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It's not you. It's me! Terminating Contractors for Convenience in the UAE

ليس أنت المقصود ولكني أنا! عملية إنهاء المقاولين بسبب المواءمة بدولة الإمارات العربية المتحدة

By

Garvan Anthony McDwyer

Student No. 90134

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Dissertation Supervisor

Dr. Aymen Masadeh

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Key Words

Termination, Breach, Default, Force Majeure, FIDIC, NEC, Contract, UAE Civil Code, Muqawala, Insolvency, Good Faith, Sharia Law, Freedom of Contract, Illusory Contract, Dubai Law No. 6 of 1997, Loss of Profit, Loss of Opportunity, Final Account, Employer, Contractor.

Abstract

This dissertation examines the potential conflict between standard construction contract clauses on termination for convenience and the UAE Civil Code provisions which could override them. Is there a loophole for Contractors to exploit when terminated for Convenience? Is it lawful for an employer to terminate a contract essentially because the financing is not available or simply because the project is no longer feasible? The study will involve a critical analysis of the local law provisions in relation to terminating construction projects with respect to standard industry norms.

الملخص

تتناول هذه الأطروحة الاختلاف أو الصراع المحتمل والكامن ما بين البنود المعيارية لعقود البناء والانشاءات حول مسألة الإنهاء للراحة والمواعمة، والقانون المدني لدولة الإمارات العربية المتحدة والتي يمكن لنصوص أحكامها أن تتجاوزها. فهل هناك من ثغرة لدى المقاولين يمكنهم النفاذ منها عندما يتم انهاء اعمالهم للمواعمة والراحة؟ وهل يكون الأمر قانونياً بالنسبة لصاحب عمل ان يقوم بإنهاء عقد ما بشكل ملحٍ وضروري عندما لا يتوافر التمويل او ان يقول وببساطة تامة ان المشروع لم يعد مجدياً من الناحية الاقتصادية؟ تشتمل هذه الدراسة على عملية تحليل جوهريّة وأساسية لنصوص احكام القانون المحلي فيما يتعلق بإنهاء مشاريع الانشاء والبناء بخصوص معايير الصناعة المعيارية.

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Introduction

Termination for convenience is described as a clause which enables the “*owner (or contractor) to terminate or cancel performance of work under a contract (or subcontract), in whole or in part, at the owner (or contractor’s) sole discretion.*”¹

Following the American Civil War in the mid-19th Century, the concept of a “*termination for convenience*” developed as a “*mechanism for the US Government to avoid costly military procurements that became unnecessary as a result of changes in war-time technology or the end of conflict.*”²

Subsequently, it has become commonplace in various types of contracts throughout the world.

In the third quarter of 2008, The United Arab Emirates (UAE) first experienced the tremors from the United States recession and eventual collapse of many of their leading financial institutions. The repercussions spread to the Middle East and to Dubai in particular with its gleaming skyscrapers and five star resorts. Liquidity quickly became an issue and without sufficient funding, many Employers were forced to rethink their projects and portfolios.

Unfortunately, this led to Employers ultimately terminating Construction projects en masse due to the fact that funding was not available or that the economic circumstances of the day did not warrant the particular development. The premature terminating of Contractors has had huge implications for many - particularly those who may have committed equipment and resources for the duration of a project.

For this research paper, it is necessary to assume that the Contractor himself is not in breach of contract, which would enable the Employer to terminate the contract due to the inadequate performance of the Contractor. The performance of the Contractor must be sufficient such that any termination on behalf of the Employer must be seen to be for his own convenience.

¹ Klinger, M. Susong, M. *The Construction Project* (2006), ABA Publishing, pg, 108, para. 3

² (<http://www.eckertseamans.com/file/pdf/newsletters/ConstructionSpring2010.pdf>) accessed on 10 Jan 2012

It is important to note that whilst this paper is focused on Employers terminating Contractors as part of a main contract, it is equally applicable to the termination for convenience of Subcontractors and Consultants. One must be aware that in the event that a main contract has been prematurely terminated for convenience, extenuating circumstances will ordain that the Contractor must also terminate his Subcontracts (if any) for convenience. In addition, having terminated the main contract, the Employer will be forced to terminate his Consultants accordingly.

It will first be necessary to examine the legal system of the UAE as it will be central to understanding how a contract term or clause may be contrary to the local law of the country. A dangerous assumption in any jurisdiction is to consider the Contract as the alpha and the omega. Consider the possibility that the local law of a Country is in direct conflict with a term or clause in a Contract entered into in that country?

This paper will attempt to answer the above question with a focus on the unilateral termination of Construction projects. Is the termination for convenience clause included in most standard forms of contract in conflict with the local law provisions? If this is affirmative, is it a material breach on the part of the Employer to terminate a Contractor for convenience notwithstanding whether or not the contract provides for it?

In order to form an impartial view on this question, it will be necessary to gain the views of a lawyer practicing in the UAE who has advised both Contractors and Employers alike when the issue of a termination for convenience gives rise to a dispute between the parties. The feedback from the questions will be analysed against the findings of the dissertation with a view to finding a common ground.

Developing this approach it will be necessary to explore the consequences relative to the analysis. What can a Contractor claim compensation for if it is deemed that the termination is lawful? On the other hand, if the termination is unlawful and considered a material breach of contract by the Employer, does this open the floodgates and enable the Contractor to claim all sums due and any potential losses? What are

the implications if the Employer is the UAE Government or a developer associated with the Dubai Government?

In conclusion, this paper will seek to inform construction professionals in the UAE of the potential consequences surrounding a termination for convenience. It will equip an Employer with the appropriate knowledge in how best to avoid a potential material breach of contract and will enlighten Contractors with the benefit of maximising financial recovery in the unfortunate event of being terminated for convenience.

The following quotations relative to this topic give the reader a flavour of the key issues that will be examined within this paper:

“In the current economic climate, there is growing interest in whether a contract can be cancelled, particularly where one party is no longer able to fulfil its obligations under the contract due to financial difficulties.” Omar Al Shaikh, Cancellation of Contracts in the UAE and the impact of the Economic Downturn (June 2009).

“The unilateral termination of a Construction Agreement remains a controversial matter under the UAE law as the boundaries, which limit the exercise of such termination rights, remain uncertain and the interaction between the Civil Code and any express contractual terms concerning termination rights and remedies is not always clear” Jim Delkousis, UAE law provides security in construction deal risks (March 2009).

“...under English law, the Courts will generally uphold an agreed termination provision, including the right for one party to terminate its contract for convenience. The validity of such provisions in the UAE, however, is highly questionable. This is because UAE law prescribes the circumstances in which a contract may be terminated (which are limited and do not include a right to terminate a contract without cause) and because such provisions are considered to be

contrary to Shari'a law." Melanie Grimmitt, To What Extent Does Freedom of Contract Exist for You in the UAE? (December 2009).

"the enforcement of termination for convenience clauses in the UAE is questionable and a party seeking to rely on this right may find that they have no entitlement to do so. The same applies with respect to the applicability of time bar clauses. Therefore, it is important to consider whether the terms of a SFCC are purporting to introduce legal concepts which do not fit within the bounds of the local law." Sachin Kerur, Standard Form Construction Contracts – Friend or Foe? (July 2010).

"The termination of convenience clauses are regularly invoked in the United Arab Emirates without caution, very few Employers are aware of the legal consequences of what may very well amount to a wrongful termination and expose the employer to pay compensation to the contractor and many contractors innocently accept the termination without challenge and risk this termination to become a termination by mutual agreement under law, which as mentioned above is permitted." Fareya Azfar, How valid is the exercise of Termination for Convenience Clauses in UAE (October 2011).

"While the parties may agree to, and include, termination clauses in the contract, the UAE civil code also contains provisions that deal with termination. The effect and scope of these provisions in different parts of the civil code are a matter of some potential debate as to their meaning and effect." Paul Taylor, Breaking up is never easy (May 2007).

Dissertation Structure

This dissertation will be structured as follows:

- A section examining the fundamental differences between Common Law and Civil Law.
- A brief review of the statutory laws regulating the termination of Construction Contracts in the UAE.
- A comparison with UK Statutory laws on terminating Construction Contracts for convenience.
- Termination for convenience clauses used in standard forms of construction contract (SFCC) will be compared and contrasted with the various standard forms used in the UAE.
- Chapter 2 will involve an interview with a reputable local law practitioner who has written articles which address this topic.
- The responses to the questions posed will be critically analysed against the findings in the dissertation.
- It is necessary at this point to form an opinion on whether or not a termination for convenience is a breach of contract.
- Assuming a termination for convenience is unlawful, it will be necessary to examine what remedies the UAE Courts judicial system provides for the aggrieved party.
- The amount and method of claiming compensation will be addressed to enable the Contractor to estimate the amount of damages and losses suffered in claiming a breach of contract.
- To conclude this paper, suggestions will be made to amend and improve the relevant UAE statutory laws relating to the termination of construction contracts and the clauses within SFCC's to reflect a more equitable outcome.

Chapter 1

Terminating Contracts in the UAE

1.1. Common Law v Civil Law – Contrasting approaches

The UAE was formed in 1971 when the states of Abu Dhabi, Dubai, Fujairah, Ajman, Sharjah, Umm Al Quwain entered into a federal Constitution. Ras Al Khaimah later joined in 1972 as the seventh State to complete what is known today as the United Arab Emirates.³

The legal system of the country in which a contract is entered into can have huge implications for the parties. The UAE is a Civil Law Country and utilises a set of codified laws as its primary source of law. Its legal system has been heavily influenced by the Egyptian legal system which is itself based on French and Roman law.⁴ In addition, the UAE is an Islamic Country and therefore has also been influenced by Islamic law codified in the Shari'a and "*embodied now in the UAE Civil and Commercial Codes.*"⁵

The Common Law on the other hand, is generally uncodified.⁶ It is a legal system which originated in England in the 11th Century with the purpose of being a "*one law*" or "*common law.*"⁷ It spread throughout the countries of the Commonwealth such as Kenya, India, Canada and most of the United States of America.⁸ The Common Law uses a system of judicial precedent, which means that Judges must issue their judgment in accordance with the facts of a similarly decided case. The rationale for this approach is such that there shall be consistency based on anecdotal precedent.⁹ The concept is known as

³ *Doing Business and Investing in the United Arab Emirates Guide*, International Business Publications, pg. 24, para. 5

⁴ Price, R. Al Tamimi, E. *United Arab Emirates Court of Cassation Judgments 1998 – 2003* (2005), Koninklijke Brill, Leiden, The Netherlands

⁵ See footnote 5

⁶ (<http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html>) accessed 10 December 2011

⁷ (http://www.consulegis.com/fileadmin/downloads/thomas_marx_08/DLengeling_paper.pdf) accessed 12 December 2011

⁸ Young, M. *Understanding Contract Law* (2010), Routledge, pg. 2, para. 1.2

⁹ Enright, C. *Legal Technique*, The federation press, Sydney, pg. 263, para. 1

‘Stare Decisis’ which is to use precedent in deciding current cases. It can be translated to mean “*to stand on decided cases.*”¹⁰

The contrast between the “Stare Decisis” of the Common Law and the codified laws of a Civil Law jurisdiction is an important aspect to consider when one is attempting to give an ‘unequivocal’ answer on a contentious provision/s of codified law/s. One must be aware that a Judge in a Civil Law jurisdiction is not obliged to refer to a previous similar case in his judgment. In theory then, a court in a Civil Law jurisdiction could decide two similar cases differently. Their judgments are merely based on their interpretation of the applicable codified laws.

1.2. Terminating Construction Contracts – The Articles of the Muqawala.

Construction Contracts are covered in the UAE Civil Code (Federal Law No. 5 of 1985). Articles 872 – 896 inclusive comprise the Muqawala (contracts to make a thing or to perform a task) which directly relate to construction. The articles are grouped together in the following four subsections:

- Definition and scope of the Muqawala (Articles 872 – 874 inclusive).
- Effects of the Muqawala (Articles 875 – 889 inclusive).
- Subcontracting (Articles 890 – 891 inclusive).
- Termination of the Muqawala (Articles 892 – 896 inclusive).

The five Articles relating to the termination of a Muqawala are as follows:

Article 892:

“A contract of Muqawala shall terminate upon the completion of the work agreed or upon the cancellation of the contract by mutual consent or by order of the court.”

Article 893:

¹⁰ Meiners, E. R. Ringleb, A. H. Edwards, F.L. *The Legal Environment of Business* (2008) 11th ed. pg. 10, para. 2

“If any cause arises preventing the performance of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be cancelled or terminated as the case may be.”

Article 894:

“If the contractor commences to perform the work and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the expenses he has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom.”

Article 895:

“A party injured by the cancellation may make a claim for compensation against the other party to the extent allowed by custom.”

Article 896:

“(1) A contract of Muqawala shall terminate upon the death of the contractor if it is agreed that he should perform the work himself, or if his personal qualifications are a material consideration in the contract.

(2) If the contract contains no such condition or if the personal qualifications of the contractor were not a material consideration in the contract, the employer may require that the contract be cancelled if the contractor's heirs do not provide sufficient guarantees for the proper performance of the work.

(3) In either event, the value of the works carried out and the expenses incurred therein shall devolve upon the estate in accordance with the conditions of the contract and the requirements of custom.”

Article 892 prescribes three instances only in which a Contract may be terminated. To illustrate their importance, they are separated clearly as follows:

1. Completion of the work agreed.
2. Cancellation of the contract by mutual consent.
3. By order of the court.

There is no issue with the first scenario which rightly points out that a contract of muqawala shall terminate upon completion of the work agreed and this is how the vast majority of muqawala contracts terminate. The second instance is not particularly transparent and it has been noted that “... *mutual consent*’ raises issues as to whether an agreed termination for convenience clause in a signed contract would in itself be accepted as that required element of ‘mutual consent.’”¹¹ Finally, the local courts can apparently only order a termination on the following grounds:¹²

1. Contractor in breach due to defects in the construction and having failed to remedy such defects despite notice being served.
2. Critical delays to the works with little prospect for completion by contract completion date.

Whilst the above articles of the Muqawala directly relate to Construction, the other provisions in the UAE Civil Code relating to the general theory of contracting may also be applicable to Construction contracts.

Article 218 of the UAE Civil Code, which is located under Section 2 entitled “*The elements, validity and effect of the contract, and options*” is entitled “*the non binding contract.*” Article 218(1) states: “A contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of

¹¹ Hirst, M. *Termination for Convenience Clauses—A Shield or a Sword in times of Economic Downturn*

¹² ([http://www.mbam.org.my/mbam/images/MBJ4Q08/@COPING%20WTIH%20TERMINATION%20\(76-78\).pdf](http://www.mbam.org.my/mbam/images/MBJ4Q08/@COPING%20WTIH%20TERMINATION%20(76-78).pdf)) accessed on 24 December 2011

the court.” (Note: underline emphasis added). In addition Article 218(2) states: “Each party may act unilaterally in cancelling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favour that he has the option to cancel.” (Note: underline emphasis added). Article 218 (1) & (2) therefore appears to suggest that a contract is not binding if one party has the option of cancelling.

On the other hand, Article 106 of the UAE Civil Code states:

“(1) A person shall be held liable for an unlawful exercise of his rights.

(2) The exercise of a right shall be unlawful:

(a) If there is an intentional infringement (of another’s rights);

(b) If the interests which such exercise of right is designed to bring about are contrary to the rules of the Islamic Shari’ah, the law, public order, or morals;

(c) If the interests desired are disproportionate to the harm that will be suffered by others;

(d) If it exceeds the bounds of usage and custom.”

It is therefore debatable whether the implementation of a termination for convenience clause contravenes Article 106 of the UAE Civil Code (particularly if the intention was ultimately to award the remaining Works to another contractor at a lower price).

Article 271 of the Code on the other hand appears to support an argument in favour of the validity of invoking a termination for convenience clause. It states:

“It shall be permissible to agree that a contract shall be regarded as being cancelled spontaneously (automatically) without the need for a judicial order failing performance of the

obligations arising there out, and such agreement shall not dispense with notice unless the contracting parties have expressly agreed that it should be dispensed with.”

A further consideration regarding the validity or otherwise of termination for convenience clauses under UAE law is that a fundamental tenet of UAE law is the obligation to act in good faith, which is enshrined in Article 246(1) of the UAE Civil Code thus: *“The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.”*

From the aforementioned articles, the position is not particularly clear and it seems that there is a certain amount of contradictory information relating to the unilateral termination of contracts including contracts of the Muqawala. Therefore, in the absence of any judicial precedence in the UAE, there may not be a definitive right or wrong answer. However it is necessary to further explore this issue by examining the background to the UAE Civil Code and what has influenced it.

1.3 A comparison with the Common Law of England and Wales

The English Common Law doctrine of Freedom of Contract is well known and described by Thorpe et. al (1999) as *“one of the few legal maxims, it means exactly what you might expect it to mean.”* They consider that: *“It is entirely up to the parties involved to decide whether to contract, to decide the subject matter and the terms of that contract and to decide whether and in what way those terms are to be recorded. The purpose of the law of contract is not to dictate to people what contracts they enter into, but to enable a party who has made a contract to enforce it in accordance with the original intention of the parties. To put it in more familiar terms, the purpose of the law of contract is to enable a person who has made a deal to hold the other party (or parties) to it.”*

English law will generally uphold an agreement made freely between parties provided it does not contravene any laws or public policy. Furthermore, the Courts of Common Law jurisdictions are “...

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slow to use the doctrines of misrepresentation, mistake and economic duress to vary the terms of a commercial agreement.”¹³

A recent case reported in Maryland, USA has shed some light on the issues surrounding termination of convenience clauses. Does a termination for convenience clause entitle an employer to terminate a contractor for no reason at all?

Questar Builders v. CB Flooring¹⁴

Questar Builders - a general contractor was subcontracted with CB Flooring to install carpeting at Greenwich Place. CB Flooring was the lowest bidder ahead of Creative Touch Interiors (CTI) which was some £120,000 more expensive. Shortly after the Subcontract had been signed, the interior designer for the project changed the designs for the carpets. However, prior to CB Flooring responding with corresponding changes in cost, Questar Builders approached CTI with a view to retendering for the works. CTI later responded with a quotation for the works. Subsequently, CB Flooring submitted a change order increasing their quotation for the works by £33,566. Shortly thereafter, Questar Builders submitted an unexecuted Subcontract to CTI. To further complicate matters, CB Flooring resubmitted their change order in the sum of £103,371 citing mathematical errors.

The original Subcontract between Questar Builders and CB Flooring was terminated by the Senior Vice President of Questar Builders. In the termination letter, it was alleged that the termination was for cause due to a breach by CB Flooring by “*refusing to perform.*” They further stated that even in the absence of a breach, they had a right to terminate the Subcontract for their own convenience with no compensation for CB Flooring. Furthermore, Questar Builders alleged bad faith on the part of CB Flooring by “*using the interior designer’s changes to seek an unwarranted increase in the Subcontract price.*”

CB Flooring responded by claiming that the termination was unlawful and “*initiated a breach of contract*

¹³ (<http://kluwerconstructionblog.com/2009/12/28/to-what-extent-does-freedom-of-contract-exist-for-you-in-the-uae/>) accessed on 30 December 2011

¹⁴ *Questar Builders, Inc. v. CB Flooring, LLC.*, No.153, September Term, 2008

action” in the Circuit Court of Baltimore County. They refuted Questar Builders claims that they refused to perform and that they acted in bad faith by taking advantage of a changing design by overestimating the cost of the changed design. CB Flooring claimed that it was Questar Builders that acted in bad faith by *“invoking the clause after scheming to hire CTI in its place.”*

The trial judge held that Questar *“improperly terminated the subcontract”* and awarded damages in favour of CB Flooring. Questar Buildings later appealed to the Court of Special Appeals whereby in its brief, it presented the following questions:

1. *“Whether a “termination for convenience” clause contained in a contract between private parties is enforceable under Maryland Law.”*
2. *“Whether the trial court erred by holding, as a matter of law, that the parties’ “termination for convenience” clause was inapplicable and did not allow Questar to terminate the parties’ Subcontract without cause.”*

The Court of Special Appeals held that *“the ‘termination for convenience’ clause in this case may be enforceable, subject to an implied obligation to exercise the right to terminate in good faith and in accordance with fair dealing.”* The fact that Questar Builders were unable to demonstrate that the termination for convenience was in accordance with “good faith” and not merely a “gut feeling” meant that the claim was dismissed.

Furthermore, Maryland’s highest appellate court held that *“an implied obligation of good faith and fair dealing limits a terminating party’s discretion to terminate for convenience.”* Apparently a contract, which may be unilaterally terminated by one party for no reason - may be illusory.¹⁵ An illusory contract is said to be an agreement which *“does not obligate one party or allow that party to excuse itself entirely*

¹⁵ (<http://www.dlapiperrealworld.com/news/updates/files/2010/real-estate/usa/us-construction-law-newsletter-right-to-terminate-contract-oct-2010.html>) accessed on 15 Jan 2012

from its promise are not for consideration and cannot be the foundation for a contract.”¹⁶

1.4 Termination for convenience clauses in FIDIC 1987/1999 and NEC3.

Standard forms of Construction Contract (SFCC's) have evolved over many years to suit changing Construction Methods / practices etc. There are numerous SFCC's available which have been drafted to suit various Construction Projects. The criteria to consider when selecting an SFCC for a particular project include:

- Country/Region
- Size
- Complexity
- Risk
- Procurement Route

However, taking into account all of the above considerations, certain regions remain loyal to the tried and tested forms. FIDIC 1987 4th Ed. remains one of the most popular SFCC's used in the UAE despite its introduction a quarter of a century ago. According to Kerur (2010), this can be attributed to the fact that it is an “Employer friendly” contract. On the other hand, FIDIC 1999 is a more “balanced” SFCC in terms of risk distribution between the Employer and Contractor.¹⁷

NEC3 has, since its introduction in 2005, had a slow uptake in the UAE. Despite its successful application on a number of high profile projects in the UK, few projects in the UAE implement it as their SFCC. The ideology of the NEC3 is for the parties to “*act in mutual trust and cooperation*” and numerous

¹⁶ Emanuel, Steven L. Contracts, (2006) Aspen publishers, 8th ed. Pg 16, part IV

¹⁷(<http://kluerconstructionblog.com/2010/07/23/standard-form-construction-contracts-%E2%80%93-friend-or-foe/>) accessed on 20 Jan 2012

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authors have commented that the inherent mistrust of Contractors in the UAE is the reason behind the slow uptake of this SFCC.¹⁸

The above SFCC's are the most widely used in the UAE and each have their fundamental differences. With this in mind, it is necessary to examine how each Contract deals with the issue of a unilateral termination.

FIDIC 1987

The fourth edition of the red book, also known as FIDIC 1987, was such a success that "*the world bank adopted it in its standard bidding documents in January 1995.*"¹⁹ It also proved to be popular in the Middle East where a Construction boom was underway during the 80's and 90's. Glover (2008) states that FIDIC 1987 remains "*the contract of choice throughout much of the Middle East, particularly the UAE.*"²⁰

Termination due to the default of the Contractor is extensively covered under Clause 63 of FIDIC 1987. Similarly, Clause 69 gives the Contractor a right to terminate due to the default of the Employer.²¹

Clause 69.1 (Default of Employer) provides that:

In the event of the Employer:

(a) failing to pay to the Contractor the amount due under any certificate of the Engineer within 28 days after the expiry of the time stated in Sub-Clause 60.10 within which payment is to be made, subject to any deduction that the Employer is entitled to make under the Contract, or

(b) interfering with or obstructing or refusing any required approval to the issue of any such certificate, or

¹⁸ (<http://www.constructionweekonline.com/article-2574-new-engineering/>) accessed on 31 December 2011

¹⁹ Bunn, N. *The FIDIC Forms of Contract* (2005) 3rd Edition, Blackwell Publishing, preface, para. 1

²⁰ Glover, J. *International procurement, development bank procurement and FIDIC*

²¹ FIDIC, Red Book, 1987

(c) becoming bankrupt or, being a company, going into liquidation, other than for the purpose of a scheme of reconstruction or amalgamation, or

(d) giving notice to the Contractor that for unforeseen reasons, due to economic dislocation, it is impossible for him to continue to meet his contractual obligations, the Contractor shall be entitled to terminate his employment under the Contract by giving notice to the Employer, with a copy to the Engineer. Such termination shall take effect 14 days after the giving of the notice.²²

In the current economic climate it is assumed that the Employer would give Notice to the Contractor pursuant to Clause 69 Sub Clause (d) by giving notice that for unforeseen reasons, due to economic dislocation, it is impossible for the Employer to meet his contractual obligations.

Following such notice the Contractor shall be entitled to terminate its employment under the Contract by giving notice to the Employer, with a copy to the Engineer. The termination would then take effect 14 days after the giving of the notice by the Contractor.

However, no article exists enabling either of the parties terminate for their own convenience. The absence of a termination for convenience clause does not prevent users amending the standard forms by inserting a bespoke clause “.. *allowing the employer to terminate the contract for its convenience, by giving a period of notice to the contractor in return for re-imburement to the contractor for work performed, up until the effective date of the termination for convenience.*”

FIDIC 1999

The fifth edition of the red book was introduced to ‘replace’ the fourth edition with the intention that Employer’s use of the old version would “*cease with time and that new projects that were being contemplated at that time should immediately utilise the 1999 forms of contract.*”²³ However, the reason

²² FIDIC General Conditions of Contract 1987, Clause 69.1

²³ See point 12 above

that the new form did not appear to be popular in the beginning was due to a “*reservation on the part of users to adopt a form that was untested and untried within the industry.*”²⁴ Other factors precluding more extensive take-up include:

1. Familiarity - particularly if Employers have an amended form which they use time after time.
2. Court decisions and Arbitral awards relating to the clauses are well documented and understood.
3. It is regarded as an ‘Employer Friendly’ Contract.

Clause 15.5 is entitled “*Employer’s Entitlement to Termination*”. It provides that:

“The Employer shall be entitled to terminate the Contract at any time for the Employer’s convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.

After this termination, the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor’s Equipment] and shall be paid in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release].”

Key Points:

1. Employer has a right to terminate notwithstanding any breach on the part of the Contractor following 28 days’ notice.
2. The Employer must not intend to finish the works himself nor shall he procure the services of another contractor to finish the works.
3. The Contractor shall be paid in accordance with Sub-Clause 19.6.

²⁴ Bunn, N. The FIDIC Forms of Contract (2005) 3rd Edition, Blackwell Publishing, preface

With the introduction of the above clause, FIDIC have clearly considered the scenario where Employers could seek to take advantage of changing market conditions by completing works themselves or by contracting with others to finish the works. What is not clear is that if this Clause limits the Employer whereby he cannot complete the works - must he undertake a new agreement to resume with the original contractor? Glover (2006) appears to agree by stating that the Employer “*will be unable to finish the project either by itself or by engaging a new contractor.*”

The key difference between FIDIC 1987 and FIDIC 1999 is the facility for the Employer to withdraw from the contract. FIDIC 1987 empowers the Employer to terminate the contract but it is considered a “default” on his part. This is in stark contrast to FIDIC 1999 which enables the Employer to terminate for his own convenience. The wording used in FIDIC 1987 suggests that the Employer must invoke Clause 69.1 - Default of Employer - if he wishes to terminate the contract for whatever reason. By its definition: “*Default in contract law implies failure to perform a contractual obligation.*” The difference in FIDIC 1999 is that the Employer is seen to be performing the contract by invoking a clause which terminates it in entirety!

Baker et al. (2009) considers that the termination for convenience of the Employer clause in FIDIC 1999 is “*primarily intended to be used where the project is abandoned.*” However, he further suggests - that it is “*sometimes used where the Employer considers that the Contractor is performing badly but does not want to take the risk of terminating for cause and having the Contractor dispute the validity of that termination.*”

NEC3

The New Engineering Contract (NEC3) provides for the termination of the Contract for both Employer and Contractor.²⁵ However, only the Employer has a right of termination entirely at his discretion.²⁶

²⁵ *The Engineering and Construction Contract Guidance Notes (1995) 2nd ed. pg. 80, para. 1*

²⁶ See footnote 25

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Clause 94.2: *“The Contractor may terminate only for a reason identified in the Termination Table. The Employer may terminate for any reason. The procedures followed and the amounts due on termination are in accordance with the Termination Table.”*²⁷

Notwithstanding the Employers ability to terminate for no reason at all, he may also terminate for any reason expressed in R1 – R21.²⁸ The reasoning for this is that *“the procedures and payments on termination differ depending on what reason is stated for termination”*.

It is worth noting that all Contracts should specify what should be paid to a Contractor in the event of a termination.²⁹ Failure to do so by the Employer may invite a claim for breach of contract by the Contractor.

²⁷ NEC3 Engineering and Construction Contract; Clause 94.2

²⁸ Gerrard, R. *NEC2 and NEC3 Compared* (2005) Academic and Technical, Bristol, UK, pg. 64

²⁹ Callahan, T.M. *Termination of Construction and Design Contracts* (2009) Aspen Publishers, pg. 36, para. 1

Chapter 2

Terminating for Convenience – Material Breach of Contract?

2.1 Interview Questionnaire with Mr Paul Taylor – Partner, Reed Smith

In order to form an objective opinion on whether a unilateral termination of a construction contract could be considered unlawful in the UAE, it is necessary to elicit the views of a lawyer who has defended both Employers and Contractors faced with this scenario. Author of numerous articles on the conflicts between the UAE Civil Code and SFCC's, Mr Paul Taylor, a partner from Reed Smith's Dubai branch has agreed to be interviewed on the salient laws relating to this topic.

Firstly, I would like to thank you for agreeing to be interviewed regarding this subject. You have been selected as the interviewee for this topic for the following reasons:

- *Your article entitled “Breaking up is never easy” dated May 2007.*
- *Whilst qualified as a lawyer in the jurisdiction of England and Wales, you have over 7 years experience practicing in the UAE.*
- *You have been highly ranked in the UAE as a construction lawyer by the “Legal 500” commenting - that you are “very practical when discussing and suggesting solutions and strategies.”*
- *Your practice is highly ranked among construction law firms in the UAE.*
- *You are a regular keynote speaker at Society of Construction Law events in the UAE.*

Questions:

1. *Does your practice tend to advise Employers or Contractors or both?*

Answer: Mr Taylor confirmed that his current practice tends to advise Employers. However, he insisted that his prior experience involved a mixture of both Employers and Contractors.

2. *It is a well-known fact that the construction industry in the UAE has suffered and continues to suffer from the global financial crisis. Have you noticed an increase in Employers invoking a termination for convenience clause?*

Answer: In reply to a query whether Employers are quick to terminate for convenience, Mr Taylor stated that *“the high point of it was probably about 18 months ago, mainly because now they’ve worked out really which product they’re going to go for.”* He further stated that *“the situation is easing generally.”* The *“blind panic”* at this time where Employers were terminating Contractors has been replaced by the intention of getting Contractors back on site and restarting suspended projects.

3. *Is there any particular sector experiencing termination for convenience more so than others?*

Answer: Mr Taylor stated that the majority of terminations were the so called “mega projects.” He also highlighted the hotel and leisure sector. Dubai’s “mega projects” provoked much comment and controversy during the time of the financial crash.

4. *Are you advising on mainly terminations invoked by private developers or local Government Authorities?*

Answer: Mr Taylor confirmed that he provides advice on terminations invoked by Private Developers more so than Government Authorities.

5. *The UAE is a Civil Law jurisdiction in an Islamic country. Does Sharia Law have much influence in the UAE Civil Code?*

Answer: Whilst not discounting the fact that there is some influence of Sharia Law in the UAE Civil Code, Mr Taylor suggested that it: *“doesn’t affect anything we do in terms of Construction Engineering.”*

6. *Are you aware of any Sharia Law / Islamic principles regarding the terminating of a valid contract by one party notwithstanding a breach on behalf of the other party?*

Answer: Paul drew my attention to the frequently quoted Shariah principle in the UAE Construction Industry that a “just claim never dies.” This is an example that indicates where Shariah law is relied upon when making a claim under a Construction Contract. For example, the Contractor will have lost his entitlement to claim under the contract if he fails to give notice of his intention to make a claim (28 days for FIDIC Red Book). Paul didn’t refer to Shariah principles relating to the termination for convenience provisions - which suggests that he doesn’t believe there to be any.

7. *In your experience, have the Courts in the UAE (or an Arbitral Panel) ever rescinded or amended an industry standard construction contract clause due to its conflict with any article of the UAE Civil Code?*

Answer: Referring to when Judges or Arbitrators alter the terms of a Construction Contract, Mr Taylor confirmed that the only instance where he has seen it occur is the punitive / liquidated damages clause. The UAE Civil Code empowers Judges to reduce or increase the amount specified to reflect actual losses suffered on the part of the Employer.

8. *In your experience - do Employers regularly amend a FIDIC 1987 or their own bespoke form of contract to accommodate a “termination for convenience” clause?*

Answer: Mr Taylor confirmed that during his 7 years experience in the UAE, he noticed that “virtually all the big development contracts” provided for a termination for convenience of the Employer clause. Furthermore, he suggested that there was an attempt on the part of Employers to make it “fair” by inserting the caveat that whilst they may be able to terminate for convenience, it may not be invoked merely to “bring in a new contract at a cheaper price.” Mr Taylor also pointed out that Employers were further abusing their position by insisting that Contractors

provide advance payments, give performance and retention bonds whilst the Contractor may have been unaware if the Employer could actually fund the entire project. To this extent, Mr Taylor has advised a Contractor to request an Employer to demonstrate that he has the necessary funds for a project and only when this has been demonstrated should the Contractor agree to a termination for convenience clause.

9. *Article 892 of the UAE Civil Code states that “A contract of muqawala shall terminate upon the completion of the work agreed or upon cancellation of the contract by consent or by order of the court” - do you consider that this clause is mandatory or supplementary in its application? Is it only enforceable when the contract is silent on the matter?*

Answer: In responding to this question, Mr Taylor hinted at the Common Law Freedom of Contract doctrine that suggests that parties are free to agree what they wish within their contract. Article 2 of the UAE Commercial Transactions Code also states that the parties’ contract will be applied unless it contradicts “public order or morals.”³⁰ Mr Taylor’s view appears to suggest that the clause is mandatory but that the “consent” is essentially the contract entered into and the termination for convenience clause within it has been “consented to” by both parties.

Mr Taylor also acknowledged that his opinion has changed over the years when he initially wrote the article entitled - “Breaking up is never easy.” His current opinion suggests that if parties freely enter into contract with a termination for convenience clause, then the parties “should be held to account for the clause.”

10. *Do you consider the fact that the parties have entered into contract is sufficient for deeming that a contractor has “consented” to an Employer’s termination for convenience?*

Answer: Mr Taylor confirmed that a termination for convenience clause, if it is included in the contract, must have had adequate consent by the Contractor in as much as he has had time to

³⁰ Federal Law No. (18) of 1995 Commercial Transactions Law – Article 2

review it, take legal advice on it and that no duress was evident. It is worth noting that Mr Taylor suggested that he was “very Contractor friendly” while heretofore he took a more balanced view. When questioned on the rationale for this apparent previous bias, Mr Taylor confirmed that his early work primarily advising Contractors shaped his perspective to a large extent. He notes that his current more balanced opinion has emerged through advising and defending Employers who merely wished to better “protect themselves.” Having worked for both Contractors and Employers, Mr Taylor confirmed that his opinion is now more balanced and sympathetic to both Contractor’s and Employer’s arguments.

11. Article 267 of the UAE Civil Code states that “If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law.” Do you consider the fact that a termination for convenience clause may conflict with Article 892 of the UAE Civil Code thereby enabling a contractor to “rescind” the clause?

Answer: Mr Taylor does not appear to agree that the clause can simply be “rescinded” as - referring to Article 892 - this can only be done when there is mutual consent or by a Court order. He believes that the Courts of the UAE rarely “interfere” with the parties’ contract although he made reference again to Article 390 where a Judge has power to amend a liquidated / punitive damages clause to reflect actual losses suffered.

Mr Taylor concluded his response by stating that he “prefers” Article 267 as opposed to Article 892. Article 267 provides that:

“If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the Law.”

Mr Taylor appears to suggest that the Courts of the UAE would refer to Article 267 of the UAE Civil Code when interpreting whether or not they can deem a termination for convenience clause invalid.

12. Freedom of Contract is very much a Common Law doctrine. Is it sufficient for an Employer in the UAE to rely on this doctrine as a defence enabling them to invoke their termination for convenience?

Answer: Mr Taylor agrees that in keeping with the Common Law, parties are free to agree on the terms of their contract. He continues to suggest that parties should be free to decide if they wish to be released from the contract and enter into a new contract with others. However, Mr Taylor warns that it must not “infringe the rights” of the incumbent contracting party.

13. Is the mere demonstration of “good faith” on the part of the Employer sufficient enough to render a termination for convenience valid?

Answer: Mr Taylor suggested that merely demonstrating good faith alone does not really prove anything. However, turning the question around, Mr Taylor agreed that a Contractor who could prove bad faith exercised by the Employer, had a better chance of succeeding. He concluded that whilst parties to any contract in the UAE are required to act in good faith, then that therefore implies that bad faith could be seen to be breaching any particular contract. He believes it is an option for a Contractor to demonstrate bad faith in an attempt to claim that an Employer has breached the Contract

14. Would you advise a Contractor faced with a termination for convenience by its Employer to make a claim for material breach of contract irrespective of whether the contract provided for it?

Answer: Mr Taylor confirmed that he would advise a Contractor to make a claim for breach of contract in such a situation. He noted that he would need to understand their case but confirmed that he would advise to make a claim almost “every time” due to the uncertainty over this issue.

He went on to suggest that the only way the issue can be resolved is when the claim is argued in the Courts or in Arbitration. The Industry in the UAE needs a body of law surrounding this issue to “get beyond” the grey areas.

15. If a Contractor who suffered a termination for the convenience of its Employer won a “breach of contract” claim, what would you advise the Contractor to include within its claim?

Answer: Mr Taylor initially suggested that this is more a question for a claims consultant - although he did point out that a Contractor should be able to claim “anything which arises from the termination - demobilization, loss of opportunity, loss of profit and any loss which relates to the termination.” Furthermore, Mr Taylor stated that there can be no argument surrounding actual losses but consequential losses are a “more difficult thing to establish.”

Concluding his response, Mr Taylor reiterated that he would advise a Contractor to claim for “everything he possibly can” but to equally ensure that it is a “credible claim.”

16. Is it reasonable for a Contractor to estimate the loss of profits and potential opportunity for its damages claim due to Employer material breach of contract?

Answer: Having previously mentioned that he would advise a Contractor to claim for loss of profit and potential opportunity, Mr Taylor again echoed that sentiment. However, he further suggested that if the Contractor is unable to demonstrate actual losses - estimations and calculations of these would be regarded as the “second tier” and obviously not as convincing to quantify actual losses.

17. When Contracting with Government Authorities in the UAE, other particular laws may apply to the contract for example: Dubai Law No. 6 of 1997, Abu Dhabi Law No. 4 of 1977. Are you aware of any articles / laws which may enable a Government Authority to terminate a Construction Contract for their convenience?

Answer: Mr Taylor confirmed during the interview that although this was a particularly relevant question, he was unaware at the time of interview and suggested time to review and respond appropriately.

Note: Mr Taylor did not respond which suggests that he did not find any evidence to suggest that a Government Department may be able to unilaterally terminate a contract pursuant to any of the above Laws.

18. Some authors in Common law jurisdictions have observed that a contract which includes a termination for convenience clause is an illusory contract on the basis that it can be unilaterally changed in part or in full by one party. Do you consider a contract that has such a clause may be deemed illusory?

Answer: Mr Taylor acknowledged that whilst he would hesitate to describe the contract illusory, he can understand how it could be construed as “offending the fundamental principles” of fair contract law established under Common Law and the UAE Civil Code.

19. Are illusory contracts recognised in the UAE and if so, what are the criteria that must be fulfilled for a contract to be deemed illusory?

Answer: Mr Taylor stated that the Courts in the UAE would not be aware of the term illusory contracts. However, he did suggest that “Western Arbitrators” may consider the point - although he believes that they would argue that if the contractor could simply have the clause removed, then that again “offends the principles which underpin the law here and that’s where they would have some problem with it.”

20. If the contract is silent on this issue, can an Employer terminate a Contractor for convenience without breaching the contract?

Answer: Mr Taylor argued that an Employer could not terminate a contract for convenience if it did not explicitly provide for it within the contract. He summed up by stating: “unless it’s in the contract, then you are doing something which basically you haven’t got the right to do.”

21. *In the event that an Employer exercises a termination for convenience clause properly, is it possible that it is still held unlawful on the basis that a Contract of Muqawala cannot be terminated in such a way?*

Answer: In response to this question, Mr Taylor again emphasised that 267 would over-ride Article 892 due to the grey areas that exist within Article 892. He argues there can be no dispute regarding 267 where both parties have “consented” to a termination for convenience clause - then “that’s all the consent you need.” His conclusion appears to suggest that a contract of Muqawala can be terminated in whatever way the parties agree for example, consent via a termination for convenience clause in the contract.

22. *What advice would you give to a Contractor who is facing the prospect of being terminated by his Employer under a termination for convenience clause?*

Answer: Mr Taylor reiterated his views as outlined in question 15 that he would advise the Contractor to claim that the termination for convenience was unlawful and therefore to claim all costs arising out of or in connection with this “breach of contract.”

23. *What would your advice be to an Employer who wishes to invoke the termination for convenience clause in their contract?*

Answer: Mr Taylor advised that if the clause is present, then the Employer can invoke it albeit he should exercise caution due to the fact that a Contractor will still be claiming irrespective of whether it is unlawful or not. He also advised that a prudent Employer should always seek legal advice when considering terminating a construction contract whether for default or convenience.

He concluded by stating: *“there can’t be a situation where you can set the contract and just willy nilly you can say we don’t like that anymore. There has to be some consequence of doing that.”*

24. *The UAE has strict mandatory provisions in the Muqawala relating to decennial liability. Is it possible that the UAE has taken an unfavourable view towards terminating construction contracts for convenience due to the issues that could arise in the event of a building collapse?*

Answer: Despite acknowledging that it was “a good argument to link the two together”- Mr Taylor advised that he didn’t think there was a “link” between the two. He stated that he didn’t believe there was a “conscious effort” to ensure that termination for convenience would be “outlawed” due to the difficulties it could create in the event that a building collapsed and was constructed by two or more main contractors. However, he did conclude by stating *“You can’t have a building which collapses and ten contractors worked on it and work out which one was at fault.”*

25. *Are there any other issues relating to this topic which you consider ought to be brought to the reader’s attention?*

Answer: Mr Taylor suggested that it would be a worthwhile exercise to examine how the termination for convenience clause has developed over the years through the various SFCC’s.

2.3 Analysis of Responses & Recommendations

The most interesting aspect of the interview with Mr Paul Taylor was discovering how his opinions have evolved over the years since releasing his article entitled: “Breaking up is never easy” in May 2007. Following some questioning, Mr Taylor acknowledged that he may have been biased at the time he wrote the article - hence his sympathetic attitude towards the Contractors he was representing at that time. He now insists his perception is more balanced having advised both Contractors and Employers and understands each parties situation to a much greater degree.

Decennial Liability

Regarding the issue of decennial liability and the link to termination for convenience, Mr Taylor considered that it is merely coincidental and that it was unlikely that they were intended to complement each other. However, the strict requirement regarding decennial liability is regarded as a reason why termination of a muqawala for convenience is not supported in the UAE.³¹

Article 892 – Mutual Consent

In relation to the issue of “consent” as stated in Article 892, Mr Taylor was of the opinion that the contract that the parties entered into, providing there was no duress, is essentially what has been consented to and if there was an express termination for convenience clause, then both parties have “consented” to it, and it can therefore be validly invoked by an Employer. Marke (2011) agrees with Mr Taylor by stating that “a contractual provision entitling a party to terminate in specified circumstances” satisfies the “mutual consent” element Article 892. The question here is: Can a party agree to something

³¹ In an article entitled “Foundations are vital when working with UAE Civil Code”, Antonios Dimitricopoulos stated that: “A case in point is the UAE Civil Code mandatory provision on termination of a “muqawala” contract being possible only through completion of the works, agreement between the parties or Court order. The rationale of the legislator is simple and fundamental: if the line that distinguishes which contractor built what, half way through a contract, is erased or even distorted, then this could expose both contractors (the terminated one and the replacing one) to risks of liability (over a part they did not actually build) and/or payment (over a part they did build but did not get paid for). The same applies to issues of liability for major defects affecting stability and safety. If parties were allowed to compromise issues relating to how stable or safe a building would be, that would obviously affect the rights and possibly the lives of third parties.” (<http://www.constructionweekonline.com/article-1756-foundations-are-vital-when-working-with-uae-civil-code/1/print/>) accessed on 21 April 2012. Similarly, Fareya Azfar, in an article entitled “How valid is the exercise of termination for convenience clauses in the UAE?” states that “termination of construction contracts is also governed strictly because the contractors are strictly liable for any defects up to 10 years from the date of completion even those arising from the defects in land or those known by the Employer. This liability is also jointly shared by those architects who carry out supervisory works. Therefore, if an Employer continues to change its contractors, it may become a rather difficult task to determine who carried out the work that turned out to be defective, and who should be held responsible for such a severe liability entailing that construction contracts should only be terminated under court supervision or completion of works.” (http://www.zawya.com/story/pdf/How_valid_is_the_exercise_of_Termination_for_Convenience_Clauses_in_UAE-ZAWYA20111023030914/) accessed on 21 April 2012

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which may or may not happen in the future? Is it lawful for an Employer to terminate a Construction Contract at any stage during performance without giving any reason whatsoever?

Good faith / Bad faith

Mr Taylor advised that a Contractor would have a much greater chance of success if he was able to prove bad faith on the part of the Employer. The fact that parties to any contract in the UAE have an obligation to act in good faith suggests that the demonstration of bad faith would prove a breach of contract.

Illusory Contracts

Acknowledging that a termination for convenience clause is in a way “*offending the fundamental principles of contracting*,” Mr Taylor was of the opinion that it did not provide sufficient grounds in which a contract could be cancelled or declared void.

Solution

In providing a potential solution to the issue, Mr Taylor stated that he advises Contractors to ensure that the Employer demonstrates that he has sufficient funds to complete the project and pay the Contractor for the whole of the works. It seems to be his view that this is a sort of compromise in that the Employer may insert a termination for convenience clause in the contract - providing he can prove his ability to pay for the works.

It would appear that whilst this is a good idea and it should be implemented by all Contractors prior to signing into contract, it may not compensate for the losses of a Contractor who finds the contract terminated prior to completion of the works.

2.4 Conclusions from Interview

In order to accurately assess the validity of invoking a termination for convenience clause in a Construction Contract in the UAE, some relevant questions need to be critically addressed.

1. Must there be Good Faith?

There is an implied duty of good faith in all contracts performed in the UAE.³² Therefore, the Courts presume good faith has been exercised by all parties in the performance of any contract. However, the express requirement for parties to act in good faith implies that a party would be breaching the contract by acting in bad faith. In the UAE, the burden of proof always rests with the claimant. That is to say a claimant must be able to prove beyond reasonable doubt that the other party has acted in bad faith thereby breaching the contract. Al Shaikh (2009) considers that: *“it is possible for any contracting party to seek cancellation of the contract based on Article 246 of the Civil Code in the event that the other contracting party does not perform his contractual obligation in consistence with the requirements of good faith.”*³³

Examples of terminating in Good Faith:

- A lack of funding on the part of the Employer required to complete the project.
- Market demand for the project considerably reduced.

Examples of terminating in Bad Faith:

- Attempting to employ another contractor to complete a project.
 - Initial failure with an attempt to terminate for default.
 - Employer completing the remainder of the works to avoid paying profit to terminated contractor.
 - Terminating due to notice to commence arbitration issued by the Contractor (or any other alternative form of dispute resolution or legal proceedings).
 - Potentially “no reason at all.”
2. Is a termination for convenience clause in a SFCC sufficient “Consent” by a Contractor as required by Article 892 of the UAE Civil Code?

³² (<http://www.hadefpartners.com/News/pageid/120-137/default.aspx?Mediaid=72>) accessed 27 March 2012

³³ Al Shaikh, O. Cancellation Of Contracts In The UAE And The Impact Of The Economic Downturn (2009) (http://www.zawya.com/story/pdf/Cancellation_Of_Contracts_In_The_UAE_And_The_Impact_Of_The_Economic_Downturn-ZAWYA20090709061914/) accessed on 30 March 2012

This is the question that ultimately goes to the very core of this paper. Article 892 of the UAE Civil Code is the Article that relates to the terminating of Construction Contracts in the UAE. Mr Taylor's view is that an Employer must be allowed to terminate a contract for convenience providing it is not done in bad faith and that stated notice provisions are complied with.

2.5 Invoking a Termination for Convenience Clause – A breach in the UAE?

Glover (2006) highlights the importance of getting it right by stating that: “*different countries may have different legal approaches*” and the “*consequence of a wrongful termination will be significant, typically amounting to a repudiatory breach of contract, which will leave the Employer vulnerable to a significant claim by the aggrieved Contractor.*”³⁴

Reflecting on the various articles of the UAE Civil Code including the Muqawala, the disparate legal opinions, relevant articles and the interview with Mr Paul Taylor, it is obvious that one cannot say that is a breach with any certitude. Due to the UAE's non-binding judicial precedence and in the absence of the relevant laws relating to the termination of a Muqawala becoming more transparent, it is likely that the question of right or wrong will remain shrouded in confusion. Having said that however, the research would suggest that if the contract termination for convenience clause is validly invoked by an Employer then it would seem harsh if a court was to find him to have materially breached the contract.

On the other hand, consider the plight of the Contractor who, through no fault of his own, is faced with the early cancellation of his contract. This contract could have the potential to generate substantial annual profits. The scale of the contract may have precluded him from accepting other lucrative contracts. All of a sudden – with little or no advance warning, the contract – despite significant investment is cancelled and the contractor must now turn his attention to final valuation of works done, demobilisation and possibly repatriation costs. The unfortunate Contractor cannot claim compensation for loss of profit or opportunity.

³⁴ Glover, J. *Understanding the New FIDIC Red Book – A Clause by Clause Commentary* (2006) Sweet and Maxwell Great Britain pg. 322, para. 1

It is likely that the greatest clue, in determining whether or not a termination for convenience is lawful, is in a Dubai Court of Cassation Judgment in 2007. Referring to Article 218 (1) & (2), it was held that a contract is “*non-binding with regard to one or both of the contracting parties, despite the validity and effectiveness thereof, if such party is given the right to cancel it without the consent of the other or without the order of the court, pursuant to article 218 of the Civil Code.*”³⁵ Effectively, this appears to be stating that a termination for convenience clause in a contract does not constitute ‘mutual consent’ as required by Article 892 of the Code. In plain English, it appears to be following the ‘illusory contract’ example of the Common Law. How can it be fair contracting when one party can simply insert a ‘get out clause’ at any time for no reason whatsoever? Therefore reading Articles 218 (1), (2) and 892 along with Dubai Cassation Court Judgment 313/2007, it appears that there is a strong possibility that a Court or Arbitrator could find that a termination for convenience clause is invalid in the UAE.

It is possible however, to conclude a number of different scenarios which one can say with reasonable certainty if it constitutes a breach or not:

Yes – It is a breach

1. When the contract does not provide for a “termination for convenience of the Employer” clause (unamended FIDIC 1987).
2. When an Employer invokes the clause without upholding the requirements of “good faith” (Employer employs cheaper Contractor to complete the works).
3. When an Employer fails in an initial attempt to terminate due to Contractor default.

No – It is not a breach

1. Notwithstanding whether the contract is silent on the issue, the Contractor consents to the Employer’s request to terminate and both parties agree the amounts payable to the Contractor due to the termination.

³⁵ Dubai Court of Cassation Judgment 313/2007

Chapter 3

Terminating for Convenience – Material Breach of Contract?

3.1 Unlawful termination – Remedies available to the Innocent Party

Adopting Mr Taylor’s advice it is obvious that - unless the law in the UAE is amended to become more transparent, a Contractor should always claim that the Employer has breached the contract if a contractual termination for convenience clause is invoked. This is because of the ‘grey area’ that exists surrounding this issue and could result in a contractor recovering his potential losses following the early termination.

UAE law provides remedies to compensate for the loss in the event of a breached contract. The Civil Procedures Code gives the UAE Courts “very wide powers to order appropriate remedies.”³⁶ The two “main types of contractual remedies available in the UAE are specific performance and damages.” The former can be described as an equitable remedy while the latter is a legal remedy. Other less prominent remedies include “*injunctive*” or “*interlocutory relief*” which are generally better recognised as tortious remedies.³⁷ Damages are the best-known and most popular remedy for a breach of contract. They are best described as “*pecuniary compensation for loss or injury incurred through the unlawful conduct of another.*” On the other hand, specific performance essentially “*grants the plaintiff what he actually bargained for in the contract rather than damages for not receiving it.*”³⁸ According to Delmon and Delmon (2011), the courts of the UAE have the power to order specific performance. Furthermore, Articles 380 and 382 of the Civil Transactions Code “*provide that orders for specific performance may be granted where the circumstances of the case lend themselves to such orders, citing the existence of a personal element in the performance of a breached contract.*” Generally, equitable remedies are “not

³⁶ Delmon, J, Delmon, V.R. *International Project Finance & Public Private Partnerships – A Legal Guide to Key Growth Markets* Wolters Kluwer (2011) pg 29, para. 4

³⁷ (<http://www.inhouselawyer.co.uk/index.php/united-arab-emirates/7708-litigating-in-the-uae-initial-guidance>) accessed on 21 March 2012

³⁸ (<http://legal-dictionary.thefreedictionary.com/Specific+performance>) accessed on 21 March 2012

available in cases where an award of damages is considered to be an adequate remedy.”³⁹ Another author has suggested that the Court “*should order specific performance if the plaintiff claims specific performance of the contract, if it is possible to do so.*”⁴⁰

Taking all of this into consideration then, it is quite clear that there would rarely be a ‘personal element’ for a Contractor who wished to complete a construction project. This ‘personal element’ is tailored for something that is irreplaceable such as a contract for the sale of a historic painting or perhaps something sentimental. Specific performance should only be awarded where damages would not be a sufficient remedy for the injured party.

UAE law recognises the loss of profits due to a contractual breach. Many industry SFCC’s exclude the recovery of loss of profit. However, it is not within the scope of this paper to discuss the validity of this and the presumption is that the Contractor may recover loss of profit. It should be noted that the Courts in the UAE are strict in their assessment of the loss. For the Courts to award a loss of profit claim to a Contractor, the “*occurrence of damage should be certain in the future.*”⁴¹

Consequential loss is usually associated with tortious acts, however, “following judicial interpretation of Articles 246-2 and 282-298 of the Code” it appears that “*damages will be awarded for all forms of loss recognized by the Civil Code (including consequential loss) that stem from a breach of contract*”.⁴² The following criteria, however, must be satisfied:

1. “*There has been a wrongful and deliberate act of breach by a party; "and*
2. “*The parties (at the time of contracting) should have expected, predicted, or foreseen (tawaka) the damages (in this context the form of damages are provided for in Article 292*

³⁹ See footnote 20

⁴⁰ (<http://www.hadefpartners.com/News/pageid/120-137/default.aspx?Mediaid=72>) accessed on 23 March 2012

⁴¹ Kanakri, C.A.H, Nassif, K.

The In House Lawyer, March 2010 referring to Dubai Court of Cassation Case 51/2007

⁴² (<http://www.velaw.com/resources/ExcludingConsequentialLossHaveYouReallyLimitedYourLoss.aspx>) accessed on 15 March 2012

and 293 to include every loss or sufferance endured) as a likely consequence of such breach.”

Finally, the Dubai Court of Cassation also “recognises loss of opportunity (forming a part of or assimilated to the loss of profit) as a result of the termination of a contract holding that “*if the opportunity is hypothetical however the loss of such opportunity is an occurrence that should be compensated*”.

3.2 Claiming for Damages

Assuming the Contractor does not wish to claim specific performance of the terminated contract, the alternative is to claim for damages by way of compensation due to the breach. Best described as a “monetary claim” - it is “*awarded by a Court in a civil action to an individual who has been injured through the wrongful conduct of another party*”. The intention is to “*restore an injured party to the position the party was in before being harmed.*”⁴³

The Expectation Method

The Expectation method is the method most commonly reflected in an order for damages. Expectation damages are sometimes referred to as loss of profit damages, and reflect compensation for the loss of the Expectation or profit that the contractor was entitled to under the contract but which it has been denied by the employer’s breach of contract.⁴⁴

There are three alternative options for the measure of damages, as provided below:⁴⁵

1. Contract Price less the likely cost of carrying out the Works - or
2. Actual outlay plus anticipated profits - or
3. The value of the Works carried out, plus the balance of profit remaining in the Contract.

⁴³ (<http://legal-dictionary.thefreedictionary.com/damages>) accessed on 15 March 2012

⁴⁴ Mastrandrea, F. *The Quantification of Termination Claims in Construction* (2008) International Construction Law Review

⁴⁵ See footnote 45

Each of these options mentioned “*seeks to locate the measure of damages designed to put the claimant contractor in the position it would have been*” had the Employer not terminated the contract for convenience.⁴⁶

The Reliance Method

In cases where assessment or determination of expectation damages is difficult, the court may instead award ‘Reliance’ damages. Reliance damages seek to award the innocent party for “*expenses incurred in performing the breached contract, and do not include lost profits*”.⁴⁷ Therefore, Reliance damages “restore the innocent party to its original economic position, as if the contract had never been made”.⁴⁸

The Restitution Method

The restitution method seeks to address the prevention of unjust enrichment. The innocent party to a unlawful termination for convenience has, once it has exercised its right to bring further performance to an end, a right to pursue a remedy in quantum meruit.⁴⁹

The claimant contractor may recover the reasonable value of what it has completed or supplied, “even though such recovery may exceed the Contract Price.”⁵⁰

The Indemnity Method

The indemnity method comprises “*positive pecuniary losses*” (i.e. it is concerned with cost/losses falling out with what was or ought to have been part of the original Contract Price or the wider revenues with which the contract was or would have been associated).⁵¹

⁴⁶ See footnote 45

⁴⁷ Stephen. D.M. *Contract Law in Hong Kong – An Introductory Guide* (2010) Hong Kong University Press, pg. 81, para. 2

⁴⁸ See footnote 49

⁴⁹ See footnote 45

⁵⁰ See footnote 45

⁵¹ See footnote 45

This would include contractor claims for “*disruption, extended overheads by reasons of delays of the employer’s making*” and inflation (i.e. escalation) in the cost of resources (i.e. materials plant and labour). In the indemnity method, the claim generally seeks “*additional costs over and above the allowance in the Contract Price*”.⁵²

Similarly to the expectancy and restitution methods, “*recovery of fixed costs may be recovered as part of the indemnity measure*”. However, the claimant contractor would be obliged to “*show a loss in addition to an expense*”.⁵³

3.4 Improvements to Standard Forms of Construction Contract

It has been suggested that the following terms could be inserted into a termination for convenience clause to prevent an Employer abusing his rights.⁵⁴

1. Statement that the clause must only be relied upon in good faith.
2. An ‘Early cancellation fee’ which maybe quantifiable depending on the amount of the works to be completed.
3. Should the Employer wish to restart the works at a later date, the Contractor must be given the opportunity to complete the project.
4. A statement that an Employer may not rely on a termination for convenience clause if he was unsuccessful in invoking a termination for breach.
5. A ‘limitation’ to ensure that the Employer can only invoke this clause if he wishes to abandon the project altogether. This limitation would avoid the scenario where an Employer chooses to complete the remaining works with a cheaper Contractor. This would be construed as acting in bad faith.

⁵² See footnote 45

⁵³ See footnote 45

⁵⁴ Rankin, E.M, *When Convenience is Inconvenient*, Emirates 24/7, (2009)

Whilst all of the above recommendations could transpire to be useful conditions to make the clause more 'equitable', number 3 could introduce some complications if it were to be included. For example, if the Employer hoped to restart the works some months or even years later, would he be obliged to use the same contractor? Would the original price for the works remain valid or could the Contractor re-tender knowing that it is not a competitive tender?

The suggestion of an 'early cancellation fee' is perhaps the most contentious of all the suggestions. More commonly known for its use in tenancy contracts, it could also be applied to construction contracts in order to dissuade an Employer to invoke an early termination. This fee could be calculated in any number of ways such as:

1. A predetermined amount via a percentage - perhaps 5% of the Contract Sum.
2. A portion of the Contractors remaining overhead and profit depending on the amount of scope left to complete.

This fee could be drafted into a termination for convenience clause which would serve the following purposes:

- a. It would encourage an Employer to reconsider terminating the contract for convenience due to this charge.
- b. It could be used as an opportunity to compensate the Contractor for loss of profits and other potentially lucrative contracts as a consequence of early cancellation.
- c. The fee would be an amount specified under the contract to be paid by the Employer, thereby taking the onus from the Contractor to claim for 'potential' lost profits and opportunity.
- d. It could avoid the need for any costly disputes since a Contractor ought to be content with such a compensation

It would appear that if this fee was to be introduced into SFCC's, and the law was clear in that the parties could 'consent' to a termination for convenience with appropriate charges applied, the issue would no longer be a bone of contention.

3.5 Improvements to UAE Statutory Laws on Termination for Convenience of Construction

Contracts

The existence of many divergent opinions on this matter illustrates the complexities that surround the issue of a termination of a construction contract for convenience. Most debate appears to be centred on the issue of "mutual consent" as expressed in Article 892 of the Civil Code. It is clear that the wording needs to be more transparent in determining what actually constitutes mutual consent.

One theory is that Article 892 relating to termination of a Muqawala has been drafted to be intentionally vague with regard the convenience aspect. Taking into consideration what was highlighted previously in relation to the non-binding precedent in the UAE and complications such as decennial liability – a cynic might argue that the intention is to give the Judges / Arbitrators flexibility in deciding cases.

Many experts and practitioners have argued that the 25 Articles of the Muqawala are simply not sufficient to govern all construction contracts in the UAE. Other jurisdictions have introduced legislation to deal with ongoing complex disputes on Construction projects. The UK's Housing Grants, Construction and Regeneration Act 1996 is perhaps the best example. From the analysis of this issue alone, it is clear that the current laws relating to construction are insufficient for a country which boasts some of the largest and most complex Construction and Engineering projects in the world.

Conclusion

The articles of the Muqawala have not kept pace with the progress in the UAE Construction Industry over the last two decades. The considerable grey area and conflicts between various articles of the Muqawala and those of the general rules of contracting results in many divergent opinions on the matter. Throw into

Garvan Anthony McDwyer
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the equation the non-binding judicial precedence in the UAE Courts and one can only speculate or safely assume that there cannot be an entirely right or wrong answer!

The Common Law jurisdiction of England and Wales does not appear to have this issue resolved either. In the case examined, it was held that *“the implied obligation of good faith and fair dealing limits a terminating party’s discretion to terminate for convenience.”* The duty to act in good faith is similarly implied in all contracts governed by UAE law which suggests that if a terminated party could prove bad faith, then that would be deemed breaching the contract.

According to Article 892 of the UAE Civil Code, the parties can consent to a termination. Whether this consent is by way of a termination for convenience clause in an SFCC and/or at the time of termination itself is unclear. Mr Taylor suggested that the consent by way of a termination for convenience clause in an SFCC is sufficient for the consent required by Article 892. However, on the contrary, Article 218 (2) of the Civil Code is quite clear in stating that *“Each party may act unilaterally in cancelling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favour that he has the option to cancel.”* The Dubai Court of Cassation have interpreted this in its ruling of case 313/2007 whereby it was found that a contract is *“non-binding with regard to one or both of the contracting parties, despite the validity and effectiveness thereof, if such party is given the right to cancel it without the consent of the other or without the order of the court, pursuant to article 218 of the Civil Code.”* In my opinion, this judgement bears remarkable resemblance to the Common Law *“illusory promise”* which does not commit the promisor to do anything at all!

Despite the apparent grey area, Employers in the UAE are advised to ensure their contract provides for a termination for convenience clause should they not wish to continue or be incapable of continuing with their Construction Project. However, an Employer must not abuse his rights under the contract and on the contrary, should ensure that he upholds the requirements of good faith by invoking the termination for convenience clause.

Contractors are seldom in a position to negotiate the terms of a contract, particularly with the current depressed state of the Construction Industry in the UAE. However, that is not to say that it must simply be signed on the dotted line. Mr Taylor advised that a Contractor should only agree to such a clause if an Employer can demonstrate that he has the adequate funding to complete the project. It has been suggested by some authors that an 'early cancellation fee' could be included with the termination for convenience clause in order to render it more equitable. This could be implemented by way of a percentage of the contract sum similar to liquidated damages provisions. Perhaps more appropriately, it could be determined as a percentage of its overhead or anticipated profit for the remainder of the works. Other amendments could include provisions to ensure an Employer can only terminate if he wishes to abandon the project altogether to avoid an attempt to complete using a cheaper Contractor.

The primary remedies in the UAE for a breach of contract are Specific Performance and Damages. It is unlikely that the Courts in the UAE would order specific performance when damages would be sufficient to recompense the Contractor. The claimant Contractor must estimate the amount of damages using the methods prescribed.

Improvements that could be made to the laws governing terminating construction contracts for convenience in the UAE. Article 892 - should be more explicit in determining whether or not "consent" can be regarded as the contract that the parties have entered into. The UK's HGCRA (1996) is a good example of an extensive body of laws relating to Construction.

It appears that this complex issue will not be resolved in the immediate future. It is difficult to comprehend that in a country with so much growth over the last two decades, the laws governing construction contracts remain trivial and incompatible with modern day SFCC's. The only solution is to rectify the laws of the Muqawala to keep pace with modern construction industry practices and standards. Until this is rectified, Employers will be advised to retain this clause: Contractors will be advised to claim its unlawfulness and neither will live happily ever after.

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Appendix A

Interview questions and answers

1. Does your practice tend to advise Employers, Contractors or both?

PT: Reed/Smith tend to advise employers albeit I started to advise contractors. I have done a mixture of both. I've worked on both sides of the fence.

2. It is a well-known fact that the construction industry in the UAE has suffered and continues to suffer from the global financial crisis. Have you noticed an increase in Employers invoking a termination for convenience clause?

PT: I would say the high point of it was probably about 18 months ago, mainly because now they've worked out really which product they're going to go for. The number of enquiries I got about it was the high point. I think the situation is easing generally. It's not ideal but the same issues weren't quite there as they were when it was almost a bit like blind panic 18 months ago. People were saying, what the hell are we doing? We need to get out of this project instead of well say we'll terminate. It was like let's get out of here. I think now they've decided what they wish to take forward. So there's not so many terminations, it's more about getting people back on board and restarting.

3. Is there any particular sector experiencing termination for convenience more so than others?

PT: It was really what I would call the mega projects in Dubai and the hotel and leisure projects. It wasn't so much the infrastructure projects because they didn't necessarily terminate. They just slowed them right down but they knew they had to carry on. It was some of the crazy ideas that we had heard about in Dubai when people were saying 'what have we got that contract for'? I can think of at least ten elements in Dubailand that aren't going ahead and those are the ones they are trying to get out of.

4. Are you advising on mainly terminations invoked by private developers or local Government Authorities?

PT: Personally private developers more than anything else.

5. The UAE is a Civil Law jurisdiction in an Islamic country. Does Sharia Law have much of an influence in the UAE Civil Code?

PT: Not really – the day to day stuff that we do and stuff that you're involved in – it occasionally gets mentioned because the local laws will be making some point about interest or something like that but day to day it doesn't affect anything we do in terms of construction engineering.

6. Are you aware of any Sharia Law / Islamic principles regarding the terminating of a valid contract by one party notwithstanding a breach on behalf of the other party?

PT: The one thing that people always say about Shariah principles is that 'a claim never dies'. What they're saying is 'no matter even if you got a notice provisionally, you have to comply with it' – condition precedent. Their view is that actually it doesn't stop me from making a claim somewhere down the line using Shariah principles. I don't tend to get involved in that unless it comes up in arbitration because we are not involved in the local court. However I have seen it run a couple of times in local court where I have been sitting behind local lawyers. It's used as a point that 'it doesn't matter what our contract said – Shariah overrules that'.

7. In your experience, have the Courts in the UAE (or an Arbitral Panel) ever rescinded or amended an industry standard construction contract clause due to its conflict with any article of the UAE Civil Code?

PT: The only one I have really had much experience of is the punitive / liquidated damages and it clearly says in the code. You can go to the judge and apply to have it raised and although depending on your actual losses I have seen that done. So to that extent then you either contract

for provision which tried to nail penalties at a set level was overruled by local law. So that would be the primary example that I have seen.

8. In your experience, do Employers regularly amend a FIDIC 1987 or their own bespoke form of contract to include for a “termination for convenience” clause?

PT: Historically here the seven years of experience virtually all the big development contracts had something in there or tried to put something in and occasionally they'd try to make it fair by saying: 'yes we can do it but not just so we can bring in a new contract at a cheaper price' but they were giving themselves the option of terminating a contract for convenience and particularly more so further down the line 2009, 2010 because of what happened everyone was really what we are going to do is the project but if for any reason to get out of it in a hurry we're going to insert a termination for convenience clause and then it comes back to the format we're discussing – as long as the other party are aware of that then they know that's the commercial terms they are going in on and they will say: 'well it is in there and they should be able to do it'. But I saw most of them really 2008, 2009 and into 2010. Now I think a lot of the contractors have got wise – you're either with us or you're not with us. If we've done something wrong then get rid of us by all means but if we are committed to a job for 3 years, 4 years whatever that might be, so should you be. There's no reason why we should be the one to suffer because you changed your mind. There's a sort of side element to that as well and when you think - well the whole balance was wrong at one time because an employer wanted to do that whilst at the same time he was saying to the contractor. 'Well produce me an advance payment', 'give a performance bond', 'give me a retention bond', and nobody has got the slightest clue whether the employer could actually fund this project. I said to a contractor once if they want a termination for convenience clause, 'go back to him and say you can have that but we want evidence that you can fund the project in the first place'.

9. Article 892 of the UAE Civil Code states that “A contract of muqawala shall terminate upon the completion of the work agreed or upon cancellation of the contract by consent or by order of the court”. Do you consider that this clause is mandatory or supplementary in its application? Is it only enforceable when the contract is silent on the matter?

PT: I have generally come to the view that if the parties have agreed to anything between them then that will be agreed, and if you sign a contract that says that they can do that then you obviously signed it in good faith – at arm’s length. And that to me is a clause which would back up the situation where there is the thing in there and someone tries to use that provision or tries to do that and he will say there is nothing in the contract. Let me go back to the UAE Law and see what that says about it. So at one time I suspect I probably felt differently about that which may not tie with the article I wrote a few years back but my view at the moment is that most of the tribunals I have been involved in will say: well look if you have agreed this – if you’re saying there’s no duress under the contract that you signed then, you sign what you sign. You’re big boys and you should be held to account for the clause that you signed up to.

10. Do you consider the fact that the parties have entered into contract is sufficient for deeming that a contractor has “consented” to an Employers termination for convenience?

PT: My view now having seen what I’ve seen over the last few years – you should be able to see that as long as it’s been signed, stamped and there’s been a process where the Contractors had an opportunity to review the contract and be aware that it’s in there. So I used to be very contractor friendly and now I’m more of the view that it’s an arm’s length agreement. You both have the opportunity to review it, you both have the opportunity to take legal advice on it, so it’s in and you’ve signed it and you’ve agreed to it.

GM: You just hinted upon being biased a little bit but is that because of your more recent experience of defending employers as opposed to Contractors on the other side of the fence?

PT: I think it is. Some of it comes from experience and when I first got here it was mainly contractors and they were just been kicked off projects left, right and centre, so I said it's disgraceful, it's outrageous and then you see from the other side which is why I said: Ok I can see why employers would want that protection for themselves. But that's why I've consistently said – 'well if they want that protection you've got to get some counter protection to show that that's unlikely to happen except in the most extreme circumstances'. In other words – have you got the money to fund this project? Good – you won't need to use your termination for convenience clause and nothing is going to go wrong – is it guys? So it was getting to that point but I was certainly contractors view at one time and then I saw it from the developer's side and then you get that sort of middle ground in the end.

11. Article 267 of the UAE Civil Code states that “*If the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law*”. Do you consider the fact that a termination for convenience clause may conflict with Article 892 of the UAE Civil Code thereby enabling a contractor to “rescind” the clause?

PT: I think my view as we sit here today having seen a few things in Dubai, I actually now look at that clause and say, 'what its saying is if you sign up to a contract you had the opportunity to look at it and there's no duress there, there's no reason why you're unaware what was in there – you had the opportunity to review it and take legal advice.' Fine, if you want then to change that or vary that, you either have to both consent to it or get an order of the court in which case you would say: 'well the court themselves are going to have a look at it and say – well why would we interfere with this'? There are only certain provisions where it would interfere. The Article 390 – or under provision of the law which is the slightly confusing one because that then sort of says – 'well you can use any provision in the civil code to avoid your contractual responsibilities.' So there is a bit of a conflict there - there's always been that bit of a conflict there. I personally

prefer 267 to 892 and I just have a feeling that that conflict between 267 and 892 and the possibility of termination for convenience would be found if a court had to look at this and certainly an arbitration tribunal. I think they'd go back to 267 primarily. In this day and age I think they would.

12. Freedom of Contract is very much a Common Law doctrine. Is it sufficient for an Employer in the UAE to rely on this doctrine as a defence enabling them to invoke their termination for convenience?

PT: Yes - if you're saying freedom of contract in terms of - 'we are entitled to enter into a contract with who we like.' Fine, but then you've got to have a mechanism that will allow you to get out of your existing obligations to be able to move onto a new set of arrangements with someone else over the same contract - a new scheme so at that level then it makes sense that you would enter a contract with who you like but if it's in anyway infringing the rights of the incumbent contracting party then that principle falls away in my view. You can't have them both sitting side by side. I always have a bit of an issue talking about common law doctrine in the UAE jurisdiction.

13. Is the mere demonstration of "good faith" on the part of the Employer sufficient enough to render a termination for convenience valid?

PT: I don't think good faith alone for example proves anything to mention. Termination for convenience is valid if it's backed up by a contractual right to do it. It's almost the other way around. If you can show bad faith, does it make the termination for convenience clause invalid and that's a slightly different way of looking at it. I think the way the question is phrased, not good faith alone, there's got to be more than that.

GM: That's a good point about bad faith. If the contractor could illustrate bad faith do you think then there may be a better case for the Contractor?

PT: I think you'd have more of a chance demonstrating from that way around albeit the concept under UAE law is called good faith, but that of itself implies that if you show bad faith therefore there is no good faith. I would argue that way around. I think it's easier to prove that way around.

14. Would you advise a Contractor faced with a termination for convenience by its Employer to make a claim for material breach of contract irrespective of whether the contract provided for it?

PT: If I was advising a contractor commercially my answer Garvan would be yes I would. And then I would have to talk to them about legally whether they got a really sustainable case but I think every time you'd have to question because there is that uncertainty.

GM: Yes there does appear to be this grey area.

PT: There is, I think you know as a lawyer, but also if you're in arbitration that's the purpose. It's points like that that need to be resolved and discussed in this part of the world because they haven't been raised before. I believe that if you can raise the point and it's not frivolous and you're not wasting the time of everyone then it should be argued over here, and they need a body of decisions like that and the people talking about things like that to get beyond where they are now which is those grey areas.

15. If a Contractor who suffered a termination for the convenience of its Employer won a "breach of contract" claim, what would you advise the Contractor to include within its claim?

PT: Well that's what I would ask my claims consultant. Yes, anything which arises from the termination demobilization, loss of opportunity, loss of profit, any loss in expense which relates to the termination. I think again the law is fairly clear as far as actual losses and secondly when you look at it, consequential losses - it's a more difficult thing to establish. So again if you're asking me commercially as a lawyer I would advise him to claim everything he possibly can but I would

also tell him: 'Speak to your lawyer and speak to your claims consultant. Let's make sure it's a credible claim.' Don't be putting things in there which he hasn't got a leg to stand on.

16. Is it reasonable for a Contractor to estimate the loss of profits and potential opportunity for its damages claim due to Employer material breach of contract?

PT: I would. I think it's reasonable to. But you're always going to get tested and particularly you're going to get.... every time I hear the other side they're going to say: 'well this is all about actual losses. What did you actually lose?' So estimations and calculations are always, I would say, the second tier if you can't show actual losses.

17. When Contracting with Government Authorities in the UAE, certain other laws may apply to the law contract for example: Dubai Law No. 6 of 1997, Abu Dhabi Law No. 4 of 1977. Are you aware of any articles / laws which may enable a Government Authority to terminate a Construction Contract for their convenience?

PT: A good question. Not off the top of my head but I will have a quiet think about that.

18. Some authors in Common law jurisdictions have commented that a contract which includes a termination for convenience clause is an illusory contract on the basis that it can be unilaterally changed in part or in full by one party. Do you consider a contract which has such a clause may be deemed illusory?

PT: Let me read that question again. I wouldn't describe it as illusory. I can see the point, if one of the parties can go off and then change it unilaterally then you almost get to a fundamental point of contract law and how it's meant to be construed. So I suppose, for me it sort of offends the principles of contractual offer and acceptance. Illusory is probably one word for it but for me it offends the general principles that have been established under common law certainly and actually are contained in very simple terms in UAE civil code as well. I think that's the phrase I would probably use. It offends the principles of fair contracting, shall we say.

19. Are illusory contracts recognised in the UAE and if so, what are the criteria that must be satisfied for a contract to be deemed illusory?

PT: My honest answer, if you went off to the courts and started talking about illusory contracts, they wouldn't have the slightest clue what you are talking about. I think the only chance of you ever getting to the bottom of that would be arbitration. Western arbitrators might consider the point and I think they would look at it and say: 'Well if you're telling me that you have the right to simply just come along and change/move the goalposts on your own, that again offends the principles which underlie the law here and that's where they would have some problem with it. I'm sure that must translate right across in Arabic in the courts as well. Very similar principles apply in the courts, until you call it illusory.

20. If the contract is silent on this issue, can an Employer terminate a Contractor for convenience without breaching the contract?

PT: Yes it goes back to my initial view. If the contract is silent on the issue I would say no. I would say if it's in the contract then you have agreed to it. Then you go back to issues of UAE law and things like that. My general standpoint would be that unless it's in the contract then you are doing something which basically you haven't got the right to do.

21. In the event a termination for convenience clause is exercised properly by an Employer, is it possible that it is still held unlawful on the basis that a Contract of Muqawala cannot be terminated in such a way?

PT: Well that's right. I think it goes back to Articles 892 and 267. I think my view would be 267 is the one that applies. My view on what is mutual consent is the fact that you've got a contract with a termination clause in there. That's all the consent you need. If it's in there it's in there. I think the question before is if it isn't in there that's where the issue is.

22. What would your advice be to a Contractor who is facing the prospect of being terminated by their Employer under a termination for convenience clause?

PT: My advice would be to claim all costs arising out of or in connection with the termination as discussed previously in question 15.

23. What would your advice be to an Employer who wishes to invoke the termination for convenience clause in their contract?

PT: My advice is if you've got the contract there you can do it but there's a price to pay for it, a price for having that clause in there. They're going to be entitled to come back to you and say: If it's valid there are still certain losses that flow from it such as demobilisation e.t.c .If it's invalid then certainly the kitchen sink argument applies.

GM: So they should exercise caution?

PT: I think definitely take advice every time. I think any lawyer in the world in any jurisdiction will say: 'any issues of termination, make sure you fully understand what it is you're getting yourself into, whether it's for default or whether it's for convenience.' Look at the contract and understand the law behind it. There may not be an absolutely clear answer but in my view there can't be a situation where you can set the contract and just willy nilly you can say we don't like that anymore but there has to be some consequence of doing that it's almost a cause and effect situation.

24. The UAE has strict mandatory provisions in the Muqawala relating to decennial liability. Is it possible that the UAE has taken an unfavourable view towards terminating construction contracts for convenience due to the issues which could arise in the event of a building collapse?

PT: Yes, it's an interesting one. I suppose that's potentially right. A job half done, someone else finishes, who ultimately is responsible? But I suspect if I was in a situation of advising the building owner after it collapsed, I'd drag them all in and let the courts carve it up between them

and say: 'We'll have a look at who was actually in charge of the structure because bear in mind decennial liability is about really serious structural failure or collapse. So let's say they built ¾ of the structure. Probably engineering evidence would show that actually the ¼ of the structure just sitting on top of what was already built wasn't the reason. It was the pile/foundation for example. The real grey area would then become, if you had someone half way through the piling. So it maybe what they call political/public reasons for trying to alienate termination for these sort of reasons. But I don't necessarily think the two are linked. I don't believe there was a conscious effort to say we're going to have these clauses in, therefore we've got to outlaw termination for convenience. But I can see it was a good argument to link the two together and say: we're trying to protect the interests of everybody. You can't have a building which collapses and ten contractors worked on it and work out which one was at fault.

25. Is there any other issues relating to this topic which you consider ought to be brought to the reader's attention?

PT: I think so. The things I would go back to and almost your starting point before you get to see how it's done in the UAE. Have a look at the filling of forms and how that particular clause is developed over the years going right back to sort of the first version of the Red Book. Then to the old yellow and orange books and see what's in there and then go to 1987 then 1999 and see if the commentary changes from this to this version. Various people who comment on differences between the old form and the new form. So see what they say about why certain clauses which I think if I can remember right are in the Orange Book is termination for convenience as long as you don't bring on contractor – why that is in there and then suddenly further down the line things started to change and then FIDIC changes its view. The commentaries on those sort of things might tell you a bit more why the drafters of those contracts changed their stance and moved towards a position where you didn't have that. So that might be a clue to why it has evolved in the way it has. But I think you must remember that FIDIC was put in place by

Engineers to try and make it a fair contract so you can see what they were trying to do. UAE and particularly the big developers over here, it's always been slightly stunted and always favourable to them because they of course have the power five or ten years ago. 'Here's our standard terms and conditions. By the way there's a termination for convenience clause in it, we don't care whether you like it. If you don't want to sign up to it, we're going to get this contractor to sign up to it'. So I think the balance of power over here is always favouring the employers which is why there were so many of these things in the contracts as opposed to FIDIC, which clearly at some point had taken the view it wasn't a very fair contract. So that was the only thing I would say about the genesis and how it developed in FIDIC and then compare how it developed in the UAE

End of Interview

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