total project amount plus supervision fees.⁹⁷

⁹³ Michael Grose, *Construction Law in The United Arab of Emirates and The Gulf* (1st edn, John Wiley & Sons, Ltd 2016) 143.

⁹⁴ UAE Ministerial Decision No. (20) of (2000) Issuing the Federal Government Contracts Regulation.

⁹⁵ *ibid* 86.

⁹⁶ *ibid* 91.

⁹⁷ Dubai Law No 6/1997, Article 63.

3.9 Liquidated damages per the *FIDIC* standard form.

In the UAE and Middle East, construction contracts are usually derived from *FIDIC* standards, which cover the liquidated damages and provide top-level calculations and procedures to allow recovery of losses. With *FIDIC* contracts, if the delay is held due to the employer's breach of contract, the contractor will be entitled to claim an extension of time. If the contractor fails to deliver on time, then the employer is entitled to obtain compensation without proving the precise total loss, owing to a breach according to Sub-clause 2.5 of *FIDIC Red Book 1999*.⁹⁸ Contractual liquidated damages allow the employer to be compensated against the damages in case of contract breaches by the contractor. In Sub-clause 8.7 of the *FIDIC Red Book 1999* and Sub-clause 8.5 and Sub-clause 9.6 in the *Gold Book*, the remedy of liquidated damages caused by delays are clarified. Further, as stated in Sub-clause 8.2 of *FIDIC Red Book 1999*, "if the contractor fails to comply with time for completion, the contractor shall be subject to the employer's claims and will pay delay damages to the employer for this default. These delay damages shall be the sum stated in the Appendix to tender, which shall be paid for every day elapsing between the relevant time for completion and the date stated in the taking-over certificate".⁹⁹ However, it adds, "the total amount due under this sub-clause shall not exceed the maximum amount of delay damages stated in the Appendix to tender". These delay damages shall be the only damages due. As stated in Sub-clause 15.2 (Termination by Employer), "the damages shall not relieve the contractor from his obligation to complete the works or from any duties, obligations or responsibilities which may have to complete under the same contract".¹⁰⁰

⁹⁸ Axel Jaeger and Götz-Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 288.

⁹⁹ Ellis Baker and others, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Informa Law by Routledge Taylor and Francis Group 2009) 409.

¹⁰⁰ *ibid.*

All *FIDIC* books adopt delay damages for construction contracts, and the damages shall not relieve the contractor from the other obligations within the contract.¹⁰¹ The employer will be entitled to either payment or extension of the defect liability if it meets two criteria:

1. Claims for the foreseeable event mentioned in the contract.
2. Other claims related to the contract.¹⁰²

Both *FIDIC Red* and *Yellow Books* govern the employer's entitlements for liquidated damages under Sub-clause 8.7 and are clear about the amount according to Sub-clause (14.15). The rate of delay damages shall be mentioned in the tender appendix,¹⁰³ per the daily rate in the *FIDIC Silver Book*. For all *FIDIC* books, there is a maximum limit for a delay, and the parties must consider the extent of the delay as a sum of the following items:

1. The cost anticipated by the employer due to extending the project.
2. The amount of the benefit to the employer once the project is completed or the commercial cost of borrowing from a local bank for the same project value.¹⁰⁴

The claim procedure is governed under Sub-clause 2.5 of *FIDIC Red Book 1999* and under Clause 20 in the *FIDIC Red Book 2017*:

"The Employer or the Engineer shall give notice and particulars to the contractor... The notice shall be given as soon as practicable after the Employer becomes aware of the event... A note relating to any extension of the defect's notification period shall be given before the expiry of such period".¹⁰⁵

¹⁰¹ *ibid* 411.

¹⁰² Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 369.

¹⁰³ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 162.

¹⁰⁴ *ibid*.

¹⁰⁵ *FIDIC Red Book 1999* Sub-clause 2.6

Notice shall be submitted to the contractor as soon as the employer becomes aware of his entitlement for the claim or of his entitlement to extend the defect liability. The notice shall be submitted to the contractor before the expiry date of the defect liability to extend the period. The engineer per Sub-clause 3.5 in *FIDIC Red Book 1999* shall try to reach an agreement between parties. If the parties do not agree, the engineer shall decide based on the contract clauses under Sub-clause 3.5 for:

1. Determining the entitlement to the employer to be paid by the contractor.
2. Determining the extension of the defect liability period according to Sub-clause 11.3 of *FIDIC Red Book 1999*; the determination shall be sent to both parties, and each party shall follow the determination unless the dispute is revised under Clause 20 of *FIDIC Red Book 1999* for claims, disputes and arbitration.¹⁰⁶

The amount entitled for the employer can be a deduction from the payment certificate by reducing the contract price, or it may be obtained through a claim based on the dispute against a breach of contract.¹⁰⁷

3.10 Importance of the employer's notice of a claim for liquidated damages per *FIDIC*

The employer's entitlement for a claim shall submit a notice for the claim as soon as he becomes aware pursuant to Sub-clause 2.5 of *FIDIC Red Book 1999*.¹⁰⁸ In a case decided in the UK, the Privy Council in *NH International (Caribbean) Limited v National Insurance Property Development Company Limited* ((2015) UKPC 37), the contract between the parties was based on *FIDIC* standards to construct a hospital. The National Insurance Property Development Company was the employer for the project, and NH International Limited was the contractor.

¹⁰⁶ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 369

¹⁰⁷ *ibid.*

¹⁰⁸ *FIDIC Red Book 1999* Sub-clause 2.5

The work started in 2003, and the contractual completion date was March 2005. The contractor suspended the work in September 2005; an arbitration was conducting in October 2005; and the contractor terminated the contract in November 2006. Out of five awards, two had been challenged. The first was the contractor's entitlement to terminate the contract because of financial payments from the employer. The second for the contractor was compensation for loss due to termination. The employer submitted a counterclaim owing to the absence of a notice from the employer, pursuant to Sub-clause 2.5 of *FIDIC Red Book 1999*. The employer failed to submit the notice,¹⁰⁹ and the arbitrator in November 2008 found for the employer's counterclaim because of the lack of clear wording to exclude the right of cross-claim. The Privy Council did not approve the counterclaim for the following reasons:

1. Conditions of Sub-clause 2.5 are applicable to any kind of claim.
2. The employer shall give notice for a claim as soon as he becomes aware and shall not wait until he received the contractor's claim before he start raising the counterclaim.¹¹⁰

The Privy Council considered the acceptance of the claim without noticing that it would conflict with the first two points in the same sub-clause regarding the methodology of determination and the function of the engineer.¹¹¹

Finally, the Privy Council failed to follow the procedure of the claim process of Sub-clause 2.5 because it is a mandatory provision for delay damages. The absence of notice prohibited the employer's entitlement for a claim due to delay damages.¹¹²

¹⁰⁹ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 369.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² *ibid.*

If the project is delayed because of contractor failure, the claim for a time extension may be rejected according to common law.¹¹³ According to Sub-clause 8.4, the contractor's request for extension shall be awarded based on completion per Sub-clause 10.1 for the original obligation. If there is a clear delay due to the contractor's failure to follow Sub-clause 8.2, the employer will be entitled to compensation for delay damages.

3.11 Establishment of liquidated damages

Enforcement of liquidated damages shall meet some requirements:

1. Liquidated damages due to a breach: There should be a clear breach of contract to obtain damages. The most common type is the failure of project completion according to the agreed specific time timeframe. If there are no liquidate damages in the contract for such eventualities, the contractor can benefit from a breach and liquidated damages will not be enforced; general damages will be the only remedy.¹¹⁴
2. Specific amount of the liquidated damages: The consequences of a breach shall be specified clearly in the contract, depending on the project, where more valuable projects will have higher-cost liquidated damages. The calculation also depends on the purpose and use of the finished project. The calculations must be agreed to in advance.¹¹⁵ To construct a liquidated damages clause in an agreement, the following are keys to consider:
 - Language: It is important to clarify the meanings within this clause to compensate rather than to penalize.
 - Specify the liquidated damages with the breach type to ensure utilization of the compensation for the specific breach.

¹¹³ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 164.

¹¹⁴ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 62.

¹¹⁵ *ibid.*

- Provide a formula for calculating the liquidated damages based on reasonable values to uphold the enforceability by the court in case of disputes.
- For the uncalculated damages, the court will enforce the liquidated damages because it is difficult to calculate them for breaches, because the parties shall have an option for choosing the situation for this purpose.¹¹⁶

3.12 Claims of liquidated damages per UAE law

Successful claim damages according to UAE law must meet three main requirements:

1. Loss for the aggrieved party
2. Wrongful act by the other party due to breaching the contract.
3. Causation for the damages

Liability will not be valid if any of the three bases listed above are not met. The aggrieved party must prove the loss based on the three requirements.¹¹⁷ The main concern is to ensure accurate and fair compensation to cover damages, according to UAE 153 of 2011.¹¹⁸

UAE court insists on ensuring the tripartite test of compensation award. The Dubai Court of Cassation in case No. 494/2003¹¹⁹ stated that the tripartite test must be validated to award compensation, considering the clause of the liquidated damages mentioned in the contract.¹²⁰

Once the employer claims liquated damages, he shall not request the court to terminate the contract. However, in the case of a terminated contract, the employer can claim liquidated

¹¹⁶ Paul Ferak and Christopher Mair, 'Liquidated Damages Provisions: Best Practices & Key Considerations' [2017] Greenberg Traurig, LLP.

¹¹⁷ Horizons & Co. Law Firm, 'Liquidated Damages In Construction Contracts/Disputes' (18 August 2020) <https://www.lexology.com/library/detail.aspx?g=c3311a94-4957-4c28-97fa-10309dca2981>

¹¹⁸ Court of Cassation Case No. 153 of 2011, issued 10 June 2012

¹¹⁹ The Dubai Court of Cassation 494/2003, the hearing of 24 April 2004

¹²⁰ Faisal Attia, 'Liquidated Damages – The Bigger Picture' (*Al Tamimi & Company*, 2012) <<https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/>> accessed 10 July 2021.

damages, and the court in this case will apply the general rule of damages, which includes actual damages and loss of profits.¹²¹

For contractual liquidated damages, the claim could be submitted without testing or evaluating the damages. In this case, the defendant must prove that there are no damages held to the plaintiff, according to UAE 264/2011¹²² and Dubai Court of Cassation 138/94.

3.13 Liquidated damage caused by a delay in completion

Delays usually create losses to the employer, creating the need for liquidated damages. However, the meaning of ‘completion’ may not be clear for both parties in some cases, or their terms may need to be modified. Analyses and interpretations of the meaning of the delay and completion according to UAE law and *FIDIC* standards are considered by the court or arbitrator during the disputes, including the responsibilities that are shared.

A claim for liquidated damages shall meet tripartite test a loss for the aggrieved party, and wrongful act from the other party due to breaching the contract, causation for damages. The creditor has not to prove the extent of damages; defendant party has to prove that the claimant did not suffer damages to avoid the liquidated damages.¹²³

3.14 Liquidated damages caused by delays due to force majeure

Sometimes a delay is neither the fault of the contractor nor the employer (eg an ‘Act of God’). This kind of delay usually gives the contractor the right to request a project extension due to force majeure, according to Sub-clause 19.1 in *FIDIC Red Book 1999*. UAE law Article 273 of the Civil Code supports this. *FIDIC* standards are not specific about the reasons for force

¹²¹ *ibid.*

¹²² Dubai Court of Cassation 138/94

¹²³ Horizons & Co. Law Firm, ‘Liquidated Damages In Construction Contracts/Disputes’ (18 August 2020) <<https://www.lexology.com/library/detail.aspx?g=c3311a94-4957-4c28-97fa-10309dca2981>> accessed 30 August 2021

majeure, but it is mentioned as natural catastrophic events, and if substantial work stops for 84 days, both parties may elect to terminate the contract. UAE Civil Code Article 273 grants this option as well, except that it is automatic. In case there is both force majeure and personal responsibility, Article 249 enables the court or a tribunal to adjust the portions and to amend the contract.¹²⁴

Both parties, up until the force majeure, must demonstrate positive intentions to complete the project per Sub-clause 8.4 in *FIDIC Red Book 1999*.¹²⁵

3.15 Employer entitlement in case of delay according to the test of the work per the *FIDIC* standard

After physically completing the work and after the contractor fails to arrange a test and commission for the completed works, the employer must provide notice to the contractor to comply with testing requirements within 21 days. Afterwards, if the contractor fails to complete the test per Sub-clause 9.2 of *FIDIC Red Book 1999*, the employer has the right to conduct the test directly or through a third party at the contractor's cost. The results shall be accepted by the contractor, who must comply with the notes of the inspection.¹²⁶

If the completion test fails, the engineer under Sub-clause 9.3 must request a repeated test; if it fails again, the works may be rejected by the engineer. If the employer requests the engineer to issue a completion certificate after a failed test, the employer has the right to reduce the contract price via a deduction in the amount of failure. The value should be agreed upon and deducted before issuing the completion certificate. If the failed test creates a significant issue and

¹²⁴ 'Delay Penalty in Construction Contracts' <<https://fotislaw.com/delay-penalty-in-construction-contracts/>> accessed 28 August 2021.

¹²⁵ Axel Jaeger and Götz- Hök, *FIDIC-A Guide for Practitioners* (1st edn, Springer 2010) 185.

¹²⁶ *FIDIC Red Book 1999* Sub-clause 9.1

prohibits the employer from using the rejected works, then the employer is entitled to remedy pursuant to Sub-clause 11.4.¹²⁷

After test failure and after the contractor is provided a reasonable time to complete the works and rectify the defect, if the contractor still does not comply, the employer shall give notice for a reasonable time for remedies. If the contractor fails yet again, the employer has full right to carry out the defect work directly or through another contractor at cost to the original contractor per Sub-clause 2.5. However, the engineer may agree to determine the deduction for the contract price at a reasonable amount for remedies, and will be agreed upon by both parties under Sub-clause 3.5.¹²⁸

¹²⁷ *ibid.*

¹²⁸ *ibid* Sub-clause 11.4

4.0 Chapter Four: Liquidated Damages Responsibility, Entitlement, Award and Challenges

4.1 Liquidated damages for concurrent delays

According to Sub-clause 4.21 of *FIDIC Red Book 1999*, project progress reports will be delivered by the contractor to compare the actual progress with the plan. Under UAE law, court or arbitral tribunal have the right to determine liability for concurrent delays based on Articles 290 and 291 of the UAE Civil Code. Shared liability will be applied according to Article 246(1), where contractor performance shall be consistent with good faith, which is allowed to achieve fairness. UAE Civil Code Article 106 is written to support the employer if the contractor intentionally infringes on the employer's right. Additionally, Article 318, regarding unjust enrichment, prohibits the employer from requesting compensation for liquidated damages if the employer is responsible for the delay.¹²⁹ UAE law does not describe how to deal with delays or costs; it only gives the right to the court and the arbitrator to decide.¹³⁰

4.2 How UAE law identifies the responsible party for a delay

According to the UAE Civil Code, the liability for a delay will be shared between parties according to the degree of the defaults.¹³¹ The principle of responsibility for losses is governed by Article 287 of the Civil Code:

“If a person proves that the loss arose out of an extraneous cause in which he played no part, such as a natural disaster, unavoidable accident, force majeure, act of a third party,

¹²⁹ CMS Legal, 'Law and Regulation of Concurrent Delay in UAE' (*CMS Legal*, 2021) <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-concurrent-delay/uae>> accessed 11 July 2021.

¹³⁰ *ibid.*

¹³¹ Jeremy Glover, 'Liquidated Damages: The Differing Approaches In The UAE And The UK' (*Fenwick Elliott*, 2015) <<http://High Federal Court in case 25/24 – 1 June 2004 Civil>> accessed 11 July 2021.

or act of the person suffering loss, he shall be bound to make it good in the absence of a legal provision or agreement to the contrary”.¹³²

Judges have the right to adjust the level of compensation under Article 290:

“It shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his act in bringing about or aggravating the damages”.¹³³

Sharing the liability of the delay is covered under Article 291 of the Civil Transaction Code, which states that “if a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shared or by way of joint or several liability.”¹³⁴

The above three articles usually apply to contractual disputes seen by the court, even if it appears that tort may be involved; this applies also to contractual liquidated damages.¹³⁵ The courts have the power to adjust liquidated damages per Article 390(2) in the Civil Code after the application is made by one party requesting the review of damages.¹³⁶

Thus, court has discretion to allocate liability between parties either for reduce the liquidated damages or dismiss.

¹³² Federal Law # 5 of 1985 - Article 287 in the Civil Code

¹³³ Federal Law # 5 of 1985 - Article 290 in the Civil Code

¹³⁴ Federal Law # 5 of 1985 - Article 291 in the Civil Code

¹³⁵ Jeremy Glover, 'Liquidated Damages: The Differing Approaches In The UAE And The UK' (*Fenwick Elliott*, 2015) <<http://High Federal Court in case 25/24 – 1 June 2004 Civil>> accessed 11 July 2021.

¹³⁶ *ibid.*

4.3 Employer's entitlement for termination of contract according to the *FIDIC* standard

If the completed works is unusable, the employer is entitled to terminate the contract without prejudice, where the employer is entitled to the sums paid for the work in addition to the financial costs for dismantling and cleaning the site. Under this termination, the contractor has the right to reclaim the plants and materials Sub-clause 11.4 in *FIDIC Red Book 1999*.

“If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor. the Employer may if the defect or damage deprives the Employer of substantially the whole benefit of the Works or any major part of the Works, terminate the Contract as a whole, or in respect of such major part which cannot be put to the intended use. Without prejudice to any other rights, under the Contract or otherwise, the Employer shall then be entitled to recover all sums paid for the Works or for such part (as the case may be), plus financing costs and the cost of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor.”

4.4 Difference between compensations owed based on liquidated damages vs actual damages

Under UAE law, there is ambiguity about whether the compensation shall be the same amount mentioned in the liquidate damages clause or if it shall be adjusted to match the actual loss. The Dubai Court of Cassation usually awards compensation based on the contract clause in relation to liquidated damages, but it sometimes adjusts the compensation if there is a huge difference between the agreement and the actual loss. The Dubai Court of Cassation in appeal (222/2005),

regarding a dispute between the subcontractor and the main contractor, where the main contractor raised a claim to obtain liquidated damages, adjusted the compensation due to the huge difference between the actual loss and the agreement.¹³⁷ However in the Abu Dhabi Court of Cassation in appeal (941/2009), the court awarded compensation per the contract, which was estimated previously to cover the proposed damages.¹³⁸ The difference in opinions lies in the differences in the understanding of Article 390(2). The Dubai Court of Cassation obeys the literal interpretation (ie *garar* principle of Islamic law) of Article 390(2), which gives the right to the judge to adjust the liquidated damages.¹³⁹ On the other hand, the Abu Dhabi Court of Cassation follows the principle of emphasizing the agreement between the parties according to the principle of Article 126 of the UAE Civil Code regarding the freedom of contract.¹⁴⁰ Hence, they apply the clause of the contract agreement.¹⁴¹ Accordingly, the Abu Dhabi Court of Cassation is the highest court authority in the region, meaning that the lower courts (ie First Instance) and the Appeal Court will follow the same reasoning.¹⁴²

4.5 Conflict regarding the employer's entitlement for termination between UAE law and the *FIDIC* standard

Pursuant to *FIDIC 1999 Red Book* Sub-clause 11.4, if the contractor fails to remedy the defects and those defects prohibit the employer from using the product, the employer is entitled to terminate the contract.¹⁴³ According to UAE' law, termination is governed by Article 267 of the UAE Civil Code: "if the contract is valid and binding, it shall not be permissible for either

¹³⁷ Dubai Court of Cassation, Appeal No. 222 of 2005, Judgment rendered 19 June 2006

¹³⁸ Abu Dhabi Court of Cassation, Appeal No. 941 of 2009.

¹³⁹ Nicolas Bremer, 'Liquidated Damages Under The Law Of United Arab Of Emirates And It Is Interpretation By The UAE Courts' (*Alexander-partner.com*, 2015) <https://www.alexander-partner.com/fileadmin/downloads/alexander-partner_gair-mitteilungen_2015_nb.pdf> accessed 13 July 2021.

¹⁴⁰ Commentary to the UAE Civil Code issued by the UAE Ministry of Justice, Abu Dhabi 1987, Section ss 2-0006.

¹⁴¹ Nicolas Bremer, 'Liquidated Damages Under The Law Of United Arab Of Emirates And It Is Interpretation By The UAE Courts' (*Alexander-partner.com*, 2015) <https://www.alexander-partner.com/fileadmin/downloads/alexander-partner_gair-mitteilungen_2015_nb.pdf> accessed 13 July 2021.

¹⁴² *ibid.*

¹⁴³ *ibid.*

of the contracting parties to resign from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law”¹⁴⁴. Hence, unilateral termination is prohibited. The Dubai Supreme Court allowed the employer to terminate the contract unilaterally but was subject to pay the cost of the work done at the site and to compensate the contractor for the loss of profit for the pending works.¹⁴⁵

The *FIDIC Red Book 1999* Sub-clause 11.4 (C) gives the contractor the right to claim for damages, and under UAE law, unilateral termination by the employer will give the contractor the right to compensation. Under Article 879 of UAE Civil Code, the contractor has the right to obtain payment and compensation from the employer; otherwise, the contractor has the right to refuse to evacuate the site.¹⁴⁶

In a case decided by the Dubai Court of Cassation, the employer was required to get permission to terminate a contract through the domestic courts.¹⁴⁷

4.6 Liquidated damages after termination of a contract under UAE law

UAE Court of Cassation recognized a principle considering the termination of a contract for all primary obligations, including liquidated damages and penalties. Consequently, claiming compensation against the terminated contract shall be done based on tort liability because there is no contractual liability remaining.¹⁴⁸

The Abu Dhabi Court of Cassation adopted the principle of termination clauses for liquidated damages when there is an agreement in place to keep the clause as independent to be used for

¹⁴⁴ Federal Law 05 of 1985, Article 267 UAE Civil Code

¹⁴⁵ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 533.

¹⁴⁶ *ibid.*

¹⁴⁷ Dubai Cassation No. 353/1999 dated 15 January 2000.

¹⁴⁸ Ahmad Ghoneim and El-Ameir Noor, 'Abu Dhabi Court Of Cassation Judgment On Liquidated Damages Clauses After Termination' (*Al Tamimi & Company*, 2015) <<https://www.tamimi.com/law-update-articles/abu-dhabi-court-of-cassation-judgment-on-liquidated-damages-clauses-after-termination/>> accessed 12 July 2021.

a claim of compensation. The Abu Dhabi Court of Cassation Commercial Appeal in case (790/2013) stated that termination of the contract is usually considered termination for all obligations and does not prevent the court from enforcing liquidated damages clause in case claim if there is an agreement to keep this clause valid.¹⁴⁹ This case involved a dispute between a claimant and a defendant who had entered into a development contract for a plot belonging to the claimant to construct a tower and to pay for a premium contract. The defendant paid only 50% and did not pay the balance, and the contract was terminated. The claimant raised the case in the Abu Dhabi Court of First Instance seeking compensation of 64,048,522.00 AED, representing the loss of profit caused by the breach by the developer. The First Instance Court awarded 31,285,656.00 AED, based on an evaluation done by appointed experts. The claimant argued that the contract stipulated that in case of termination due to developer's breach, the liquidated damages clause will be valid as an independent clause and sought for 55,972,800.00 AED as compensation. The Court of Appeal rejected this and refused to apply the clause. Then, the claimant raised an appeal to the Court of Cassation, who accepted the argument and upheld the liquidated damages clause.¹⁵⁰

In this case, after the Court of Cassation awarded the compensation, the judgment became a precedent on the principle of possibility of claiming liquidated damages for a terminated contract. Beforehand, the courts awarded compensation based on tort law, and the value was based on damages only, since the liquidated damages clause was considered to be part of the contract that was terminated.¹⁵¹

¹⁴⁹ Abu Dhabi Court of Cassation Commercial Appeal in case (790/2013)

¹⁵⁰ *ibid.*

¹⁵¹ Ahmad Ghoneim and El-Ameir Noor, 'Abu Dhabi Court Of Cassation Judgment On Liquidated Damages Clauses After Termination' (*Al Tamimi & Company*, 2015) <<https://www.tamimi.com/law-update-articles/abu-dhabi-court-of-cassation-judgment-on-liquidated-damages-clauses-after-termination/>> accessed 12 July 2021.

4.7 Damages interest under UAE law

Sharia law prohibits interest in general, whereas the Federal Supreme Court accepts it commercially and legally matches the UAE law per Article 76 of the Commercial Code:

“Accreditor shall be entitled to charge interest on a commercial loan according to the rate provided in the contract. If the rate of interest is not specified in the contract, it shall be reckoned according to the market rate prevailing at the time of the transaction, but in this case shall not exceed 12% until payment is made”.

Therefore, the employer can request interest as a percentage (9% in this case) if the dispute resolved by the Dubai courts, as per the contract.

4.8 Amount of liquidated damages caused by delays according to *FIDIC*

The delay damages stipulated in the contract should entail fixed amounts to be paid per day for the elapsed time from taking over certificate and that of completion.¹⁵² The amount of the delay damages should represent the loss according to the bona fide employer suffering due to the delay per the applicable laws of the country, as mentioned in Sub-clause 8.5 of *FIDIC Gold Book*.¹⁵³ The sum of delay damages could be estimated as the employer’s loss, which mainly comprises financial charges for the contract price per day in addition to the cost of the employer’s personnel, who supervise the project. Furthermore, the loss of profit may also be claimed.¹⁵⁴

¹⁵² Ellis Baker et al, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Routledge Taylor and Francis Group 2009) 410.

¹⁵³ Ellis Baker and others, *FIDIC CONTRACTS: LAW AND PRACTICE* (5th edn, Routledge Taylor and Francis Group 2009) 410.

¹⁵⁴ *ibid.*

All *FIDIC* books provide a cap on liability for delay damages, and the upper limit specified shall not exceed the maximum amount of delay damages mentioned in the contract, which is usually 5–15% of the total price of the contract per Sub-clause 17.6 of *FIDIC Red Book 1999*.¹⁵⁵ If there is no minimum limit stated in the contract, the liability will accumulate to the completion of the obligation of the project per Sub-clause 8.2.

4.9 Power of arbitrators to award liquidated damages

Based on the principle of freedom of agreement regarding a construction contract involving foreign companies, the arbitration clauses of those contracts are normally adopted as the mechanism for dispute resolution, which usually account for award of liquidated damages. It is the arbitrator's duty to judge based on the contract without prejudice to the public policy of the applicable law per article 17(2) of ICC Rules. This rule allows the tribunal to proffer the award based on the applicable law pursuant to articles 106, 246(2) and 318 of the UAE Civil Code.¹⁵⁶

4.10 Limitation periods for the claim of liquidated damages

Claims generally have a limited period in the UAE Civil Code for liquidated damages (ie 15 years), unless otherwise agreed pursuant to article 473 of the UAE Civil Code.¹⁵⁷

4.11 Challenging liquidated damages under UAE law and *FIDIC*

The analysis of a project's delay should clarify the rights of the parties and their entitlements. An employer seeking liquidated damages due to a delay shall rely on a clear analysis methodology in addition to a tripartite test, which will find causation, damages and certainty for the delay. The analysis should be supported with dates and events reflected appropriately in

¹⁵⁵ *ibid.*

¹⁵⁶ Bernardo Cremades, 'Liquidated Damages, Penalty Clauses and Punitive Damages Within International Contracts' (2002) 1 International Business Law Journal.

¹⁵⁷ Zarghona Fazal and Maria Lezala, 'LIMITATION PERIODS IN THE UNITED ARAB EMIRATES' (*Hadef & Partners*, 2018) <<https://www.hadefpartners.com/News/333/Limitation-periods-in-the-United-Arab-Emirates>> accessed 1 September 2021.

the planning report to show clearly the delay. Programmes analysis deals with data. As such, the data entry must be conducted appropriately. The contractor may add early causes based on employer actions and any legitimate reasons that will provide a clear extension opportunity for the contractor. The engineer and the employer should regularly review the programme on site and compare progress with the plan to ensure all the events are updated correctly to avoid contractor adulteration. The engineer shall determine any pending issues according to the time frame mentioned in the contract and according to *FIDIC* provisions. Any determinations have time frames based on the engineer's responsibilities mentioned in the *FIDIC* standard contract, and the employer shall conduct all his obligations to avoid any chance for the contractor to seek extensions. All evidence and documents shall be recorded to be used in case of any disputes.

Usually, the contractor can challenge the liquidated damages or defend against delay damages to protect his rights and to recover payment through the benefit of precedent. The contractor is aware of legal flaws in the contractual provisions of liquidated damages, and any mismanagement by the employer towards the contractual obligations will support the contractor during a challenge for damages. A dispute resolution between parties will analyse the damages based on a practical engineering perspective, which normally has a wide scope compared with the legal perspective. The contractor may defend according to:¹⁵⁸

1. Extension of time due: If an employer claims liquidated damages because of a perceived breach by the contractor owing to circumstances that may lead to a delay in completion, and if the contractor seeks an extension without recognizing his faults, it may allow time for the contractor to complete the work. The employer must ensure that there is no entitlement for the contractor if he obtains an extension. Otherwise, the contractor may

¹⁵⁸ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, John Wiley & Sons Ltd, 2009) 209.

litigate.¹⁵⁹ Further to Sub-clause 20.1 under *FIDIC Red Book 1999*, the contractor shall give a notice not later than 28 days after awareness of the event gives his right for extension of time.

2. Completion achieved earlier than certified: The challenge in this case is based on two principles. First, the employer may begin using the completed project without issuing a taking over a certificate. In this case, the project will be implicitly handed over, according to the Sub-clause 10.1 of *FIDIC 1999 Red Book*, the project considered substantially completion in case the engineer fails to approved or reject the application of the contractor within 28 days even if the certificate is not issued. The second principle involves the case in which the contractor completes the work, and the engineer is over-zealous in seeking perfection in completion without applying the substation principle for the handover. In this case, the contractor can challenge the delay of the issuance of the completion certificate if the engineer refuses handover due to the employer's pressure. However, if the engineer is doing his job perfectly and determines the unacceptance of the handover fairly and lawfully, the employer's entitlement to liquidated damages will be upheld. However, if the engineer determines the unacceptance because of pressure from the employer, the contractor can sue the engineer for damages.¹⁶⁰
3. Certification not valid: the certificate of the extension of time can be invalidated, and the judge will not approve it, and the employer will be entitled to liquidated damages. The features of the validity of the time certificates are described as follows:
 - a. Certificates are given out of time: in some contracts, the certificate will be invalid if a certain milestone or a fixed date has passed.

¹⁵⁹ *ibid* 210.

¹⁶⁰ *ibid* 219.

- b. Incorrect form of certificates: the communication shall be in writing, and if the submittal is not performed in the specified method (e.g. fax or mail), invalidation may be warranted.
 - c. Certificate given by unauthorised person: contracts mention the names of the parties and allow for the parties to appoint proxies. Hence, the employer can appoint a contract administrator with limited power such that these powers will not cover termination or extension; otherwise, the proxy may be valid for a limited time.
 - d. No name certifier: In a small construction contract, the parties are not mentioned by name for the administration of the contract. In such cases, parties provide a certificate under their peril.
 - e. Delegated improperly: In some contracts, conditions permits the engineer to delegate some functions under the contract, and it gives the engineer the power to delegate certification.
 - f. Unfair certificates: The certificate submitted to the contractor may unfairly prohibit the entitlement of the employer to seek liquidated damages, or it may try to force the contractor to be liable for damages not mentioned in the contract.
 - g. Improper choosing of contractual mechanism: the certifier sometimes fails to choose the proper mechanism for determining a delay. For example, instead of performing a logical analysis, the certifier performed an impressionistic assessment that was not objective. In this case, the certification was invalid.
4. Conditions prior to unobserved contents: the contractor may challenge the award of liquidated damages that would be payable to the employer through no observances of contractual conditions. For example, if the condition in the contract mentions a period for the engineer's determination of the entitlement of the employer for liquidated

damages within 28 days of disputes, and when the engineer determines after this period when the employer deducts the liquidated damages without determination, the engineer will rely on the request of extension from the contractor. In this case, the contractor is entitled to the cost of acceleration if the engineer does not reply within the contractual time of the agreed limited period.¹⁶¹ According to *FIDIC Red Book 1999* under Sub-clause 2.1, the employer shall give a clear access to the contractor otherwise, the contractor shall be entitled for suffers delay and cost subject to Sub-clause 20.1 to submit a notice.

5. Clearance of the commencement date: The commencement date in the project usually depends on the handover date of the site to the contractor without obstacles. The date of handover relies on the commencement date unless otherwise agreed upon by the parties. The date mentioned in the contract refers to the date of the agreement, which relies on the tender stage. The actual commencement date is the handover date of the site to the contractor. In some contracts, the engineer decides the commencement date. In this case, the letter of intent of the project only refers to the preparation of the contract, which is normally generated to ensure the bank guaranty if requested by the employer. When the contractor begins the work at the site after receiving the letter of intent and before signing the contract, it creates an issue for liquidated damages, owing to the work done at the site without the contract.¹⁶² Under Sub-clause 2.1 of *FIDIC Red Book 1999*, the employer shall give the contractor possession of all parts of the site within the time, any failure from the employer cause suffered to the contractor, subject to Sub-clause 20.1 to give notice, contractor will be entitle for extension of time and cost plus profit.

¹⁶¹ *ibid* 226.

¹⁶² *Ibid* 227.

6. Prevention: If there is clause in the contract prohibits the right of extension to the contractor due to an employer breach, this clause will allow the contractor to challenge the conflict with the contractor based on the applicable law.¹⁶³ For example, if an extension is not allowed by contract, the contractor will not liable for damages under Article 878 of UAE Civil Code if the delay held due to event could not be prevented by contractor.
7. Penalties: Courts will not enforce liquidated damages that are considered to be a penalty.
8. Waiver/estoppel: if the employer approves a contractor to complete the project without applying the liquidated damages and for the sake of this assurance, the contractor completes the project according to the valid capacity without acceleration, the employer in this case has no right to apply the liquidated damages, and the court will not enforce such damages. Accordingly, the principle that prevents the party from asserting an act that is contrary to the implied action related to suing the contractor against the liquidated damages will not be enforced by the court.¹⁶⁴

Under Article 390(2) of the UAE Civil Code, the contractor has the right to challenge the award of the liquidated damages and use the court's power to vary the agreed liquidated damages to be close to the actual loss.¹⁶⁵ In the High Federal Court case 25/24 from 1 June 2004, the ruling stated that the liquidated damages were merely an agreed estimation of the expected loss for the employer caused by a breach of contract, which may delay the project and cause some loss for the employer. Under Article 390(2), it is necessary to award compensation to verify the loss not only for breaching the contract, it also allows the contractor to submit evidence showing

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ Jeremy Glover, 'Liquidated Damages: The Differing Approaches in The UAE And The UK' (*Fenwick Elliott*, 2015) <<http://High Federal Court in case 25/24 – 1 June 2004 Civil>> accessed 11 July 2021.

that there is no loss for the employer. Hence, the judge will not award the compensation to the employer and will consider the contractual liquidated damages to be repudiated.¹⁶⁶

As shown in the previous case, the court may completely repudiate the contractual liquidated damages in the absence of loss from the delay. Simultaneously, the judge may reduce the compensation if the loss is less than the liquidated damages. For both, the burden of proof is on the contractor to submit evidence to the court for the absence of the damages or submit evidence on the actual amount of damages so as to reduce the compensation.¹⁶⁷

¹⁶⁶ High Federal Court in case 25/24 – 1 June 2004 Civil

¹⁶⁷ Jeremy Glover, 'Liquidated Damages: The Differing Approaches in The UAE And The UK' (*Fenwick Elliott*, 2015) <<http://High Federal Court in case 25/24 – 1 June 2004 Civil>> accessed 11 July 2021.

5.0 Chapter Five: Conclusion

Delays in construction project completion could create damages for the employer. UAE law gives the right to the court to adopt the liquidate damages clause mentioned in the contract and to enforce it without proof for the actual damages. UAE law and *FIDIC* standards use the substantial construction completion principle to verify levels of completion. Owing to delays in completion, if an extension is not allowed either by law or the contract, the contractor by default is liable for liquidated damages according to *FIDIC*. UAE law per Article 878 of the Civil Code says that the contractor will not be liable for damages in cases of delay due to events that could not be prevented by the contractor.

The courts in the UAE have discretion to evaluate the harm and damages and to modify the contracted damages clause. The court has stated that the compensation should be balanced according to the actual losses suffered and to ensure that it is fair, based on Sharia principles. To reduce the liquidated damages, the injured party must prove to the court that the compensation mentioned in the contract is more than the actual damages. If the court adopts the contractual clause regarding the liquidated damages, the court analyses the clause to verify its applicability to justice to avoid leveraging the clause to punish the other party.

Under the *FIDIC* standard, the only way to avoid liquidated damages is to complete the project within the period or get an extension of time for the project. Practically, the contractor fails to prevent the liquidated damages in the *FIDIC* standard due to failure in submitting the notice and claims stipulated in Sub-Clause 20.1, where the claim has a limitation period, since the failure in extension of time means the completion date still as determined previously.

It is clearly shown according to this dissertation that project delays can be verified by diligently using planning programme analysis to show the precise delays and to avoid extra extensions of

time. UAE law does not provide guidance on how to judge delay responsibilities in case of concurrent delays; thus, proper analysis must be done logically using the planning programme. This responsibility will be shared, based on Article 287 of the UAE Civil Code and *FIDIC Red Book 1999*. The delay may be verified by comparing the progress achieved with the planning report per Sub-clause 4.21. An employer that obtains damages due to a delay caused by a contract breach can be legally compensated for losses suffered, even if the damages are greater than the delay penalty. This is normally presented as a custom 10% of the total contract amount, and it is safe to say that UAE law deals fairly enough with the employer's in such cases.

In summary, *FIDIC* contracts are strong, and employers should follow the rules closely and adhere to the conditions mentioned in the contract. Any notices of claims should be raised clearly and on time to avoid misunderstanding. Furthermore, it is necessary to keep all parties involved in the planning and progress to reduce gaps in understanding among the parties.

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