

Chapter I

Introduction

1.0 General Background

In the United Arab Emirates (*henceforth UAE*), the construction law is governed by limited provisions of the civil transaction code dedicated for this aim¹. These provisions are subsidized by other general provisions and law principles. And as the selected construction contractual provisions determines the firmness of the contract, the latter's effectiveness depends on its consonance with the law.

Thus, the construction contract in regulating the contractual relationship in its all aspects determines amongst many things the contractor's entitlement to extension of time (*henceforth EOT*) within the principles of the governing law and the public policy rules. This research is concerned with contracts of construction works designed by the employer.

And as it is common in the private (nongovernmental) contracting practice in the UAE to use bespoke contracts lacking EOT provisions, This research will focus on the situation where such contracts are used. This is because this situation can create uncertainties regarding the contractor's entitlement to EOT, hence, the research will examine the UAE's law capability to supplement the EOT provisions in such contracts.

In the same context of the question of the contractor's entitlement to EOT, light will be cast on the possible way of operation of the eminent contract forms in the UAE under the UAE law. And because the widely adopted construction delivery method in the UAE is the traditional method (*design bid and build*), this research will consider the FIDIC red books 1987 and 1999² being the mainly used contract forms in the UAE to deliver projects.

¹ UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Articles 872 to 896 (*Muqawala*).

² Z. Ran, M. Atout and J. Jones, "Root Causes of Construction Project Delays in Dubai", available on < http://www.arcom.ac.uk/-docs/proceedings/ar2008-749-757_Ren_Atout_and_Jones.pdf >, accessed on 12/4/2013.

1.1 Research Problem

This research will aim to look into the question of the contractor's entitlement to EOT under the UAE law. So it will investigate the situations arising out of the lack³ of the contractual EOT provisions to reconnoiter contractor's entitlement to EOT along with any potential procedure required by law as a requisite for entitlement.

Additionally, the research will analyze using the aforementioned FIDIC Red books under the UAE's law. In this context, the entitling events and the procedural requirements in the mentioned FIDIC forms will be scrutinized from the UAE's law perspective.

1.2 Research Questions

This research will endeavor to answer the following questions:

1. To what extent can the law of the UAE determine the contractor's entitlement to EOT when parties use bespoke contract having no provisions determining EOT? In answering this question, the research will examine the determination of entitling events under the UAE law, with exploring any procedure potentially imposed as a requisite for entitlement to EOT.
2. What is the extent of applicability of the provisions of the contracting forms FIDIC red books 1987 and 1999 in entitling the contractor for EOT under the UAE law? In this regards, this research will examine the validity of the entitling events and the efficacy of the stipulated procedures of the two forms from the UAE's law perspective.

In this research, the authors consider that most of the construction projects in Dubai are procured by the traditional approach and FIDIC is the widely used as the General Conditions of Contract.

³ Bin Shabib and Associates (BSA) LLP Advocates and Legal Consultants, "7 Legal Tips on UAE Construction Law", available at <<http://www.bsa.ae/pdf/7%20Legal%20Tips%20on%20UAE%20Construction%20Law.pdf>>, accessed 12/4/2013. the author highlights that many contractors in UAE in order to clench a deal, they sign contract having deadly clauses or even proceed with the works at the beginning of the project without a contract at all.

1.3 Aims and Objectives

This research will study the contractor's entitlement to EOT in the construction contracts governed by the UAE's law. This entitlement will be examined for two cases; the first case is when parties draft a bespoke contract that includes no EOT provision. And the second case is when the mentioned FIDIC forms are used.

The research is backed by the objectives set forth hereunder:

1. To verify the capability of the UAE's law to provide for the contractor's entitlement to EOT when a bespoke construction contract fails to do so. Then propose the potentially required law improvements or recommendations.
2. To review and analyze the entitling events of FIDIC forms the UAE's law perspective.
3. To study the operability of the mentioned FIDIC forms procedural provisions pertaining to the EOT entitlement within the law of the UAE, then propose any required recommendations to assure its operation in harmony with the law.

1.4 Significance of the Research

This research will offer insight into the problems of the contractor's entitlement to EOT in the UAE. It will focus on the vague areas where many dispute relating to the eligibility for EOT arises. The research will detect any potential shortcomings of the UAE's law, or else clarify the law's stand therein. It will also provide recommendations (if required) regarding further legislations or enactments.

In the light of this research, the legislative body in the UAE will be able to diagnose the current construction contracting law's inadequacies pertinent to EOT and be in position to introduce the potentially required reforms or clarifications.

1.5 Research Scope

The scope of this research is limited to the following:

1. The events that entitle the contractor to EOT under the UAE law.
2. The conformity of the EOT entitling events of FIDIC 1987 & 1999 with the UAE law
3. The required procedure for EOT under the UAE law
4. The conformity of the EOT procedure of FIDIC 1987 & 1999 under the UAE law

This research will not analyze the issue of the concurrent delays as it can be a broad topic requiring a dedicated extensive research.

1.6 Research Structure

This dissertation is structured in five chapters. The first chapter is the introduction. The second chapter will present an overview of the extension of time. The third chapter clarifies the research methodology. In the fourth chapter, will provide analysis for the collected data, and fifth chapter will present the conclusion and recommendations.

Chapter II

Overview of Extension of Time In Construction Contracts

2.1 Extension of Time in Common law Jurisdictions with focus on the United Kingdom

Usually the contractor is bound by a contractual completion time. This completion time is significant for the employer as it protects his interest in having his project delivered on time and usually in order to further protect this interest, the liquidated damages clause against delay is included in the contract. It aims to discourage the contractor from delaying the completion, and to compensate the employer if such delays happen. Thus, the liquidated damages amount in principle is no more than an agreed pre-estimate for the employer's losses⁴.

2.1.1 Completion Time and Extension of Time

Most of the contracts whether carried through bespoke or using standard forms define the grounds that entitles the contractor for EOT and contains a certain procedure to be followed to grant the contractor an EOT when entitled to it. Lack or inoperability of this procedure makes parties uncertain about the completion time. This uncertainty can expose a contractor deserving an EOT to the liquidated damages. Moreover, if the contractor proved deprivation of Due EOT, it may might be entitled to complete in reasonable time without liquidated damages. Apparently, this forfeits the employer's recovery through liquidated damages. It is for the Employers benefit to maintain the

⁴ Outlaw.com, Legal News and Guidance from Pensent Masons, "Liquidated Damages", available on <<http://www.out-law.com/en/topics/projects--construction/construction-contracts/liquidated-damages/>>, accessed on 1/10/2013. defines the liquidated damages as a real estimation of the possible losses that occurs in case of delay.

operation of liquidated damages provision when a delay out of the contractor's control happens⁵.

The need for defining entitling grounds to EOT in construction contracts in England where early (1930s) conceived by Rammer⁶. He considered that particularities of construction contracts included unstable conditions, unforeseeable earth conditions, damages to others' property, possibility of long delays in execution, the employer's need to use partially occupy the work...etc, for these reasons Rammer considered that special provisions in the construction contract forms need to be added, that are not required for other commercial standard contract forms.⁷ So, a viable construction contract should empower the employer to grant EOT to the contractor when relevant delaying events happen (events not attributable to the contractor)⁸.

2.1.2 The Prevention Principle and the Concept of Time at Large

Delays can be due to the employer's acts. Thus, the contractor must be protected if the employer prevented him from timely completion. In the common law jurisdictions this relates to the *prevention principle*. The principle's rationale is that a party is not liable in law if it did not timely discharge its contractual obligation because it was prevented by the other party to do so⁹. This *Principle* is well known in the common law jurisdictions.

The effect of the employer caused delays with the inability to extend the completion time is potentially to enable the contractor to establish that the completion time has become *at Large*. In a *Time at Large* mode, the contractor escapes the liquidated damages and his obligation becomes to complete within *Reasonable Time*.

⁵ N Gould, "NEC3: Construction Contract of the Future?", (2008) 24 Const. L.J, Construction law Journal 304, 305, the author clarifies that the aim of the EOT provision is simply to permit the employer benefit of the LD clause when the contractor is in delay for reasons not caused by the employer

⁶ C Seppala, "Contractor's claims under the FIDIC contracts for major works"(2005) Construction Law Journal.1. In the domestic constructions contracts in England by E. J. Rammer, Rammer considered then (1930s) that the contract for the construction must allow for events and contingencies of particular nature. Rammer referred to many particularities accompanying the construction contract

⁷ C Seppala, "Contractor's claims under the FIDIC contracts for major works"(2005) Construction Law Journal. 1.

⁸ D Brawn, "Extensions of time and liquidated damages in construction contracts in England and Wales"(2012) International Journal of Law in the Built Environment.2

⁹ E BAKER, J BREMEN, A LAVERS, "THE DEVELOPMENT OF THE PREVENTION PRINCIPLE IN ENGLISH AND AUSTRALIAN JURISDICTIONS"(2005)*The International Construction Law Review* 198

The Employer's preventive acts can include: a morally blamable conduct, a deliberate breach of contract, other breaches, a conduct amounting to breach of contract, the ordering of variations, and the actions of others whom the employer is responsible for. Those types of acts became recognized over the evolvement of the English law and the common law in general, early cases¹⁰ founded the principle then it crystallized in subsequent cases.¹¹

2.1.3 The Prevention Principle and the Time-bar Clauses

The development of the standard contracting forms brought about new requirement. The employer has the right to be notified within reasonable time about any possible delay in completion whatsoever the cause, or else, the completion time will not be extended.

Clauses stipulating this requirement are known as *Time-Bar* clauses as it bars the contractor's claim if done in a manner different from the contractual prescribed procedure. The timely notice in this case becomes a *Condition Precedent* to any potential entitlement. Such clauses might give the employer the right after causing delays to insist on completion date of the contract, thus overriding the prevention principle.

The mainstream in Australia looks to be in favor of the prevention principle in spite of some judgments to the contrary¹². Notwithstanding, some scholars consider the Australian law as not quite settled in this area¹³. However, the UK law takes a stand in favor of the time bars.¹⁴

¹⁰ Roberts v. Bury Improvement Commissioners (1870) LRCP 310, per Kelly CB at p. 324 & Perini Pacific Ltd v. Greater Vancouver Sewerage and Drainage District (1966) 57 DLR 2d 307.

¹¹ E BAKER, J BREMEN, A LAVERS, "THE DEVELOPMENT OF THE PREVENTION PRINCIPLE IN ENGLISH AND AUSTRALIAN JURISDICTIONS"(2005) *The International Construction Law Review* 198

¹² *Gaymark Investments Pty Ltd v. Walter Construction Group Ltd*, (1999) 16 BCL 449 & *Abigroup Contractors Corp Pty Ltd v. Peninsula Balmain Pty Ltd*, [2001] NSWSC 752.

¹³ G SMITH, "THE PREVENTION PRINCIPLE AND CONDITIONS PRECEDENT: RECENT AUSTRALIAN DEVELOPMENTS" (2002) *The International Construction Law Review* 403

¹⁴ E BAKER, J BREMEN, A LAVERS, "THE DEVELOPMENT OF THE PREVENTION PRINCIPLE IN ENGLISH AND AUSTRALIAN JURISDICTIONS"(2005) *The International Construction Law Review* 211. The authors see that as the English authorities do not seem to rule out contractor's claim for non adherence to condition precedent, and that the decisions of Abigruop and Gaymrk will be considered in the future to have represented false perception.

In this context, and based on cases' analysis Lal¹⁵ proposes to overcome this inconsistency between the prevention principle and the contractual time bar clauses¹⁶ by perceiving the prevention principle as no more than a construction rule rather than a rule of law. With this confined view, its operation can be excluded by the contractual stipulation of the time bar clauses. Additionally, he perceives that the "proximate cause" of the contractor's loss of entitlement to extension of time is his failure to abide by the contractual procedure, and not the employers act of prevention.

Nevertheless, It remains for time to determine whether Lal's proposition can conquer the mainstream¹⁷ that sees the prevention principle as rule of law as founded by precedents like : “some broad notion of justice as that a man should not be allowed to recover damages for what he himself has caused”¹⁸, and an implied term “as a matter of fairness or policy”¹⁹.

It looks that when a time-bar clause succeeds, the contractor opportunities are limited. However, it may scantily be able to peruse entitlement to EOT and recovery under *waiver*, but this requires demonstrating that the employer has waived the requirement of following the time bar. Additionally, the contractor can try the *estoppels*, which needs proving that the employer has made representation that it will not apply the time bar, or the contractor can argue that the works were done outside the contract²⁰.

In Australia, the statute offers another option for a time-barred contractor if he can demonstrate that the employer has acted unconscionably²¹. This can be pursued under the section 51 AC of the trade practices act 1974²² (commonwealth).

¹⁵ H Lal, "The Rise and Rise of the Time Bar Clauses, The Real Issue for Construction Arbitrators"(2007) The international Construction Law Review 128.

¹⁶ Like FIDIC Red book 1999 sub-clause 20.1

¹⁷ K PICKAVANCE, "CALCULATION OF A REASONABLE TIME TO COMPLETE WHEN TIME IS AT LARGE" (2006) The International Construction Law Review 167

¹⁸ *SMK Cabinets v. Hili Modern Electrics Pty Ltd* [1984] VR 391 at 395, 1 Const LJ 159 (Sup Ct Vict)

¹⁹ *SMK Cabinets v. Hili Modern Electrics Pty Ltd* [1984] VR 391 at 395, 1 Const LJ 159 (Sup Ct Vict)

²⁰ B CLAYTON, "CAN A CONTRACTOR RECOVER WHEN TIME-BARRED?"(2005) The International Construction Law Review 342

²¹ B CLAYTON, "CAN A CONTRACTOR RECOVER WHEN TIME-BARRED?"(2005) The International Construction Law Review 378.

²² Trade Practices Act 1974, Act No. 51 of 1974 as amended, available on <<http://www.google.ae/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCcQFjAA&url=http%3A%2F%2Fwww.comlaw.gov.au%2Fcomlaw%2FLegislation%2FActCompilation1.nsf%2F0%2F566E7CD758914>>

Another scholar²³ approached the problem differently from Lal's way by proposing establishing a classification of delays, and based on that classification the time bar clause should operate. The notion is to stipulate the time bar clause in a way to distinguish between delays caused by the employer and delays which *if the EOT clause did not operate* would be the contractor's responsibility, thus, reducing the damages recoverable by durations of delay that the employer caused.²⁴

5FACA256FC5001A01EB%2F%24file%2FTradePrac1974Vol1_WD02.pdf&ei=Yd1zUtqUAuG_0QXkuoGACw&usg=AFQjCNEHfN0n0PwaZxpuRoga_AD4UEuHRA >, accessed on 1/11/2013. The act prevents any corporation or person in transactions of commerce, trade, supply of services or goods to act unconscionably.

²³ PROFESSOR DOUG JONES, *Partner, Clayton Utz, Sydney, Australia*

²⁴ D Jones, "Can Prevention be Cured by Time Bars?"(2009), *The international Construction Law review* 74

2.2 Extension of Time in the United Arab Emirates

The following will firstly provide review for the grounds entitling the contractor to EOT in the bespoke that lack EOT provisions (Entitlement under the law) and the FIDIC Redbooks contracts 1987 & 1999 under the UAE law. Then secondly, conduct a review for the EOT procedures in these mentioned contracts.

2.2.1 The Contractor's Entitlement to EOT Under the UAE Law.

2.2.1.1.Grounds for Contractor's Entitlement to EOT under the UAE Law (Entitlement to EOT in Bespoke Contract Lacking EOT Provisions):

When bespoke or ad hoc contracting lacking EOT provisions is used, it is left for the law to determine the grounds of entitlement to EOT. So, it is required to identify the grounds that the UAE law recognizes for entitlement to EOT; the following identifies the mentioned grounds:

I. Changes in the Nature, Amount of, or Additional Work²⁵:

At the beginning, it is required to clarify the concept of gharar that is sourced from Islamic shari'a as it has relevance to this review. Gharar refers to the situation where a contracting party acquires benefit from the other contracting party without paying for this benefit or without paying the right counter-value corresponding to that benefit. the result is rendering the party who did not obtain the right counter value regret in that transaction which resulted in excessive gain to the other party (riba al fadl) as a result of the inequity of that sale.²⁶ Ibn Taymiyyah's (a renowned scholar of the Hanbali School) defines Gharar as one party's gain under the other parties pain, regret, or exposure to risk, and Ibn al-Qayyim al-Jawziyyah (a scholar of the Hanbali School) describes *gharar is the possibility of non- existence and existence. and thus is a forbidden sale as it is a type of gambling*²⁷.

In current terms, gharar is the uncertainty related to what the obligation entails as a result of the unavailability (caused by the contracting parties) of detailed awareness

²⁵ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 274

²⁶ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 275.

²⁷ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 274.

of the subject matter. This may entail an aleatory condition in the contract that might result in an unequal benefit conferred on the parties²⁸.

The Islamic scholar Ibn Juzay²⁹ identified ten ways in which uncertainty can take place in a transaction. From these ten ways, table (1) below lists five that apply to the construction contract and clarifies it in terms of construction³⁰.

No.	Way of uncertainty - as per Ibn Juzay	In terms of construction contract
1	Difficulty in discharging delivery of the subject-matter	Lack of enough knowledge related to the required resources for delivery of the structure
2	Lack of enough knowledge related to the type of the subject matter	Lack of enough knowledge as to the design the structure
3	Lack of enough knowledge related to the characteristics of the subject-matter	Lack of enough knowledge related to the quality of the structure
4	Lack of enough knowledge related to the subject matter's quantity	Lack of enough knowledge related to the quantity required for delivering the structure
5	Lack of enough knowledge related to the future performance date	Lack of enough knowledge related to the required time for delivering the structure caused by the above points 1 to 4 above

Table (1) Ways of Uncertainty - as per Ibn Juzay

And as Article 2³¹ of the CTC mandates that reference should be made to Islamic jurisprudence for interpretation of the law, the aforementioned meaning of gharar should be referred to in relation to the meaning of gharar in the CTC.

Article 202(1) of the UAE's CTC requires the inexistence of hazard (Gharar) in a future thing in contracts that involve property in order for that future thing to be proper subject matter³². Moreover, Article 203(1) mandates that in commutative property contracts, the subject matter need to be specified in a manner that avoids

²⁸ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 276

²⁹ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 276

³⁰ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 276

³¹ Article 2, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text

³² Hazard in the article refers to Gharar as per the commentaries of the ministry of justice, Westlaw Gulf, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED

gross uncertainty. Furthermore, part 3 of the same article renders the contract void if the subject matter is not specified sufficiently³³.

In the same context also, article 874³⁴ of the UAE CTC (muqawala) requires for a valid muqawala subject matter the existence of its description, its performance mode, a defined period of performance, and a determination of the counter value. Thus, reading article 874 of muqawala in conjunction with articles 202 and 203 with the clarification of table (1), yield that, to avoid gharar in projects designed by the employer, the availability of the following in the construction contract is required³⁵:

No.	What Should be Available in the Contract to Avoid Gharar:	How the Requirement Relates to Construction Contract
1	There should be a Description of the subject matter	: Relates to the nature and amount of work
2	There should be a Description of the quality of the work	: Relates to the Specifications and comprehensive set of drawings (nature of work)
3	There should be Description and statement of the mode of performance	: Relates to method statement and required resources that will be used in the construction
4	There should be a Description or statement of the performance period for executing the works	: Relates to achievable program in measurable time units (days)
5	There should be Determined contract price	: Relates to counter value

Table (2) What Should be Available in the Construction Contract to Avoid Gharar

So all of the aforementioned components of the subject matter in a construction contract need to be sufficiently known in order to avoid gharar resulting from potential uncertainties therewith. It is evident from the above that gharar can be caused by the lack of enough knowledge related to the time required for completing the construction, this lack of enough knowledge related to the completion time can be a result of either lack of enough knowledge related to description of the subject matter (nature and amount) as described by the drawings, or the lack of enough knowledge related to the required quantity for construction³⁶.

Accordingly, the lack of enough knowledge related to the nature, amount, or quantity of the works can lead to gharar in the construction contract. Gharar in this situation can be clarified by this sequence: (1) the delay in the delivery (2) causes increase or

³³ Article 203, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text

³⁴ Article 874, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text

³⁵ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 280,281

³⁶ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 281

loss in the benefit of the sale (construction contract), (3) the counter value then is paid either in lower that or in excess of the right counter value, (4), the received counter value is either lower that or in excess of the right counter value (5) application of penalties on the contractor and the occurrence of disputes related to grounds of delay, (6) which leads to type of gharar (riba al fadl) ³⁷.

Clearly, a known period of delivery of the structure is a requirement of a valid construction contract, and this period is measured in days as a matter of custom. Normally, the running cost incurred in the project is calculated on the basis of this unit (days). The basis of estimating the delivery date (time for completion) is derived from the project's quantities. Accordingly, when a substantial increase of the quantities is required to complete the work, then the duration required for completion will increase³⁸ and this applies also to the changes in the nature an amount of the works.

In view of the above, to maintain the validity of a contract of construction, the components of the subject matter of the contract must be fully known in order to avoid the sale of gharar caused by the uncertainty described in Table 1 and to fulfil requirements of Table 2. With applying article 210 (1), if the certainty is not achieved regarding the muqawala contract then that contract is either defective or void. The justification for this is contained in article 212(1) and (3) which is that the contract in essence can be lawful to the limit of its compliance with the law; and upon removing the cause of gharar (or any other defect), the contract becomes lawful under article 206. Accordingly, upon changes in the nature, amount, or quantities of the construction contract, a corresponding change in the time for completion should be issued to maintain validity of the contract. In other words, the mentioned changes entitles the contractor to EOT under the UAE law³⁹.

In addition to the above, the CTC appears entitling the contractor to EOT on the basis of prevention of gharar in the two modes of construction contracting (Lump Sum and Re-measure Unit Rate) defined under the muqawala section. In the lump sum price contracting, the second part of Article 887⁴⁰ that deals with the occurrence of variations or additions in lump sum muqawala contracts with the acceptance of the employer, requires observing the contract in relation with this change. The requirement of this article implies amending the remuneration and the completion time.

³⁷ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 279, table 1

³⁸ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 282

³⁹ S CRAWLEY, "ISLAMIC JURISPRUDENCE: CAN FIDIC PREVENT GHARAR INFECTING A CONTRACT?"(2012) The International Construction Law Review 281

⁴⁰ Article 887, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text.

Article 887 therefore protects the employer from being exposed to excess payment for a benefit taken by the contractor (additional work), and furthermore protects the contractor from executing additional work without being paid for the impacted cost and time. This article requires the consent of the employer for variation thus preventing the occurrence of Gharar.

For the other mode of contracting (re-measure unit rate), part 1 of Article 886⁴¹ provides a similar conception by requiring immediate notification to the employer if it turns out that substantial increase in quantity is required to perform the plans. Such notification must explicitly clarify to the employer the implication of such increase on the price, and if the contractor fails to notify the employer in this manner, he shall lose his right thereto.

This part of the article prevents the occurrence of gharar related to the contract price, and as normally the increase in quantities impacts on both cost and time, the article looks preventing gharar in price and time of performance, thus providing ground for EOT entitlement.

The afore discussion shows that the UAE law protects both contracting parties of a construction contract from falling into gharar resulted from different grounds including the additional quantities or changes in nature and amount of works. In doing so, the law establishes for the contractor's entitlement to EOT associated with changes in the contract's subject matter including the amount of work, nature of work, and additional work.

II. Delayed Payment

Under the section of *obligations of the employer* in the effects of a muqawala, Article 885⁴² of the CTC obliges the employer to pay the contract price upon the delivery of works if the parties did not agree otherwise or if there is no custom to the contrary.

Nonetheless, the custom has established for allocating the burden of financing in construction contracts to the employer. With this custom, the contract's price is paid fragmentally through interim payments over the course of executing the works. Such payments can be either monthly or against stages of accomplishment. With the existence of this custom, Article 885 can be construed as obliging the employer to pay to the contractor over the course of executing the works.

In addition, Article 247⁴³ provides legal ground for the contractor to abstain from work when not timely paid grounded on the employer's default in payment on time. Thus, it appears that unpaid contractor can slow down or even suspend the work lawfully with maintaining entitlement to EOT.

⁴¹ Article 886, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text

⁴² Article 885, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text

⁴³ Article 247, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for full article text

The commentary provided by the UAE ministry of justice on this article makes clear that the mutual obligations should be performed based on mutual exchange, so a party's obligation shall be discharged at the same time the other obligation is discharged. Consequently, each contracting party can withhold performing his part until he receives what he is entitled to receive.⁴⁴ However, there might be no express reference as to when the obligation (time of payment) is due if the contract is silent about this, in such case determination it is left for the custom.

This abstain of the contractor can take the form of suspension⁴⁵ as the Egyptian scholars interpret the corresponding Article 161 of the Egyptian Civil Law⁴⁶. The analogy between the two Articles is quite sufficient to render accepting the interpretation Article 161 reasonably applicable to Article 247.

In the situation of bespoke contract that provides for interim payments, the Sanhuri⁴⁷ argument can be far acceptable, as he perceived that a delayed payment that leads to delayed completion renders the contractor not liable in delay. The obvious consequence is entitling the contractor to suspend or slow the progress legally (with maintaining entitlement to EOT)⁴⁸.

Apparently, the law sympathizes with the contractor when the payment is delayed, a stand subsidized by UAE case law that upholds suspension against delayed payment⁴⁹. In this context, a Union Supreme Court decision clarifies that a party can legitimately withhold performance if the other party did not deliver his counter obligation⁵⁰.

However, it is necessary to clarify the apparent inconsistency between the above and Article 359⁵¹ that confers on the judge the discretion to respite the obligor's (employer) performance. It should be noticed that Article's 359 scope is limited to particular situation "*exceptional circumstances*" and it further restricts the judge's

⁴⁴ UAE Ministry of Justice Commentary on article 247, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf.

⁴⁵ T HAMED, S EL HAGGAN, N YEHIA, "EMPLOYER ' S FAILURE TO MAKE PAYMENT TO CONTRACTOR — A STUDY OF CONSTRUCTION CONTRACTS UNDER EGYPTIAN CIVIL LAW"(2012), *The International Construction Law Review* 408

⁴⁶ Article 161 of the Egyptian Civil Law, refer to appendix 2 for the article's full text.

⁴⁷ Who's Who in Islam, available at <<http://everettjenkinswhoswhoinislam.blogspot.ae/2013/05/abd-al-razzaq-al-sanhuri.html>>, accessed on 27/9/2013, defines Abd al-Razzaq al-Sanhuri (1895-1971) as an Egyptian scholar, jurist, and founder of civil codes in many Arab countries.

⁴⁸ T HAMED, S EL HAGGAN, N YEHIA, "EMPLOYER ' S FAILURE TO MAKE PAYMENT TO CONTRACTOR — A STUDY OF CONSTRUCTION CONTRACTS UNDER EGYPTIAN CIVIL LAW"(2012), *The International Construction Law Review* 414

⁴⁹ A Dimitracopoulos, " All Work & No Pay? - Can a contractor suspend works following delay in payment?", JANUARY 1 200, Law Update 2004, 154, 29

⁵⁰ Union Supreme Court, 556/2009, 7 June 2010

⁵¹ Article 359, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED

discretion to respite employer to pay to cases that do not cause *serious loss* to the obligee (Contractor)⁵².

III. Actual Loss Less than Liquidated Damages (Judge Discretion)

Many civil jurisdictions confer range of discretion to the arbitral tribunal or the court to adjust recovering liquidated damages or even to change the contractual performance standard. For instance, Article 1147 of the French civil code provides for this discretion when the contractor is able to demonstrate that the occurred delay is not due to him. Another example is Article 1346 of the Peruvian Civil Code that allows to debtor to request for equitable reduction in the liquidated damages when the obligation is irregularly or partially fulfilled. Many other civil jurisdictions have similar fairness and equity principles⁵³.

Likewise, while part 1 of Article 390⁵⁴ of the UAE CTC, allows parties to pre-agree fixed value for damages of delay, part 2 vests an ultimate discretion on the judge upon one party's request to readjust that value to match the actual losses⁵⁵.

The scope of application of this article as clarified in the commentary applies when there is loss; the judge retains the right to adjust the compensation to be equal the amount of loss as a rule of jurisprudence⁵⁶.

Court judgments also added emphasis to this conception by reducing the liquidated damages to the amount proportionate to actual losses⁵⁷. In essence, this implies awarding the contractor an EOT for the portion of delay that did not cause loss to the employer.

IV. Hardship

Article 249⁵⁸ of the CTC mandates that if unforeseeable exceptional events that have public nature occur and renders performance of the obligation arduous although being possible but in away threatening the obligor with severe loss, then the judge can and based on the case particulars lessen the hard obligation to rationale level subsequent

⁵² UAE Ministry of Justice Commentary on article 247, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf, explains that this article is designed to establish balance between the parties for example, where, a delayed payment can bankrupt a creditor, the judge might not grant extension. What can amount to '*serious loss to the obligee*' is within the discretion of the judge.

⁵³ P Cowan, J Bellhouse, "Common law 'time at large' arguments in a civil law context" (2007) Construction Law Journal. 5

⁵⁴ Article 390, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED

⁵⁵ F Attia, "Liquidated Damages - the bigger picture", MARCH 1 2012, Law Update 2012, 247, 2

⁵⁶ UAE Ministry of Justice Commentary on article 390, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf.

⁵⁷ Union Supreme court, 103/Judicial Year 24, 21 March 2004, Union Supreme court, 65/Judicial Year 22, 8 January 2002, Union Supreme court, 428 and 459/2010, 29 November 2010, Union Supreme court, 61/Judicial Year 25, 8 January 2005

⁵⁸ Article 249, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

to weighing each party's interest, as a rule of public policy.

This article rests on two footings a) The circumstance should be of public nature, exceptional, and unforeseeable, b) It renders the performance oppressive being threatening with severe loss⁵⁹.

This article implies wide range of events that confers discretion on the judge to reduce the level of obligation in certain exceptional circumstances, amongst this reduction is extending the time of completion, However, the Article requires for reducing the level of obligation that the duly discharge of that obligation *threatens of grave loss* on the part of the contractor.

Worthy to be noted that this is different from the case of force majeure. In fact, This article defines a borderline between force majeure and unforeseen contingencies. It discriminates between the impossibility (force majeure) and hardships that renders the performance obligation onerous⁶⁰.

Article 249, provides ground for entitlement to EOT upon on the occurrence of a spectrum events provided that the events are of public nature and unforeseeable. However, it does not provide any example⁶¹ of these events. So, it can be implied that any event of the description provided in the article can qualify for reducing the level of obligation in the contract's performance including extending the time for completion.

V. Temporary Force Majeure

Article 273⁶² of the CTC relates to the consequences of the occurrence of a force majeure on the contractual obligations. On one hand, the first part cancels automatically the contract if the supervening force majeure renders the contract's performance impossible. On the other hand, part 2 extinguishes the obligation to perform the impossible part if the impossibility is partial and extinguishes the obligation to perform the impossible part of a continuing contract if the impossibility is temporary. the significance of part 2 of this article is that it allows the obligee to cancel the contract after making aware the obligor.

In the cases of temporary and partial impossibility of performance due to force majeure, the contract can be cancelled upon a notice from the contractor to the employer. Effectively, the decision of resumption of the contract is vested on the obligee (contractor) in these cases.

Clearly, this stand of law protects the contractor from the application of liquidated damages as it entitles him to cancel the contract in the cases of temporary and partial

⁵⁹ C Clutterham, The Credit Crunch - The New Force Majeure?, FEBRUARY 1 2009, Law Update 2009, 215, 10

⁶⁰ UAE Ministry of Justice Commentary on article 249, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf.

⁶¹ UAE Ministry of Justice Commentary on article 249, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf.

⁶² Article 273, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

force majeure. This power in the hand of the contractor to cancel the contract can be effective in securing EOT from the employer at the time of these events.

VI. Events that are not Possible to Guard Against

While article 878, holds the contractor liable for any loss resulting from his work or act regardless whether defaulting or wrongful or not. Notwithstanding, it negates the contractor's liability if the loss is the result of an event that was not possible to be guarded against⁶³.

The grounds of entitlement to EOT under this article look including the occurrence of events which are analogous to the events described by the hardship in Article 249. This is because the *unpredictable extraordinary events having public nature* of the hardship can also be seen as *events that was not possible to guarded against*. Nevertheless, this article's scope is broader as it does not require that the event is unforeseeable; it can include also foreseeable events provided that it was not possible guarded against it. Eventually, Article 878 negates the contractor's liability against delays occurring due to events not guardable against, and in effect entails entitlement to EOT for the contractor in such case.

VII. Employer's Acts

There looks to be law concepts corresponding to the common law prevention principle in many civil law jurisdictions. Section 280 (1)⁶⁴ of the German Civil Code (BGB) provides that a party cannot claim damages from the other party in case of the other parties breach when that breach is not the responsibility of the other party. though, the good faith provision of Section 242⁶⁵ implies a broader meaning of the prevention principle and may be used to prevent applying the liquidated damages in cases of prevention caused by the acts of the employer.⁶⁶

Similarly, Article 1147⁶⁷ of the French Civil Code provides that the debtor shall be liable in paying damages if suitable for non performance or for delayed performance in the cases when the non performance is a result of an external cause which is not

⁶³ UAE Ministry of Justice Commentary on article 878, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

⁶⁴ S. 280 (1), the German Civil Code (BGB), Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I p. 42, 2909; 2003 I p. 738), last amended by Article 2 (16) of the statute of 19 February 2007 (Federal Law Gazette [*Bundesgesetzblatt*] I p. 122) Version: New version by promulgation of 2 January 2002 I 42, 2909; 2003, 738; last amended by statute of 4 December 2008 I 2586, Available at < <http://www.fed.ult/LinkClick.aspx?fileticket=KrjHyaFOKmw%3D&tabid=505>>, accessed 18/10/2013.

⁶⁵ S. 242, the German Civil Code (BGB), Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I p. 42, 2909; 2003 I p. 738), last amended by Article 2 (16) of the statute of 19 February 2007 (Federal Law Gazette [*Bundesgesetzblatt*] I p. 122) Version: New version by promulgation of 2 January 2002 I 42, 2909; 2003, 738; last amended by statute of 4 December 2008 I 2586, Available at < <http://www.fed.ult/LinkClick.aspx?fileticket=KrjHyaFOKmw%3D&tabid=505>>, accessed 18/10/2013

⁶⁶ D Jones, "Can Prevention be Cured by Time Bars?" (2009) The international Construction Law review 60

⁶⁷ Article 1147⁶⁷ of the French Civil Code, refer to appendix 2 for the article's full text.

due to the debtor provided that the debtor did act in good faith. the acts of the employer can fall in the category of this "external cause".⁶⁸

The corresponding UAE Article 287 of the CTC looks depriving the employer from taking advantage of his delaying acts⁶⁹. If the employer suffers losses due to the delay caused by his acts and seeks applying liquidated damages, then the contractor shall not be liable to make good these losses (shall not be liable for liquidated damages) if he can prove that the delays were caused by the employer's acts. However, it vests the burden of that proof on the contractor. In this context, it should be noted that the article imposes the limitation that this shall be applicable only if there is no agreement to the contrary.

Additionally, in the UAE, a statutory entitlement to EOT may be found under Article 247⁷⁰. The Article allows a party in commutating contracts to abstain performing its due obligation if the counterparty so abstains. This article can imply grounds for entitlement to EOT against delaying acts attributable to the employer's on the basis that it can be classified as breach of the employer's obligation to act in good faith⁷¹ under the law while performing his contractual obligation.

A court of cassation decision further supported this reasoning by freeing the contractor from the liability of delay damages if such delays were caused by the employer's acts.⁷² However, it remains required to identify the spectrum of acts of the employer that can cause delays and can be considered as grounds to entitle the contractor to EOT.

VIII. Nominated Subcontractor Defaults

Although there looks to be no provisions related to the nominated subcontractor defaults in the CTC, a UAE court's decision established for acquitting the contractor from delay liabilities attributable to a subcontractor *chosen* by the Engineer or the Employer⁷³. The application of this concept eventually offers a contractor in delay a justified EOT.

IX. Justified Delays

Other grounds for entitling the contractor for EOT are offered by a Union Supreme Court judgment⁷⁴; although it is not a primary authority, it remains persuasive. The

⁶⁸ D Jones, "Can Prevention be Cured by Time Bars?"(2009) The international Construction Law review 60

⁶⁹ Article 287, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

⁷⁰ Article 247, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

⁷¹ Article 246, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

⁷² AD Court of Cassation, 269/Judicial Year 3, 13 May 2009

⁷³ Dubai Court of Cassation, 266/2008, 17 March 2009

⁷⁴ Union Supreme Court, 18/Judicial Year 25, 19 June 2004.

judgment relates to application of damages by head contractor on a sub-contractor. It held that in the case of justified delays, or where the delay did not cause loss to the head contractor then neither the law nor the shari'ah allows application of penalties.

Although the meaning of the word *justified* is not well defined by the judgment, it still could be perceived to have referred to delays caused by hardship, events impossible to guard against, employer acts, nominated subcontractor defaults, or delays not caused by the contractor⁷⁵, in broad words, delays that are not attributable to the contractor.

X. Delays that did not Cause Loss to the Employer

Stopping an employer who did not suffer losses because of delays from applying liquidated damages on a delayed contractor is backed by article 318 that relates to unlawful enrichment⁷⁶. In light article 318, if the employer did not suffer loss due to delay, there exist no lawful reason to deduct liquidated damages, and consequently, the contractor is entitled to statutory EOT subject to proving no loss on the part of the employer.

A Union Supreme Courts' judgment settled this principle by depriving a head contractor who did not suffer loss (due to subcontractor's delays) from applying penalties on the subcontractor.⁷⁷ Another Union Supreme Court judgment in the same context clarified that in order to apply penalty against delays the elements: default, damages, and the causal link between the default and damage should exist as a criterion to assess payable compensation⁷⁸. Many other UAE Courts' judgments established this principle⁷⁹. The effect of this equity principle of the UAE practically awards the contractor an EOT, nevertheless, such EOT is subject to proving no loss on the part of the employer.

XI. External Reasons not Caused By the Contractor

Article 287⁸⁰ relieves the contractor from making good the losses arising from external reasons not caused by him including force majeure, acts of the employer (acts of person suffering loss), third party's acts, or unavoidable accidents provided that the contractor can prove that loss arose out of these events. and provided that the parties did not agree to the contrary.

⁷⁵ Dubai Court of Cassation, 266/2008, 17 March 2009, this judgment considers the contractor not liable for damages if he can prove that the delays was attributable to causes in which he played no part.

⁷⁶ UAE Ministry of Justice Commentary on article 318, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf. the commentary explains that this article is the basis of the unlawful enrichment, it is an independent rule and an independent source of obligation, and it applies when someone takes the property of the other without lawful reason.

⁷⁷ Union Supreme Court, 18/Judicial Year 25, 19 June 2004.

⁷⁸ Union Supreme Court, 690/Judicial Year 21, 27 June 2001

⁷⁹ Union Supreme court, 782 and 787/Judicial Year 22, 7 April 2002, also see Union Supreme court, 103/Judicial Year 24, 21 March 2004, and Union Supreme court, 65/Judicial Year 22, 8 January 2002, also see Union Supreme court, 26/Judicial Year 24, 1 June 2004, also see Union Supreme court, 428 and 459/2010, 29 November 2010, also see Union Supreme court, 218/Judicial Year 25, 27 November 2004, also see Union Supreme court, 65/Judicial Year 22, 8 January 2002

⁸⁰ Article 287, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, refer to appendix 2 for the article's full text.

Although the article allocates the burden of proof to the claiming party (the contractor), it defines a range of events or acts that renders the obligee (contractor) unbound to make good the consequence. In other words, if the consequence is delay in completion, the contractor is entitled to EOT provided that it can establish the proof. Nevertheless, there should not be in the contract an agreement to the contrary which can negate the operation of this article.

A Similar EOT entitling ground is offered by a court decision that frees the contractor from the liability of delays that are "*not caused by him*"⁸¹. Another courts judgments⁸² settles an EOT entitling grounds in a similar manner based on the occurrence of extraneous causes that the contractor played no part in (Article 287).

2.2.1.2 Grounds for Entitlement to EOT in FIDIC Red Book 1987

The following reviews the grounds of entitlement to EOT of FIDIC 1987 under the UAE law:

The FIDIC red books (in general) seem to adopt the cause and effect concept to entitle contractor to extension of time⁸³. In the FIDIC 1987 Red book, there are five categories of causes of delay that can be grounds to entitle the contractor to extension of time⁸⁴ as per sub-clause 44.1:

44.1	Cause of Delay as Grounds for Entitlement to EOT	Remarks
(a)	"Change in the amount or nature of extra or additional work"	-
(b)	"any cause of delay referred to in the FIDIC conditions"	Causes (Events) are listed in table 4 bellow.
(c)	"exceptionally adverse climatic conditions"	-
(d)	"any delay, impediment or prevention by the employer",	
(e)	"other special circumstances which may occur, other than through a default of or breach of contract by the contractor or for which he is responsible"	-

Table (3) Cause of Delay as Grounds for Entitlement to EOT in FIDIC Red Book 1987

Its noticeable that the FIDIC's entitlement to EOT is discretionary as it should be "*such as fairly to entitle the Contractor to an EOT*"⁸⁵. The FIDIC Conditions do not

⁸¹ Dubai Court of Cassation, 266/2008, 17 March 2009, this judgment held that the contractor who could demonstrate that he was not able to handover the building on the contractual completion date due to causes in which he played no part shall not be liable for penalty for delay.

⁸² Abu Dhabi Court of Cassation, 269/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division: 13 May 2009

⁸³ P CAPPER, "BASIC CHOICES IN THE ALLOCATION AND MANAGEMENT OF RISK"(2001) The International Construction Law Review 334

⁸⁴ Sub-clause 44.1 Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987

⁸⁵ Sub-clause 44.1 Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987

identify who should decide the mentioned *fairness*, thus leaving it open to the law if disputed.

In relation to (a) above, the EOT entitlement based on changes in the nature or amount of additional or extra work is consonant with Article 874⁸⁶ of the CTC that relates to maintaining the certainty about the subject matter of the contract and the prevention of Gharar. The reasoning is that the modification of the subject matter requires a corresponding modification of the Time for Completion to avoid lack of enough knowledge.

With referring to point (c) of Table (3) above, there are many references in the UAE law that covers events including adverse weather conditions. The CTC reduces the level of obligation and possibly establishes entitlement to EOT for weather conditions under the hardship under of Article 249⁸⁷. Additionally, Article 878⁸⁸ frees the contractor from the liability of consequences of *events that was not possible to guard against*. In this context also, Article 287⁸⁹ relieves the contractor from delays caused by external reasons not caused by him.

The types of delays caused by the employer mentioned in point (d) of Table (3) falls in the scope of Article 247 related to performance of mutual obligations⁹⁰ and Article 287⁹¹ that refers clearly to the employer's acts as grounds for freeing the contractor from delay damages. the requirement of good faith also has role in this context.

In connection with point (e) of Table (3), Christopher⁹² perceives that the mentioned special circumstances in (e) can include in certain situations the Engineer's acts that are the responsibility of the employer which have no reference in the FIDIC Conditions, and also includes other unlisted matters that neither party is responsible for.

From the view of the CTC, the Engineer's actions are covered by Article 287 as the acts of the party who suffers the loss. Additionally, the engineer's actions can also be classified under the employer's acts that Article 247 deals with, which relates to the

⁸⁶Article 874, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, requires the subject matter in contracts of muqawala be described with the period of performance, and a with a determined counter-value. refer to appendix 2 for the article's full text.

⁸⁷ Article 249, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, allows the judge to reduce the level of obligation to reasonable level if unpredictable, extraordinary events of public nature makes the performance hard; refer to appendix 2 for the article's full text.

⁸⁸ Article 878, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. The Article holds the contractor liable for any loss resulting from his work or act regardless defaulting or wrongful or not, notwithstanding, it negates the contractor's liability if the loss is the result of an event that was not possible to guarded against; refer to appendix 2 for the article's full text.

⁸⁹Article 287, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, the article prevents the employer from taking advantage of his delaying acts; refer to appendix 2 for the article's full text.

⁹⁰ Article 247, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. It provides legal ground for contractor to abstain from work when not timely paid, grounded on the employer's default in payment on time; refer to appendix 2 for the article's full text.

⁹¹Article 287, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, the article prevents the employer from taking advantage of his delaying acts; refer to appendix 2 for the article's full text.

⁹² C Seppala, "Contractor's claims under the FIDIC civil engineering contract, Fourth (1987) Edition"(1991) International Business Law Journal.11

performance of mutual obligations⁹³, and can be also included in the employer's obligation to act in good faith. The Articles accepts to be construed to include the employer's acts besides his omissions thru the engineer's acts, this can be also implied in Court of Cassation decision⁹⁴ that frees the contractor from *the stoppage or delays that are attributable to the employer*.

On the other hand, the matters that no party is responsible for mentioned by Christopher can include the hardship events of Article 249⁹⁵, and the events that are not possible to be guarded against of Article 878⁹⁶.

The other cause of delay referred to in FIDIC 1987 Conditions (point (b), table 3) that are grounds for entitling the contractor to EOT include:

Sub-clause	Cause of Delay as Grounds for Entitlement to EOT
6.4	Delayed Drawings and Instructions
12.2	Unforeseeable physical obstructions or Conditions
27.1	Delays resulting from carrying out the engineer's instructions related to fossils
36.5	Delays of certain test requested by the engineer
40.2	Delays resulting from suspension instructed by the engineer
42.2	Delay in giving possession of the site
69.4	Delays resulting from reduce the speed of works or suspension due to delayed payment

Table (3.1) Cause of Delay as Grounds for Entitlement to EOT in FIDIC Red Book 1987

From the perspective of the UAE law, the grounds of the sub-clauses 6.4, 27.1, 36.5, 40.2, 42.2, 69.4 can be considered as "delays attributable to the acts of the employer"⁹⁷ or the acts of the person who suffers the loss mentioned in article 287⁹⁸ which reliefs contractor from liability to loss caused by the employer and entitle the

⁹³ Ibid 92..

⁹⁴ Abu Dhabi Court of Cassation, 269/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division: 13 May 2009

⁹⁵ Article 249 UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, mandates that if unpredictable exceptional events that have a public nature occur that renders performance of the obligation arduous although being possible but in away threatening the obligor with severe loss, then the judge can and based on the case particulars lessen the hard obligation to rationale level subsequent to weighing each party's interest, as a rule of public policy. Refer to appendix 2 for the article's full text.

⁹⁶ Article 878 UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. The article holds the contractor liable for any loss resulting from his work or act regardless defaulting or wrongful or not. Notwithstanding, it negates the contractor's liability if the loss is the result of an event that was not possible to be guarded against. Refer to appendix 2 for the article's full text.

⁹⁷ Abu Dhabi Court of Cassation, 269/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division: 13 May 2009

⁹⁸ Article 287 UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, reliefs the contractor from making good the losses arising from external reasons not caused by him including force majeure, acts of the employer (acts of person suffering loss), third party's acts, or unavoidable accidents provided that the contractor can prove that loss arose out of these events. and provided that the parties did not agree to the contrary. Refer to appendix 2 for the article's full text.

contractor to EOT, while the event of sub-clause 12.2 is valid grounds for entitlement under the previously mentioned Articles 249 (Hardship), and the events not possible to guard against of Article 878 of the CTC.

Finally, it should be noticed that clause 20.1 of FIDIC 1987 Conditions of Contract lists the risks agreed to be assigned to the employer⁹⁹, and refers to damages or losses associated with eventuation of such risks and refers to the contractor's entitlement to addition in the Contract Price up to the limit of rectification requested by the engineer¹⁰⁰. However, the Conditions do not refer to the delaying effect of such events. Evidently, occurrence of these risks delays the Time for Completion, but the conditions do not state those risks as grounds of entitlement to EOT. Notwithstanding, it can be implied that the mentioned damages or losses in its broader meaning include delays, yet, this implication remains not definitive.

On the other hand, the UAE law recognizes the mentioned employer's risks as valid grounds for entitling the Contractor to EOT without requiring pre-agreement to assign it to the employer. The law perceives the war, rebellions, contaminations, riots, operation of forces of nature, and even pressure waves of airplanes as either hardship events under Article 249, or *events un-guardable against* of Article 878, or as *External Cause not attributable to the Contractor* of Article 287 and Dubai Court of Cassation, 266/2008. And eventually, the UAE law recognizes the "*damage to the extent that it is due to the design of the Works*"¹⁰¹ as "*attributable... to the act of the employer*"¹⁰².

2.2.1.3. Grounds for Entitlement to EOT in FIDIC Red Book 1999

FIDIC 1999 Red Book brought about some improvement in defining the grounds that entitle the contractor to EOT. The causes of delay provided at sub-clause 8.4 that entitles the contractor to EOT is change to include as grounds of entitlement to EOT the preventions of the employer's other contractors onsite and the unpredictable shortage of goods and personnel resulting from epidemic or governmental action. Although Red Book 1999 conditions has omitted the other special circumstances that may occur of FIDIC 1987, it introduced the entitlement to EOT under clause 19 Force Majeure and under sub-clause 8.5 delays caused by authorities. Those latter two

⁹⁹ Sub-clause 20.4, Employer's Risks, Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987, Employer Risks include war, hostilities, rebellion, civil war, contamination by radio-activity, pressure waves caused by aircraft, riot, loss or damage due to the use or occupation by the Employer, loss or damage to the extent that it is due to the design of the Works, and any operation of the forces of nature against which an experienced contractor

¹⁰⁰ Sub-clause 20.3, Losses or Damages Due to Employer's Risks, Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987

¹⁰¹ Sub-clause 20.4, Employer's Risks, Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987, Employer Risks include war, hostilities, rebellion, civil war, contamination by radio-activity, pressure waves caused by aircraft, riot, loss or damage due to the use or occupation by the Employer, loss or damage to the extent that it is due to the design of the Works, and any operation of the forces of nature against which an experienced contractor

¹⁰² Abu Dhabi Court of Cassation, 269/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division: 13 May 2009

might specify part of the situations which were previously (in FIDIC 1987) considered special circumstances ...other than the breach or default of the Employer, which were left fully discretionary in the 1987 version¹⁰³.

With considering the other new delay causes of FIDIC 1999 Conditions that can be grounds for entitling the contractor to EOT, it appears that a broader and more specific spectrum of entitling ground is drawn by FIDIC 1999 Conditions. In addition to the entitling grounds of FIDIC 1987, the grounds in Table (5) were identified in FIDIC Red Book 1999:

Sub-clause	Cause of Delay as Grounds for Entitlement to EOT
4.7	Delays that result from inaccurate plot reference point and levels
8.4(d)	Unpredictable shortage of material and manpower caused by epidemic or actions of government.
8.5	Unpredictable Delays caused by Authorities provided that the Contractor has diligently abided by its procedures
10.3	Employer's Prevention of the Contractor's to conduct the Completion Test
13.7	Modification for any increase or decrease in cost resulting from changes in Laws
17.4	Employer's risks' consequences (that cause loss or damage to the documents of the contractor or his works or goods).
19.4	The Consequences of Force Majeure

Table (4) Cause of Delay as Grounds for Entitlement to EOT in FIDIC Red Book 1999

From the perspective of the UAE law, the grounds of sub-clauses 4.7 and 10.3 are part of the *delays caused by the employer's acts*¹⁰⁴. Moreover, the grounds of sub-clauses 8.4(d), 8.5, and 17.4, from the view of the UAE law's can be seen as either *events un-guardable against* of Article 878¹⁰⁵, or the external causes not attributable to the contractor (Article 287)¹⁰⁶ and as Dubai Cassation Court Decision¹⁰⁷ clarifies.

In relation to (13.7) the changes in legislation, whether or not agreed by the parties to compensate the contractor against changes in the cost resulting from changes in

¹⁰³ B. W. Totterdill, FIDIC User's Guide, A Practical Guide to the 1999 red and Yellow Books, (Published By Thomas Telford Publishing, Thomas Telford Ltd, 2006) , 12

¹⁰⁴ Abu Dhabi Court of Cassation, 269/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division: 13 May 2009, and Article 287 of the UAE law stops the employer from taking advantage of his delaying acts. Refer to appendix 2 for the article's full text.

¹⁰⁵ Article 878, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED . It negates the contractor's liability if the loss is the result of an event that was not possible to be guarded against. Refer to appendix 2 for the article's full text

¹⁰⁶ Article 287, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. The Article relieves the contractor from making good the losses arising from external reasons not caused by him. Refer to appendix 2 for the article's full text.

¹⁰⁷ Dubai Court of Cassation, 266/2008, 17 March 2009, this judgment held that the contractor who could demonstrate that he was not able to handover the building on the contractual completion date due to causes in which he played no part shall not be liable for penalty for delay.

legislation, the changes in legislation as ground of entitlement to EOT is recognized by the UAE law if it has caused delay, it comes under the scope of Article 878 being not guardable against.

Eventually, and in relation to 19.4 of Table (4), although the FIDIC's conception of force majeure events is broad, it is similar to that of the CTC. Nevertheless, FIDIC deals with the consequences of the partial force majeure; it appears to entitles the contractor to EOT for force majeure events with maintaining the contract valid.

On the other hand, part 2 of Article 273¹⁰⁸ of the CTC deals with both partial and temporary force majeure and confers the decision on the contractor whether to resume the contract or to cancel it after notifying the employer with the contractor's intention to cancel the contract. This CTC approach practically puts the contractor and the employer in consensual position regarding resumption of contract.

2.2.2 Procedures of EOT under the UAE Law

2.2.2.1. EOT Procedure under Bespoke Contracts that lack EOT Procedure

Generally, if the bespoke contracts lacks EOT procedure, the construction law in the UAE do not look imposing particular procedures towards the employer to be adhered to by the contractor as a prerequisite for entitlement to EOT. However there is reference for requirement for notifying the employer in two occasions. Nevertheless, both cases relates to contractor's entitlement to remuneration against increase in the quantity of works.

the first case pertains to the lump contracts; the CTC refers to the need of the consent of the Employer when remarkable addition or variation to the drawings appears required to execute the works.¹⁰⁹ Such consent can be construed as requirement for notifying the Employer prior to executing this variation. This is as the law perceives the employer of limited knowledge in construction. Contrary to FIDIC Red books, the law do not state any consequences for violating such implied requirement for notice in the case of lump sum contracts.

The second reference in the law is to the per unit re-measure contracts¹¹⁰. This is more specific and harsh, as it requires the contractor when it appears necessary to increase the quantities of the contract by significant amount to immediately notify the

¹⁰⁸ Article 273(2) of the UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, extinguishes the obligation to perform the impossible part if the impossibility is partial and extinguishes the obligation to perform the impossible part of a continuing contract if the impossibility is temporary after notifying the employer. Refer to appendix 2 for the article's full text.

¹⁰⁹ Article 887(2) of the UAE Civil Code [Fed. Law 5 of 1985] AS AMENDED, requires observing the contract in relation with the change. Refer to appendix 2 for the article's full text.

¹¹⁰ Article 886, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. This Article requires the contractor to immediately notify the employer if it turns out that substantial increase in quantity is required to perform the plans. such notification must clearly clarify to the employer the implication of such increase on the price, and if the contractor fails to notify the employer in this manner, he shall lose his right thereto. Refer to appendix 2 for the article's full text.

employer of such increase, otherwise the contractor loses the right to recover the excess cost.

Whilst the two references (articles 886 and 887) refer to the cost, it can be implied that the completion on time with the increased quantities is equivalent to incurring increased cost by the contractor against lack of EOT. In other words, the additional cost is paying for the lack of EOT.

Eventually, The two articles although looking oriented to protect the employer¹¹¹, it can entail entitlement for the contractor to EOT associated with executing additional works.

2.2.2.2. EOT Procedures under FIDIC Redbook 1987

Under Sub-clause 44.2¹¹² the Contractor is required to notify the Engineer in 28 days with copying the Employer regarding any event for which the Contractor considers that he is entitled to EOT. And within other 28 days (or other agreed reasonable period) to provide the particulars. Otherwise, the Engineer is not under the obligation to make determination.

Sub-clause 44.3¹¹³ deals with events of continuing effect. It requires the Contractor to maintain submitting intermediate particulars on 28 days intervals, and to submit final details in 28 days after the impact of the continuing event has ceased. On the other hand, the Engineer shall make corresponding intermediate determinations for EOT without undue delay, and shall provide after the final details by deliberation with the parties a full determination and to notify the Contractor.

Additionally, Sub-clause 67.1 renders the Engineer's decision in relation to any dispute (including EOT) binding and final if after a certain time of learning the decision no party gives notice of his intention to start arbitration.

Although, some of the Engineer's authorities under the FIDIC 1987 contract including his role under clause 67 may require approval from the Employer under the Engineer's employment contract with the Employer¹¹⁴, the general situation is that the FIDIC conditions of contract confers a quasi-judicial role on the Engineer that entitles the Engineer judging the Contractor's entitlement to EOT and this decision can contractually acquire a final shape. This can have decisive implications as the second step of dispute resolution mechanism probably renders the Engineer's decision enforceable. This is as any challenge to it could be faced by the dismissal by the arbitral tribunal. The FIDIC contract provides for referring the incompletion to this

¹¹¹ Abu Dhabi Court of Cassation, 573/2, 18 December 2008, the judgment held that in lump sum contracts is not subject to variations between the contractor and the employer. contrarily, this do not apply if the contract is between the sub-contractor and the head in which case article 887 will not apply.

¹¹² Sub-clause 44.2, Contractor to Provide Notification and Detailed Particulars, Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987

¹¹³ Sub-clause 44.3, Interim Determination of Extension, Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition 1987

¹¹⁴ N Bunni, The FIDIC Forms of Contract, (3rd edn, Blackwell Publishing Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK, 2005)180

decision to arbitration and do not provide for the referral of the final decision itself to arbitration. Consequently, it remains undetermined whether the Engineer's final decision after taking its final shape under the contract can be enforced or remains exposed to parties' challenge in courts.

The other issue relates to lack of the Engineer's decision. Prima facie, sub-cause 44.2 requires notice as condition precedent to EOT entitlement, however, its wording do not imply that, as it confers discretion on the Engineer to either make determination or just not make it when the contractor fails to serve the notice on time. Nevertheless, one might argue that lack of Engineer's determination effectively bars the contractor's entitlement to EOT¹¹⁵.

The significance of the lack of engineers decision was tested in an English case where the availability of the Engineer's decision was considered as condition precedent to arbitration thus creating a cumbersome situation related to blocking the availability of subsequent means of dispute resolution¹¹⁶. Although this came in a common law context, the argument might succeed under the UAE law deeming the contractor have then waived his right in having the Engineer's decision by not serving the notice timely.

Another point of view is that the FIDIC 1987 Conditions do not look trying to confiscate the contractor's entitlement to EOT for the non adherence to the prescribed timely procedure, alternatively, it limits the sanction to the Contractor's failure to comply to the notice requirement by relieving the Engineer from making timely determination; Effectively, restricting the Contractor's claim to what he can prove subsequently with the available contemporary records¹¹⁷, such view looks in line with the UAE law as it does not forfeit the contractor's right and maintains his chance to prove it subsequently with the possible evidences.

2.2.2.3. EOT Procedures under FIDIC Redbook 1999

FIDIC 1999 Sub-clause 20.1 (Contractor's Claims) brought about new concept related to barring the contractor's right in EOT for non-adherence to the contractual notice requirement. The sub-clause requires the contractor who considers himself entitled to EOT either under the Contract or "*otherwise in connection with the Contract*" to notify the Engineer with depicting the event not later than 28 days of the date on which the contractor become or should have become aware of the event. Failing to give the notice in the prescribed manner, dismisses the contractor's claim in EOT and discharges the employer liabilities related to the claim¹¹⁸.

¹¹⁵ N Bunni, The FIDIC Forms of Contract, (3rd edn, Blackwell Publishing Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK, 2005) 347,348

¹¹⁶ N Bunni, The FIDIC Forms of Contract, (3rd edn, Blackwell Publishing Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK, 2005) 404. The author clarifies that it were held in a common law context that the Engineer's decision was a condition precedent to arbitration particularly in *J. T. Mackley & Company Ltd v. Gosport Marina Ltd* that dealt with a dispute under the ICE form on which the Red Book conditions are modeled.

¹¹⁷ E.C. Corbett, "FIDIC 4 TH, A Practical Legal Guide", available on < <http://dc312.4shared.com/doc/gdJAiQGA/preview.html> >, accessed on 27/9/2013.

¹¹⁸ Sub-clause 20.1, Contractor's Claims, Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, First Edition 1999.

Sub-clause 20.1 requires the contractor within 42 days of being aware (or should have become aware) of the event to submit to the Engineer full substantiation of the claim. The Conditions prescribes also certain procedure for events of continuing effects. However, the serious ingredient of the clause pertains to time-barring the claim due to non compliance to the notice requirement.

However, if the contractor defaults in relation to keeping the records, or delaying the particulars, a less harsh contractual impact applies by limiting the recoverable to what could be proved thereafter.

This new part of FIDIC's procedure for claim although appears harsh in its consequences on the contractor, it effectively acts as an integral part of the entire FIDIC's risk allocation balance scheme. Time bars effectively allows contemporaneous investigation of matters, besides it gives the opportunity for the Engineer to give timely instructions or to withdraws upon appearance of the timely and financial results of a claim event. Additionally, it allows making determination without undue delay. The net effect of that achieves certainty and prevents prolonged disputes at the project's end¹¹⁹.

Although it is submitted that the Contractor in all cases can claim for remedies either contractual or the available under the law rather than under the contract whether FIDIC or otherwise¹²⁰, the Conditions appears to imply that other claims under the law also are subject to the contractual time bar. This conception can be objected by some UAE law provisions that can override the contractual stipulations

Additionally, the time-barring can be inconsistent with the equity principles of the CTC as it can collide with many equity provisions. For instance, the concept of unlawful exercise of right of Article 106¹²¹, this article renders the use of right unlawful and the user liable in cases amongst which when the interest sought by such exercise of right is disproportionate to the damage sustained by others.

Moreover, although the contract may establish the right for the employer to bar a rightful contractor's claim but for the bar is confiscated, and although the scope of application of this article (abuse of right) contains a component of intention to cause harm¹²², it still can be used to challenge the time bar. Notwithstanding, a contractor remains required to prove the mentioned lack of proportionality of interests in terms of the article.

¹¹⁹ A Volkmar Jaeger , G Sebastian Hok, FIDIC-A guide for practitioners, (Springer Heidelberg Dordrecht London New York, Library of Congress Control Number: 2009929206)359

¹²⁰ C Seppala, "Contractor's claims under the FIDIC contracts for major works"(2005) Construction Law Journal

¹²¹ Article 106(1), UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. The article clarifies that the use of right can be unlawful if the interest sought is disproportional to the harm that will be suffered by the others as a result of the use of such right. Refer to appendix 2 for the article's full text.

¹²² UAE Ministry of Justice Commentary on article 106, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf. the commentary explains that the criterion related to disproportionate harm is objective but if happens the existence of indication to cause harm.

Other principle that stands in this context to face the time-bar clause is the unjust enrichment of Article 318¹²³ as taking the others' property (or right) without the lawfully acknowledged methods of disposing ownership (like sale, inheritance, or gift¹²⁴) can render the transaction unlawful. Furthermore, Article 319(1) calls for returning the unlawfully acquired property or its equivalent value if it ceased to exist¹²⁵.

In addition to the above principles, the good faith requirement in performing the contracts of Article 246(1)¹²⁶ can form legal ground to object the application time-bar clause. It can be construed that the Employer's rejection to the EOT claim on grounds of lack of strict compliance with the contractually stipulated formality for the claim can amount to bad faith. For instance, the case of rejecting the notice through minutes of meeting or via a periodic report because it is not a proper *written notice*¹²⁷. Further, good faith can stop an employer that knows about the existence of the claim from barring that claim just for being presented after the elapse of the stipulated time¹²⁸.

¹²³ Article 318, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for the article's full text.

¹²⁴ UAE Ministry of Justice Commentary on article 318, UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED, Westlaw Gulf.

¹²⁵ Article 319(1), UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for the article's full text.

¹²⁶ Article 246(1), UAE Civil Code, [Fed. Law 5 of 1985] AS AMENDED. Refer to appendix 2 for the article's full text.

¹²⁷ Construction Management Guide, "The UAE Civil Code and Claims Under the Red Book FIDIC in the UAE", available at <<http://www.cmguide.org/archives/238>>, accessed 30/5/2013.

¹²⁸ S Hunt, "Good Faith". August 1, 2009, Law Update 2009, 221, 20

Chapter III

Research Methodology

To find answers for the questions related to EOT under the UAE law, the research used a quantitative method as the tool to collect data as it assures collecting and presenting data objectively. Thus the research used a survey amongst the senior professionals in the construction and construction law sphere, the targeted respondents are Consultants (Engineers), Developers (Employers), Project Management Firms, Contractors, and Construction Lawyers.

The research is designed to collect and analyze the responses and opinions of the professionals regarding the emerged queries throughout the literature review to form answers for the propositions that will be used in the result of the research.

3.1 Research Objectives

This research was designed and conducted to disclose two legal issues:

- I. To assess the capability of the UAE's law of determining the contractors entitlement to extension of time when a bespoke or ad hoc contracting is used that lacks provision related to EOT with identifying any procedural requirement by law for such entitlement.
- II. To explore the validity of the EOT entitling events of FIDIC red books 1987 and 1999, along with the applicability of the procedural requirement imposed by the mentioned red books under the UAE law.

3.2 Research Method

In relation to the first legal issue, the first step was to study the relevant provisions of the UAE law with reference to the interpretation available in the commentary provided by the UAE ministry of justice. This is to determine the articles that can play role in defining the entitling events and to explore the potential presence of any procedural requirement imposed by the UAE law on the contractor as a requisite to establish the contractor's entitlement to EOT.

In the second step, the UAE high courts' judgments were reviewed to establish better understanding of the legal provisions related to EOT therewith.

Similarly, for the second legal issue related to the FIDIC's 1987, and 1999 Red books, the entitling events were reviewed from the point of view of the UAE law to determine the extent of its applicability under the law. This review was conducted based on the interpretations of the CTC Articles of relevance as provided by the

ministry of justice commentary on the CTC. Additionally, the procedural requirements of both FIDIC forms were reviewed in the same manner.

3.3 Survey Design

Throughout this literature review and analysis, issues emerged that need to be inquired about. The initial questions for the survey were formulated based on these inquiries.

After formulation the survey questions, and in order to assure its clarity and appropriateness, the survey questions were offered for the review of four top senior professionals elected for this purpose in the field of construction law as a first screening step¹²⁹.

The first professional is a civil engineer of 16 years of experience working with a developer (Employer) and a holder of master's degree in construction law with another master's degree in sustainable design. The second professional, is a senior lawyer in the construction field with more than 10 years of experience in the UAE law and is in preparation of his construction law masters degree dissertation, the third professional is an a civil engineer working with a municipal authority in Abu Dhabi, he is a holder of masters degree in business administration, he is in preparation of his dissertation for his construction law masters degree, besides he is a third year bachelor degree student in law. The fourth professional is manager of consultancy firm with experience of 17 years.

The comments and recommendations of the four professionals were incorporated into the survey questions. It included eliminating any items of less relevance, and improving the clarity of questions.

After this step, the survey questions were given to be answered by three senior respondents, an engineer, a contractor, and a lawyer, this is to determine any potential shortcomings in the survey.

Then the proposal was submitted for the professor supervising the dissertation work. The outcome of the professor review related to the clarity and correlation between the questions was also incorporated¹³⁰.

3.4 Collection of Data

After putting the survey's questions into its final form:

- I sent three types of invitation to the respondents (available in appendix 1):

¹²⁹ R Panneerselvam, Research Methodology, (Prentice Hall of India Private Limited, New Delhi, 2004) 13. The author summarizes the steps for designing the questionnaire; identify the research issue and finalize the hypothesis, formulate the set of questions, determine the wording of the questions, arrange the questions in suitable sequence to serve the purpose of the research, test the questionnaire before floating, then base on the test introduce the required improvements.

¹³⁰ R Panneerselvam, Research Methodology, (Prentice Hall of India Private Limited, New Delhi, 2004) 13

- Masters Degree Construction Law Students in the British University in Dubai
 - Construction and legal professionals of my contact list
 - Contractors, Employers, and Project Managers of the contact list of the consulting firm where I work.
-
- After sending the invitations, I stated following the responses by sending weekly reminder emails and making telephone calls at three days intervals.

3.5 Ethical Considerations

The survey also included with its introductory an ethical release clarifying for the respondents the bounds of confidentiality and the purpose and usage of data (available in appendix1) the purpose of this is to encourage respondents to participate.

Chapter IV

Discussions and Analysis

4.0 Discussions Overview

In order to find answers for the questions related to contractor's entitlement to EOT under the UAE law, The research targeted 62 respondents in two groups, the first group is either engineers with knowledge of law or lawyers with knowledge of construction law. The second group is the working professionals of contractors, developers (employers), managers in project management firms , and professional lawyers.

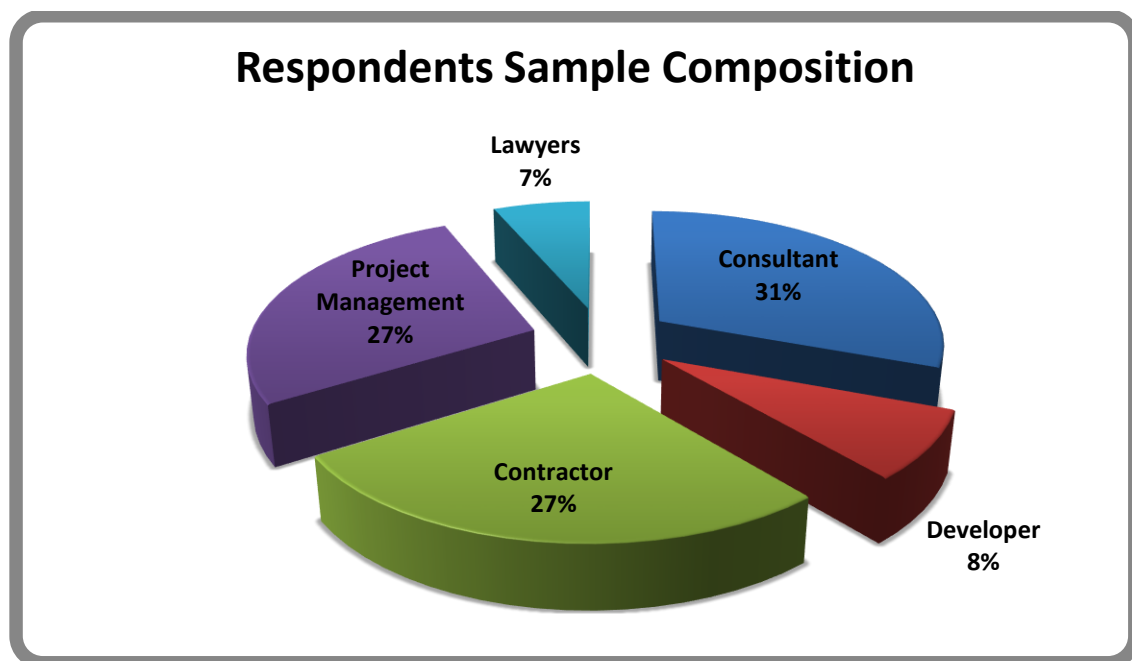


Figure 1 (Respondents Sample Composition)

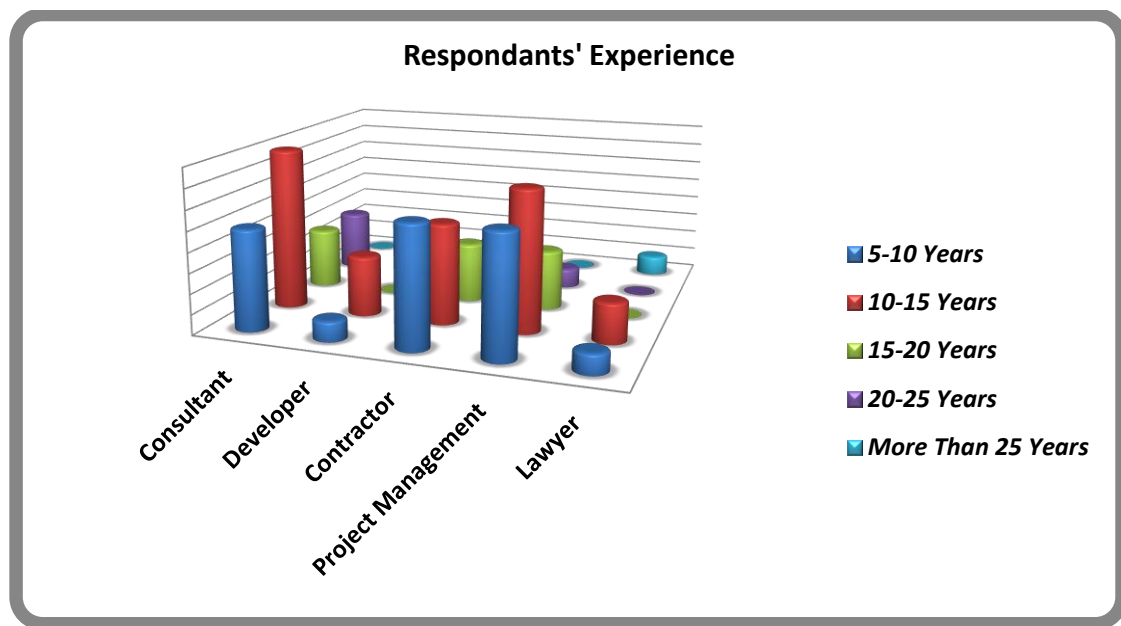


Figure 2 (Total Numbers of Years Experience of Respondents)

Identifying the participants and collecting the data was carried out by posting the survey's questions on a public website offering secured domain exclusively available for this data gathering process and accessible by respondents recruited through email invitations. This approach was selected to encourage respondents by the anonymity offered by this electronic facility.

4.1 The Analysis

As the entitling grounds for EOT stated by the FIDIC Redbooks 1987 and 1999 appeared in line with the UAE law in the chapter 2, the data analysis will focus on following issues:

1. The Grounds Entitling the Contractor to EOT under the UAE Law in Bespoke Contracts Lacking EOT Provisions
2. Procedures of EOT under the UAE Law
 1. EOT Procedure under Bespoke Contracts that lack EOT Procedure
 2. EOT Procedures under FIDIC Redbook 1987
 3. EOT Procedures under FIDIC Redbook 1999

4.1.1 The Grounds Entitling the Contractor to EOT under the UAE Law (Entitlement to EOT in Bespoke Contract Lacking EOT Provisions)

The provisions in the UAE law that could entitle the contractor to EOT were identified through the review of chapter III, and the survey questions were formulated to either support or refute the hypothesis or to provide answers for the review's queries.

The following grounds could be identified throughout the review as possible grounds for entitling the contractor to EOT under the UAE law:

Number	Event
1	Changes in the Nature, Amount of, or Additional Work of the Contract
2	Delayed Payment
3	Actual Loss Less than Liquidated Damages (Judge Discretion)
4	Hardship
5	Temporary Force Majeure
6	Events that are not Possible to Guard Against
7	Employer's Acts
8	Nominated Subcontractor Defaults
9	Justified Delays
10	Delays that did not Cause Loss to the Employer
11	External Reasons not Caused By the Contractor

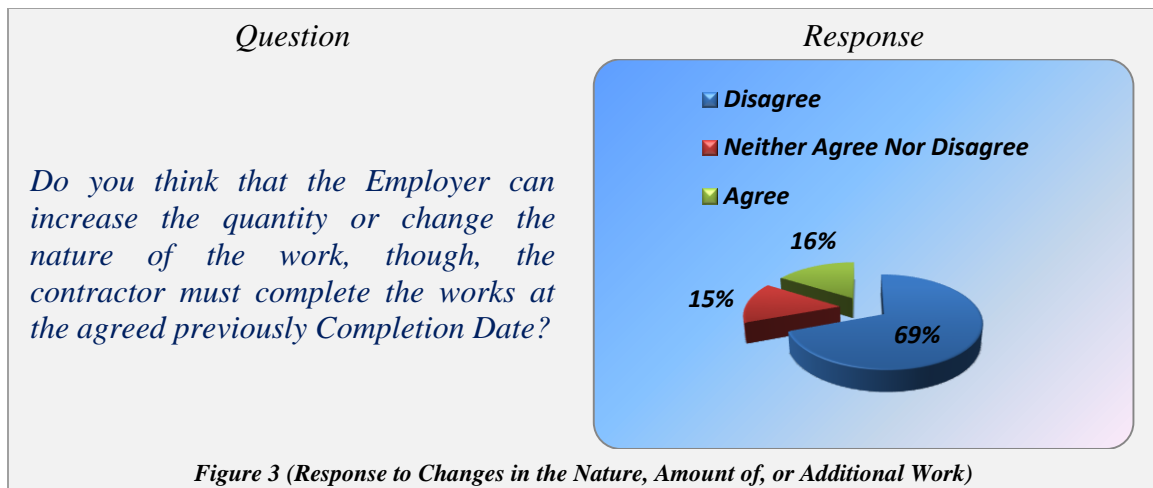
Table (5) Grounds for Entitling the Contractor to EOT under the UAE Law

As the grounds in 3, 5, 8, 9, and 10 appeared sufficiently clear throughout Chapter 2 , questions were put to:

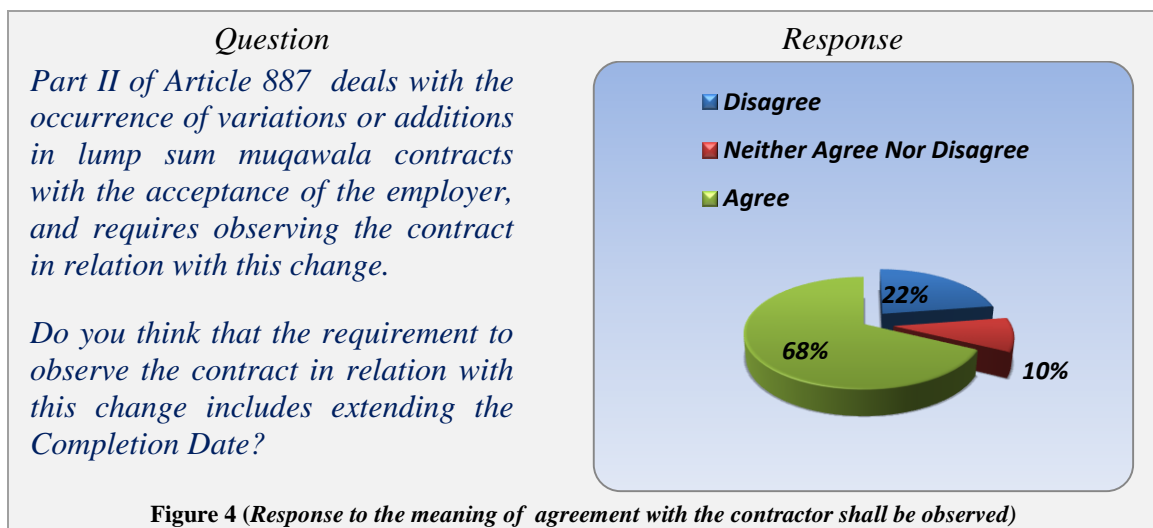
- a) Explore opinions regarding EOT entitlement against changes in nature of work, and delayed payment.
- b) Define the events of the Hardship, Events not possible to guarded against, Employer's act, and External reasons not caused by the contractor.

4.1.1.1 Changes in the Nature, Amount of, or Additional Work

Around 70% of respondents disagreed that the employer can change the nature or amount of work or assign additional work to the contractor without granting proportionate EOT.



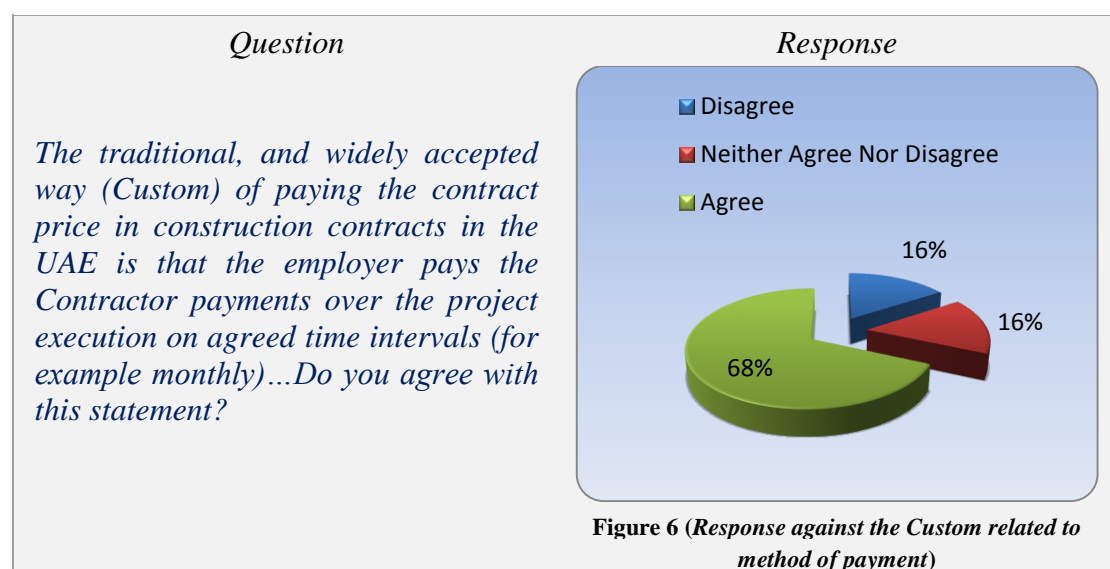
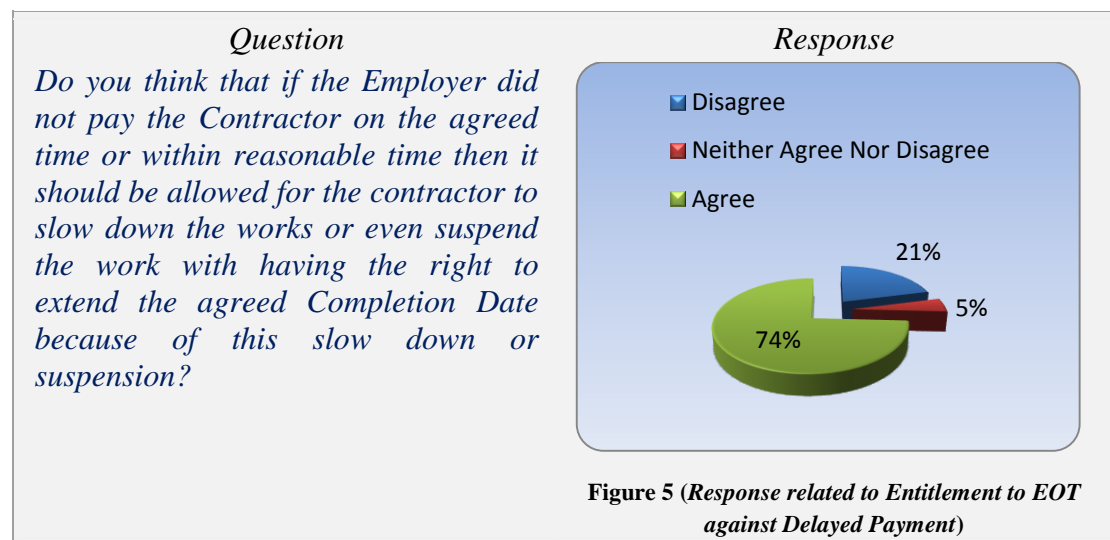
Another question in the same context intended to reveal whether the additional work (after being agreed by the employer) implies entitlement to EOT:



Most of respondents agreed that this article implies entitling the contractor for EOT against addition or variation to the drawings. Thus the responses assures that the increase in quantity of the contract should be associated with entitlement to EOT, this conclusion is in line with proposition that granting such EOT protects the contract from falling into gharar and is a requisite to maintain the contract's validity.

4.1.1.2 Delayed Payment

A remarkable percentage (74%) of the respondents considers that the contractor is entitled slow down the work or even suspend it if the employer did not pay it in reasonable time with still retaining the contractor's right in EOT. And a similar percentage (68%) agreed that if such time for payment is not stated in the contract then *one month* is reasonable duration for payment based in the custom of the construction industry in the UAE.

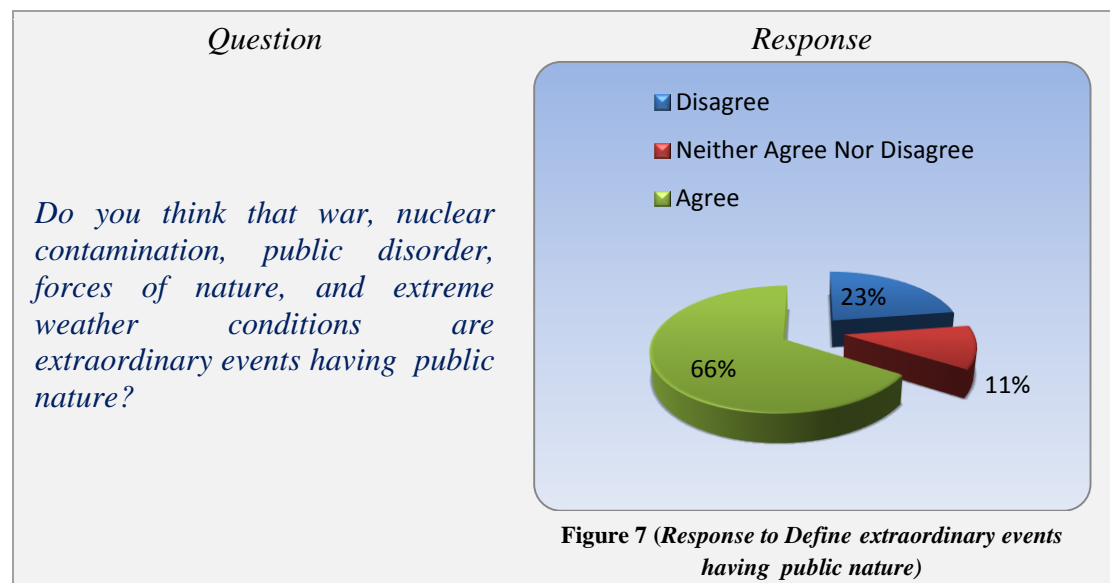


It can be seen that there is an established custom in the UAE that the employer has to pay for the contractor on monthly basis. Accordingly, a contractor can legitimately

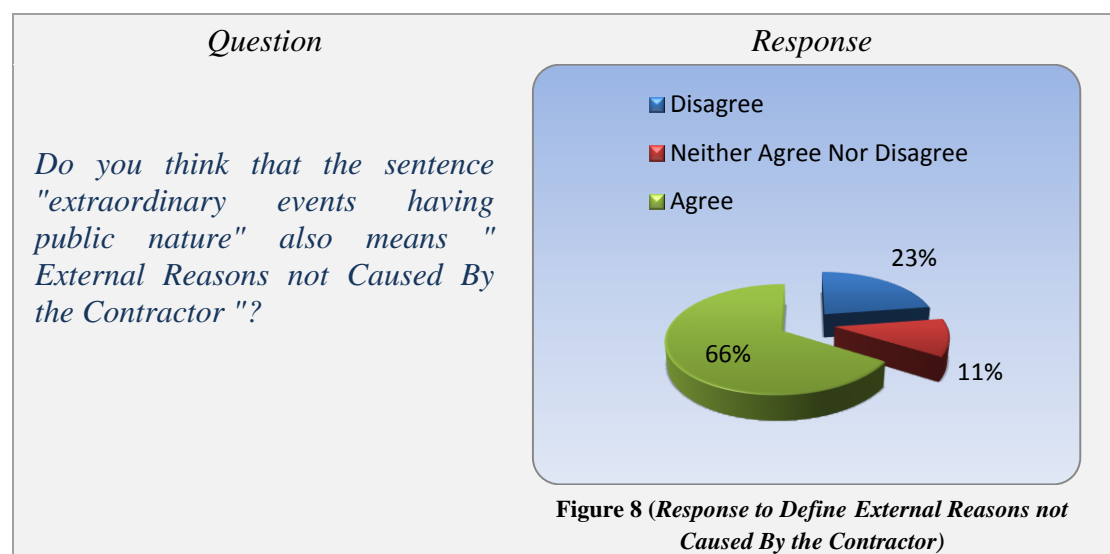
slow down the works if the employer did not pay him in one month with lawfully retaining its right in EOT.

4.1.1.3 Hardship

In order to define the events that constitute the hardship defined by article 249, two questions were used, the first's question's response affirmed that war, nuclear contamination, public disorder, forces of nature, and extreme weather conditions are events of hardship:

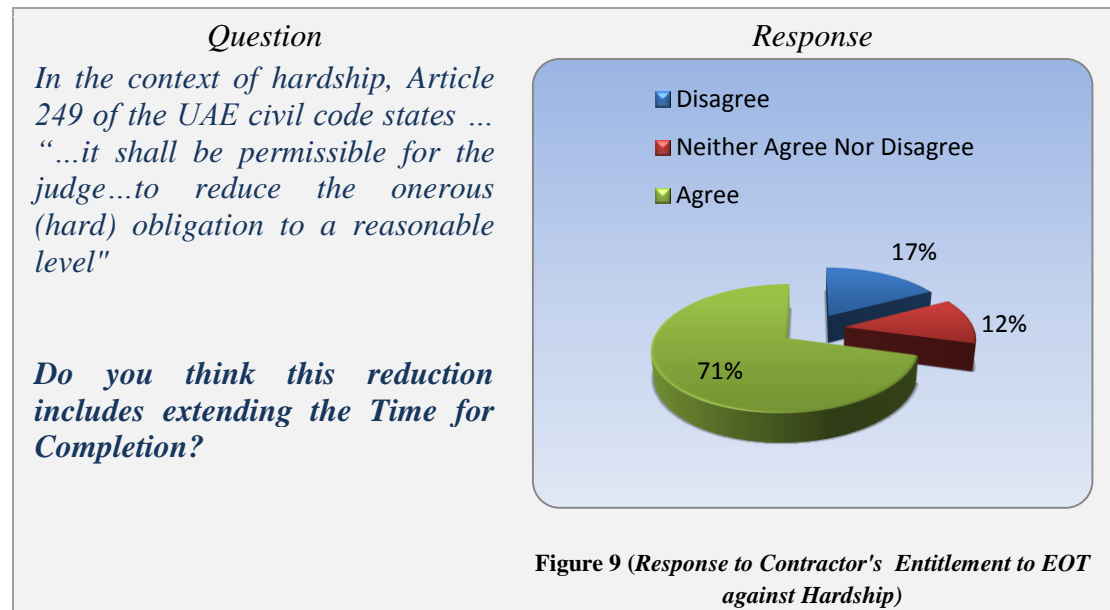


The second question's relates to the meaning of the statement *External Reasons not Caused By the Contractor* mentioned in Article 287.



The response of this question shows that it refers also to hardship events. Consequently, the law frees the contractor of delay liability resulting from these hardship events.

In the same context, and to further examine the validity of those hardship events as grounds for entitling the contractor to EOT the following question was posted:

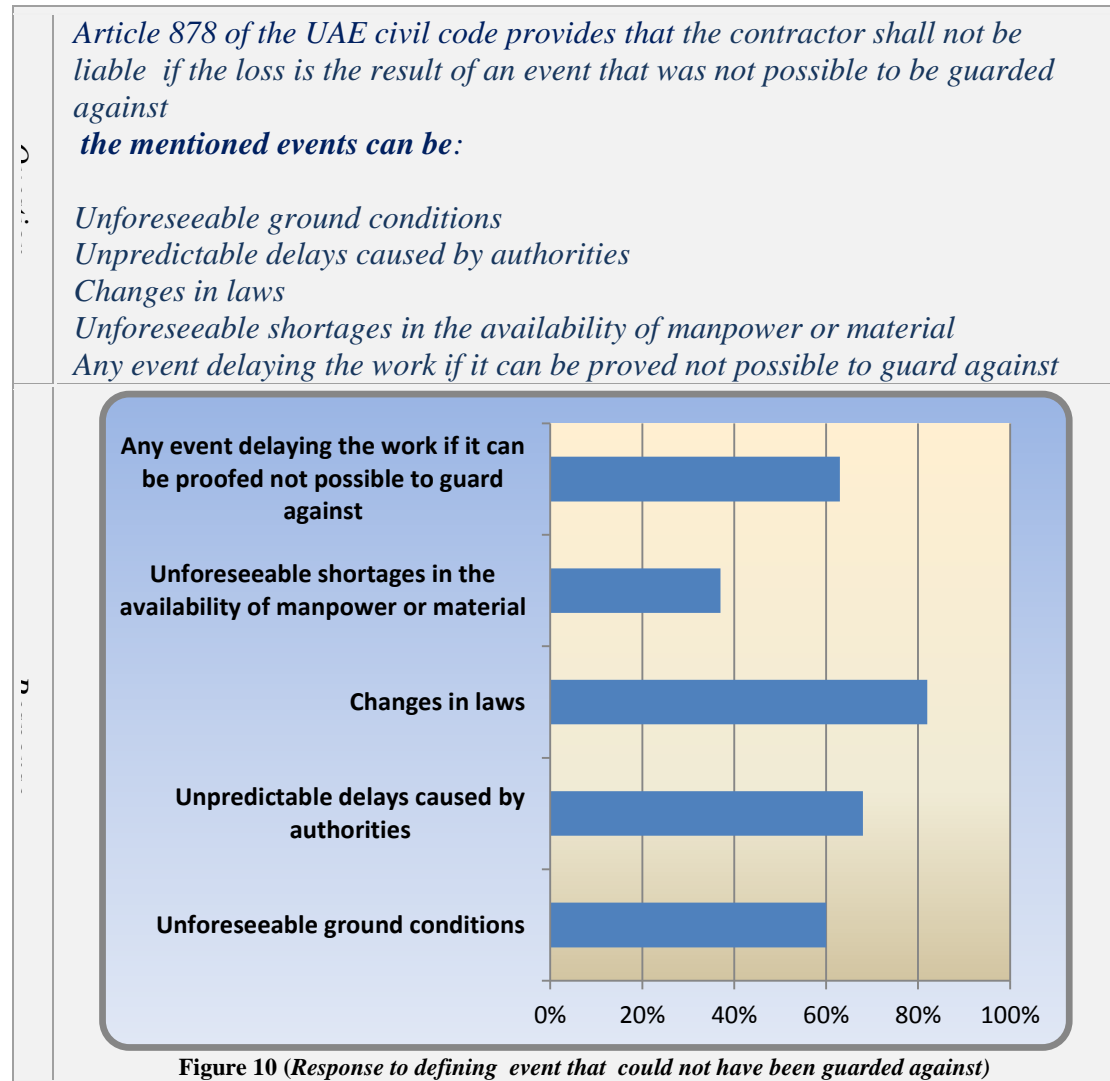


The hardship events establishes for the contractor's right in extension of time in the UAE law, and it further validates the EOT entitling grounds of FIDIC 1999 that includes sorts of war, nuclear contamination, public disorder, forces of nature, and extreme weather¹³¹.

¹³¹ Those are not listed clearly as grounds of entitling the Contractor to EOT under FIDIC 1987 as it is described as “Employer’s Risks”. moreover in FIDIC 1999 the contractor attains entitlement to EOT if such risks causes damages or loss to the works and contractor documents and up to the extent of rectification required by the Engineer.

4.1.1.4 Events that are not Possible to Guard Against

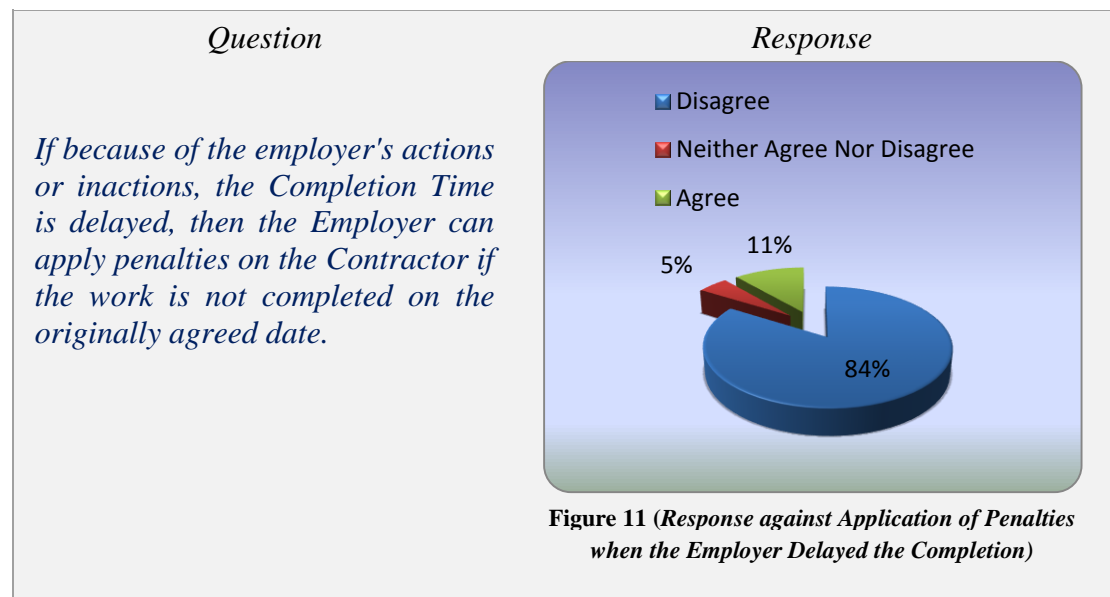
To define what is meant by event that was not possible to guarded against the following question was used:



The response to the question supports considering the mentioned events as EOT entitling events save the unpredictable lack of manpower and material. There is less tendency to consider the unforeseeable shortage of manpower and material as such, this can be attributed to the dominant believe that those are submitted to be the contractor's risk under all circumstances.

4.1.1.5 Employer's Acts

Most of the respondents agreed that when act attributable to the employer delays the works, then the contractor is lawfully entitled to EOT:



The shown response indicates that the Employer's acts that includes prevention or related to non compliance good faith requirements entails EOT for the contractor.

To identify the mentioned employer's acts that can delay the work, the following question was included:

In judgment 269/Judicial Year 3 of Abu Dhabi Court of Cassation refers to completion delay due to the employer or to his acts" ...

Which of the following you think can be of the mentioned Employer's acts?

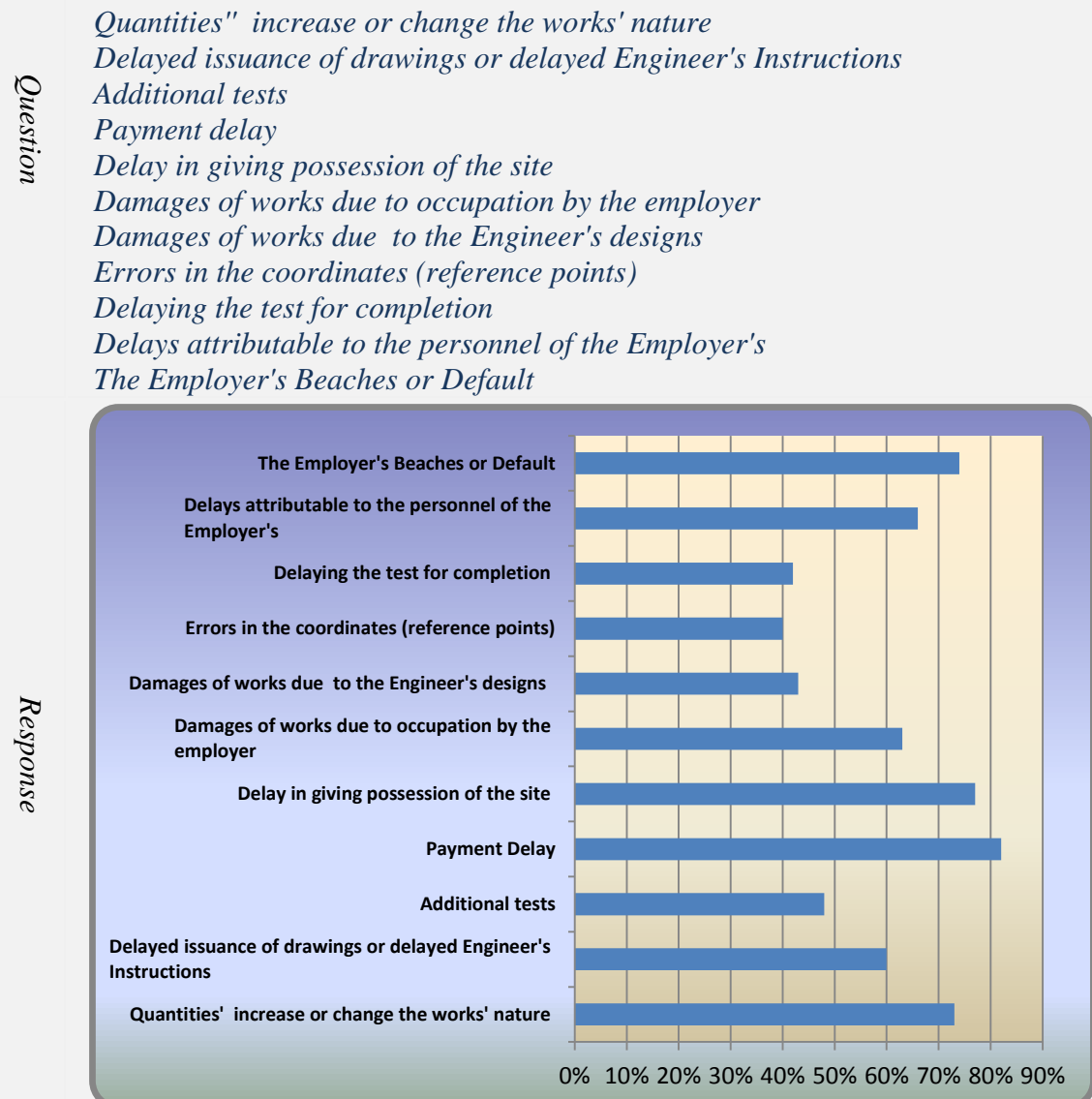


Figure 12 (Response against Defining the Employer's Acts)

The response indicates clearly that the following events can be considered as valid grounds for EOT entitlement

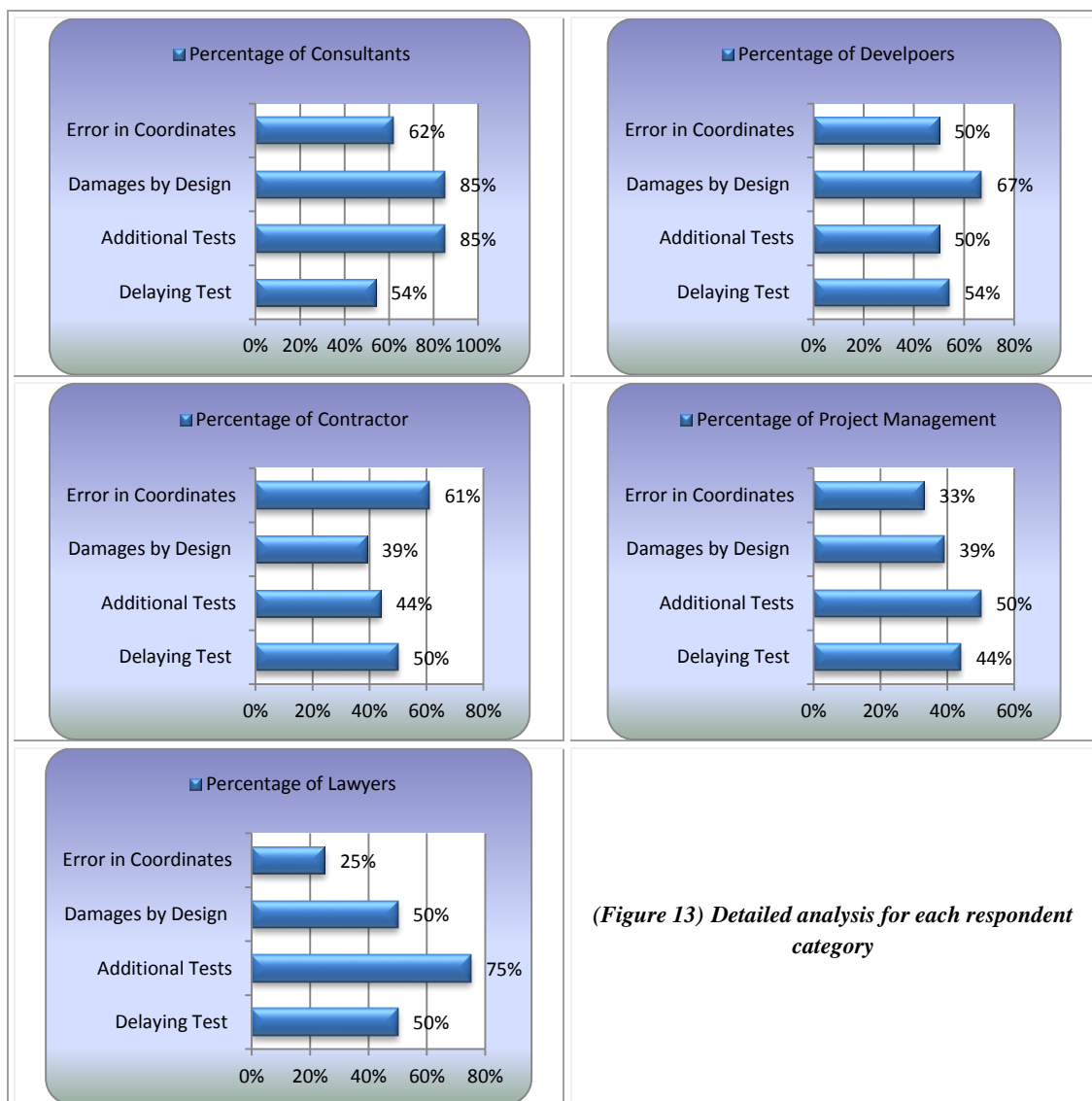
- *Quantities" increase or change the works' nature*
- *Delayed issuance of drawings or delayed Engineer's Instructions*
- *Payment delay*
- *Delay in giving possession of the site*

- *Damages of works due to occupation by the employer*
- *Delays attributable to the personnel of the Employer's*
- *The Employer's Beaches or Default*

However, to clarify the low percentage supporting the following events:

- *Delaying the test for completion*
- *Additional tests*
- *Damages of works due to the Engineer's designs*
- *Errors in the coordinates (reference points)*

The following are detailed analysis is done for each respondent category:

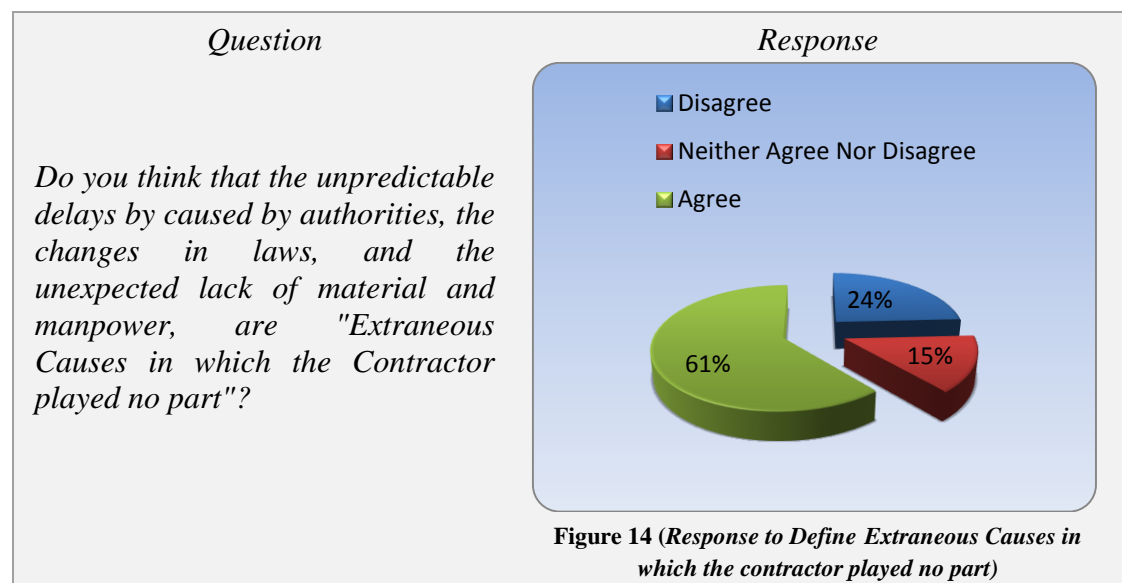


(Figure 13) Detailed analysis for each respondent category

Astonishingly, although the mentioned events are originated from the consultant who acts on behalf of the developer, both the consultant (Engineer) and the developer (Employer) appears accepting those events as their liability, which gives this proposition more weight, consequently, those events can found for the Contractor's entitlement to EOT.

4.1.1.6 External Reasons not Caused By the Contractor

To examine whether the events: un-expectable delays by authorities, the changes in law, and the unexpected shortage of manpower and material can be "...*Extraneous Causes in which the Contractor played no part*" mentioned in Article 287 and Abu Dhabi Court decision¹³² the following question was included:



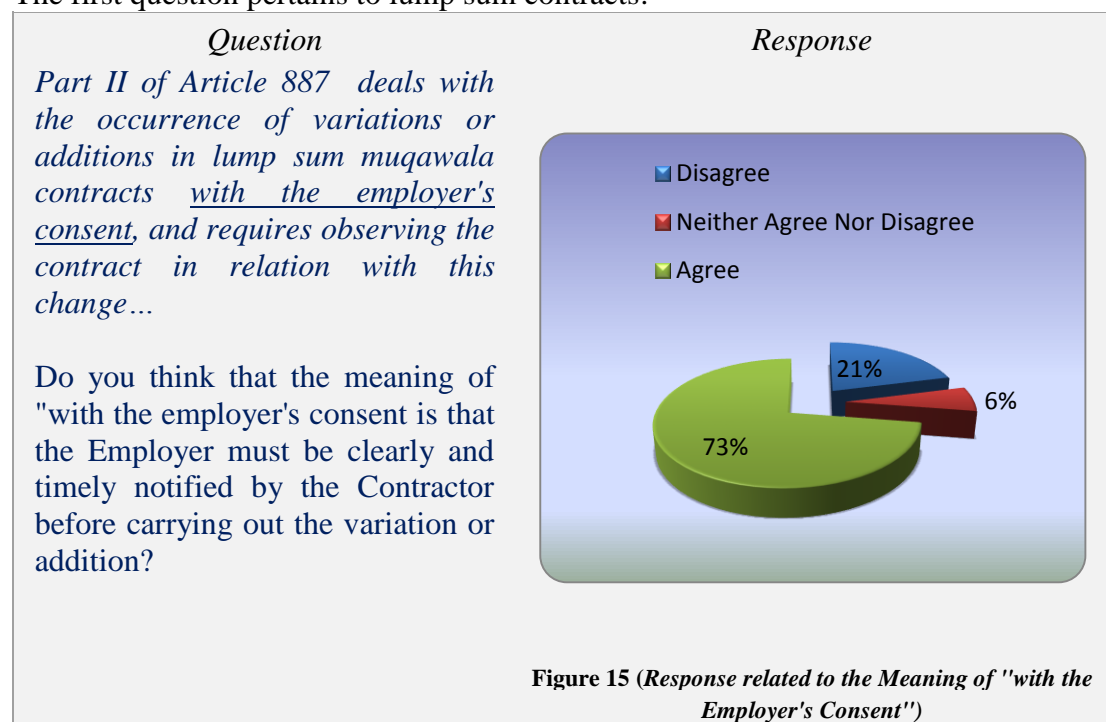
The response refers that the statement external causes not caused by the contractor refers to the same events covered by the scope of article 878 (event that was not possible to be guarded against) and eventually can form ground for entitling the contractor to EOT.

¹³² Abu Dhabi Court of Cassation, 269/Judicial Year 3, Consultant Yusuf Abdul Halim Al Hata, President of the Division: 13 May 2009

4.1.2. EOT Procedure under Bespoke Contracts that lack EOT Procedure

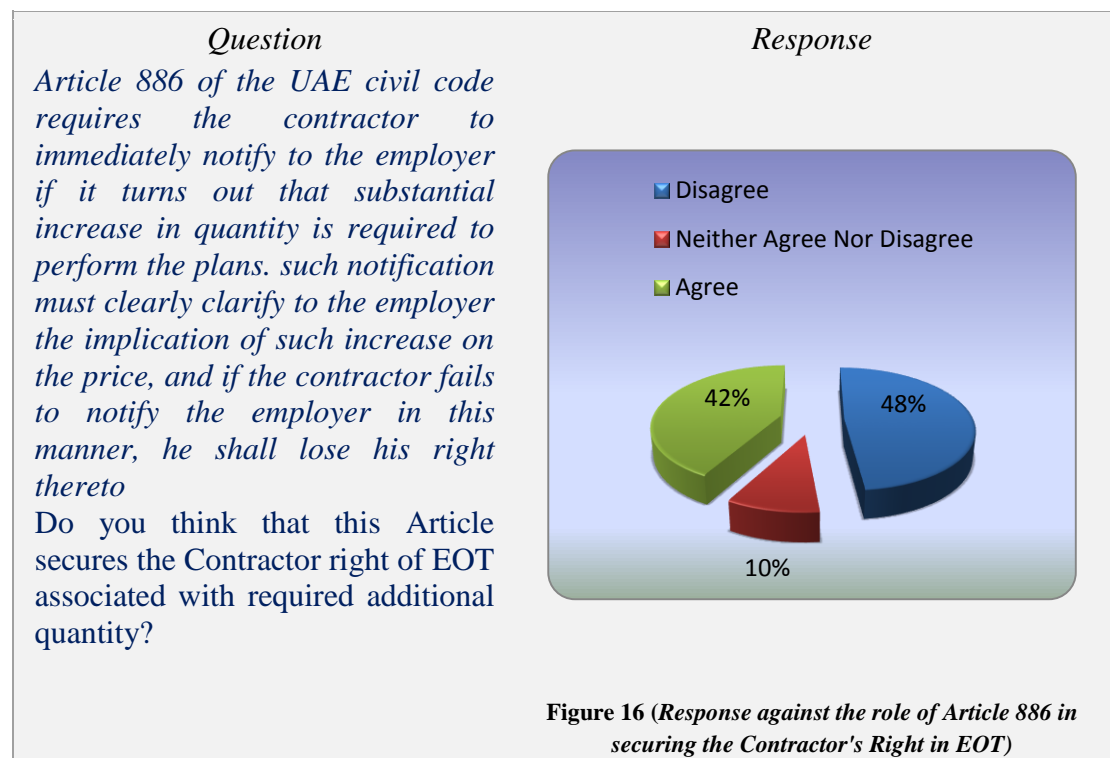
In order to explore any EOT procedure (or requirement for notification to the employer) imposed by the law on the contractor as a requisite for entitlement to EOT, two questions were included to determine any requirement of notice for the employer.

The first question pertains to lump sum contracts:



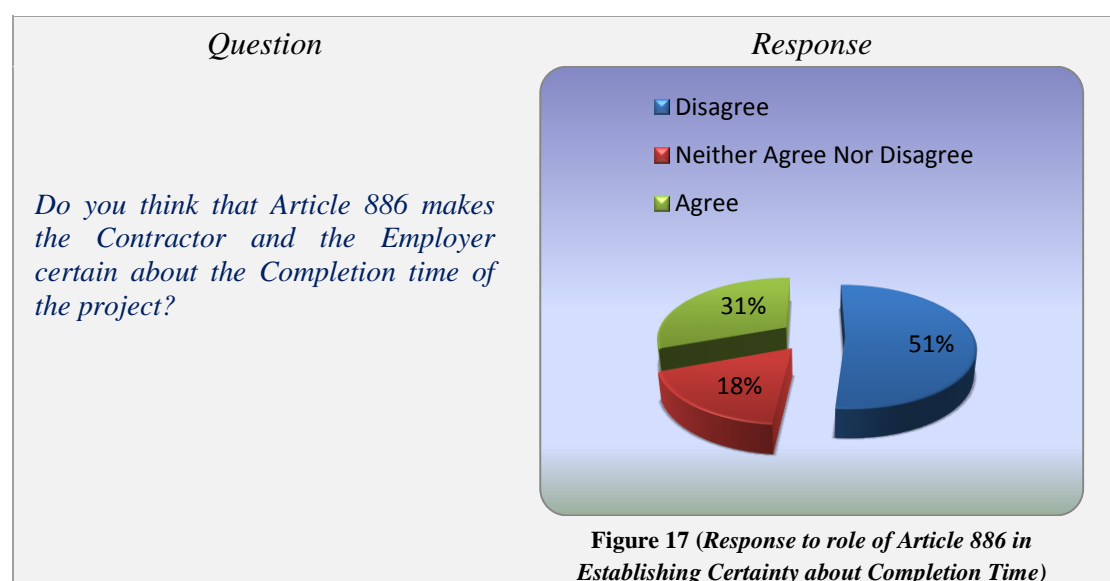
The pattern looks in favor of the requirement of notice, although the stipulation is not explicit.

The other manifest reference to notification requirement is in article 886, the article's stipulation is quite stringent, it deprives the contractor of additional payment for lack notice, the following question was included to ascertain the interpretation of the article in relation its intention:



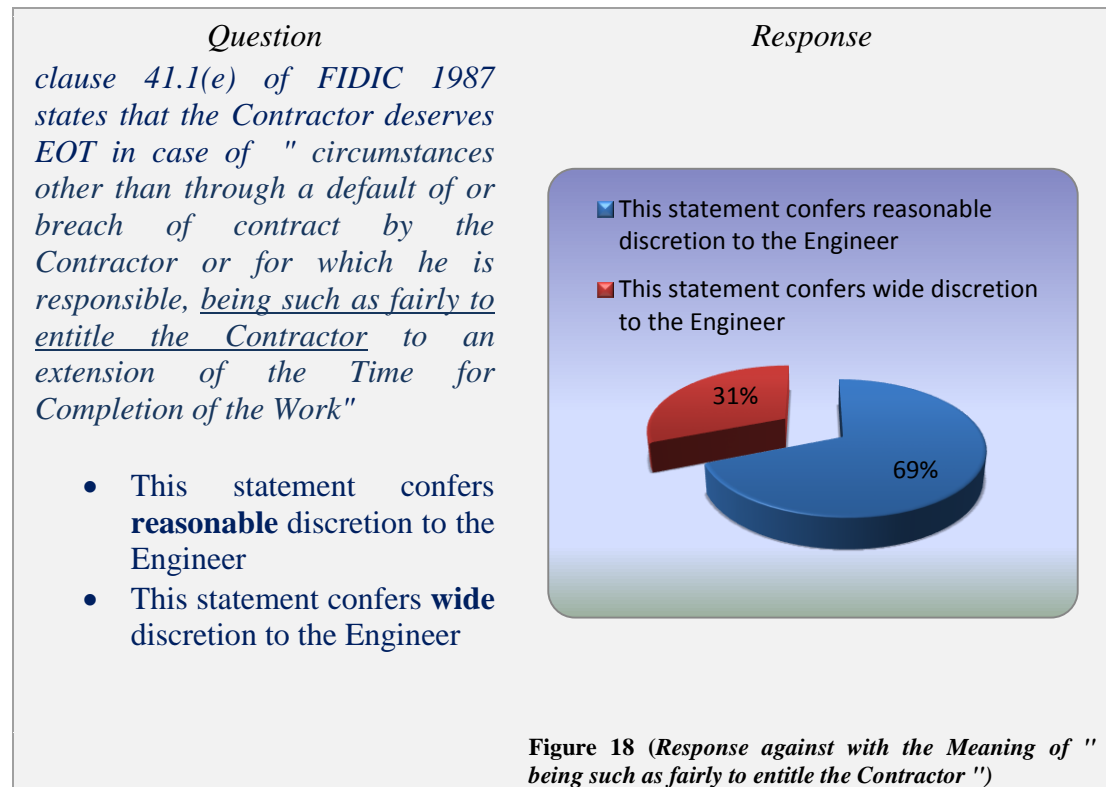
The undetermined response indicates that the notice is not intended to secure the contractor's entitlement to EOT, conversely it looks designed to protect the employer from exposure to the burden of unexpected expenses.

The response bellow also proposes that this article as not about establishing certainty about completion time in the first place, in other words, is not related to extension of completion time, this further supports the previous proposition.

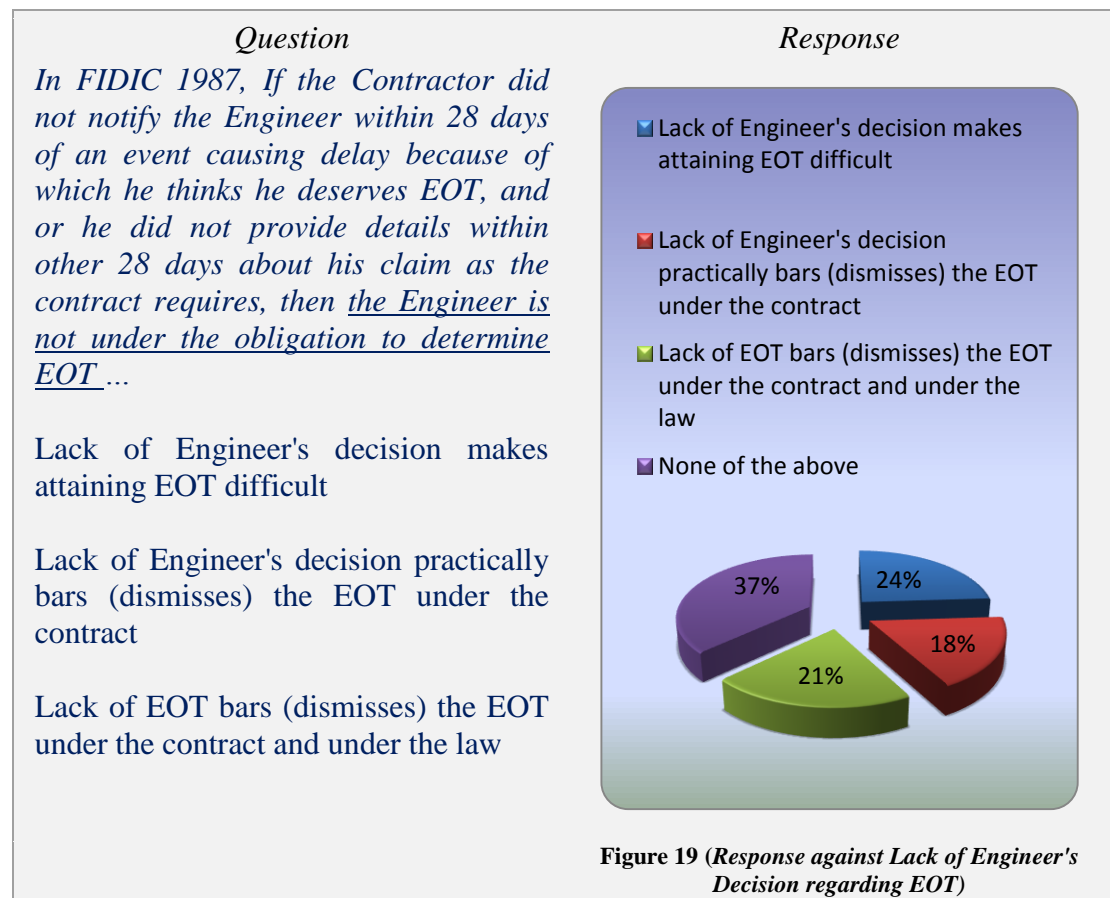


4.1.3. EOT Procedures under FIDIC Redbook 1987

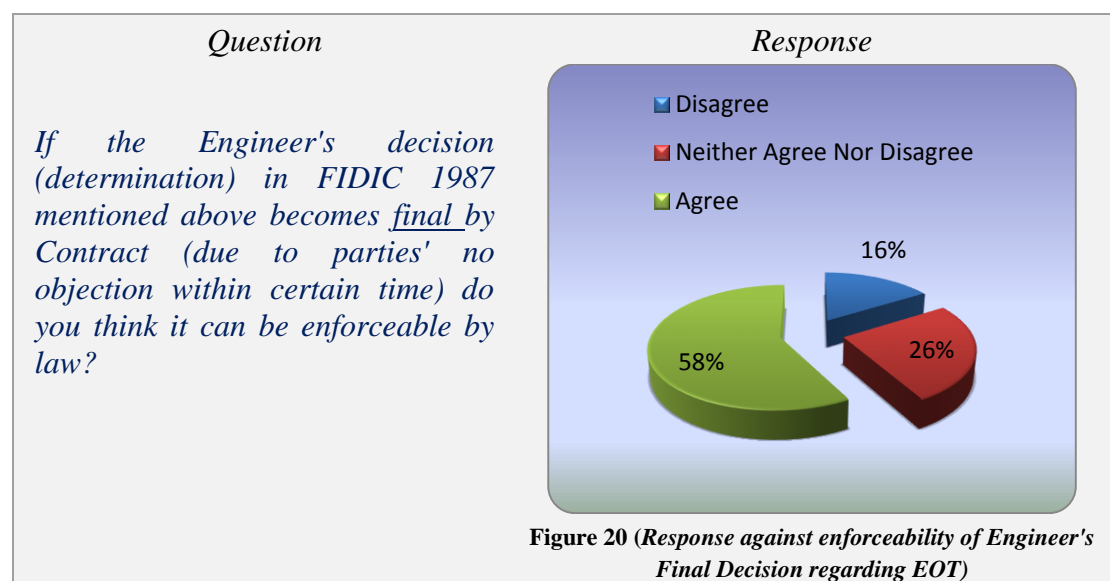
The response pattern bellow accepts that FIDIC 1987 is reasonable in the amount of discretion offered for the engineer in weighting the events that entitle the contractor to EOT:



However, in relation to the lack of this engineer's decision, the response of the question might first seem undetermined, as almost equal percentage of respondents considered that lack of decision can bar the EOT claim or make it unattainable. Nevertheless, a relatively high percentage voted for *non of that*. In fact this supports that the lack of such decision do not confiscate the entitlement to EOT, a result in line with the equity principles of the UAE law.



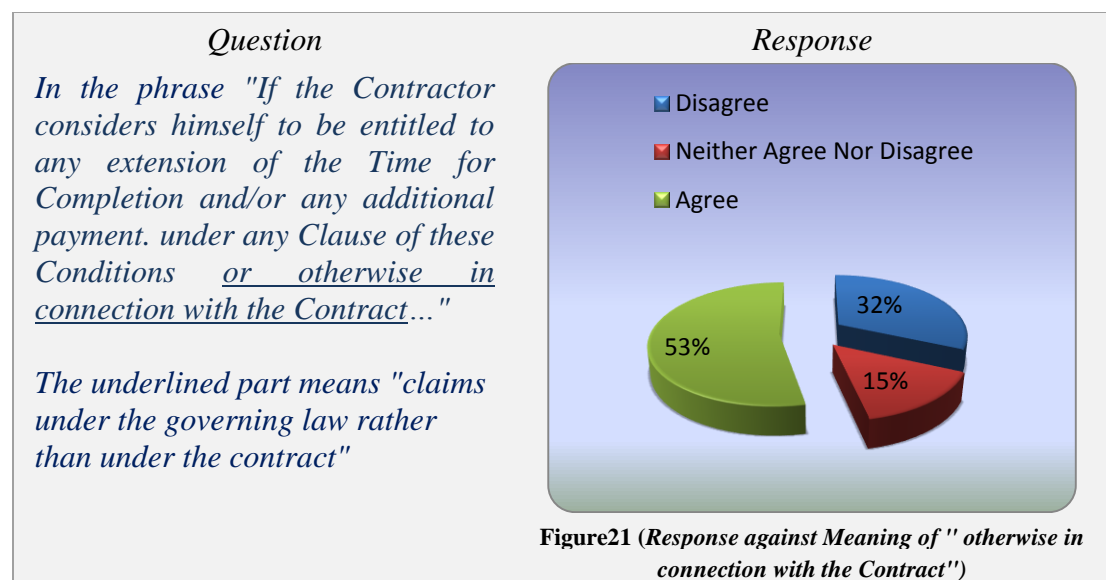
The other cumbersome situation relates to the legal shape of the final decision of the engineer:



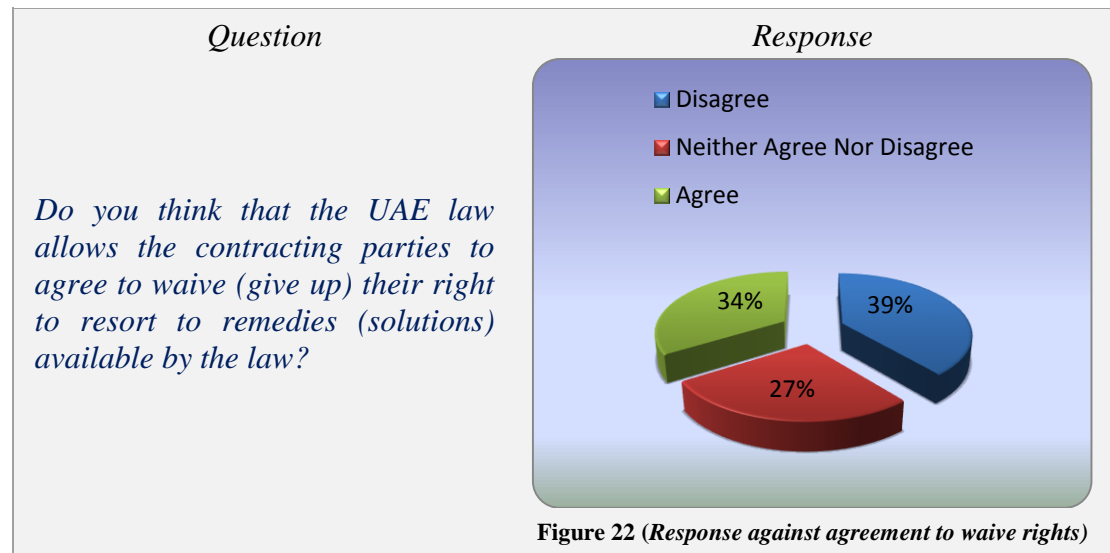
Although the response looks in favor of the enforceability of the final engineer's decision, fifty percent only of the lawyers selected disagree. This percentage reflects uncertainty in the overall response of lawyers. It would be inevitable in this context to refer to the dispute resolution mechanism of FIDIC 1987; challenging engineer's final decision might be dismissed by an arbitral tribunal. Thus terminating the tiers of resolution at this level and potentially blocking the access to courts.

4.1.4. EOT Procedures under FIDIC Redbook 1999

Compared to the opponents' percentage, the proportion of proponent's who believe that FIDIC 1999 tries to block claims under the law for non compliance to notice requirement looks significant:



It is not clear whether the UAE law considers valid a contractual provision trying to override a statutory right. To further examine this possibility, the question was put in the below stipulation:



The response shows that a pre-agreement to wave a statutory rights may be illegal, thus potentially rendering the attempts to bar a claim under the law as per Sub-clause 20.1 (Contractor's Claims) unlawful.

A further troublesome provision in the context of EOT is the time bar clause that blocks the contractor's entitlement to EOT for incompliance to the procedure of notice:

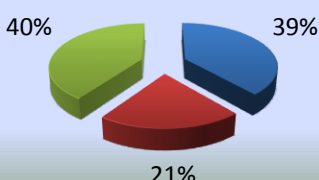
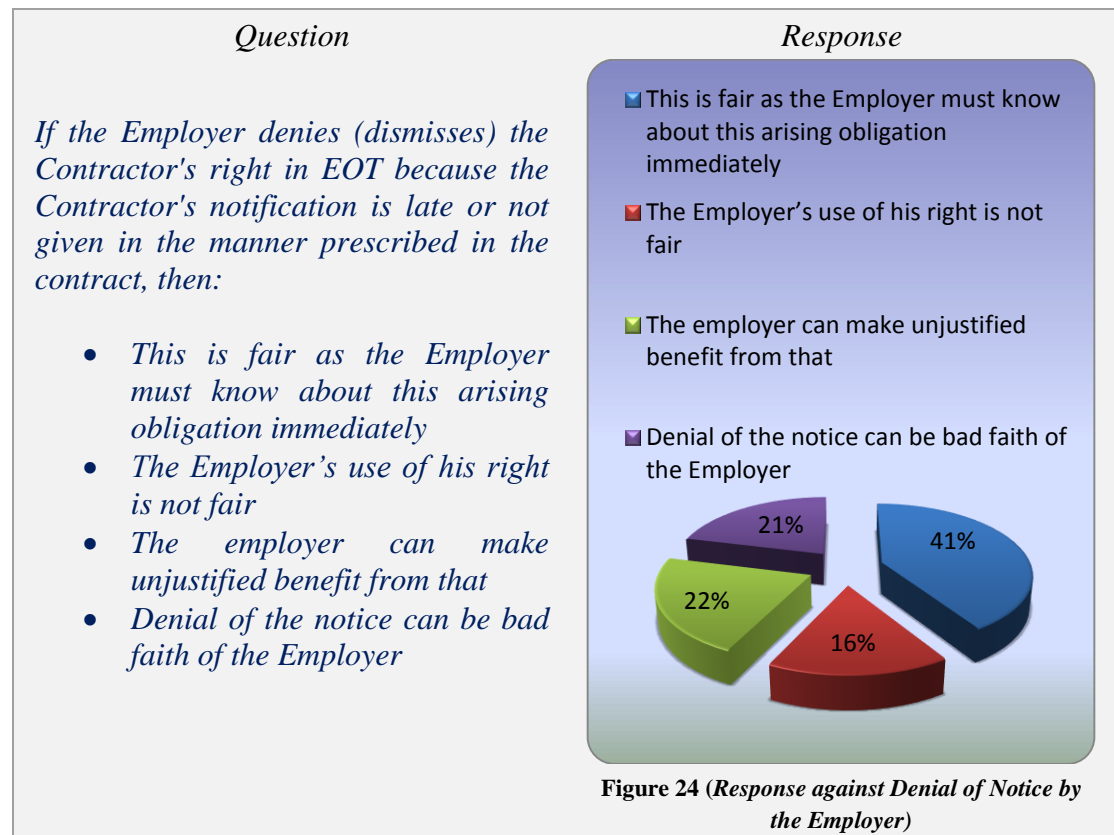
Question	<p><i>FIDIC 1999 require the Contractor to notify the Engineer about any occurred event which the contractor considers a ground for giving him the right to EOT. However, FIDIC1999 provides that if such notice is <u>not provided within 28</u> days then the completion time <u>shall not be extended</u> and the Employer is discharged from the liability to grant an EOT.</i></p> <p>What you think regarding this statement?</p> <ul style="list-style-type: none"> • <i>A Right can be barred (dismissed) if the contract states so.</i> • <i>It is not fair to bar the contractor's right because he was late in notification, or because he notified in manner different from the manner described in the contract.</i> • <i>If the Contractor did not give timely notice the Employer will be in risk or uncertainty about the completion date</i> 								
Response	<div data-bbox="357 891 1308 1335"> <p> <input checked="" type="checkbox"/> A Right can be barred (dismissed) if the contract states so. </p> <p> <input type="checkbox"/> It is not fair to bar the contractor's right because he was late </p> <p> <input type="checkbox"/> If the Contractor did not give timely notice the Employer will be in Risk & Uncerativity about Completion Time </p>  <table border="1"> <thead> <tr> <th>Response Option</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>A Right can be barred (dismissed) if the contract states so.</td> <td>39%</td> </tr> <tr> <td>If the Contractor did not give timely notice the Employer will be in Risk & Uncerativity about Completion Time</td> <td>40%</td> </tr> <tr> <td>It is not fair to bar the contractor's right because he was late</td> <td>21%</td> </tr> </tbody> </table> </div>	Response Option	Percentage	A Right can be barred (dismissed) if the contract states so.	39%	If the Contractor did not give timely notice the Employer will be in Risk & Uncerativity about Completion Time	40%	It is not fair to bar the contractor's right because he was late	21%
Response Option	Percentage								
A Right can be barred (dismissed) if the contract states so.	39%								
If the Contractor did not give timely notice the Employer will be in Risk & Uncerativity about Completion Time	40%								
It is not fair to bar the contractor's right because he was late	21%								

Figure 23 (Response against Barring EOT Claims under Contract)

With allowing on answer per one respondent in this question, the response pattern probably do not overbalance any answer. Although 39% respondents saw in favor of "right can be barred", little more preferred to express the worry about the exposure of employer to risk without considering the claim can be barred lawfully, and ultimately, the 21% respondents consider it unfair to bar the EOT claim. Rendering the majority respondents in disagreement with the legitimacy of barring the claim.

Further the coming question with the corresponding response supports the same view:



More than half of the respondents voted against upholding the lawfulness of time bar, this looks in line with the law stand related that opposes the time bar of claim for lack of strict compliance to time notice.

Chapter V

Conclusion and Recommendations

5.1 Conclusion

The law of the United Arab Emirates (as it stands) looks capable of defining the grounds that entitles a contractor to an extension of time when the contract does not provide for it. However such definition might not be straightforward in most of the cases, yet requiring derivation.

The UAE law appears providing for entitling the contractor for EOT for all grounds defined in the most advanced contracting forms designed for construction contracts designed by the employer, the law recognizes the entitlement resulting from changes in the nature, amount of, or additional work by the combined operation of different legal provisions based on the prevention of gharar in the contracts that is originated from Islamic Shari'ah, however, the reasoning is not direct and requires devise.

The law also entitles the contractor for slowing down the progress of works and even for suspending the works with retaining his right in EOT when payments is delayed by the employer. This is based on the concept of mutual exchange of performance of obligations in contracts, yet the determination of period considered as delay in payment is left to be judged by the custom.

In addition, the law entitles the contractor indirectly for EOT by vesting on the judge the discretion to adjust the liquidated damages to a value proportionate to the loss sustained, upon an application of the contractor, this right is conserved by law as a matter of public policy.

In cases of hardships that renders the execution of the contract onerous and threatening with severe loss to the contractor, the UAE law further allows the judge to reduce the level of obligation on the contract obviously including extending the completion date. While there is no listing of such conditions causing hardship, the law's definition of hardship albeit being broad tends to include events like war, nuclear contamination, public disorder, forces of nature, and extremely severe weather conditions.

The UAE law has a particular stand related to the temporary force majeure; it entitles the contractor to either cancel the contract (after notifying the employer) or continue the works after the expiration of the temporary force majeure events. In essence, the law effectively reserves the contractor right in EOT associated with temporary force majeure.

The law further relieves the contractor from losses resulting from events that was not possible to guard against, evidently, such losses can include delay in completion. Such events can include unpredictable delays caused by authorities, changes in laws, unforeseeable shortages in the availability of manpower or material, or broadly, any cause delaying the work if it can be proved not possible to guard against.

The UAE law also recognizes the delay causes as EOT entitling events including delays caused by the Employer's acts, omissions, preventions, defaults and breaches as ground for entitling the contractor to extension of time.

The mentioned employer's acts can include, Increasing the quantities or changing the nature of the works, Delayed issuance of drawings or Instructions, Additional tests, Delaying the payment, Delayed giving possession of the site, Damaging the works by the employer occupation to the limit of rectification required, Damages of the works due to the Engineer's designs, Errors in the provided coordinates (reference points), Delaying the completion test, and Delays caused by the Employers personnel.

Another EOT entitling ground although not provided for in the CTC seems to be firmly settled by many judgments of courts, is the delays caused by the defaults of a nominated subcontractor.

The UAE law further provides broad grounds for entitling the contractor to EOT, under either Justified Delays, the case when the Employer did not sustained losses because of the contractor's delay, and in case of the external reasons that are not due to the Contractor.

While the FIDIC 1999 Conditions of contract appears introducing improvements over the previous FIDIC 1987 Conditions by incorporating more grounds of contractor's entitlement to EOT and by being more specific in defining some of the other previous grounds, the UAE law appears loosely accepting as valid grounds all the EOT entitling grounds of FIDIC Red Books 1987 and 1999.

When the construction contract is carried out ad hoc (bespoke) and has no provisions as to EOT procedure, then the operating provisions in this regard shall be up to the supplementation offered by the UAE law. In such situation, it should be noted that the UAE law has reference to the requirement of timely notice to the employer as a contractual requisite to the entitlement to EOT when a significant changes occur either in a lump sum contracts or in a re-measured contract based on unit rates.

Accordingly, if the contract is carried as lump sum or unit rate re-measure, it is implied that the contractor shall notify the employer in case of need to additional quantities as a requisite to any entitlement including EOT.

However, the UAE law appears not imposing any timely notice requirement for the employer as a requisite for entitlement to any claim for the sole reason of barring entitlement for non compliance to notice, rather, it appears imposing such requisite notices to protect the employer from unexpected excessive payment, and to avoid

potential gharar to maintain equity. Yet, the lack of those notices can operate as procedural condition precedent to EOT entitlement that can bar the contractor's claim. Although the articles relating to the aforementioned two modes of construction contracting refer to financial entitlement, it can be implied that it refers to EOT as every increase in the quantities entails a corresponding amendment in the completion time.

Contracting under FIDIC 1987 Conditions requires notice to be communicated to the Engineer in certain prescribed period of the occurrence of the event giving rise to EOT entitlement. While this notice might appear as a condition precedent to bounding the Engineer to make determination, the conditions leaves discretion to the Engineer to elect to do the determination. If the Engineer opt not to provide such determination, then the effect of lack the of the Engineer's decision can entail uncertainties on the contractor's entitlement to EOT that might amount to barring the entitlement. Another view in this regard is that such failure to serve notice timely, in effect just limits the contractor's entitlement to whatever could be proved later by the available substantiation records then. Whatever the impact is, a Contractors must assure serving such notices timely to avoid facing sorts of uncertainties related to the law's stand in this situation.

The Conditions of FIDIC 1987 renders the Engineer's decision final if not challenged by the parties within a certain time. As the UAE law has no reference to or recognition of the engineer's final decision of FIDIC 1987 , the enforceability of that decision remains undetermined, particularly as the contract renders such decision ultimate in the hierarchy of dispute resolution tiers.

the Conditions of Contract of FIDIC 1999 brought about new requirements related to the EOT procedure. these requirements can be seen as improvements being parts of the overall contractual risk allocation balance. it included the of timely notice of an EOT claim as a condition precedent to contractor's entitlement to EOT, this requirement rationale relates to assuring conservation of parties' rights.

FIDIC 1999 subjects all the contractor's claims either under the contract or in connection with the contract (under the law) to the procedural requirement of the contract which might lead to barring such claim. It remains unclear whether the UAE law accepts this FIDIC approach and allows parties to contractually and beforehand agree to waive their rights under that law by subjecting it to contractual dismissal. So the ability of FIDIC 1999 to bar claims under the UAE law remains unclear.

While FIDIC 1999 bars the contractor's claim including EOT when the contractor fails to provide notice to the Engineer in a prescribed contractual manner, such bar remains exposed to challenges based on some equity provisions in the UAE law like the unlawful use of right, the incompliance with good faith requirement in executing the contract, and the unlawful enrichment depending on the particulars of the case.

5.2 Recommendations

It can be devised that although the UAE law recognizes a broad spectrum of events that entitles the contractor to EOT when bespoke contract lacking EOT provisions is used, the law's ability to establish the contractor's right to the EOT can be further ascertained and clarified if a dedicated commentary related to construction is issued by the ministry of justice with the aid of the expertise's inputs. Such commentary need to include ample definition of the EOT entitling events with listing the events, and with clarifying the durations considered reasonable for notices.

Furthermore, it is recommended that the ministry of justice in association with the authorities concerned with public works carry out a review that leads to amending the mentioned FIDIC forms to work in harmony with the UAE law in relation to EOT procedures. This proposed amendment should consider the provisions related to the engineer's decision of FIDIC 1987, and the scope and operation of the time bar clause of FIDIC 1999. After such amendment the mentioned FIDIC forms can be published for public adoption as standard contracting forms in the UAE.

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