“DO FIDIC RED BOOK 1999 AMENDED CONTRACTS IN THE UAE FAVOR THE EMPLOYER OVER THE CONTRACTOR AND THE CONTRACTOR OVER THE SUBCONTRACTOR AND PROVIDE AN UNREASONABLE RISK, WHICH IS SUPPORTED BY THE CIVIL LAW IN UNITED ARAB EMIRATES COMPARED TO THE COMMON LAW OF THE UNITED KINGDOM?”

" هل العقود الواردة في النسخة المعدلة من الكتاب الأحمر لعقد الفيديك لعام 1999 في دولة الإمارات العربية المتحدة تتحيز لصالح صاحب العمل على المقاول، والمقاول على المقاول من الباطن، وتنص على مخاطر غير معقولة بدعم من القانون المدني في دولة الإمارات العربية المتحدة مقارنة بالقانون العام للمملكة المتحدة؟"

by

FARZAD MOHEBALI

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ABSTRACT

This dissertation looks at the amended FIDIC 1999 red book contract in the United Arab Emirates and see if the amended FIDIC Red book favours the Employer over the Contractor or the Contractor over the Subcontractor, which provides unreasonable risk to the Contractor or the Subcontractor, and whether the amended FIDIC red book contract is supported by the Civil Law in the United Arab Emirates and the Common Law in the United Kingdom. The dissertation briefly looks into the FIDIC 2017 Red book, however as the FIDIC 2017 red book is not used in the Middle East including the United Arab Emirates, the dissertation compared heavily on the FIDIC 1999 red book.

The findings of this dissertation are that even though the amended version of FIDIC 1999 red book and FIDIC 2017 red book provides the Employer and Contractor a upper hand and an unfair and unreasonable risk to the Contractor and to the Subcontractor. The common law in the United Kingdom and the Civil Law in the United Arab Emirates both have introduced laws and legislations to try and provide the Contractor and Subcontractor from ensuring that the Employer and the Contractor meets their main performance obligation of making payments to the Contractor and Subcontractor and provides the right for the Contractor and Subcontractor to remedy if the Employer or Contractor doesn't meet their main performance obligation of payment.

KEYWORDS
Risks, Risk Management, FIDIC 1999 Red Book, Payments, Damages, Liquidated Damages, Bonds, Dispute Resolution, Arbitration, DAB, Adjudication, Variations, Extension of Time, Taking over Certificates, Defect Liability Period, Decennial Liability, Civil Law, Subcontractor, Main Contractor, Back to Back Clauses, Collateral warranty

ملخص

تختص هذه الدراسة بالبحث في النسخة المعدلة من الكتاب الأحمر لعقد الفيديك لعام 1999 الصادرة في دولة الإمارات العربية المتحدة وترى ما إذا كانت النسخة المعدلة من الكتاب الأحمر لعقد الفيديك تتحيز لصالح صاحب العمل على المقاول أو تتحيز للمقاول على المقاول من الباطن وتنص على تعرض المقاول أو المقاول من الباطن إلى مخاطر غير معقولة، وما إذا كانت النسخة المعدلة من كتاب الفيديك الأحمر مدعومة من القانون المدني في دولة الإمارات العربية المتحدة والقانون العام في المملكة المتحدة. وتبحث هذه الدراسة بصورة موجزة في الكتاب الأحمر لعقد الفيديك نسخة 2017، رغم عدم استخدام هذه النسخة من الكتاب الأحمر في الشرق الأوسط بما في ذلك دولة الإمارات العربية المتحدة كوثيقة مقارنة بالكتاب الأحمر لعقد الفيديك نسخة 1999.

وتتلخص نتائج هذه الدراسة في أن النسخة المعدلة من الكتاب الأحمر لعقد الفيديك لعام 1999 ونسخة عام 2017 من الكتاب تنصان على منح صاحب العمل والمقاول الصلاحية العليا، بينما تُعرض المقاول والمقاول من الباطن لمخاطر غير عادلة وغير معقولة. وقد سن كل من القانون العام في المملكة المتحدة والقانون المدني في دولة الإمارات العربية المتحدة قوانين وتشريعات تخص المقاول والمقاول من الباطن لضمان وفاء صاحب العمل والمقاول بالتزاماتهما الرئيسية الخاصة بتقديم المدفوعات إلى المقاول والمقاول من الباطن وتمنح المقاول والمقاول من الباطن الحق في الحصول على تعويض في حالة عدم وفاء صاحب العمل أو المقاول بالتزاماتها الأساسية بالدفع.

DEDICATIONS

I dedicate this to my wife and my daughters:

Ruchi Shakrani, Maya Mohebali and Nikki Mohebali

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I would like to give acknowledgement and thanks to my beloved Wife and Daughters, who have supported me constantly through my Master at the British University in Dubai.

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CONTENTS i

TABLE OF STANDARD FORM OF CONTRACTS

CHAPTER 1 – INTRODUCTION

This dissertation looks at FIDIC Contracts against the background of the Civil Law in the United Arab Emirates and the Common Law in the United Kingdom to examine if FIDIC contracts or their amended versions in the United Arab Emirates favor the Employer over the Contractor or the Contractor over the Subcontractor due to the nature of Civil Law in the United Arab Emirates.

This research paper looks at the FIDIC 1999 red book rather than the FIDIC 2017 red book, as the FIDIC 2017 red book is not currently well used in the middle east including the United Arab Emirates and currently the majority of government establishments and corporations in United Arab Emirates have modified the FIDIC 1999 red book; an example of this is the DUBAI EXPO 2020 project, which the Contract is based on the FIDIC 1999 red book with changes in the particular section of the Contract.

This research paper examines the changes in FIDIC 1999 red book compared to the earlier versions and draws out how FIDIC has attempted to protect the rights of both the Employer and the Contractor and to fairly allocate risks between them.

The focus is on clauses in FIDIC contracts or their amended versions and how they are treated differently under United Arab Emirates Civil Law and the United Kingdom Common Law and how this may have an effect on the fine balance of risk between parties.

It examines specific clauses and the principle adopted of the back to back clauses, which is potentially not in accordance with the requirements of the law and provides the Subcontractor a

very high risk, which could be problematic and not included in the Subcontractor's price. The back to back clauses only seems to work if there are no issues or conflicts between the Subcontractor and the Main Contractor. If the Main Contractor is in breach of the Contract due to no fault or cause by the Employer or Subcontractor and has a significant effect on the Subcontractor, the Subcontractor needs to ensure that there are significant clauses in the Subcontract agreement for the Subcontractor to seek compensation from the Main Contractor.

1.0 RESEARCH OBJECTIVES

The Objectives of this dissertation are as follows:

1. To establish and present whether the legal framework of the Civil Law of the United Arab Emirates compared to the Common Law in the United Kingdom allows an Employer or a Contractor to modify the FIDIC Standard Contract to a modified version which does not allocate the risks of the Contract in a fair and reasonable manner.
2. To identify clauses under the FIDIC contract, which are not supported in the Civil Law of the United Arab Emirates and provides the Employer or the Contractor the right to make changes to re-allocate the risk compared to the Common Law in the United Kingdom.
3. To understand and demonstrate areas where the back to back clause may apply and the potential risks and outcome of these Clauses to the Subcontractor from the Contractor, with issuing recommendations to the Main Contractor and the Subcontractor to ensure that both parties are protected, and the allocation of risk is correctly managed.

1.1 RESEARCH QUESTIONS

a) FIDIC has understood over the last twenty years that the risk aspect of a contract needs to be correctly allocated and therefore has modified their Standard Conditions of Contract to re-allocate the risks. What changes to various clauses in the FIDIC 1999 Red Book from the FIDIC 1987 Red book, demonstrate how FIDIC has changed, added or omitted clauses to re-allocate the risk in a fair manner

b) FIDIC contracts provide clear and precise direction for the following conditions of the Contract. Does the Civil Law of the United Arab Emirates provide Employers and Contractors the opportunities to modify the Contract to favor their requirements and to issue Contract or Subcontract agreements which are on a back to back basis and unfairly distribute the risk down the supply chain compared to Common Law in United Kingdom for the following conditions:

1. Payment
2. Damages, Penalties, Liquidated Damages
3. Bonds
4. Dispute Resolution
5. Variations
6. Extension of time
7. Taking over
8. Defects Liability period
9. Decennial Liability

1.2 RESEARCH SCOPE

The scope of this research is limited the above questions in relation to FIDIC 1999 Red Book Conditions of Contracts within the jurisdictions of the Common Law of United Kingdom and the Civil Law of the United Arab Emirates.

1.3 RESEARCH STRUCTURE

This dissertation is structured in four chapters, beginning with the introduction, which lays down the objectives and scope of the dissertation, as well the structure and research methodology that will be used for this dissertation.

Chapter 2 will consist of the literature review of the subject, the risks associated with the Conditions of contract, the management and allocation of risk and how risks are addressed in the revisions of the Standard Conditions of Contract under FIDIC 1999 and the protections offered to the Contractor and Subcontractor by the Common Law of the United Kingdom in contrast with the Civil Law of the United Arab Emirates with particular reference to the clauses cited in Chapter 3.

Chapter 3 lists and describes the significant clauses under FIDIC that are examined in this dissertation and how the Civil Law in the United Arab Emirates differs in the treatment of these clauses in comparison to the Common Law of the United Kingdom and how this difference may be biased to the Employer or Contractor against the Contractor or Subcontractor respectively.
Chapter 4 provides the conclusion and recommendation of the research and the suggestions based on the findings of this study.

1.4 RESEARCH METHODOLOGY

There are two research methodology adopted for this dissertation, which is:

1. Qualitative, taking in to account the common practices adopted in construction contracts within the legal systems under observation.
2. Comparative approach, comparing the Civil Law with the Common Law

The research looks into FIDIC Contracts with references to the Common Law in the United Kingdom and the Civil Law of the United Arab Emirates with particular focus on risks, their allocation and management of risk in certain clauses of the FIDIC contracts.

CHAPTER 2 – FIDIC CONTRACTS AND RISKS

2.1 INTRODUCTION

This dissertation aims to examine and identify how FIDIC has developed the Standard Conditions of Contract and has created the FIDIC 2017 Red Book and FIDIC 1999 Red Book to try to fairly allocate and manage the risks between the various stakeholders including the Subcontractor and the Contractor, however the Employer and Contractor has amended the FIDIC 1999 Red Book to provide an unreasonable risks, and whether this is supported by the civil law in United Arab Emirates compared to the common law of the United Kingdom. This dissertation looks at the FIDIC 1999 Red Book rather than to the FIDIC 2017 Red Book as FIDIC 2017 Red Book isn't used in the Middle East including United Arab Emirates.

The FIDIC 1999 Red Book is mainly used in the Middle East including the United Arab Emirates this dissertation will examine, whether the modifications of the FIDIC 1999 Red Book increases the risks on the Main Contractor and the Subcontractor and whether the conditions of contracts are modified to provide the Employer or the Main Contractor an amendment, which favor the Employer over the Main Contractor and the Main Contractor over the Subcontractor.

This dissertation would go further to see if the Civil Law of the United Arab Emirates allows bias in favor of the Employers over the Contractor or the Contractor over the Subcontractor in contrast to the Common Law of the United Kingdom.

In order to examine this proposal, this section takes particular note of what is a FIDIC contract, the risks of the contract, the allocation and management of risk.

2.2 WHAT IS A FIDIC CONTRACT?

The International Federation of Consulting Engineers, known as FIDIC was created on the 22nd July 1913, which was created by Belgium, France, Switzerland and supported by two other countries Netherlands and Germany. Over the coming years, more and more countries joined the FIDIC association and implemented FIDIC contracts. In 1987, FIDIC created and published the red and yellow books, which they started to sell. In 1990, FIDIC created the white book and published it. In 1997, FIDIC started to understand that the risks of the contracts were not being understood and therefore created a risk management manual, which was published for the Contractors and Subcontractors to start to understand the risks and the allocations of risk under the FIDIC contracts. In 1994, FIDIC created and published the conditions of Subcontract for works of civil engineering construction, which works in accordance with the FIDIC 1987 Red Book.

In 1999, FIDIC created four different contracts for various usage:

1. Conditions of Contract for Construction (Red Book)
2. Conditions of Contract for Plant and Design-Build (Yellow Book)
3. The Short form of Contract (Green Book)
4. Conditions of Contract for EPC Turnkey projects (Silver Book)

These became standard conditions of contracts, which are being used in various countries in the world including the Middle East.

In 2005, FIDIC developed a standard format with the world bank, which was called the harmonized version of the red book. In 2011, FIDIC understood that the red book is currently being used for Subcontractors, which did not suit subcontracts and therefore required the Main Contractor to make amendments in the particular conditions to make the FIDIC 1999 red book contract usable, however unfairly allocating the risks from the Main Contractor to the Subcontractor. Therefore, FIDIC created the 2011 Subcontract conditions, which worked with the FIDIC 1999 Red book, however allocating and managing the risk in a better way. This dissertation does not look into the 2011 Subcontract conditions, as the 2011 Subcontract conditions are not being used in the Middle East including United Arab Emirates.

Currently over 98 countries have adopted the use of the FIDIC contracts in their region and it is a major condition of Contract used in various part of the world.

2.3 WHAT IS RISK?

N Bunni[1] states that "risk is defined in British standard no. 4778: Section 3.1:1991, as a combination of the probability, or frequency, of occurrence of a defined hazard and the magnitude of the consequences of the occurrence."[2] Therefore the different stakeholders of the business accept certain risks and price these risks within their quotation, which their client whether Subcontractor, Contractor or Employer can either accept or decline their offer. Once the offer is accepted, then each party has accepted certain risks with the project and the Contract and these risks have been clearly identified by the parties and managed using various risk management

[1]Bunni N, The FIDIC Form of Contract, the Fourth Edition of the Red Book (2nd edn, Blackwell Science, 1997), 95
[2] Ibid, 95.

systems, which helps the parties calculated the risk, the outcome, the likelihood of the outcome and potential ways to mitigate or protect themselves from the risk. During the process of the risk management systems, the allocation of risks will be divided between the Subcontractor or Contractor and the Employer or Developer.

2.4 RISK MANAGEMENT

J Murdoch and W Hughes[3]expound that there are three steps in managing any risk.

1. Identify the risks – This will ensure that all risks, whether it could be considered as minor or major, needs to be identified by the parties.
2. Analyze the risk – This will include to understand the probability of the risk, the outcome if the risk occurs and the likelihood of the risk.
3. Provide an adequate plan to avoid or control the risk. This may include but not limited to, having a metric review of the risk and ensuring that the risk is managed on a daily or monthly basis. This will depend on the likelihood and severity of the risk.

The above three steps allow each party to understand the areas of concern and the various types of risk. The likelihood of the risk occurring and the various impacts whether it is to an individual, collective risk or a company risk. K Potts[4] expresses that the burden of responsibility for the identification of the risk should be with the Employer, however K Potts[5] goes further by declaring that the Contractor has duty of care to advise and highlight the risks to the Employer as an expert.

[3] Murdoch J & Hughes W, Construction Contracts Law and Management, Third Edition (Spon Press, 2000)
[4] K Potts, Construction Cost Management, learning from case studies, (Taylor and Francis group, 2008)
[5] Ibid

Only once all the risks are identified, then the various stakeholders can choose how to manage the risk to ensure the impact of the risk to every aspect including time, quality and costs are minimized. The stakeholders can look at various ways of managing the risk, whether transferring the risk to the Employer, to reduce the price, to add a contingency in the quotation for the risk or over specify or over design the building to remove the potential risk or taking out necessary insurances like professional indemnity insurance or Contractors all risk insurance or third party liability insurance to transfer the risk to a third party, which will absorb the risk from the Contractor, Subcontractor or the Employer.

J Adriaanse[6] explains that the Employer can chose to accept the Contractor's offer letter with certain clarifications and exclusions. This may include a limitation clause, which will allow the Contractor to reduce their price and offer the Employer or Developer a better price due to the Contractor limiting the risk. This has occurred in the *Shepherd Homes Ltd v. Enica Remediation Ltd and Green Piling Ltd [2007] EWHC 70 (TCC),* where the Piling Contractor had inserted a clause that limited his liability to the value of the works, which was around One Hundred Thousand Great Britain Pounds. The Employer's actual costs to rectify the works were around ten million Great Britain Pounds. The Employer proceeded to take the Piling Contractor to court to recover their complete costs from them. The Judge ruled in favour of the Piling Contractor, stating that if the Employer required a bigger liability, then the Employer should have sought an adequate sized company to provide the necessary liability coverage the Employer sought. The Employer chose to accept the Piling Contractor condition due to the programme requirements of the project.

[6] Adriaanse J, Construction Contract Law, Third Edition (Palgrave Macmillan, 2010)

2.5 ALLOCATION OF RISK

N Bunni[7] states that the FIDIC 1999 Red Book tries to share and allocate the risks to the Employer and the Contractor. N Bunni[8] goes on to declare that the "function of a contract to define upon who the various risks of an enterprise shall fall, and it was decided that the Contractor should only price for those risks which an experienced contractor could reasonably be expected to foresee at the time of tender."[9] K Potts[10] agrees with N Bunni[11] by maintaining that the "project risk must be allocated rationally among the parties."[12]FIDIC believes that if the risks are correctly allocated and managed, then the various stakeholders should receive the necessary benefits; i.e. the Employer will receive a better price for the works and the Contractor will have a limit of their liability and therefore will be able to remove the unnecessary risk factor from their price.

2.6 FIDIC 1999 RED BOOK VS FIDIC 1987 RED BOOK

The 1999 edition of the red book endeavors to deal with the issues in the previous versions and to address the changes in the construction industry over time. Effort has been made to protect the rights of both the Employer and the Contractor and to allocate the risks in a fair and reasonable manner between all parties. Glover J[13] asserts that "In 1994 FIDIC established a task force to update both the Red and the Yellow Books in the light of developments in the international construction industry, including the development of the Orange Book. The key considerations included: (i) The role of the Engineer and, in particular, the requirement to act impartially in the

[7]Bunni N, The FIDIC Form of Contract, the Fourth Edition of the Red Book (2nd edn, Blackwell Science, 1997), 100.
[8]Ibid, 100.
[9]Ibid, 100.
[10] K Potts, Construction Cost Management, learning from case studies, (Taylor and Francis group, 2008)
[11]Bunni N, The FIDIC Form of Contract, the Fourth Edition of the Red Book (2nd edn, Blackwell Science, 1997), 101.
[12] K Potts, Construction Cost Management, learning from case studies, (Taylor and Francis group, 2008)
13 Glover J, FIDIC: an overview, The Latest Developments, Comparisons, Claims and Force Majeure, (Construction Law, 2007)

circumstances of being employed and paid by the Employer; (ii) The desirability for the standardization within the FIDIC forms; (iii) The simplification of the FIDIC forms in light of the fact that the FIDIC conditions were issued in English but in very many instances were being utilized by those whose language background was other than English; and (iv) That the new books would be suitable for use in both common law and civil law jurisdictions."[14] FIDIC understood the requirement to try and create conditions of contract which allocated the risks better and help to protect not only the Employer but also tried to protect the Main Contractor. FIDIC introduced the four new 1999 contracts, which included the FIDIC 1999 Red Book.

The major changes from the FIDIC 1999 red book contract to previous years, was the following:

1. Introduction of Clause 2.4 clauses which allows the Contractor to "suspend work or reduce the rate of work."[15] This is a significant clause that has been added by FIDIC and Glover J[16] professes "This was an entirely new provision to the 1999 FIDIC form and provides a mechanism whereby the Contractor can obtain confirmation that sufficient funding arrangements are in place to enable him to be paid, including if there is a significant change in the size of the project during construction."[17] This will have a major factor in the Middle East and particularly the United Arab Emirates as payments are delayed compared to other regions and countries. It has been alleged by different corporations, that their debt ageing in the Middle East including the United Arab Emirates is far higher than Europe. Therefore, there is an understanding that there is a problem in the Middle East for receiving of

14 Ibid, 3

[15] FIDIC Red Book 1st Edition 1999, 9.
[16] Glover J, FIDIC: an overview, The Latest Developments, Comparisons, Claims and Force Majeure, (Construction Law, 2007)
[17] Ibid, 4

payments. The majority of Employers including major government bodies like Dubai Municipality, Etihad Airways, Expo 2020 Dubai remove this clause from the contract and the Main Contractor accepts the deletion of this condition from the Contract conditions and therefore receiving payment on time, becomes one of the biggest risk to Main Contractors and Subcontractors. Grose M[18] argues that under article 247 of the civil law of the United Arab Emirates, which states "In contracts binding upon both parties, if the mutual obligations are due to performance, each of the parties may refuse to perform his obligations if the other contracting party does not perform that which he is obliged to do."[19] the Main Contractor or the Subcontractor has a right to suspend if the parties are not receiving payment."[20] Therefore the obligation of the Subcontractor or Main Contractor is to finish the works in accordance with the contract documents and the obligation of the Employer or Main Contractor is to make payment.

2. There has been a general change to the wordings of bonds and the requirement now has changed from a conditional bond to an on -demand bond. Glover J[21] elucidates that "the 1999 form where the performance guarantees are in an on-demand guarantee form, which are payable upon the submission of identified documentation by the beneficiary. It is still necessary to state in what respect the Contractor is in breach of his obligations. In keeping with the intentions of FIDIC to achieve a degree of uniformity and hence clarity, the securities derive from the Uniform Rules of the International Chamber of Commerce."[22]

[18] Grose M, Construction Law in the United Arab Emirates and the Gulf, (Wiley Blackwell, 2016)
[19] UAE Civil Code, Article 247
[20] UAE Civil Code, Article 247
[21] Glover J, FIDIC: an overview, The Latest Developments, Comparisons, Claims and Force Majeure, (Construction Law, 2007)
[22] Ibid, 5

Using the word on- demand bond, doesn't really make the bond on- demand, however the conditions stipulated in the bond will help to ensure that the bonds will be paid on- demand.

3. Glover J states that "sub-clause 2.5 is a new Contractor-friendly clause. . . it is designed to prevent an Employer from summarily withholding payment or unilaterally extending the Defects Notification Period. One particularly important feature can be found in the final paragraph which specifically confirms that the Employer no longer has a general right of set-off. The Employer can only set-off sums once the Engineer has agreed or certified any amount owing to the Contractor following a claim."[23] The Employer has to issue a notice to the Main Contractor stating their intention to claim against the Main Contractor. Under clause 2.4 and 2.5, FIDIC 1999 Red Book has clearly demonstrated its intention that the Employer is unable to withhold sums of money from the Main Contractor, whether to ensure that the collateral they hold on the Main Contractor is sufficient, to ensure that the Main Contractor will be required to agree with the Employer to obtain a significant payment from the Employer. This also shows that FIDIC has modified their standard terms and conditions in their 1999 Red Book Contract to support the market in the middle east and the United Arab Emirates. Even though FIDIC has made these necessary changes, the contracts in the United Arab Emirates exclude or delete or modify the wording of clauses 2.4 and 2.5 in their particular conditions and therefore the Contractor doesn't have the intended rights as per the FIDIC requirements.

[23] Ibid, 5

4. FIDIC 1999 red book has included that the Employer has to pay any amount which it certified under Clause 14.7, if the payment is not done on time and is deleted, the Main Contractor can seek for financial charges or interest changes to be paid in accordance with the Conditions of the Contract Clause 14.8. delayed payment. The percentage will be pre-agreed and included the particular conditions. In the Middle East and the United Arab Emirates, the majority of Employers remove the right for the Main Contractor to seek interest or financial charges from the Employer for late payment. If the Main Contractor or Subcontractor wins in the Dubai Cassation Courts, then an interest rate of 9% will be added to the awarded amount until the payment is received. The 9% interest rate is the standard rate in the United Arab Emirates and Dubai, which is set by the courts.

5. The last change from the FIDIC 1999 Red book Contract to the previous years, is that FIDIC has defined under clause 3, that the Engineer is "whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer." The previous FIDIC forms of Contract stated the Engineer would act impartial, however as the Engineer was being paid by the Employer, it was difficult for the Engineer to truly act impartial, therefore FIDIC has understood this matter and made the necessary changes to the 1999 standard contract formats.

FIDIC has understood that their standard conditions of contract are used heavily in the Middle East and United Arab Emirates and have carried out numerous changes to make their standard

form of contract aligned with the Civil laws of the Middle East and the United Arab Emirates. Kerur S[24] acknowledges that "civil construction projects in the middle east are often delivered under an amended form of FIDIC Red Book 1999, with Employer friendly amendments that range from reasonably balanced to completely outrageous."[25] Therefore the Employers of the Middle east and United Arab Emirates have chosen to heavily modify the FIDIC 1999 Red book Contract to become Employer friendly and to allow the Employer to stipulate the required clauses, which supports them and penalizes the Main Contractor. As a result increasing the Main Contractor's risk and therefore increasing the Subcontractor's risk as well, as the Main Contractor allocates their risk down the line to the Subcontractor ensuring that the back to back clause is included in the Subcontract and ensuring that the Main Contractor is transferring his obligations and liabilities to the Subcontractor from the Employer, which could be unrealistic and unfair for the value of works associated with the Subcontractor.

The next chapter looks into the back to back clauses of the Subcontracts and looks at the various positions of the FIDIC 1999 red book contract compared to the Common law of the United Kingdom and the Civil Law of the United Arab Emirates.

[24] Kerur S, Identifying and Managing risk in international construction projects (the international law review, 2012)
[25] Ibid, 11

CHAPTER 3 – BACK TO BACK CLAUSES SUBCONTRACTS

3.1 INTRODUCTION

This section looks at specific clauses under FIDIC and their differential treatment under the Civil Law of the United Arab Emirates and the Common Law of the United Kingdom and how these differences may favor of the Employer over the Contractor or the Contractor over the Subcontractor. The Contractor usually states that their subcontract agreement is on a back to back basis with the Main Contract. A Dimitracopoulos[26] alleges that "back to back is not a legal term and may not mean much to a dispute resolution authority (particularly to the UAE Courts, if its substance is not reflected in the Subcontract with an express explanation of what clauses of the Main Contract are to apply by analogue or verbatim to the Subcontract."[27] Therefore the United Arab Emirates courts understand that back to back contracts cannot always work as the Main Contractor may be in default due to his own issues, which is not the Employer or the other Subcontractor's fault. Therefore, the Subcontractor may be unfairly penalized as the Main Contractor may impose penalties or delay in payment, due to the default of the Main Contractor under the pretense of back to back conditions of contract. This is a major issue in the United Arab Emirates and the Middle East. This dissertation highlights this key aspect and shows how the back to back condition affects the supply chain and the project and provides an unreasonable risk to the Subcontractor.

[26]Dimitracopoulos A, Consultants and Contractors: Consult before contracting! Contractual transactions in the world of construction that are devoid of legal input are fraught with pitfalls , (Law update, 2005)
[27]Ibid, 3

3.2 PAYMENTS

More and more Main Contractors in the Middle East and the United Arab Emirates are imposing on their Subcontractors a "back to back"[28] or "pay when paid policy"[29], which will provide the Main Contractor a safety net not to pay the Subcontractors as the Employer or Developer has not paid them. O'Leany D[30] articulates that a number of jurisdictions have outlawed or ban the use of pay when paid, especially the United Kingdom, where pay when paid is not allowed under section 113 of the Housing Grants, construction and regeneration Act 1996. The major dispute arises out of this is when the Subcontractor has not breached the Contract and has finished their works on time, however the Contractor may be in breach due to their own fault or delay or the Employer and Contractor can be seeking arbitration or litigation, which has nothing to do with the Subcontractor and therefore in turn will delay the Subcontractor's payments due to conditions outside their control or ability to rectify. M Grose[31] stated that in the court of cassation in case Dubai Cassation No. 281/95 dated 6th July 1996, which was a case raised by a subcontractor against the Main Contractor for non-payment of their Subcontract price. The Main Contractor declared that the non-payment was due to the non-payment by the Employer, and therefore in accordance with the pay when paid clause, the payment to the Subcontractor was not due, even though five years had elapsed. The Courts concluded that "there is no justifications for Subcontractors to be concerned with recovering the balance of their dues if they have completed their work"[32] Therefore the Subcontractor won the case against the Main Contractor and the Main Contractor was required

[28] O'Leary D, Construction Disputes what are the common issues in dispute? (law update, 2010), 4
[29] Ibid, 4
[30] Ibid
[31] Grose M, Construction Law in the United Arab Emirates and the Gulf, (Wiley Blackwell, 2016), 161
[32] Ibid, 161

to issue payment to the Subcontractor even though they had not received payment from the Employer.

This issue has become more and more apparent in the Middle East including the United Arab Emirates, especially Dubai, where the Construction industry has had a phenomenal growth in the last ten years. Subcontractors are still agreeing to the "pay when paid"[33] basis, however insisting that an additional clause is introduced, where it states that the Main Contractor will make payment to the Subcontractor anywhere between 75 days – 90 days, if the reason for non-payment by the Employer is due to the Main Contractor's breach or delay of the Contract and therefore the Subcontractor can seek different avenues to recover its money from the Main Contractor. Subcontractors have insisted on this clause as they have no direct contact with the Employer and therefore are unable to control the outcome of a non-payment issue or to seek direct payment from the Employer due to the Main Contractor's breach.

FIDIC has introduced different clauses which allows the Main Contractor to suspend or slow down the works due to non-payment, which increases the pressure on the Employer to make the on-time payments to the Main Contractor, which will be passed to the Subcontractors. Under the FIDIC 1999 Red book Sub- clause 16.1, which states "if the Engineer fails to certify in accordance with Sub-Clause 14.6 [issue of interim payment certificates] or the Employer fails to comply with Sub-Clause 2.4 [Employer's financial arrangements] or Sub-Clause 14.7 [payment], the Contractor may after giving not less than 21 days notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence

[33] O'Leary D, Construction Disputes what are the common issues in dispute? (law update, 2010)

or payment, as the case may be and as described in the notice."[34] The wording of the FIDIC 2017 Red Book is the same as the wording of the FIDIC 1999 Red Book for Clause 16.1.

Appuhn R and Eggink E[35] describes that FIDIC 1999 Red book has recognized that non-payment of Contracts by Employer is a problem and therefore has made necessary clauses within their Contract standard format to ensure that the Contractor has certain rights and certain remedies if the Employer does not issue payment. This is supported by Article 247 of the Civil Law, which allows the Main Contractor or the Subcontractor to suspend their works if the Employer or Main Contractor is not fulfilling their performance obligation of payment.

In addition, the Contractor under Clause 2.4 of the FIDIC 1999 Red book can request for the Employer to demonstrate that the required funds for the project are available and therefore ensuing that payment will be received on time from the Employer. Under the FIDIC 2017 Red book, FIDIC has expanded the wording of this clause and sets forth that "the Employer's arrangements for financing the Employer's obligations under the Contract shall be detailed in the Contract Data. If the Employer intends to make any material changes (affecting the Employer's ability to pay the part of the contract price remaining to be paid at that time as estimated by the Engineer) to these financial arrangements or has to do so because of changes in the Employer's financial situation, the Employer shall immediately give a notice to the Contractor with detailed supporting particulars. If the Contractor: a) received an instruction to execute a variation with a price greater than ten percent (10%) of the accepted contract amount, or the accumulated total of variations

[34] FIDIC Red Book 1st Edition 1999, 49.
[35] Appuhn R & Eggink E, The Contractor's view on the MDB Harmonised version of the New Red Book, (the International law review, 2006),

exceeds thirty percent (30%) of the accepted contract amount; b) does not receive payment in accordance with Sub-clause 14.7 [payment]; or c) becomes aware of a material change in the Employer's financial arrangements of which the Contractor has not received a notice under this Sub-Clause, the Contractor may request and the Employer shall, within 28 days after receiving this request, provide reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the part of the Contract Price remaining to be paid at the that time (as estimated by the Engineer)."[36] This slight change from the FIDIC 1999 Red Book, however shows that FIDIC understands that the problems that arise out of non-payment, is due to the changes by the Employer. In addition, the financial arrangement has to be included in the Contract instead of the Contractor requesting this information from the Employer. Appuhn R and Eggink E[37] point out that the basic requirements and obligations of the parties is for the Contractor to finish the works in accordance with the Contract documents and the Employer to make payment to the Contractor for works or services rendered. The Employer's "crucial obligation"[38] is to make payment and therefore the Contractor has a right to ensure that the Employer is able to meet their crucial obligations as required by the Contractor. Appuhn R and Eggink E[39] goes further to declare that the Contractor has a right to understand the terms between the Employer and the Lender, therefore ensuring that the Employer does not breach the Lender's requirements, which will stop the Employer not meeting their required crucial requirements.

[36] FIDIC Red Book 1st Edition 2017, 15
[37] Appuhn R & Eggink E, The Contractor's view on the MDB Harmonised version of the New Red Book, (the International law review, 2006),
[38] Ibid, 11
[39] Ibid,

O'Leary D[40] explains that the Contracts in the Middle East are heavily in favour of the Employer and therefore even if the basis of the Contract is FIDIC 1999 Red book, the Contract is usually heavily modified and the clause 2.4 is usually deleted in the particular conditions and clause 16.1 is usually modified to stop the Contractor from suspending the works or slowing down the progress of the works. Under the Common law of the United Kingdom, the Employer will have to ensure that the money is available for the Construction prior to the works starting and Clause 2.4 or 16.1 in the FIDIC 1999 Red book won't be modified or deleted, as the Employer may be required to deposit the money into an escrow account before the works start. May different professionals state that the Middle East especially Dubai has had a phenomenal growth in Construction compared to the United Kingdom and therefore the Middle East is able to have flexibility on the bespoke Contracts as the Culture of the land and the people, have a different method and mentality in Construction and Contracts. Under the United Arab Emirates Civil Law, payment is only due when the works are completed however as this law is not mandatory and due to good faith and freedom of Contract, the Courts allow for the interim payments in accordance with the agreed Contract between the two concerned and the civil law allows the parties to agree otherwise. This is also supported by United Kingdom, section 109 of the 1998 Housing Grants Construction & Regeneration Act, which now gives most contractors the right to payment by instalments.

3.3 DAMAGES, LIQUIDATED DAMAGES AND PENALTIES

N Bunni[41]asserts that liquidated damages should "stipulate a genuine pre-estimate of a certain sum of money to be paid as compensation if a breach actually takes place."[42] N'Bunni[43] goes further to

[40] O'Leary D, Construction Disputes what are the common issues in dispute? (law update, 2010)
[41]Bunni N, The FIDIC Form of Contract, the Fourth Edition of the Red Book (2nd edn, Blackwell Science, 1997)
[42]Ibid, 66
[43]Ibid,

state that this pre-estimate value should in the eyes of the English law restore the position, the Employer or Contractor would have been if the breach never occurs. Therefore, it is clear that FIDIC is not trying to award the Employer or Contractor for the Contractor's or Subcontractor's breach, but to ensure that the Employer or Contractor are not penalized for the breach of others. Contractors have started trying to pass down their liquidated damages or penalties to their Sub-contractors in recent years, which is out of proportion to the Subcontractor Contract Value. FIDIC contracts states that the Contract agreement will have a 10% maximum cap for the liquidated damages, however under the current back to back clauses that Contractors are unfairly imposing onto Subcontractors, the Subcontractors could be held responsible for the complete penalties that an Employer imposes on a Contractor. Under the United Arab Emirates Civil Code Article 390 (2), there is no cap for the Liquidated damages that an Employer or a Contractor can impose on a Contractor or a Subcontractor. Article 390 (2) of the United Arab Civil Code states that "The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the harm, and any agreement to the contrary shall be void.[44] The cap on the liquidated damages allows the various stakeholders to manage and allocate their risk when pricing the project. If there is no cap, then the risk will increase for the various parties and the price for the Employer will increase, which will mean that the Employer will be paying more money for the project. The cap on liquidated damages allows the Employer or the Main Contractor to gain a better price for the works as the risk is manageable for the various parties.

However, under the United Arab Emirates Civil Code Article 390 (1), states "The contracting parties may fix the amount of compensation in advance by making a provision therefore in the

[44] United Arab Emirates Civil Law, Article 390 (2)

contract or in a subsequent agreement, subject to the provisions of the law."[45] This clearly demonstrates that the two parties are free to agree the terms and conditions of a Contract or Subcontract agreement and therefore even though the Employer or the Contractor or subcontractor can request the courts to change the Liquidated damages from the Contract or Subcontract to the actual loss, to date there has not been a case that this research paper has found in the United Arab Emirates, where the courts have agreed to change the liquidated damages from the contract to the actual loss.

The difficulties arise when there are concurrent delays and the parties have difficulties assessing the responsibility of these delays. F Mastrandrea[46] states that "the English rule . . . approach to the attribution of responsibility for sequential project delays, and it marked influence on the approach adopted to delay analysis by its delay practitioners,"[47] Mastrandrea F[48] goes further by asserting that the "English rule" takes the earliest events into full consideration and further delays are taken into consideration if they "generate additional critical delay."[49] This information is obtained through the use of Time Impact Analysis (TIA). Masadeh A[50] states that the Main Contractor's requires the Subcontractors to indemnify them and compensate the Main Contractor for any compensation for damages or costs the Main Contractor has incurred due to the Subcontractor's failure to perform their obligations. The Main Contractor will normally require that any nominated subcontractor, which is done through the tender process of the Employer, indemnify the Main

[45] Ibid, Article 390 (1)
[46] Mastrandrea F, Concurrent delay in construction – principles and Challenges (the international construction law review, 2014),
[47] Ibid, 86
[48] Ibid,
[49] Ibid, 86
[50] Masadeh A, Vicarious performance and privity in construction contracts, (the international construction law review, 2014),

Contractor of any failure to meet their performance obligation. Masadeh A[51] understand that the majority of standard Contracts allow for the clause to indemnity the Main Contractor and minimizes the Main Contractor's risk. Masadeh A[52] explains that nominated Subcontractor's in the United Kingdom are rare and therefore the Subcontractor is named, however not nominated. A Main Contractor has to take responsibility over the nominated Subcontractor and FIDIC 1999 red book clause 5.2 states that the "Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Engineer as soon as practicable, with supporting particulars."[53] FIDIC 2017 Red Book provides the Contractor the right to object to the appointment of a nominated Subcontractor.

Some Employers chose to remove the Main Contractor's right to object to a nominated Subcontractor and therefore Masadeh A[54] maintains that this removes the right of the Employer to impose penalties or Liquidated damages on the Main Contractor for the delays of the nominated Subcontractor. This was supported by the Dubai Cassation court in case 266/2008, where the Dubai Courts refused to impose the penalties onto the Main Contractor for the delays caused by the nominated Subcontractor, even though it goes against the United Arab Emirates Civil Law Article 890, where the Main Contractor is responsible for the Subcontractor, whether the Subcontractor is domestic or nominated. Masadeh A[55] states that the Cassation Courts judge comment in the hearing was "the criterion for the liability of the original contractor for a delay made by the Subcontractor is that the head contractor must be the person who appoints or chooses the Subcontractor. If the Subcontractor was chosen by the Employer (the building owner) or the latter's consultant, then

[51] Ibid,
[52] Ibid,
[53] FIDIC Red Book 1st Edition 1999, Clause 5.2
[54] Masadeh A, Vicarious performance and privity in construction contracts, (the international construction law review, 2014),
[55] Ibid,

any delay in the performance on the part of the Subcontractor is the liability of the Employer and not of the head Contractor, who will not be liable for any penalty for the delay if it is demonstrated that his failure to hand over the building on the date specified in the contract was attributable to causes in which he played no part."[56] This case clearly demonstrated to the Employer that the United Arab Emirates Civil Law will not penalize the First Contractor or the Main Contractor for nominated Subcontractors if the Employer hasn't provide the Main Contractor the ability to reject or object to a nominated Subcontractor, which the Main Contractor believes that the nominated Subcontractor may not have the necessary resources, cashflow, expertise or knowledge to complete the project to the quality and requirements of the Main Contractor.

3.4 PERFORMANCE BOND

The Main Contractor will issue a 10% performance bond from their bank directly to the Employer within 14 or 28 days of the signing of Contract according to clause 4.2 of the FIDIC 1999 Red book. The performance bond can either be open ended or fixed duration and usually will be returned or expire within 28 days after the completion of the defect liability period or receipt of the performance certificate. The Employer will keep this bond as collateral to ensure that the Main Contractor fulfils their Contractual obligation to ensure the project finishes as per the agreed period and that the Main Contractor finishes in accordance with the Contract documentation. The Main Contractor will then require for the bond in the same 10% percentage from the Subcontractor and will only in cash the bond if the Main Contractor's bond is in cashed by the Employer. Under the FIDIC 1999 Red book clause 14.7, "the Employer shall pay to the Contractor . . . within 21 days

[56] Ibid, 113

after receiving the documents in accordance with Sub-clause 4.2 [performance security]."[57] This clause is supported in the FIDIC 2017 Red book. Therefore, the Employer doesn't need to pay the Main Contractor, or the Main Contractor won't pay the Subcontractor until the performance bond is issued.

Broccoli G and Adams L[58] explains that "on demand performance bond is a contractual undertaking given by the bank to pay a specific amount to a named beneficiary on the occurrence of a certain event."[59] Broccoli G and Adams L[60] goes further to clarify that the words of on-demand, doesn't make the bond in the United Kingdom on demand and therefore the bond becomes a "conditional bond,"[61] where the bank would require proof that the Contractor or Subcontractor Is in breach. Therefore, Employers or Contractors add certain clauses or languages to indicate that the on-demand bond will be paid immediately once presented to the bank.

The on- demand bonds requires for the Contractor or the Subcontractor to breach their obligations of performance and therefore the Employer or Contractor's remedy is to pull the on demand bond. There are two types, conditional bond or unconditional bonds. On a conditional bond, the Employer or Contractor has an obligation to the bank to demonstrate that the Contractor or Subcontractor has breached his contractual obligations. An unconditional bond, the Employer or Contractor has to only present the bond to the bank for the release of payment. Conditional Bonds

[57] FIDIC Red Book 1st Edition 1999, Clause 14.7
[58] Broccoli G and Adams L, On Demand bonds: a review of Italian and English decisions on fraudulent or abusive calling, (the international construction law review, 2015),
[59] Ibid, 104
[60] Ibid,
[61] Ibid, 104

have become more and more rare, as the banks usually don't want to be involved in determining whether the Main Contractor or the Subcontractor has breached their obligation for performance.

In the Middle East and the United Arab Emirates, the on-demand bonds are unconditional as the banks don't want to be party to the Contract between the Employer and the Main Contractor or the Subcontract between the Main Contractor and the Subcontractor. The wording of the formats issued by the various banks in the United Arab Emirates including Emirates NBD, Mashreq, First Abu Dhabi Bank, Abu Dhabi Commercial Bank, etc. demonstrate that the bank's only concern is that once the bond is presented to them, the payment is made to the Employer or Main Contractor and the bank has no obligations to seek the truth or whether either party has breached their obligations.

Broccoli G and Adams L[62] affirm that this was supported in the English Court of Appeal in Edward Owen Engineering v Barclays Bank International Ltd, where the judge stated "A bank ….is not concerned…with the relations between the supplier and the customer, nor with the question whether he supplier has performed his contracted obligations. . . nor with the question whether the supplier is in default or not. The Bank . . . must pay . . .on demand . . .without proof or conditions."[63] This case clearly demonstrated that the bank's only obligation is to make the payment against the bond and therefore the bank has no requirement to seek the truth or whether the obligations of the parties have been met or breached. The Bank has not got the required expertise and does not want to enter into the disagreement between the parties. If the on-demand has been pulled unlawfully,

[62] Ibid,
[63] Ibid, 105

then the Main Contractor or the Subcontractor will have to seek remedy under the conditions of the Subcontract or Contract for the recovery of the money.

In the United Arab Emirates, the Contractor can seek an injunction against the Employer or the Contractor to pull their on-demand bond, however this is very rare to carry out. The Contractor will have to seek a judgement, demonstrating proof that the Employer or Contractor has not made necessary payment and has recognized that works has been completed and payment is due, which is usually through a payment certificate. If this can be demonstrated, the judge may issue a court order for an injunction on the cashing of the on-demand bonds. If the Performance bond is submitted for encashment to the Bank from the Employer, this can cause potential problems for the Main Contractor for receiving future bonds, as the encashment of a bond is usually a sign by the Employer or the Main Contractor that the Main Contractor or the Subcontractor has failed to perform on the project and therefore usually the Main Contractor or Subcontractor will not have the complete cash value of the bond in their account, which will mean that a debt is owned from the Main Contractor or Subcontractor to the Bank.

3.5 DISPUTE RESOLUTION

Another development in FIDIC 2017 Red Book and the FIDIC 1999 Redbook the introduction of adjudication or a dispute adjudication board (DAB) as the first step in the contract for a quick and efficient resolution mechanism for any dispute which arises. Molan N[64] endorses that this is to "avoid drawn out arbitral or legal proceedings"[65] and to help the parties to resolve the issue in a

[64]Molan N, The Loophole in enforcement of FIDIC DAB decisions – a timely reminder (International construction newsletter, 2012),
[65]Ibid, 5

quick manner, which "endeavor to implement both best engineering and management practice on site."[66] The key objective is to allow a quick solution to disputes, which will ensure the project is not affected. According to Redfern and Hunter[67],a standby adjudication board was implemented at the Hong Kong airport during the start of the construction phase to be on site during the construction for the timely management of any disputes to ensure that it does not affect the project.

There are two different types of adjudication, statutory adjudication and contractual adjudication, which support the adjudication process and helps with the enforcement of adjudication.
Statutory adjudication, which according to Gould N[68], "a growing number of common law countries are familiar with rapid binding and enforceable statutory adjudication procedures, namely England, Scotland, Wales, Australia, and Singapore."[69] Gould N[70]goes further to state that the English common law was the first to introduce the statutory adjudication through the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). The adjudicator's decision is supported and enforced under section 108(3) of the HGCRA, making the decision binding, but not final.

In the case of Macob Civil Engineering Limited v. Morrison Construction Limited, the judgement delivered by the Hon. Mr. Justice Dyson "on 12 February 1999 confirming that the decision of an adjudicator was enforceable summarily regardless of any procedural irregularity, error or breach

[66]Hok G, FIDIC/MDB Approach in respect of dispute adjudication boards (the international law review, 2012), 3
[67]Redfern A and Hunter M, Redfern and Hunter on international arbitration (5th edn, Oxford University Press, 2009)
[68]Gould N, Enforcing a dispute board's decision: issues and considerations (the international law review, 2012)
[69]Ibid, 470
[70]Ibid,

of natural justice. The Judge adopted a purposive approach to the construction of the word decision, refusing to accept that the word should be qualified."[71] This judgement was clear evidence that the strength of adjudicator decision and illustrates that the decision of an adjudicator is binding and is not a recommendation but a decision. The obligation to affect the decision of the adjudicator, helps to minimize the effects of the dispute on the project, until a resolution is reached in litigation or arbitration.

Contractual adjudication is followed in countries where civil law is in place, such as the United Arab Emirates. The United Arab Emirates private and public sector both regularly uses modified FIDIC 1999 contracts, amended to suit the employer requirements. The dispute adjudication boards or adjudication judgement or decision is not enforceable in the United Arab Emirates, Kerur S and Marshall W[72] states that some employers even delete it from the contract. The first recourse for a company in the United Arab Emirates is usually arbitration if an amicable settlement of a dispute is not possible.

The Abu Dhabi government has started to recognize the benefits if the adjudication system as demonstrated under the "new conditions of contract issued in January 2007 (Law No. 1 of 2007)."[73] Sunna E[74] attests that DAB is now being used by the Abu Dhabi government as the "first tier"[75] in their dispute resolution process. Sunna E[76] continues that the Abu Dhabi government has

[71] Ibid,471
[72] Kerur S and Marshall W, Identifying and managing risk in international construction projects, (imternational review of law, 2012)
[73]Sunna E, How can dispute boards benefit you? (Law update, 2007), 4
[74]Ibid,
[75]Ibid, 4
[76]Ibid,

implemented the DAB or adjudication in many different major developments in Abu Dhabi. Although the complete benefits of having a DAB or adjudicator on board even before the rise of any disputes is not fully perceived by the Abu Dhabi government, they have moved towards having an "adhoc type"[77] of DAB or adjudication demonstrates that they begin to realize the advantage of having a swift mechanism for dispute resolution. This recognition of the vitality of a speedy dispute resolution and acceptance of the significance of adjudication could help to support a statutory adjudication process in the United Arab Emirates in the future. Therefore, unlike other civil law countries, the United Arab Emirates is seeking alternative dispute mechanism, which will help to resolve disputes in a speedy manner.

The adjudicator or the DAB, which usually consists of one member or three members will have to be selected under Clause 20.2 of the FIDIC 1999 Redbook and Clause 21.1 of the FIDIC 2017 Red Book. As stated by Hok G[78],"the board members are independent experts and not employees or agents of either the employer or the contractor."[79] The intent is to ensure that the DAB or the adjudicator is impartial and independent, therefore allowing them to make a decision in accordance with the contract and not to be influenced by either party. Selection of a DAB or adjudicator before the start of the project is a preventative measure, giving them an active role in the project and ensuring the management of any disputes that arise, and preventing any effect on the project completion. Alternatively, the adjudicator or DAB can be brought on board on an adhoc basis, which means selecting an adjudicator or DAB to resolve disputes as they arise between the parties to provide his binding but not final decision. This allows the advantage of having parties agree on

[77] Ibid, 4
[78] Hok G, FIDIC/MDB Approach in respect of dispute adjudication boards (the international law review, 2012)
[79] Hok G, FIDIC/MDB Approach in respect of dispute adjudication boards (the international law review, 2012), 2

the members of the DAB or jointly selecting an adjudicator who will be an expert in the field of dispute.

In case of any disputes that arise, under clause 20.4 of the FIDIC 1999 Red Book and 21.4 of the FIDIC 2017 Red Book, either party can refer the dispute to DAB or the adjudicator, notifying the other party at the same time. The adjudicator or DAB has a total of 84 days to issue their decision with the reasoning, which "the majority feels that an adjudicator or DAB should make a decision rather than recommendation."[80] The decision is binding but not final. Hok G[81] highlights that "unlike an arbitral tribunal the board is authorized to investigate the merits."[82] If either party does not agree with the adjudicator or DAB decision, then either party has 28 days to give notice for non-acceptance or dissatisfaction with the decision. HokG[83] agrees with Sabae M[84] who states that the "parties have the freedom to form contracts as they see fit"[85] and therefore the parties agree to abide by the adjudicator or DAB decision on any disputes that arising between the parties during agreeing the terms and conditions of the contracts. The FIDIC 1999 Redbook standard format is highly used in the United Arab Emirates, however DAB or adjudicator decision is not easily enforceable and therefore, the majority of FIDIC contracts will strike adjudication or DAB out of the contract. Consequently, the parties will have to resort to arbitration or litigation for dispute resolution in case of failure of amicable settlement in the contract. Arbitration and litigation are long drawn out processes, which would hinder the progress of the project or delay or stop the

[80] Hughes W and Shinoda H, Achieving satisfactory contractual terms for the engineer's role (University of Reading, 1999), 7
[81] Hok G, FIDIC/MDB Approach in respect of dispute adjudication boards (the international law review, 2012)
[82] Ibid, 2
[83] Ibid,
[84] Al Sebae M, Limitation of Liability clauses – can they always be enforced? (International law office, 2011)
[85] Ibid, 1

completion of the project due to the delay in resolution of disputes. FIDIC under its standard contract recommends or encourages the use of adjudication or DAB, to provide a swift mechanism for dispute resolution.

Under clause 20.5 of the FIDIC 1999 Red Book and clause 21.5 of the FIDIC 2017 Red Book, attempts should be made for amicable settlement of the dispute if either party receives a notice of dissatisfaction, before the dispute advances to arbitration, which can be a lengthy and costly process. In case neither party provides notice of dissatisfaction, then the arbitrator's or DAB's decision is binding and final and the parties agree to abide by the adjudicator's or DAB decision in accordance with the contract.

Hok G[86] declares DAB or adjudicators "creature of contract"[87] under Civil Law as they are empowered by the FIDIC contract and not by federal law. Consequently, Hok G[88] states that "complying with a court decision or an arbitral award is a matter of law whilst abiding by an adjudicator or DAB decision is a matter of contract."[89]

Therefore, there are three ways of enforcing an adjudication decision in the United Arab Emirates.

The first way of enforcing an adjudication decision, is in accordance with the Clause 20.7 of the FIDIC 1999 Red Book contract and Clause 21.7 of the FIDIC 2017 Red Book, which gives the parties recourse for the enforcement of the DAB or adjudicator decision under the FIDIC contract.

[86]Hok G, FIDIC/MDB Approach in respect of dispute adjudication boards (the international law review, 2012)
[87]Ibid, 5
[88]Ibid,
[89]Ibid, 8

Under this clause, on the refusal of if either party to comply with the DAB or adjudicator decision, then the aggrieved party can go straight to arbitration. The parties have a contractual obligation to enforce the DAB or adjudicator decision, according to Gould N[90]. Gillion F[91] states a clear demonstration of this is the Persero case in the Singapore Courts. Molan N[92] maintains that the "court set aside the award on the basis that the arbitral tribunal had exceeded its jurisdiction . . . essentially by making its final award without opening up and reviewing the underlying DAB decision."[93] in the opinion of Hok G[94], it is "hardly likely that a state will assist a party to enforce a contractual duty without reserving to its courts the right to examine whether that duty is legally binding and thus enforceable."[95] As the adjudicator or DAB was selected as a third party expert from the Employer and the Contractor for the resolution of any disputes that may arise, the argument can be made that this goes against the agreed form of contract, therefore making "dispute adjudication as a purely contractual mechanism."[96] If the courts can open the case and decide on the merits of the award during the enforcement, then it will make the DAB or adjudication award difficult to enforce. The Persero case demonstrated that there is a loophole in the FIDIC contracts for the enforceability of the DAB or adjudicator decision, causing a furor. Therefore, FIDIC may "amend the language in sub clause 20.7 to allow immediate enforcement of both final and binding DAB

[90] Gould N, Enforcing a dispute board's decision: issues and considerations (the international law review, 2012)
[91] Gillion F, Persero II, "pay now, argue later" in the context of DAB decisions – what approach best advances the purpose of the FIDIC's Security of payment Regime? (the international construction law review, 2015),
[92]Molan N, The Loophole in enforcement of FIDIC DAB decisions – a timely reminder (International construction newsletter, 2012)
[93]Molan N, The Loophole in enforcement of FIDIC DAB decisions – a timely reminder (International construction newsletter, 2012), 6
[94]HokG, Dispute adjudication boards- the international or third dimensions (the international law review, 2012)
[95]Ibid, 424
[96]Ibid, 424

decisions, as now done in equivalent sub clause 20.9 of the FIDIC gold book."[97] This clearly highlights that FIDIC believes there is a weakness in the enforceability of the DAB or adjudicator decision and has made adaptations to their standard form of contract to try and reduce this in the future. Therefore, the innocent party can take the dissatisfactory party to litigation or arbitration to enforce the DAB or adjudicator decision.

In the instance that the losing party does not comply with the DAB or adjudicator decision, there are different recourses for the aggrieved party for the breach of contract. According to McKendrick E[98], a "breach of contract does not automatically bring the contract to an end."[99] In addition, McKendrick E[100] points out that the innocent party has various options, depending "upon the seriousness of the breach."[101] McKendrick E[102] goes further to state the three different recourses for the breach of the contract available to the innocent party. The first recourse they can use, is recovering damages for the loss which the innocent party has occurred, due to the breach of contract. As the adjudicator's or DAB decision is binding but not final, this will be highly difficult to implement.

The second remedy is if the "party who is in breach of the contract, may be unable to enforce the contract against the innocent party"[103], allowing the suspension of works by the innocent party until the DAB or adjudication decision is enforced by the courts. This will help to enforce the

[97]Ibid, 425
[98]McKendrick E, Contract Law (10th Edition, Palgrave Macmillan, 2013)
[99]Ibid, 323
[100]Ibid,
[101]Ibid, 323
[102]Ibid,
[103]Ibid, 323

decision by the DAB or adjudicator, as the dissatisfactory party may choose to abide by the adjudicator or DAB's decision until the dispute is resolved in arbitration or litigation. Thus, minimizing the delay on site and allowing the works to carry on, until the final binding award is issued by the arbitration or litigation.

The last recourse is the "right to terminate performance of the contract."[104] As both parties have signed a contract that best suits the works and in accordance with the freedom of contract, the innocent party can terminate the contract for breach of the contract. The refusal of the dissatisfactory party to follow the temporary but binding decision of the DAB or adjudicator which is in accordance with the signed contract will constitute the breach of contract, thereby allowing the innocent party the opportunity to terminate the contract. Such a termination of contract will cause delay to the completion of the project due to disruption of work on site. If the project is completed before the adjudicator or DAB have submitted their decision, then the only recourse would be to go to litigation or arbitration to try and get the DAB or adjudicator's decision to be enforced.

A Dimitracopoulos[105] asserts that "certain clauses, such as an arbitration clause, cannot be included in a subcontract by reference to a back to back" The words of back to back doesn't work in all cases especially if the Employer has a case against the Main Contractor for works outside the Subcontractor's scope of works or responsibility or obligations, then the arbitration clause will not be valid. If the arbitration is used by the Subcontractor to take the Main Contractor to Arbitration

[104] Ibid, 323

[105] Dimitracopoulos A, Consultants and Contractors: Consult before contracting! Contractual transactions in the world of construction that are devoid of legal input are fraught with pitfalls, (Law update, 2005), 3

for not fulfilling its obligations under the Subcontract, then it is very difficult for the Main Contractor to attach their arbitration to the Employer.

3.6 VARIATIONS

Clause 13 of the standard contract of FIDIC Red Book 'new' 1st edition 1999 consists of "variations and adjustments"[106] clauses, which is also under Clause 13 in the FIDIC 2017 Red Book.

Sub clause 13.1 of the FIDIC 2017 and 1999 Red Book allows the "right to vary"[107] by the engineer "either by instruction or by a request for the contractor to submit a proposal."[108] The contractor, under the FIDIC 1999 Red Book and FIDIC 2017 red book standard form of contract, is to proceed with a variation in certain conditions, the first condition being under an Engineer's Instruction or the second condition if the Engineer approves a variation. This clause clearly declares that the contractor "shall execute and be bound by each variation."[109]This clearly establishes that the contractor has to carry out the variations under the FIDIC 1999 red book and the FIDIC 2017 red book.

The Contractor is allowed to submit to the Engineer a proposal which could speed up the completion, reduce the costs, improve the quality or provide another benefit to the employer if he could re-design a certain part of the works or change a material which is readily available in the market, which is equivalent or better quality of the material which is specified however not changing

[106]FIDIC Red Book 1st Edition 1999, Clause 13, 26
[107]Ibid, Clause 13.1, 26
[108]Ibid, Clause 13.1, 26
[109]Ibid, Clause 13.1, 26

the look and feel of the project under Sub Clause 13.2 'Value Engineering'[110]. For instance, by changing a specified porcelain tile from Italy to a porcelain tile from RAK, which will be the same size and the same look and feel as the porcelain tile from Italy, however at a much lower price as there will be no transportation, customs or taxes to be paid, as the tile is manufactured locally in the United Arab Emirates. The local procurement of the material may also allow acceleration of the completion date of the project and reducing the costs of the client.

Sub Clause 13.3 'Variation Procedure'[111] lays out the Engineer's right to request from the contractor a proposal for a variation. In response to such a request, the Contractor will either have to respond to the Engineer by clearly demonstrating why he is unable to comply with the variation instruction or by issuing the proposal. The proposal should show the scope of works from his understanding and a programme of works for the variation or an impacted programme, showing the effects of the variation on the overall programme of works. This clause then allows the Engineer to reject, accept or provide comments to the Contractor for his variation proposal, however in accordance with this sub clause, "the contractor shall not delay any works whilst awaiting a response."[112]

Sub Clause 13.7 'Adjustments for Change in Legislation'[113] states "that the contract price should increase or decrease in cost resulting from a change in the laws of the country."[114]

[110]Ibid, Clause 13.2, 37
[111]Ibid, Clause 13.3, 37
[112]Ibid, Clause 13.3, 37
[113]Ibid, Clause 13.7, 39
[114]Ibid, Clause 13.7, 39

J Adrianne[115] sets out that the contractor can sometimes regard some works as variations as the works may not be covered in the bill of quantities, but can still be within the contractor's original scope of works, and therefore requires no additional or extra pay the employer for this works. To obtain a better understanding of whether a variation is a variation, J Adrianne[116] states "the starting point is to look at the contract and discover exactly what the contractor has agreed to do in the first place."[117] The major issue is when the Main Contractor has a lump sum price and the Subcontractor has a re-measurable price, the Main Contractor will try to enforce that if the Main Contractor is unable to obtain a variation from the Employer, then the Subcontractor will be left exposed to try and obtain a domestic variation or an increase in their contract price. This has been an issue for many different Subcontractors in the Middle east and the United Arab Emirates, as the Main Contractor is unable to recover the additional costs from the Employer and therefore left exposed to the Subcontractor trying to obtain additional costs.

Domestic variations can be an issue between the Main Contractor and the Subcontractor, if the Main Contractor is unable to obtain additional funds from the Employer or one of the third parties on site. Main Contractors have introduced a coordination clause in the Subcontract agreement, to ensure that if the Subcontractor approaches the Main Contractor for a variation due to the site conditions not being in accordance with the Contract documents, then the Main Contractor will have an avenue to reject the variation based on the coordination clause of the contract conditions. Another contract condition with the Main Contractor will impose on the Subcontractor is that the works of the Subcontractor has to be protected before the handover of the site and the issuance of the taking over certificate from the Employer. This provides the Main Contractor another avenue

[115]Adriannse J, Construction Contract Law, Third Edition (Palgrave Macmillan, 2010
[116]Ibid,
[117]Ibid,

to reject domestic variations for reworks or repair works due to damages occurring from other Subcontractors or third parties on site. The Main Contractors in the Middle East and United Arab Emirates will usually only approve domestic variations which they are able to recover from the Employer or a third party on site.

3.7 EXTENSION OF TIME

The FIDIC 1999 Red book Contract clause 8.4 and under the FIDIC 2017 Red book clause 8.5, which states that "the Contractor shall be entitled subject to sub-clause 20.1 [contractor's claims] to an extension of the time for completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [taking over of the works and sections] is or will be delayed by any of the following causes: (a) a variation. . . (b) a cause of delay giving an entitlement to extension of time . . . (c) exceptionally adverse climatic conditions (d) unforeseeable shortages in the availability of personnel or goods . . .(e) any delay., impediment or prevention caused by or attributable to the Employer . . ."[118] The Main Contractor has certain conditions and therefore if the Main Contractor requires an extension of time in accordance with the FIDIC 1999 Red book, the Main Contractor has to notify the Employer of the delay normally within fourteen days or twenty one days once the event first occurs; with the issuance of interim particulars during the ongoing delay event occurring and for final detailed particulars to be issued normally within fourteen days or twenty-one days after the completion of the event.

The Main Contractor or Subcontractor may lose their entitlement to an extension of time if they don't issue the necessary notices and particulars as per the Contract requirement. This was

[118]FIDIC Red Book 1st Edition 1999, Clause 20.1, 58

discussed under the Common law in the United Kingdom in Two cases, the first case was of *Bremer* Handelsgesllschaft mbh -v- Vanden Avenne-Izegem [1978] 2 LLR 109 and the second case was between Stanley Hugh Leach -v- London Borough of Merton [1985] 32 BLR 51, "Vinelott J summarized the position as follows: the case for Merton is that the architect is under no duty to consider or form an opinion on the question whether completion of the works is likely to have been or has been delayed for any reasons set out in JCT 63 Clause 23 unless and until the Contractor has given notice of the cause of delay that has become reasonably apparent or, as it has been put in an argument, that the giving of notice by the contractor is a condition precedent which must be satisfied before there is any duty on the part of the architect to consider and form an opinion on these matters. The Arbitrator's answer to this question was that a "written notice from the contractor is not a condition precedent to the granting of an extension of time under clause 23."[119] This was also supported in the case of Maidenhead electrical services -v- Johnson Controls (1996), which the contract required notice to be provided with 10 days of the event first arising. The judgement stated that the failure to provide notice within the agreed period of time, did not make the claim invalid and therefore the rejection of the claim based on that position, was invalid.

Under the United Arab Emirates Civil Law, there are currently no cases as per the United Kingdom Common Law which clearly demonstrate and set the precedent that if a notice for an extension of time is not provided in accordance with the Contract terms and conditions, then the claim for an extension of time with costs cannot be rejected on that basis.

This is a claim which the Main Contractor will ensure that the Subcontractor is on a back to back basis and therefore will only grant an extension of time once the Employer grants the extension of

[119]Stanley Hugh Leach -v- London Borough of Merton [1985] 32 BLR 51,

time to the Main Contractor. The fundamental problem with this is that if the Main Contractor or other of the Main Contractor's domestic Subcontractors has delayed the project, then the Subcontractor may be held liable for the delay as well, and therefore the Employer can deduct the agreed amount of money for the liquidated damages, which the Main Contractor will endeavor to recover from the Subcontractor's account. If there is a concurrent delay caused by the Employer and the Main Contractor, the Employer will grant an extension of time without costs to the Main Contractor, which will secure the Main Contractor from the Employer seeking to apply liquidated damages from his account.

Therefore, a back to back clause for this extension of time may not be applicable to the Subcontractor and the Subcontractor will have to seek an alternative route to recover their additional costs and recover of liquidated damages if imposed from the Main Contractor if the Main Contractor is unable to obtain the necessary extension of time from the Employer.

3.8 TAKING OVER CERTIFICATE

The FIDIC 1999 Red Book and the FIDIC 2017 Red Book states under clause 10 states that "except as stated in Sub-clause 9.4 [failure to pass tests on completion], the works shall be taken over by the Employer when (i) the works have been completed in accordance with the Contract, including the matters described in Sub-Clause 8.2 [time for completion] and except as allowed in sub-paragraph (a) below and (ii) a taking over certificate for the works has been issued, or is deemed to have been issued in accordance with the Sub-Clause. The Contractor may apply by notice to the Engineer for a taking over certificate earlier than 14 days before the works will, in the Contractor's opinion, be completed and ready for taking over. . . The Engineer shall within 28 days after receiving the Contractors application: a) issue the taking over certificate . . . b) reject the

application, giving reasons."[120] The Contractor may issue the Engineer a notification for a taking over certificate and within the agreed time period the engineer will have to accept or reject the taking over. This is in accordance with the United Arab Emirates Civil Law articles 884 and 885 state that the Contractor is obliged to finish the works and hand over to the Employer and in return the Employer is obliged to pay the Contractor the agreed amount of money once the works are finished and handed over. The FIDIC 1999 Red book understands the requirement for the Employer to take over the works and this is used as a trigger for the issuance of fifty percentage of the retention held by the Employer and the start of the defect liability period. Some Employer's may refuse to take over the project or stop their Engineer/Consultant from issuing a taking over certificate due to the Employer's own financial difficulties. FIDIC 1999 Red book has recognized that there could be a potential problem with the Employer's finances and therefore has included Clause 2.4 into the Standard forms of contract which states "The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material changes to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars."[121] This ensures that the Employer will take possession of the building as soon as it is finished and starting the process for the retention period.

[120]FIDIC Red Book 1st Edition 1999, Clause 9.4, 30
[121]Ibid, Clause 2.4, 9

The Main Contractor usually only takes possession of the Subcontractor's works once the Employer has taken possession of the works from the Main Contractor, therefore under the Subcontract agreement and the Main Contract, the works have to be protected and maintained during the period of the Employer has not taken hand over. This is based on the back to back clause that the Main Contractor imposes onto their Subcontractor, which will mean that the Subcontractor may be maintaining and protecting the works over a potential duration of five years, before the Employer takes hand over and issues the taking over certificate to the Main Contractor. This realistically increases the duration of the warranty and defects liability period from twelve to twenty-four months to forty-eight to sixty months. The Subcontractor and Main Contractor needs to be mindful of the insurance coverage that they require for this duration of works and that the Subcontractor will be liable if anything happens to their works, which would require for the works to be repaired or re-done.

3.9 DEFECTS LIABILITY PERIOD

The FIDIC 1999 Red book and FIDIC 2017 Red book Contract, clause 11.1 states the completion of outstanding works and remedying defects, "in order that the works and contractor's documents and each section, shall be in the condition required by the Contract (fair wear and tear excepted) by the expiry date of the relevant defects notification period or as soon as practicable thereafter, the Contractor shall: a) complete any work which is outstanding on the date stated in a taking over certificate, within such reasonable time as is instructed by the Engineer, and b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the defects notification period for the works or section (as the case may

be)"[122]. Masadeh A[123] stated that under the United Arab Emirates Civil Code Article 890(2) the Main Contractor is still liable for the works done by the Subcontractor. This point is supported by the FIDIC 1999 Red book Clause 4.4, which states "the Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor. Unless otherwise stated in the particular conditions."[124] The Employer may require for the Subcontractor to issue a collateral warranty which provides a direct line from the Employer to the Subcontractor and therefore allows the Employer to take legal action against the Subcontractor under the warranty or to take legal action against the Main Contractor under the Conditions of Contract, however it does not provide the Employer the opportunity to recover their loss or obtain the necessary compensation twice. If either the Main Contractor or the Subcontractor compensates the Employer, the Employer is unable to take any further action against the other part, however if the Main Contractor compensates the Employer, and the defect is due to the Subcontractor, then the Main contractor can seek to recover its full costs under the indemnity clause of the Subcontract agreement and therefore seek compensation from the Subcontractor for the defect. Both the United Arab Emirates Civil law and the FIDIC red book define that the defect liability is not general wear and tear and is an actual defect.

The defect liability period varies depending on the particular conditions and the requirement of the Employer, however generally the defects liability period is either twelve months or twenty-four months. The Employer will receive an Operation and maintenance manual during the taking over, which will provide details and instruction on the preventative maintenance and necessary

[122]FIDIC Red Book 1st Edition 1999, clause 11.1, 32
[123] Masadeh A, Vicarious performance and privity in construction contracts, (the international construction law review, 2014),
[124]FIDIC Red Book 1st Edition 1999, Clause 4.4, 14

requirements for the Employer team to clean and maintain the necessary equipment and materials in the employer's premises. The Defect liability period of twelve to twenty-four months does not include for decennial liability, as decennial liability remains part of the United Arab Civil Law and is a mandatory law which cannot be changed in a contract by any parties. If the Employer doesn't take necessary steps for the maintenance of the equipment in accordance with the operation and maintenance manual, then the Main Contractor or Subcontractor may argue that their warranty issue is not in accordance with the requirements and therefore may not return to repair the equipment or material. The Employer usually safe guards their requirement by holding the performance bond for a duration of ninety days after the end of the defect liability period, which means that the Employer has collateral on the Main Contractor, and therefore the Main Contractor holds the necessary bonds against their Subcontractor. In addition, the Employer will hold 10% to 5% retention against the Main Contractor to ensure that there is sufficient security to repair any works if the Main Contractor refuses to return to the Employer premises to repair or rectify the defect. FIDIC 1999 Redbook Contract allows the Employer to hire a third party under Clause 11.4 "failure to remedy defects"[125], which states "if the contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of the date. If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under Sub-Clause 11.2 [cost of remedy defects]."[126] This will allow the Employer to seek a third party to remedy the defect and costs this against the Main Contractor. The Main Contractor will normally ensure that they have the same

[125] FIDIC Red Book 1st Edition 1999, Clause 11.4, 33
[126]FIDIC Red Book 1st Edition 1999, Clause 11.2, 33

back to back clause in their Subcontract agreement with their Subcontractor, which will provide them security including the performance bond of 10% and the retention in the same percentage, in case the Main Contractor has to rectify the Subcontractor's defect and contra charge the Subcontractor the costs. The Main Contractor usually states that they will only release the performance bond and retention, once the Main Contractor has received the following from the Employer. The problem arises when the Main Contractor is unable to receive the necessary performance bond and release of retention due to another reason, with their own works or due to one of the Subcontractor unable to remedy their defect. This will stop the other Subcontractors receiving their performance bond or the release of retention, which could depending on the duration, proceed for a long duration increasing the defect liability period.

3.10 DECENIAL LAIBILITY

Article 882 of the UAE Civil Code provides an employer a duration of 3 years to seek compensation for a partial or total collapse of a building or from the discovery of any structural defects. In the United Arab Emirates Civil Code, the liable party is only the Contractor and not the Subcontractor, therefore the Contractor includes clauses into the Subcontractor's Subcontract to pass the liability to the Subcontractor, whether domestic or nominated and not to maintain the risk under the Contract. Therefore, the Employer will have a total of 13 years for the decennial liability period to report any damages to the stability of the building whether partial or total collapse or the discovery of the structural defects. Dimitracopoulos A [127] explains that "clauses relating to limitation of liability (particularly defects liability) may not be enforceable under UAE law as they

[127] Dimitracopoulos A, Consultants and Contractors: Consult before contracting! Contractual transactions in the world of construction that are devoid of legal input are fraught with pitfalls, (Law update, 2005)

may be overridden by mandatory law provisions."[128] Under the United Arab Emirates Civil Law article 880, states the decennial liability period for any major structural issues or partial or total collapse cannot be reduced as this is against the local laws. Therefore, the Employers may require a collateral warranty from the Subcontractor, which will link the Subcontractor to the Employer and will allow the Employer to take direct action against the Subcontractor in case of decennial liability. The United Arab Emirates Civil Law states that the decennial liability is between the Employer and the Main Contractor or the first Contractor, therefore the collateral warranty of the Subcontractor doesn't mean the Employer is not able to take legal action against the Main Contractor. Under the United Arab Emirates Civil law, the Employer will have two options, either to take legal action against the Main Contractor under the conditions of Contract or to take legal action against the Subcontractor for conditions under the warranty. Masadeh A[129] clarifies that if the Employer is fully compensated for the defect either by the Subcontractor or the Main Contractor, the Employer will be unable to take legal proceedings against the other party. However, if the Main Contractor compensated the Employer for the defect, which was due to the Subcontractor, the Main Contractor will be able to take legal proceedings against the Subcontract under the Subcontract agreement to recover their complete costs. Main Contractors generally allow a clause in the Subcontract agreement which protects them from decennial liability and allows them to pass their risk to the Subcontractor in these respects.

Under United Arab Civil law, the Contractor is not the only entity that is held liable to the employer for Decennial liability. The designer and supervising engineer are also held jointly liable to the

[128] Ibid,

[129] Masadeh A, Vicarious performance and privity in construction contracts , (the international construction law review, 2014),

employer for Decennial liability. The United Arab Emirates Civil Law understand that the partial collapse or total collapse or the structural defect could be due to a number of reasons and not just the workmanship, therefore all three parties are always held jointly liable at first until the investigation demonstrates whether it is a design issue or a workmanship issue. As the supervising engineer will be held jointly liable if the workmanship is a defect as the supervising engineer was responsible to ensure that the works was installed correctly and carried out necessary checks.

Even though the Main Contractor is able to re-allocate the risk from themselves to the Subcontractor, the risk to the designer and engineer supervising the works remains and therefore the engineer and designer obtain necessary Professional indemnity insurances to protect them from events of partial or total collapse of the structure due to the design. Most Employer requires for the professional indemnity insurance to be valid for a duration of ten years which coincides with the durations of the decennial liability period.

CHAPTER 4 – CONCLUSIONS AND RECOMMENDATIONS

This dissertation has looked at several different clauses in the FIDIC 1999 Red Book Contract and has clearly demonstrated that the FIDIC 1999 Red book conditions of Contract has made significant changes to fairly allocate the necessary risks of the Main Contractor and to ensure that the rights of the Main Contractor is supported if the Employer is in breach of their performance obligations in accordance with the Contract. Therefore, improving the risks and rights of the other stakeholders. S Kerur and W Marshall[130] agrees with this statement, and goes further by stating that "civil construction projects in the middle east are often delivered under an amended form of FIDIC Red Book 1999, with Employer friendly amendments that range from reasonably balanced to completely outrageous."[131] The Employers in the Middle east and United Arab Emirates are able to impose these outrages conditions of contract onto the Main Contractor and subsequently onto the Subcontractor as there are Main Contractors and Subcontractors which accepts these conditions and are happy to work for these Employers. If all Main Contractors and Subcontractors request acceptance of these heavily modified Conditions of Contract and remain in line with the conditions of FIDIC 1999 Red Book, then the Employers will have no choice but to bend to line with the Market.

As the Main Contractor accepts these conditions and therefore seeks to spread the risk amount the Supply chain including the Subcontractor by imposing a back to back basis with them and the Main Contract conditions for the Subcontract conditions. The principle of the back to back conditions can be considered as an ideological principle, where the Main Contractor and the Subcontractor are all one and their seek the rewards and benefits collectively and accept the

[130] Kerur S and Marshall W, Identifying and Managing risk in international construction projects (the international law review, 2012)
[131] Ibid, 11

punishment in the same sprint, however this is not the case and the Subcontractor may be punished if the Main Contractor or conditions outside the Subcontractor's control is effected and therefore adds further risk to the Subcontractor's position. A Dimitracopoulos[132] recognizes this issue and alleges that "back to back is not a legal term and may not mean much to a dispute resolution authority (particularly to the UAE Courts) if its substance is not reflected in the Subcontract with an express explanation of what clauses of the Main Contract are to apply by analogue or verbatim to the Subcontract."[133] Therefore the Main Contractor has to specify the clauses that are applicable from the Main Contract to the Subcontract agreement and it would be highly recommended for the Subcontractor to ensure that there are additional clauses in the Subcontract agreement, which clearly demonstrates their remedy for defaults caused by the Main Contractor, which delays payments, allows the Employer to impose Liquidated damages, pull of Bonds, defects, etc. The United Kingdom Common Law does not allow for Subcontractors to be on a back to back basis with the Main Contractor's conditions, as the United Kingdom Common Law understands the fundamental issues or flaws of the back to back basis and the issues of varies subcontractors being held responsible for other Subcontractors breaches or for the breach by the Main Contractor, which is outside the control of the Subcontractor. The recommendation of this dissertation for the Main Contractor is to ensure that if they use a back to back basis for a Subcontract agreement between themselves and a Subcontractor, the Main Contractor needs to ensure that they specify the clauses or the conditions of Main Contract, which is applicable to the Subcontractor and therefore not to use a general waive that all conditions are applicable to the Subcontractor, as this may not be sufficient if the Subcontractor seeks litigation or arbitration against the Main Contractor.

[132]Dimitracopoulos A, Consultants and Contractors: Consult before contracting! Contractual transactions in the world of construction that are devoid of legal input are fraught with pitfalls, (Law update, 2005), 3
[133]Ibid, 3

In addition, the Main Contractor has to ensure that they have the agreement of the Subcontractor before the agreement of the final account with the Employer. If the Main Contractor accepts a final account by the Employer, without the agreement of the Subcontractor, then the Main Contractor takes the responsibility and liable to settle the final account of the Subcontractor.

The recommendation of the dissertation for the Subcontractor is to ensure that the conditions of the Main Contract that is agreed, needs to be understood and followed. In addition, the risk which is being allocated to the Subcontractor needs to be identify and recognized by the Subcontractor. Ensuring that the relevant requirements of the conditions of Contract is met. The Subcontractor also needs to ensure that the clauses are included in the conditions of Contract which allows the Subcontractor to seek remedies if the breach of Contract is due to the Main contractor with no attributing factor to the Subcontract. i.e if the Subcontractor receives payment from the Main contractor 7 days after the Main Contractor receives payment by the Employer, the Subcontractor should require a clause in the Subcontract agreement, which allows the Main Contractor to make payment after 75 days if payment is not received by the Employer due to the Main Contractor's default. This will limit the risk of the Subcontractor and allocate the risk back to the Main Contractor if the breach of the default is due to the Main Contractor. Especially in accordance with the taking over certificate, if the Main Contractor is unable to obtain the taking over certificate due to a defect outside the control of the Subcontractor, then the Subcontractor could potentially be held responsible for the protection of their works for a longer duration and for a warranty period which was not expected during the tender stage, which will increase the risk of the warranty for the equipment and materials that has been supplied, which the Subcontractor will be unable to

obtain from the supply chain and therefore may increase its overall costs as if any problems or defects which may arise during the extended period, this will fall onto the Subcontractor's account as well as the Subcontractor will be responsible for the preventive maintenance of the equipment in accordance with the Operation and maintenance manual, which will increase the Subcontractor's overall costs and liability to the Main Contractor and the Employer.

In addition, the Subcontractor needs to understand how they are able to recover domestic variations due to changes of contract documents and potential coordination issues on site, especially as coordination is the responsibility of the Main contractor, which the Main Contractor is trying to re-allocate their risk to the Subcontractors on site and provides the Main Contractor various avenues to reject the domestic variations, which they are unable to recover from another party.

END OF DISSERATATION

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