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'Key clauses in the Dubai Municipality General Conditions of Contract: Are they compatible with Islamic Law?'

بعض البنود الأساسية في الشروط العامة للعقد النموذجي لبلدية دبي:
هل هي متوافقة مع الفقه الإسلامي؟

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'Key clauses in the Dubai Municipality General Conditions of Contract: Are they compatible with Islamic Law?'

Key Words

Adverse Physical Obstruction – Alja'eha – Al-Udhr – Civil Transaction Code (CTC) - Claim - Compensation – Completion - Conditions - Construction – Contract – Contingent Events – Contractor - Cost – Darar- Dirar - Delay Damages - Dubai Municipality (DM) – Employer – FIDIC - Force Majeure – Hire - Islamic Law – Jurisprudence - Legislation – Loss & Damage - Performance – Time Bar - Limitation – NOC- Notice – Penalty- Risk - Rock – Soil Investigation – Termination - Unforeseeable – UAE Law.

Abstract

This dissertation considers whether Dubai Municipality General Conditions of Contract are compatible with Islamic law or not? It focuses only on two main headings i.e. the contingent events and the delay damages. It also, compares the DM conditions with Dubai Government Departments Contracts law and UAE law. Concerning the two topics, the dissertation concludes that the conditions are not in strict compliance with Islamic law and therefore, adjustments are required in order to seek compatibility. Surprisingly, it also shows that the contingent events article of UAE law i.e. article 249 of the Civil Code is not as well in compliance with Islamic rules and principles.

الخلاصة

إن هذه الأطروحة تبحث فيما إذا كانت الشروط العامة للعقد الإنشائي النموذجي لبلدية دبي متوافقة مع الفقه الإسلامي من عدمه . وهي في طرحها ذلك ، تسلط الضوء على عنوانين رئيسيين هما الحوادث أو الظروف الطارئة والتعويض عن التأخير. وتقوم بمقارنة هذين العنوانين الرئيسيين بمثيلتهما في كل من قانون عقود الدوائر الحكومية لإمارة دبي والقانون الاتحادي الإماراتي متمثلاً في قانون المعاملات المدنية . ويستنتج من البحث ، أن المواد المذكورة في الشروط العامة لعقد البلدية والتي تخص الموضوعين السابق ذكرهما ، غير متوافقة مع الفقه الإسلامي ، ويجب أن تطرأ بعض التعديلات عليها كي تتماشى وتتلاءم مع ما تقرضه الشريعة في ذلك. ومن الأمور المهمة الأخرى التي

توصلت إليها الأطروحة ، أن المادة رقم 249 من قانون المعاملات المدنية الإماراتي والمتعلقة بنظرية الظروف الطارئة لا تفي أيضا بما تتطلبه قواعد ومبادئ الفقه الإسلامي في مجال المعاملات.

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Table of Holy Quran Verses and Prophet's Ahadieth

1- Holy Quran Verses

NO	Surat Name	Verse No.	English Text	Arabic Text	Page
1.	Al Baqarah	173	"...But if one forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless"	" فمن اضطر غير باغ ولا عاد، فلا إثم عليه ، إن الله غفور رحيم".	35
2.	Al Baqarah	177	"To fulfill the contracts which ye have made;"	"... والموفون بعهدهم إذا عاهدوا..."	48
3.	Al Baqarah	185	" So every one of you who is present during that month (Ramadan) should spent it in fasting, but if anyone is ill or on a journey, the prescribed period should be made up by later days, Allah intends every facility for you; He does not want to put you to difficulties"	" فمن شهد منكم الشهر فليصمه ومن كان مريضا أو على سفر فعدة من أيام أخر، يريد الله بكم اليسر ولا يريد بكم العسر..."	35
4.	Al Baqarah	188	"And do not eat up your property among yourselves for Vanities..."	" ولا تأكلوا أموالكم بينكم بالباطل..."	38
5.	Al Maidah	1	"O ye who believe, fulfill all obligations"	" يا أيها الذين آمنوا أوفوا بالعقود..."	48
6.	Al Israa	34	"... and fulfill every engagement, for every engagement will be enquired into (on the day of reckoning)"	"...وأوفوا بالعهد إن العهد كان مسؤولا."	48
7.	An-Nisa	59	"O ye who believe, obey Allah and obey the Messenger and those charged with authority among you"...	"يا أيها الذين آمنوا، أطيعوا الله وأطيعوا الرسول وأولي الأمر منكم..."	40

2- Prophet's Ahadieth

NO	English Text	Arabic Text	Page
1.	On the authority of Saeed Saad bin Malik Al-Khudari (Allah be pleased with him), that the messenger of Allah (may peace be upon him) said: " <i>La darar wala dirar</i> "(narrated by Ibn Majah, Al-Daraqutni and others).	عن أبي سعيد سعد بن مالك الخدري رضي الله عنه أن رسول الله صلى الله عليه وسلم قال (لا ضرر ولا ضرار) حديث حسن رواه ابن ماجه والدارقطني وغيرهما مسندا ورواه مالك في الموطأ مرسلًا عن عمرو بن يحيى عن أبيه عن النبي صلى الله عليه وسلم مرسلًا فأسقط أبا سعيد وله طرق يقوي بعضها بعضا	14, 35, 40, 48
2.	Jabir b. Abdullah (Allah be pleased with them) reported Allah's Messenger (may peace be upon him) saying: "If you were to sell fruits to your brother and these are stricken with Calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother, without justification?"	عن جابر بن عبد الله قال: قال رسول الله صلى الله عليه وسلم: (لو بعث من أخيك ثمرًا، فأصابته جائحة، فلا يحل لك أن تأخذ منه شيئًا، بم تأخذ مال أخيك بغير حق؟)	38
3.	Jabir (Allah be pleased with him) reported that Allah's Apostle (may peace be upon him) commanded to make deductions in the payment of that stricken with a Calamity.	حدثنا بشر بن الحكم وإبراهيم بن دينار وعبد الجبار بن العلاء واللفظ لبشر قالوا حدثنا سفيان بن عيينة عن حميد الأعرج عن سليمان بن عتيق عن جابر (أن النبي صلى الله عليه وسلم أمر بوضع الجوائح قال أبو إسحاق وهو صاحب مسلم حدثنا عبد الرحمن بن بشر عن سفيان بهذا.	38

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Chapter One: Introduction

Dubai, one of the seven emirates comprising UAE, was known until few years ago, to be one of the biggest construction sites in the world. The heydays of the industry were in the period of 2005-2008.¹ In 2006, about 30,000 or 24% of the world's construction cranes were operating in Dubai alone.² Both private and public sectors contributed to the construction booming. However, the contribution was led by several big real estate developers like Nakheel, Emaar and Dubai Properties Group.³ On the other hand, Dubai Municipality; henceforth DM; as a government department was responsible for the majority of the public construction works till late 2005. Those projects varied from public housing, public parks, roads, bridges tunnels to drainage and irrigation. The only exceptions were the electricity, water and the telecommunications projects.⁴ The first two were and are still carried out by Dubai Electricity and Water authority (DEWA) while the third is carried out by Emirates Telecommunications Corporation (ETISALAT).

DM in carrying out almost all of its projects was applying one single standard document of general conditions of contract. FIDIC 3rd edition was the one which was used before the year 1991. In 1991, DM produced its own document derived mainly from FIDIC 4th edition 1987 prepared by Nael Bunni.⁵ However, there were some deviations and changes in the document to suit the local conditions in Dubai. All the works were carried out based on 1991 version until the year 2005. In 1999, DM produced a new document

¹ --, 'UAE Construction Heyday Consigned to History' Arabian Business (Dubai 10 April 2011) <<http://login.westlawgulf.com/maf/app/document?&src=search&docguid=I6a044e70639c11e083a88fd18359d2dd&epos=1&snippets=true&srguid=i0ad8090f00000136e3a3149267b43d34>> accessed 24 April 2012.

² --, 'ESMA Conducts Seminar on the Accreditation of Crane Inspection Bodies in Abu Dhabi' Islamic Fin. News (Dubai 25 December 2011)

<<http://login.westlawgulf.com/maf/app/document?&src=search&docguid=Icb06ef202fde11e1bd6ad576ea987618&epos=1&snippets=true&srguid=i0ad80a0400000136e3a8afe83400159e>> accessed 24 April 2012.

³ Dubai's construction boom ended by the end of 2008 with home prices plunging by about 60 percent, forcing many developers to abandon projects.

⁴ Electricity and water utilities belong to Dubai government while telecommunications belong to Federal government of UAE.

⁵ Prof. Dr. Bunni is a Chartered Engineer, Chartered Arbitrator, Conciliator/Mediator and Visiting Professor in Construction Law and Contract Administration, Trinity College Dublin. He is currently a member of: Board of Trustees of Dubai International Arbitration Centre and Chairman of its Executive Committee; and the FIDIC Contracts Committee.

drafted by a UN expert Steven Majteni.⁶ The 1999 document was based mainly on the 1991 version. However, new concepts, definitions and some new clauses were introduced.⁷ This new document was not implemented immediately and it took several years before applying it first on pilot projects and finally a decision was made in late 2005 to apply it to all DM projects. Since then DM has tendered all its projects using the 1999 version regardless to the size or the type of the project. This current document is named ‘Conditions of Contract for Works of Civil Engineering Construction, Part I: General Conditions (GC)’, May 20, 1999, henceforth, called DMCC.

In 2005, the decree no. 17 was issued by the ruler of Dubai to form a separate department called ‘Roads and Transportation Authority’ (RTA). The main responsibility of this department was to plan and carry out all roads, transportation and traffic projects in the emirate of Dubai. As a result, all roads and transportation related projects were shifted from DM to this newly formed department. Having said the above, the 1991 DM General Conditions of Contract for Works of Civil Engineering Construction remained in use by Roads Authority after applying some minor changes to it and the new document was produced as the RTA General Conditions of Contract dated January 2006. This 2006 standard document has been the only document applied to all RTA construction projects since 2006.

The aim of this dissertation is to explore whether the current DMCC i.e. the 1999 version are in compliance with Islamic Law or not. Due to the large number of clauses (75 clauses), this dissertation will focus only on some key ones discussed in two main headings. The first would be the clauses which relate to contingent events or changed circumstances. Under this heading, four sub-headings will be discussed. They are the natural events, man-made events, changes in cost and changes in legislation. The second main heading will relate to the clause of delay damages or compensation for delays.

⁶ Steven Istav Majtenyi is a retired civil engineer got his PhD in 1969 from Cornell University in New York. Worked in The World Bank U.S. Department Transp./FHWA for over 20 years. Worked as UN Procurement Expert from 1995-1998 when he was seconded to Dubai Municipality to draft different procurement documents. Besides the General Conditions of Contract; he drafted the particular conditions. He also drafted the terms of reference for consultancy services contract. He left DM in late 1998. He also participated in improving the procurement documents in numerous countries worldwide.

⁷ For example: Commencement of Works, Completion Date, Effective Date, Effective period of Contract and others referred to in clause 1.1 “Definitions” of DMCC.

The motivation behind this study was driven mainly by the clause of applicable law of contract. Clause 5.1(a) of the said DMCC states:

“This Contract, its meaning and interpretation, and the relation between the parties shall be governed by the Applicable Law.” This Applicable Law is further defined in clause 1.1 (f) as:

“The laws and any other instrument having the force of law in the UAE and in Dubai, in this order of priority, as they may be issued from time to time and in force during the Effective Period of the Contract.”

The above implies that UAE law shall prevail and govern the contract provisions should any contradiction exists between federal UAE law and Dubai emirate law. Bearing in mind that Shari’ah is a primary source of UAE law,⁸ the reader can understand and realize the importance of having those conditions checked and verified against the Islamic Law. Article 7 of UAE Constitution states that:

“Islam is the official religion of the Union. The Islamic Shari’ah shall be a main source of legislation in the Union. The official language of the Union is Arabic.”

In addition, DM Contract is considered to be an administrative contract⁹, but due to the non-existence of a separate independent administrative law in UAE, the ‘Civil Transaction Code’ (CTC) will be applicable to the subject matter of the dissertation.¹⁰ The CTC covers construction contract provisions in section 3 chapter 1 under the heading ‘Muqawala’. It consists of 25 articles from article 872 to article 896. Those articles cover the main aspects of any construction contract.

⁸ UAE law is considered to be mix of civil law and Islamic (Shari’ah) law. The fundamental sources of Shari’ah are Holy Quran and Sunna which is the model behavior of Prophet Muhammad in his statements, deeds and acknowledgements.

⁹ A contract is administrative if one of the contracting parties is a public entity and it concerns a public service or contains a highly unusual clause (clause exorbitant).

¹⁰ A A Alqaisi, *Alwajeez in Administrative Law: Comparative Study* (3rd edn Dubai Police Academy, Dubai 2008) 40

Article 2 of the said CTC states: “The rules and principles of Islamic jurisprudence (*Fiqh*) shall be relied upon in the understanding, construction and interpretation of these provisions.”

Based on the aforementioned article, it is presumed that there would not be areas of conflict between DMCC and Islamic law. However, if the contrary is concluded, then, efforts must be made to modify the conflicted clauses in order to seek conformity with Islamic Jurisprudence in particular for parties who desire to carry out their businesses according to Islamic law. The same then can be generalized to be used in the whole UAE¹¹ and GCC¹² countries in which their laws are based mainly on Islamic rules and principles.¹³

In order to answer the question of the dissertation and because both laws are applicable to the DMCC, the law of Dubai Government Departments Contracts and UAE law will be considered in addition to the Islamic law. It is worth noting that due to the fact that all DM construction disputes to be resolved through arbitration, no court cases are available for which DM is a party. Instead, several real claims and disputes which have been settled before reaching arbitration will be mentioned without the indication of the contractor’s identity.¹⁴ Also, some claims from RTA will be presented since both departments (DM & RTA) share almost the same clauses of the subject matter of dissertation. The output of those claims and disputes will be stated first the way they had been settled by the Municipality or RTA and then the same will be demonstrated if those claims would have been resolved under Islamic law.

The obstacles the author encountered during writing up the dissertation were:

- Almost the non-existence of Islamic construction law references.
- The scarcity of references available explaining specific articles of the UAE ‘Muqawala’ contract in particular article 893.

¹¹ In Dubai, parties to a contract are free to choose between Dubai and UAE laws and DIFC (Dubai International Financial Centre) law which applies English law on contracts provisions and terms.

¹² GCC stands for Gulf Cooperation Council which comprises 6 countries: UAE, Saudi Arabia, Kuwait, Qatar, Bahrain and Oman.

¹³ Saudi Arabia is the only GCC country which its legal system is based entirely on Shari’ah.

¹⁴ Those claims have been taken from their sources either from Contracts and Purchasing Dept. of DM or from RTA Contracts & Purchasing Dept.

- The non-existence of an accurate English translation of the Prophet Muhammed’s saying “*La darar wala dirar*”¹⁵ in the available English translated UAE Civil Code. The available translation does not reflect the preferable explanations of the hadith mentioned by Muslim scholars. As a result, the different meanings of the hadith have been searched for in Islamic references and then have been translated by the author.

One last worthy point is that words such as Employer, Contractor, Engineer, Contract and the like will be used in capital forms when stated under DMCC. The same words will be shown in small letters when mentioned in any other laws.

¹⁵ The English translation is “No harm shall be done, nor harm done in return” is available at <http://login.westlawgulf.com/maf/app/document?&src=search&docguid=I4E742F86B3034A11ADEC00CFDB6A758F&snippets=true&maintain-toc-node=true> accessed 24 April 2012.

Chapter Two

Contingent Events or Changed Circumstances

2.1 Definition

Contingency is defined in Webster's dictionary as "the quality or state of being contingent" and a contingent event is "an event that is of possible but uncertain occurrence".¹⁶ In construction industry, in order for a contingent event to be taken into consideration, it shall occur after signing the contract and during the execution of the works. It usually results in a loss to one or both parties of the contract. In some jurisdictions, the concept is called 'hardship' or 'gross inequity'.¹⁷ Sometimes, the reader may encounter the phrase 'changed circumstances' which means the unanticipated changes in circumstances which a party may encounter during the course of the contract and which have an impact on the end cost of the project.¹⁸ Both phrases are used interchangeably throughout the dissertation. The contingent events may fall under one of these categories:

- Natural events which are beyond any party's control like flood, earthquakes, storms, adverse ground physical condition, damage to crops on the site and the like.
- Man-made events which result from human being acts like wars, revolution, disorder and the like.
- Legislative conditions which result from changes in legislation by the government during the contract period such as the decision of increasing the price of certain fuel like diesel. The said changes are unknown and usually unexpected by the parties at the time of signing the contract and therefore are not taken into account when fixing the contract price.¹⁹
- Personal excuses like insolvency, disease or fear which will be elaborated in detail when discussing the contingency events in Islamic law.

¹⁶ *Webster's New Collegiate Dictionary* (G&C Merriam Co, Massachusetts 1980) 243

¹⁷ In France it is called 'hardship' while in America it is the 'gross inequity'.

¹⁸ L Macgregor, 'Long-term contracts, the rules of interpretation and "equitable adjustment"' (2012) 16(1) LR 104-110

¹⁹ M M Saleem , *Contingent Events Theory between the Civil Law and the Islamic Fiqh: Comparative Study* (1991) 336

It is worth noting that the dissertation mainly focuses on the events which render the performance burdensome and not impossible although they may be both resulted from same causes or same events. In other words, the dissertation will discuss mainly the hardship or the contingent events theory and not the force majeure except when the context requires mentioning it.²⁰

2.2 Contingent Events in DM General Conditions of Contract

The DMCC covers the contingent events in 4 main headings:

- Adverse Physical Obstructions or Conditions (Clause 12.2 and related Clause 11.1)
- Forces of nature and man-made events both of which are mentioned under clause 20.4 ‘Employer’s risk’. Flood, bad weather, earthquake, damage to crops on the site are some examples of the former while war, invasion, revolution and labor strikes are considered examples of the latter.
- Changes in cost: Increase or decrease of cost (Clause 70.1).
- Changes in legislation: Subsequent legislation (Clause 70.2).

It is worth mentioning that forces of nature and man-made events will be discussed in 2 separate subtitles.

2.2.1 Adverse Physical Obstructions or Conditions

Clause 12.2 of DMCC states that if during the execution of the works at the site, the Contractor encounters physical obstructions or conditions other than climatic conditions, which in contractor’s opinion, not foreseeable by an experienced contractor, then the contractor will be entitled to a time extension or an additional cost or both provided he satisfies the requirements of time and procedures stated in Clause 12.3.²¹ The physical conditions or obstructions are meant to include natural sub-surface conditions, natural and artificial (man-made) physical obstructions like the underground utilities pipelines and the presence of chemical pollutants.²²

In order for a contractor to proceed with his claim based on the above clause, he has to meet certain conditions:

²⁰ In England, the ‘Doctrine of Frustration’ does not differentiate between the performance being burdensome or impossible in contrary to France and Arab countries in which they have two different concepts, the force majeure and the hardship or contingent events clause.

²¹ The exact quote is available at Appendix A.

²² *The FIDIC Contracts Guide* (FIDIC, Lausanne 2000) 117

- i) The event encountered is to be adverse and unforeseeable by an experienced contractor.
- ii) The contractor is to continue executing the works in spite of the event.
- iii) Notice of claim to be served within a specific time period.

The above three points will be discussed in some detail in the following pages.

i) **Adverse and Unforeseeable Event**

The Webster's dictionary defines adverse as opposed to one's interest or unfavorable.²³ DMCC does not define 'unforeseeable' but the 1999 FIDIC Conditions of Contract for Construction defines 'unforeseeable' under sub-clause 1.1.6.8 to be "not reasonably foreseeable by an experienced contractor by the date for submission of the Tender".

In order to decide upon the issue of foreseeability, clause 11.1 of the DMCC 'Inspection of Site' is to be taken into account and read together with clause 12.2. Clause 11.1 assigns obligations to both parties in providing and acquiring data about the site. It requires the Employer to make available to the Contractor the data on hydrological and sub-surface conditions through investigations carried out by the Employer or on his behalf. Usually, in most of DM projects, site investigations are carried out by specialized geotechnical firms during the very early stages of design. Those specialized firms produce soil investigation reports which include data about subsurface soil conditions including the existence of any water underneath the ground. Those reports are of great importance to both the designers as well as the contractors. For example, the building designers depend on the data in deciding upon the level at which the foundation can be erected. Moreover, it helps them to decide on the type of foundation they are going to adopt for the building. The contractors as well need to know about the data so that they can foresee the conditions in which the works are to be constructed.²⁴ Therefore for a contractor, it would constitute an unforeseeable condition if the type of the soil mentioned in the report was given to be loose but while excavating encountered hard material or rocks. Copies of the soil investigation

²³ *Webster's Dictionary* (n 16) 17

²⁴ *The FIDIC Guide* (n 22) 112

reports are given to the tenderers with the other tender documents during tender stage or in certain instances, the report would be kept at the DM office for inspection by the tenderers. Having said the above, the Contractor is responsible for his own interpretation of the report.

As regard to physical artificial obstruction, the tenderers are also provided with copies of No Objection Certificate (NOC) obtained by the Engineer.²⁵ NOCs' are set of plans issued by the service authority in Dubai showing the approximate locations of its underground utility pipelines with the validity period of 6 months. Those pipelines may be for telecommunication, electricity, water supply, sewerage, drainage, irrigation or for other public services. According to DM circular 47 of 1995, no contractor in Dubai can start excavating without obtaining the NOCs'.²⁶ Thus, the Contractor who wins the Tender and signs the Contract is obliged to get a new set of NOCs' called 'Construction NOCs'. Nevertheless, since the locations shown on those NOCs' are approximate, the Contractor is to carry out several trial pits manually before carrying out the excavation in order not to damage any of the existing underground utility pipelines. The existence of utilities pipelines in locations other than those shown on NOCs used to be the source of many claims when roads projects were carried out under DM. On the other hand, the aforesaid clause requires the Contractor to inspect and examine the site and its surroundings and satisfy himself so far as is practicable with regard to cost and time,²⁷ to the nature of the site including subsurface conditions, the hydrological and climatic conditions and others and shall take all necessary information related to any risks or contingencies which may influence his Tender.²⁸

²⁵ The NOCs' obtained by the Engineer during the design stage is called 'Design NOC' and they are sometimes available at the Engineer's office for inspection by the tenderers during the tender stage.

²⁶ Administrative Circular 47 of DM requires all the engineering firms operating in Dubai to submit all no objection certificates from all service authorities in Dubai when they apply for building permit for any project.

²⁷ The Contractor during tender stage is not required to carry out investigations which are costly or lengthy. The Tender period might be short. Also, he might not be awarded the project, therefore, no point of incurring additional cost in preparing his tender. In addition, the Municipality will not allow all the tenderers during tender stage to come to the site and start digging in order to reveal the underground conditions.

²⁸ DMCC, Clause 11.1. Available at Appendix A.

Based on the above, and in order for the Contractor to interpret the reports accurately and foresee the conditions in which the works to be carried out, he has to be experienced and possess general civil engineering works knowledge and not being a layman who cannot deduce anything out of the available information. Thus, the fact that some physical obstructions or conditions may have escaped the notice of the Employer would not entitle the Contractor to claim for an additional time and/or cost if an experienced contractor could reasonably have foreseen such obstruction or condition.²⁹

ii) Continuation of the Work

Unless it is legally or physically impossible as in the case of Force Majeure, the Contractor who encounters adverse physical conditions shall continue executing the works and not await instructions from the Engineer. It is expected that an experienced contractor uses his expertise to overcome the problem he faces and continues the work as per the Contract.³⁰ This is stated in clause 13.1 of DMCC. Therefore, the Contractor who does not undertake measures to overcome the problem and reduces its impact will be considered performing in bad faith and not carrying out his obligations as per the Contract.

iii) Notice to be Served in Specific Time Period

This is another condition in order for the claim to be considered. According to clause 12.3 of DMCC, the Contractor once he encounters the adverse event shall send a written notice to the Engineer with a copy to the Employer within 3 days from the day of the event, describing details of the event, anticipated effects, measures already undertaken and those which would be taken to overcome the problem and a preliminary estimate of delays in the work. He has also to state explicitly his intention to prepare a claim if he believes that he is eligible to entitlement. If the Contractor did not specify his intention to serve a claim in the notice he served, then he is obligated to state explicitly his intention in another claim notice within 28 days from the event. Failure to give notice of his intention

²⁹ C R Seppälä, 'Contractor's Claims under the FIDIC Civil Engineering Contract: Fourth (1987) Edition' (1991) 8 IBLJ 1051-1086

³⁰ *The FIDIC Guide* (n 22) 117-118

to claim within the time periods stated above deprives the Contractor of his entitlement to an extension of time and compensation. This is clearly mentioned in Sub-Clause 53.4(B) 'Failure to comply' which states:

“Failure by the Contractor to comply with any of the provisions of clause 12 or 44 shall invalidate the related claim”.

Thus, complying with the time period is considered as a condition precedent for the entitlement of the claim.

In a claim submitted by an Irrigation Contractor on 26th May 2006 for the project of Installation of an Automatic Irrigation System for Emirates Road Green Belt- Phase 8, the Contractor claimed for additional money of AED 1,214,392.42. The Contractor based his claim on Clause 12.2 of unforeseen physical obstructions or conditions and mentioned in his first notice dated 13th February 2006 that he came across rock excavation in most of the areas and it was impossible for him to excavate with normal machineries.³¹ He attached several photographs of the material encountered to support his claim. It is worth noting that there was no soil investigation report given to the Contractor in this project and He was given the following information in the preamble to BoQ³²: “the quantities in BoQ for excavation in rock and artificial hard material are assumed and may not be encountered during excavation”. Moreover, the Contract was remeasured and the BoQ included two items for excavation; one is for excavation in rock and the other is in materials other than rock. However, the quantities given against the excavation in rock was nominal (100 m³) for which the rate was AED 25/m³ while the quantities of the excavation item in materials other than rock was more than 16000 m³ and the rate was AED 7/m³. The Contractor mentioned in a subsequent letter dated 27th March 2006 that in spite of using 8 heavy duty excavators and 3 numbers of JCB, the output of machineries were low due to the rocky areas and later he explained in his letter dated 21st May that he used excavators 20 to 30 tone to catch up with the Time for Completion and

³¹ Report from Mohammad Wadood to author (6th March 2012)

³² BoQ stands for bill of quantities document which contains all the work items that a contractor has to carry out in a project. In remeasured type of contract, the items descriptions with the corresponding quantities are prepared and fixed by the employer or on his behalf while the prices are to be filled by the contractor. BoQ is considered a part of contract documents which usually comprises other documents like general and particular conditions, drawings and specifications.

therefore, was incurring cost equivalent to rock excavation.³³ The Contractor supported his claim with a site investigation report issued by a private laboratory in Dubai for which the cost was borne by the Contractor himself. The laboratory collected several samples from the site and the Unconfined Compressive Strength Test was carried out. The conclusion was that moderately weak, light brown sandstone lied underneath the loose to medium dense sand cover along the excavated trench. However, the Municipality carried out its own investigation and upon the request of Drainage and Irrigation Department, DM Central Laboratory investigated the site and collected samples from 9 locations along the Emirates road in the presence of both DM Engineer and the Contractor's representative. The objective was to determine whether the hard material encountered by the contractor during excavation can be categorized as rock or normal material. The DM report was issued on 1st May 2006 and concluded that Unconfined Compressive Strength test has been carried out on the samples taken from the site and showed the rocks encountered are considered weak to moderately weak in accordance with BS 5930:1999. Unfortunately, the results of both laboratories did not assist the Contractor in his claim for additional money. Therefore, the Contractor's claim to be paid according to the rate of excavation in rock was rejected by DM and he was paid the normal rate of excavation in material other than rock existed in the BoQ which was AED7/m³.

In another claim submitted by the Contractor of the Arabian Ranches Interchange project (road project), the Contractor claimed for additional cost of over AED11, 000,000 for the excavation in rock.³⁴ He based his claim on two independent reports concluded by two site investigation firms, the cost of which has been borne by the Contractor himself. The result of those reports was that the material encountered could not be removed using a CAT D8 ripper. However, in this project, the soil investigation report was given to the Contractor as part of Tender documents. The soil investigation report identified the existence of a sandstone layer in the sub-strata which was classified as a "rock". Further, the definition of the rock was given in the General Specification document item 2/10.5 as: "unaltered and un-weathered firm and rigid igneous, metamorphic and sedimentary solid rock that in the opinion of the Engineer is impracticable to remove by heavy

³³ See (n 31)

³⁴ Report from yasser Fahmi to author (7 February 2012)

mechanical excavating equipment (e.g. Cat.D8) or by heavy duty hydraulic ripper, or by approved pneumatic tools. This type of rocks would normally be removed by blasting with explosives, or by heavy duty hydraulic breakers or by drilling and broaching with wedges and sledge hammers if removed by hand.”³⁵ The BoQ items were prepared in accordance with CESMME³⁶ in which two items for excavation exist; one in rock and the other in materials other than rock. The rates of those two items are AED 149 and AED 49 respectively. The Engineer rejected the claim and the Contractor rejected the rejection of the Engineer and asked for Engineer’s Decision as per Clause 67. The Engineer in his decision invalidated the Contractor’s claim for rock excavation for the following reasons:

- Borehole strata report shows that the material encountered is partially weathered, fractured, weak to very weak which conflicts with the specification requirement of rock to be unaltered, un-weathered and solid.
- During execution stage, the Contractor was not able to demonstrate that the material could not have been excavated with Hydraulic ripper or D8, when the claim was rejected by the Engineer for the first time.
- Undefined Compressive Strength of the material is varying from 1.5 to 2.2 MPa. As per BS 5930 material up to 5MPa strength can be broken with heavy hand pressure. Accordingly, anything that can be broken with heavy hand pressure can definitely be broken by hydraulic ripper and need not to involve breakers.

The Contractor did not accept the Engineer’s Decision and proceeded to arbitration. Much effort was put into in order to solve the issue amicably and avoid arbitration and finally the above dispute together with other claims submitted by the Contractor was settled. The settlement stipulated the Employer to pay to the Contractor an amount of AED 12,200,000 as final and full settlement for his all submitted claims which amounted approximately to AED 160,000,000. The settlement also required the Employer to waive the Penalty which may be due to him for the late completion of the Work.³⁷ The details of other claims submitted by the Contractor are out of scope of the dissertation.

³⁵ See (n 34)

³⁶ CESMME stands for Civil Engineering Standard Method of Measurement which is used for the preparation of bills of quantities in Civil Engineering works.

³⁷ See (n 34)

2.2.2 Forces of Nature.

Force of nature which occurs at the site is considered to be another source of contingent events which may be encountered by the Contractor during the construction period. The DMCC mentions this source under Clause 20.4 'Employer's Risks'. Sub-Clause 20.4(G) states the conditions that should be met first in order for the force of nature be considered as an Employer's special risk for which he shall bear the consequences of it. The conditions are:

- An experienced contractor could not reasonably have foreseen the event.
- Could not reasonably have taken appropriate measures which either prevent the loss or damage to the property or insure against such loss or damage.

Examples of forces of nature are bad weather, flood, earthquake and the like. According to DMCC, any damage or loss resulted from the above events shall be rectified by the Contractor if required by the Engineer. The Employer shall pay for that rectification unless the damage was resulted from a combination of Employer's and Contractor's Risks for which they both share the responsibility of rectification and this has to be taken into account when an additional payment is determined by the Engineer.³⁸

2.2.3 Man-made Event

This is also considered to be another source of contingent events for which the contractors usually claim that they do not allow for, when they submit their tenders. Man-made events are listed in Clause 20.4 items (A), (B), (C) and (D) of DMCC.³⁹ War and hostilities, revolution, civil war, riot and disorder are examples of this type of events. It is worth noting that the disorder or the strike should be general and not solely restricted to the employees of the Contractor or of his subcontractors which arise from the conduct of the works. As mentioned before, the man-made events may render the performance either burdensome or impossible. The Contractor may claim for extension of time and/or additional payment as a result of the event. If the performance becomes impossible as in case of war, the Contract will be terminated and both parties will be released from performance. The Employer will pay the Contractor the amount due for all executed work

³⁸ DMCC, Clause 20.3

³⁹ The exact quote of the Clause is available at Appendix A.

till the date of termination in accordance with clause 65 of DMCC. Details of payment in case of termination are out of the scope of this dissertation.

2.2.4 Changes in Cost: Increase or Decrease of Cost

Another source of contingent events is when the cost of labor, materials or any other input to the work rises or falls after concluding the Contract. The rise or fall in cost of materials and labor is considered to be inevitable during the lifespan of any project and contractors usually allow for the normal escalation in the cost of those items in their tender sums. However, if the cost of the said items continued to escalate not due to any changes in legislation (which will be discussed next) but due to any other reason which could not have been reasonably foreseen by an experienced contractor, then would there be any remedy to the Contractor?

According to DMCC Clause 70.1 “No adjustment to the Effective Contract Price shall be made in respect of rise and fall in the cost of labor and/or materials, or any other matters affecting the cost of the execution of works”.⁴⁰ Therefore, the contractors who desire to tender for DM projects, attempt to protect themselves by inflating their tender price in order to act as a buffer for unknown or unquantifiable risks arising from this clause. At the same time they struggle to keep this inflationary factor as reasonable as possible since they fear the possibility of losing the tender. But because this risk factor is common for all the tenderers which means that they all will take it into account when they price their tenders, the prices received by DM in general seem to be escalated and exaggerated bearing the risk of including such a clause in its Conditions of Contract. Lower tender prices would likely be received by the Municipality if the clause would have allowed for adjustment to benefit both parties and share the risk in case of rise or fall in the prices.

In a claim submitted to DM on 4th August 2008 for a Multi-Story Car Park project at Awir, the Contractor requested DM to increase his Contract Price by 20% due to the unforeseen increase in concrete and steel prices.⁴¹ He claimed that the price of concrete and steel at the time of Tender (December 2007) was AED 240/m³ and AED 3200/ton while their prices inflated to become AED 405/m³ and AED 6200/ton by August 2008,

⁴⁰ Effective Contract Price is defined as the Contract Price minus the Provisional Sums. For more details, refer to Clause 58 of DMCC at appendix A.

⁴¹ Letter through email from Mohammad Ameer to author (21st March 2012)

respectively. This means that the price of concrete increased by 69% while the increase in steel reached to 93%. He also mentioned that since the major part of the project was the structural works, those two elements would cover approximately 70% of the total cost of the project and hence indicate the loss that the project would face.⁴² Regardless whether the figures mentioned in the Contractor's claim are accurate or not, the issue which cannot be argued is that the prices of construction materials in Dubai was increasing at the time at a rate of 1.5% per month which means around 20% in a year.⁴³ According to another statement in the industry, the cost of materials had risen by 50 percent on average and even more for some items in 2008.⁴⁴

The increase in the price of the steel and cement in Dubai was so huge that lead the government of Dubai, in an attempt to stabilize the prices of these two essential elements in construction sector, to intervene and issue a decree on 30th April 2008 to exempt the steel and cement from importing custom fees.⁴⁵ Those shocking prices which were not expected by any experienced contractor was not because of any exceptional circumstances in the manner of natural or man-made events but only because of the abnormal demand of those materials to meet the need of so many projects going on in the region at the time. The DM in its reply to the Contractor's claim ignored all those factors and rejected his request on the basis of Clause 70.1 of the Conditions which does not allow for any adjustment to the contract price due to any increase or decrease in the building materials cost. The Contractor once received the rejection of DM did not proceed further with his claim.

It is worth noting that the said Clause in FIDIC 1987 is optional and if both parties intend to apply the Clause, they have to enter adjustment sums in part II of the conditions. Such

⁴² See (n 41)

⁴³ --, 'Inflation in Construction Galloping at 1.5% per Month' Gulf News (19 March 2008) <<http://login.westlawgulf.com/maf/app/document?&src=search&docguid=18777eda06b3711ddb468f7e6b40007d&epos=1&snippets=true&srguid=i0ad80a0400000136e38755551087f45d>> accessed 24 April 2012

⁴⁴ --, 'Gulf Construction Costs Rise 50% in First Half' Gulf News (9 July 2008) available at <<http://login.westlawgulf.com/maf/app/document?&src=search&docguid=1e8f67ff06b7411ddb5fda98d10997570&epos=2&snippets=true&srguid=i0ad8090f00000136e39630575aab6323>> accessed 24 April 2012

⁴⁵ --, 'Industry Hails Customs Duty Waiver' Gulf News (1 May 2008) <<http://login.westlawgulf.com/maf/app/document?&src=search&docguid=1f1f52fc06b5611ddaf718a9455cb52ee&epos=1&snippets=true&srguid=i0ad8091000000136e39c1f3cf6b7a178>> accessed 24 April 2012

sums will be added to or deducted from the Contract Price in case of rise or fall in materials, labor or equipment costs.⁴⁶

2.2.5 Changes in Legislation: Subsequent Legislation

According to DMCC Clause 70.2, no adjustment shall be made to the Effective Contract Price due to any cost changes result from any changes in the Applicable Law as defined in Clause 1.1 of the Conditions. This Clause applies to the changes under Clause 26.1 'Compliance with Statutes and Regulations' which requires the Contractor to comply with the Applicable Law including paying all the fees.⁴⁷ Fixing new tariffs or prices for fuels or introducing new law for issuance of labor admission visas by the government may be some examples of changes in legislation. In most times, those changes would create new burden to be borne by the Contractor for which he had not allowed for when he submitted his Tender. Although the heading of the said Clause has been taken from FIDIC 1987, the content of which has been deviated from the one exists in FIDIC tremendously. According to the same clause in FIDIC, the additional or reduced cost as a result of the change in law shall be determined by the Engineer after consultation with the Employer and the Contractor and shall be added to or deducted from the Contract Price.

2.3 Contingent Events in Dubai Government Departments Contracts Law

In 1997, the government of Dubai issued law no. 6 to govern the provisions of the contracts its departments and institutions conclude with other parties.⁴⁸ In the said law, article 66 summarizes the conditions that should be met in the event or the circumstance in order to entitle the contractor to claim for his right of compensation. Those conditions are as follows:

- i) The event is to be exceptional, of public nature, could not have been overcome or could not have been foreseen by the contractor, beyond his control and the execution of the works as a result becomes onerous and threatens the contractor

⁴⁶ FIDIC 1999 introduce a formula for the adjustment of changes in cost (clause 13.8) and in order to apply the formula, a table of adjustment data should be complete and included in the Appendix to tender, otherwise, the clause shall not apply.

⁴⁷ C R Seppälä, 'Cost Management in FIDIC Conditions Of Contract' (Annual FIDIC Conference, Doha, February 2012)

⁴⁸ The provisions of the law shall be applied to both types of contracts; the ones which entail expenses like supply of materials or execution of works (construction) and the others which yield income to the department like auction.

with grave loss. These conditions are typical to the ones mentioned in the contingent events article of UAE law. Therefore, they will be explained there when discussing the subject matter under UAE Law.

- ii) The contractor once he faces the contingent incident or event, has to proceed with the work without any stoppage or suspension and only thereafter he would have the right to claim for compensation for which he has to raise his request to the Negotiations and Tenders Committee of the department which will study the claim and raises its recommendations to the Director General for his approval.

2.4 Contingent Events in UAE Law

UAE Law no.5 of 1985 'Civil Transaction Code'; henceforth CTC, regulates the construction contracts provisions under the name of 'Muqawala'. It defines Muqawala "as a contract whereby one of the parties thereto undertakes to make a thing or to perform work in consideration which the other party undertakes to provide".⁴⁹ It is the second part of the definition (to perform work) which applies to construction. The 25 articles of Muqawala cover only 4 main aspects of any construction contract ie the definition and the scope, contractor's and employer's obligations, subcontracting and termination of contract. The subject of contingent events is not obvious in Muqawala provisions. However, a term called *Al-Udhr* which is translated in English as 'the Excuse' has been used in article 893 of Muqawala which allows either party to the contract (and not only the contractor) request for cancellation of the contract and not for the amendment. *Al-Udhr* or 'the Excuse' is a notion which has been taken from Islamic jurisprudence and will be discussed in detail under the Islamic law heading. Article 894 talks about the impossibility of continuation of the work by the contractor due to a cause beyond his control. This incapability of performance by the contractor will render the contract cancelled by the law without the need to any judicial proceedings. At the same time, the contractor will be entitled to payment by the employer for the works he had completed. Article 894 states:

"If the contractor commences performance and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the

⁴⁹ CTC 1985, A.872

value of the work he has completed and to the expenses he has incurred in the performance up to the amount of the benefit the employer has derived therefrom.” The above article i.e. the incapability of completing the work due to a foreign cause is an implementation of the force majeure article mentioned under the general provisions of the contract.⁵⁰

Having said the above, the theory of contingent events or changed circumstances which renders the performance of one of the parties onerous and burdensome and entitles the judge to intervene and amend the contract in order to restore its economical equilibrium is mentioned in article 249 under the general provisions of ‘Contracts’. The said article states:

“If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligations, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party to reduce the oppressive obligation to a reasonable level if justice so requires and any agreement to the contrary shall be void”.

2.4.1 The Descriptions of the Contingent Event

Under UAE Law, in order for a contingent event is considered by a judge, it should meet the following criteria:

- i) **The event is to be exceptional** which means that it occurs rarely.
- ii) **It should be of a public nature.**⁵¹ This means that it should affect a group of people and not restricted solely to one of the parties of the contract⁵². Therefore, the insolvency of the contractor cannot be considered as an exceptional circumstance since it affects the contractor solely and hence the text of the article does not apply to it. Following the same argument, a fire which comes over the

⁵⁰ Article 273 (1) of CTC talks about force majeure and states: “In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.”

⁵¹ Article 249 of CTC corresponds to article 147 of the Egyptian Civil Law which has been taken from the Polish law. However the term ‘of public nature’ does not exist in the Polish law but has been added to the Egyptian article.

⁵² M M Saleem (n 19) 349

machinery of a contractor and destroys it completely or a disorder caused by the contractor's employees or of his subcontractors do not fall under this category.

iii) **The event could not have been foreseen.** This is the most essential characteristic of the contingent event. It implies that the event occurs rarely and therefore cannot be expected by any contractor. Thus, the normal fluctuations or slight changes in the prices of materials do not permit to use the above article because these normal changes can be foreseen by any experienced contractor. The unforeseeable condition is usually decided upon objectively and not subjectively related to the affected party itself. This means that the judge would decide upon a specific circumstance to be an exceptional if he became convinced that the circumstance could not have been foreseen by an ordinary person being put in the same position of the affected party (obligor) at the time of concluding of the contract.⁵³ Therefore, the contractor is not required to have expertise and knowledge above any moderate ordinary person has in his field of construction to decide upon the unforeseeable condition. It has been noticed that the words 'exceptional' and 'unforeseeable' have got the same meaning. Therefore, some jurists have objected to include both characteristics in the article and they were of the opinion that the word "unforeseen" can suffice. Their argument was based on that the unforeseeable condition cannot be imagined or thought of unless the event is exceptional.⁵⁴ Thus, DMCC as well as FIDIC Contracts do not have the word exceptional in their clauses.

iv) **The event is irresistible or could not be overcome.** Although the article does not refer to this description or criterion in particular, it could be inferred from the general provisions that govern any type of contract. Article 246 of the Code states:

"The contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith".

So, if the contractor who encounters the exceptional circumstance does not take any measures to overcome or reduce the effect of the problem in spite of his

⁵³ M M Saleem (n 19) 386-393

⁵⁴ M M Saleem (n 19) 359

ability to do that , will be considered that he performs in a bad faith and any claim he raises to avail himself based on the above article would not benefit him. For example, if the contractor knows that by issuing a certain decision, his employees would be irritated and may go on strike, then he has to postpone his decision in order not to affect and delay the work.⁵⁵ Also, if a heavy rain occurred which was above the normal average of the season and caused deterioration to the steel reinforcement existed in the courtyard of the site, it would not avail the contractor to base his claim for compensation on the above article because he could have taken some measures to protect his reinforcement by keeping them in stores and providing them with necessary cover and shelter.

- v) **The event should be beyond both parties control.** In other words, the party by his wrong doing should not be the cause behind the exceptional and unforeseeable circumstance. This is rationale because it cannot be imagined that a party causes harm and injury to itself and then tries to remove the hardship by referring to the above article. Also, the event should be beyond the other's party control because if it was resulted from the other party's bad conduct, the consequence is to cancel and revoke the contract as a result of bad faith and not to reduce the obligation to a reasonable level as mentioned in the article.
- vi) **The performance of the contractual obligation should be affected to the extent that it becomes onerous and oppressive.** This is a very tough and harsh measure since the normal loss which can be expected in any type of business should be borne and absorbed by the affected party and would not allow him to utilize the said article. The event, although does not render the performance absolutely impossible, it changes the economic balance of the contract to such extent, that its performance becomes too onerous for one of the parties.⁵⁶ At this stage, the affected party can seek the judge intervention in an attempt to restore the economical balance and reduce the oppressive obligation to a reasonable level in accordance with justice principles.

⁵⁵ M M Saleem (n 19) 365

⁵⁶ H Konarski, 'Force Majeure and Hardship Clauses in International Contractual Practice' (2003) 4 IBLJ 405-428

Let us assume that a contractor A has entered into a contract to build a building for B. The price of one ton of steel reinforcement was AED 1500 in the contract. A started execution of the work with the same price as in the contract but as a result of some governmental restrictions on the import, the supply became less and price suddenly rose up to AED 3500 per ton. This is undoubtedly considered an unforeseeable condition which would affect all the contractors in the field adversely including the one in the example. Therefore, in order for the judge to reduce the burdensome obligation to a reasonable level, he would not distribute the whole difference between the original price in the contract and the new increased one which is $(3500-1500=2000)$ equally between the two parties but first he would recommend that the expected normal and ordinary increase in the price which will be assumed to be AED 400 should be absorbed by the affected party alone and the remainder which is AED 1600 would be distributed among both parties equally. Therefore, AED 800 will be each party's share and the new price of the steel reinforcement would be adjusted to become AED 2300 per ton compared to AED 1500 originally existed in the contract.⁵⁷

This new price, although seems to be far from the market price (AED 3500), it would give some relief to the contractor and would not threaten him with excessive loss. At the same time, the result reached is not considered burdensome to party B because if he wanted to have a building at this time of imposed restrictions on the import, he would have to pay AED 3500 per ton which is more than what was decided upon by the judge. It has to be known that the article has introduced the expression "if justice so requires" to restrict the discretionary power the judge possesses in deciding upon the amendment to the contract price. Thus, if no amendment has been decided, the only remedy available to the obligor is to appeal the judgment to the court of appeal and then to the court of cassation. Further, the article is mandatory and any agreement between the parties to nullify or inactivate the article is considered void. In other words if the parties agree in their contract to keep the contract price fixed regardless to any event arises, the said clause will be null and void and would not be sustained by the court.

In the same previous Arabian Ranches project, the Contractor submitted another claim of over AED 28,000,000 under the heading excessive price escalation. He based his claim

⁵⁷ M M Saleem (n 19) 641

on article 249 of CTC and clarified that the cost of materials was escalated due to unforeseen exceptional circumstances. He further listed some features of the construction market prevailed in Dubai during the second half of 2008 for which he considered them as unforeseen and exceptional. Those features were as follows:

- Deficiency in supply of raw materials in UAE market.
- Unavailability of sufficient stock/production due to high demand.
- Abnormal boom in construction projects.
- Global increase of the prices of cement and steel.
- Global increase in oil prices and its derivatives.

The Engineer rejected the claim on the basis that there was no any provision in the Contract in respect of recovery in case of excessive inflated prices. Clause 70.1 clearly expresses that there would be no adjustment to the Contract Price due to any increase or decrease in cost of materials, labor and equipment and therefore, the risk would be borne by the Contractor. The independent consultant who had been appointed by the Employer to verify the Contractor's entitlement for the above claim concluded that the Contractor has to demonstrate that he had suffered grave loss; a loss that would threaten to bankrupt the whole company or would wipe out the profit on the project in order for the judge to reduce the oppressive obligation to a reasonable level.⁵⁸ Both of which were very difficult to prove or did not reflect the reality and hence the contractor's position in respect of the said claim considered weak.

2.4.2 Time Bar for Claiming Rights in UAE Law

When studying the time bar articles in UAE law, it is important to distinguish between two significant confusing terminologies which are the statute of limitation principle and the preclusion period. While the limitation period extinguishes the right of action itself (hearing the claim), the preclusion period limits in time the exercise of that right of action (or remedy) by the injured party.⁵⁹ By applying the above concepts on Muqawala contract, it can be found that there is no a general time bar which can be applied to all types of construction contracts restricting the contractor from claiming his right for compensation. However, there is an exception to the above statement which only relates

⁵⁸ See (n 34)

⁵⁹ M Saket, 'Time Bar to Claims in FIDIC 99 Red Book & The Civil Code in Numerous Arab Countries' (Annual FIDIC Conference, Doha, February 2012)

to the unit rate or re-measured type of contract. In such type of contract, if the actual quantities carried out during the construction of an agreed design exceed the quantities mentioned in the contract noticeably, the contractor has the obligation to notify the employer immediately of any increase in the price due to such increase in the quantities or otherwise he will lose his right in compensation. Article 886 (1) of CTC mirrors the above situation and states:

“If the contract has been made for a measured quantity on a per unit basis, and it appears during the work that it is necessary for the implementation of the agreed plan to exceed the estimated quantity by a significant amount, the contractor must immediately notify the employer thereof, stating the amount by which he expects the price to be increased, and if he does not do so he shall lose his right to recover the excess costs over the value of the measured quantity”.

The word “immediately” is the one which emphasizes the time bar. Having said that, the above article cannot be generalized as a rule for all type of claims in construction contracts due to the following reasons:

- The above article is specific for a unit rate type of contract and hence it cannot be applied for any other type such as lump sum contracts.
- The article does not address the claims that may arise from different types of contingent events; our subject matter of dissertation; instead, it addresses the claim which arises from a single issue which is the significant increase in the quantities of the work during construction compared to the estimated ones included in the contract.

It is one of the basic and agreed rules among the contractual parties of the unit rate type of contract, that the contractor would be paid as per the actual quantities carried out on the site and not according to the approximate quantities mentioned in the BoQ. Those quantities are subject to increase or decrease during the course of construction. Therefore, if significant increase in the quantities has occurred as per the article, then, it would have been resulted either from mistakes and errors in taking off the quantities during the tender stage or from non-carrying out the geotechnical investigation of the site to reveal the subsurface conditions before starting excavation. Both of which have been managed in today’s market by the availability of computer soft wares which calculate the quantities

accurately and by carrying out the geotechnical investigation of the ground by specialized firms during the design stage to avoid any unforeseeable conditions which may arise during the course of the work, respectively. Therefore, it is concluded that the above article deems hardly to occur in today's construction industry provided the above two requirements are fulfilled.

Further to the above, the contingent events article 249 does not include any time bar beyond which, the contractor loses his right to claim for any amendment to the contract price. In addition, according to article 473 of CTC, the substantive right itself does not extinguish by the lapse of time but the right of claim or raising an action will be barred after lapse of 15 years. Article 473 states:

“A right shall not expire by the passage of time but no claim shall be heard if denied after the lapse of fifteen years without lawful excuse, but having regard to any special provisions relating thereto.”

It is the first part of the above statement (the right shall not expire by the passage of time) which might have rendered the time bar periods defined in the prevalent construction contracts in UAE and the rest of GCC countries less relevant when deciding upon a claim entitlement by arbitrators.⁶⁰ It is noted that in practice, some arbitrators set aside the time bar provisions and accept the claim despite noncompliance with the said time bars.⁶¹

Hence, it can be said that the only periods which apply to the claims under UAE law is the limitation periods which cannot be changed by the agreement of the parties. Sub-Article 487(1) states:

“It shall not be permissible to waive a time-bar defense prior to the establishment of the right to raise such defense, nor shall it be permissible to agree that a claim may not be brought after a period differing from the period defined by law.”

The above invalidates the time bar mentioned in DMCC for serving the notice and submitting the particulars of any claim (refer to heading 2.2.1(iii)).

2.5 Contingent Events in Islamic Law

The contingent event is a concept or a notion well recognized in Islamic law under the term or *Al-Udhr* which means the 'Excuse'. Islam as a religion does not accept the

⁶⁰ M Sakr, 'Turnkey Contracting under The ICC Model Contract for Major Projects: A Middle Eastern Law Perspective'(2009) ICLR 146-160

⁶¹ M Saket (n 59)

oppression neither in Muslim worships nor in his business transactions. This is illustrated through different verses in holy Quran as well as in several Prophet Mohammad's (PBUH) *Ahadieth*.⁶² For example, Islam permits attending the forbidden when it is necessary. Verse no. 173 of Surat *Al-Baqarah* in Quran says: "...But if one forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless".⁶³ In addition, a Muslim fellow is permitted to eat in holy month of Ramadan if he is ill or on a journey for which period he has to substitute in later days. Verse 185 of the same Surat says: " So every one of you who is present during that month (Ramadan) should spent it in fasting, but if anyone is ill or on a journey, the prescribed period should be made up by later days, Allah intends every facility for you; He does not want to put you to difficulties".⁶⁴ In Prophet's Hadith, one can find his statement: "*La darar wala dirar*".⁶⁵ The Muslims jurists and scholars mentioned about the differences between *darar* and *dirar* and one of the interpretations is that *darar* is to harm others by a conduct which benefits the doer and *dirar* is to harm others through a conduct which will not benefit the doer.⁶⁶ Another interpretation is that *darar* is to harm somebody who does not harm the doer while *dirar* is to harm a person who harmed the doer previously but in a more intensive way.⁶⁷ The best interpretation which has been said about the Hadieth is that there is nothing that leads to harm in any of Allah's rules and instructions, and one is forbidden to inflict harm upon oneself or others.⁶⁸

The available English translation of the saying "No harm shall be done, nor harm done in return"⁶⁹ has been derived from the explanation included in the Explanatory Notes of Ministry of Justice for the article 42(1) of CTC. The explanation is "Harm *darar* is any wrongdoing to a person, and harm done in return *dirar* is harm done in retaliation for the

⁶² Ahadieth is plural and the singular is Hadieth. Hadieth is defined as a report or collection of sayings, approvals and practice attributed to the Prophet Muhammad which to be followed by the Muslim community.

⁶³ The Arabic verse reads as follows: " فمن اضطر غير باغ ولا عاد، فلا اثم عليه، إن الله غفور رحيم"

⁶⁴ The Arabic Verse reads as: " فمن شهد منكم الشهر فليصمه ومن كان مريضا أو على سفر فعدة من أيام أخر، يريد الله بكم اليسر ولا يريد بكم العسر..."

⁶⁵ Ibn Rajab, *Jame'a Aloloum wal Hekam: Sharh Al Arbaeen An Nawawiyah* (Hadieth no. 32)

⁶⁶ --, ' Le-Ajlek Mohammad' <<http://www.4muhammed.com/40-nawawi/32--ولا-لاضرر-ولا>> accessed 2nd May 2012.

⁶⁷ --, ' Le-Ajlek Mohammad' (n 66)

⁶⁸ --, 'Islamweb.net' <<http://www.islamweb.net/media/index.php?page=article&lang=A&id=77768>> accessed 25 April 2012.

⁶⁹ CTC, A.42(1)

first harm do.” It is worthy to know that this explanation has been taken from Al-Majallah.⁷⁰ Although this last explanation is not in strict compliance with the preceded interpretations mentioned above, it addresses the issue of preventing harm in Islam.

Almerghinani⁷¹ defined ‘*Al-Udhr*’ in transactions as: “the incapability of the party to continue performing his contractual obligations unless he bears an excessive harm or damage not deserved or not obligated by the contract.”⁷² The above definition implies that the performance under *Al-Udhr* may be possible but with bearing excessive harm. The harm referred to is the one which exceeds the one expected and obligated by the contractual party at the time of concluding the contract.⁷³ Some of jurists consider *Al-Udhr* to be the contingent event itself while others consider it as one of the applications of the contingency theory. Alsanhoury considers *Al-Udhr* similar to the contingent event in which both of them do not render the performance impossible but only oppressive and burdensome.⁷⁴ However, there is a third opinion which differentiates between *Al-Udhr* and contingent event. The bearers of third opinion argue that *Al-Udhr* is the incapability of a person which means that it is always a description of the human being while the contingency event can be a description of the event itself like earthquake, flood, molds or a description of the human being as in the case of fear or disease.⁷⁵ On the other hand, termination is the effect or the result of *Al-Udhr* while reducing the oppression to a reasonable level is the effect of the existence of the contingent event.⁷⁶

Regardless to whether *Al-Udhr* and contingent event is one concept or they are two different notions, it has not been formulated in a theory or a rule like the contingency article exists in UAE civil law. Instead, its decisions were the resultant of practical

⁷⁰ Al Majall is the short form of Majallat Al-Ahkam Al-Adliyyah and it is the Ottoman court’s manual based on Shariah and specifically on Hanafi school of thought. It is codified in a manner similar to civil laws. It was issued first in Turkish language, and then it was translated into Arabic. AlMajallah provisions have been the source for lots of articles of Civil laws in Arabic countries.

⁷¹ Burhan Addine Almerghinani is a Muslim scholar and jurist in Hanafi school of thought. He was born in Merghilan in Uzbekistan in the year 511H which corresponds to 1117 AD. He has several valuable books such as *Alhidaya*, *Kifayat Almontahi*, *Manasek Alhaj* and others. He died in 593H corresponds to 1197AD and buried in Samarqand in Uzbekistan.

⁷² B A Almirganani, *Alhidayah: Sharh Bidayat Almobtadea vol.3* (Almaktaba Alislamiyyah, Amman 1970) 251.

⁷³ M N Noor Mohammed, *Al-Udhr Theory and its Effect on Obligation: a Comparative Study between Islamic Jurisprudence and the Egyptian and Pakistani Laws* (Islamabad 2005) 21-30

⁷⁴ A A Alsanhoury, *Sources of Right ‘Masader Al-haq’ in Islamic Fiqh: a Comparative Study with Western Jurisprudence* vol.6 (Dar Ehya’a Atturath Al Arabi, Beirut) 95.

⁷⁵ M N Noor Mohammed (n 73) 31

⁷⁶ A A Alsanhoury, *Masader Alhaq* (n 74) 95

solutions to the problems resulted from the execution of contractual obligations. Also, as was mentioned above, since Islamic religion does contain a lot of Quran verses as well as a lot of Ahadith which encourage his followers to deal with sympathy and do not cause harm to each other in their transactions, Islamic jurists did not find it difficult to depend on Islamic juristic rules which were extracted from those verses and Ahadieth texts to find out the solution to different matters raised to them and hence found no necessity to formulate a comprehensive rule or theory governs the changed circumstances or contingent events.⁷⁷

2.5.1 Applications of Contingent Events in Islamic Law

Although no record or information is available about contingent event in construction industry during the early days of Islam and thereafter, the Islamic jurisprudence has known the concept of changed circumstances in 3 different applications:

- 1) Al-Udhr or ‘the Excuse’ in hire contracts which allows the contractual party to terminate the contract on his own or request termination of the contract from the judge.⁷⁸
- 2) Fluctuations of monetary value which allows adjusting the contract price. The Muslim scholar Ibn Abidin suggested allocating this type of risk equally between the contracting parties and a new price to be renegotiated and fixed after sharing the losses equally.⁷⁹
- 3) Al Ja’eha (Calamity or Pandemic) is any irresistible natural or man-made event which destroys the crops (fruits, plants and the beans) wholly or in partial exceeding the known normal limit and beyond both buyer and seller’s control.⁸⁰ Fire, cold, storm, rain, thirst, molds and locust are examples of natural pandemic while war, revolution and theft are considered man-made pandemic. The effect of it is to adjust the crops price taking into account the harmed or the destroyed one. The basis for this rule is the Quran verse 188 of Surat *Al-Baqarah*: “And do not eat up

⁷⁷ M M Saleem (n 19) 186

⁷⁸ There are two types of Al-Udhr: obvious one which results in cancelling the contract without the need of judge rule or the acceptance of the other party and the non-obvious one which needs the court’s judgment or the agreement of the other party. For more details refer to M.N Noor Mohammed (n 75)

⁷⁹ M A Ibn Abidin, *Majmou’at Rasa’el Ibn Abidin: Tanbih Arroqood fi Masa’el Annoqood* vol. 2 (Alam Alkutub, Cairo 1980) 62-68

⁸⁰ M M Saleem (n 19) 445

your property among yourselves for vanities...”⁸¹ The said verse prohibits a party from taking or eating up other party’s wealth and money by wrong doing or with no right or justification. The Islamic jurists also depended on the Prophet’s Hadieth which says: “If you were to sell fruits to your brother and these are stricken with Calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother, without justification?”⁸² In another Hadieth, “the Prophet (peace be upon him) commanded to make deductions in the payment of that stricken with a Calamity.”⁸³

In order for an event to be considered in Islamic law, it does not need to follow the same series of criteria as in UAE civil law, nor does it need to follow the criteria of DMCC.

The criteria of the event will be discussed for each of the above three applications individually.

First, in case of Al-Udhr, the event needs not to be exceptional, of a public nature or beyond one’s control. This means that any personal event can permit the obligor to cancel or request cancellation of the contract. Therefore, the bankruptcy of a tenant (lessee) is considered an excuse allowing him to cancel the lease contract. In addition, if an owner of a house entered into a tenancy agreement with a tenant. Then, for a reason of paying off his loans which is purely personal, provided no other resources are available to him, entitles him to cancel the tenancy agreement in order to sell the house and pay back his loans.⁸⁴ However, a one’s decision to change his job after being hired not due to a genuine reason but only because it does not meet his satisfaction, would not be considered an excuse and therefore he is obliged to continue his current job until the expiry of his contract period.⁸⁵

Also, a contractual party can perform an act willingly and nevertheless becomes an excuse allowing him to cancel the contract. The matter refers to an important principle in Shari’ah: “a person is not forced to harm himself” and “it is not allowed to obligate

⁸¹ The Arabic verse reads as follows: "... ولا تأكلوا أموالكم بينكم بالباطل ..."

⁸² An-Nawawi, *Sahih Muslim with An-Nawawi Explanation* vol.5 (Dar Abi Hayyan, Cairo 1995) Hadieth no.14-1554.

⁸³ An-Nawawi (n 82) Hadieth no.17-1554.

⁸⁴ M M Saleem (n 19) 501

⁸⁵ A A Alkasani, *Bada’ea Alsana’ea fi Tartib Alshara’ea* [in Arabic], vol.4 (2nd edn Dar Alkitab Alarabi, Beirut 1982) 199

somebody to bear harm not deserved in the contract.”⁸⁶ So, if a tenant of a showroom became bankrupted and decided to leave the business, he has the right to cancel the tenancy contract. Further, if he decided to travel to another country or change his profession to another one, this would be considered an excuse allowing him to terminate the tenancy contract.⁸⁷

Second, in Alja’eha application, the event would only be considered exceptional if it destroyed one third or more of the crops and any less destruction would be considered normal and will not allow utilizing Alja’eha rules.⁸⁸ Also, Alja’eha needs not to be unforeseeable. The mold and the warms, although can be expected by the farmers, can be subject to Alja’eha rules if they harm and destroy one third or more of the crops. In addition, it needs not to be of a public nature. In the same above example, mold, can occur and harms the crops of one single farm without affecting the neighboring ones and still could be subject to Alja’eha rules.

Third, in case of money value fluctuations, the event seems to be public since it affects the whole community and not restricted to a single person only.⁸⁹ The fluctuations can cause harm to the obligor if he is forced to perform his obligation in a very strong demanded currency. In addition, in both Alja’eha and the Fluctuation of money value, the event needs to be beyond the party’s control.⁹⁰

2.5.2 Time Bar for Claiming Rights in Islamic Law

In Islamic jurisprudence, the right does not extinguish or expire by the lapse of time. The right of a contractual party exists until he gets it. If a party did not get what he is ought to get in the life time, this right would be there in the thereafter day and Allah almighty will extract it from the oppressive party. Having said that, specifying a time period by an authority of a government for hearing a claim is permissible under Islamic law and Muslims are expected to respect and obey those who are in charge with authority as long as they do not order the community to commit sins. This is obvious in verse 59 of Surat

⁸⁶ A A Alkasani (n 85) 198.

⁸⁷ A A Alkasani (n 85) 197.

⁸⁸ This is according to Almaliki school of thought. For more details see A A Alsanhoury, *Masader Alhaq* (n 74) p103-110

⁸⁹ M M Saleem (n 19) 467

⁹⁰ M M Saleem (n 19) 473-474

An-Nisa which says: “O ye who believe, obey Allah and obey the Messenger and those charged with authority among you”...⁹¹

Returning to DM claims to explore the available settlement options if they have to be decided under Islamic law.

In the irrigation project, there were several positive points supporting the Contractor’s claim. They are:

- The non-existence of soil investigation report which otherwise, would have helped the Contractor interpreting the conditions of the sub-strata properly. There is an obligation on the Employer during the tender stage to make available to the Contractor all the information on the sub-strata condition (clause 11.1 of DMCC).
- The misleading information existed in the tender document that the rock may not be encountered by the Contractor. In addition, the quantity entered against the excavation in rock was nominal which implies that the event was unlikely to occur. This definitely supported the view of the Contractor of not being able to foresee the existence of sandstone in most areas of the project.
- There was no definition available for rock in the tender documents. The tender documents consisted only of BoQ and drawings.
- The price for excavation in material other than rock was very low i.e. AED 7/m³ which is not comparable with the price of excavation in rock prevailed in the market at the time of tender even if the rock is classified to be weak to moderately weak. This implies undoubtedly, that the intention of the Contractor at the time of tender was to price for excavation in normal material and not in sand stones.

Based on above, it is concluded that the Contractor had suffered harm and loss which he did not intend for when he tendered his price. DM by rejecting the Contractor’s claim and insisting on paying him the rate of only AED 7/m³ seems to be in conflict with the Islamic Hadieth ‘*La darar wala dirar*’. Therefore, the harm should be removed and made good. This can be achieved by DM accepting to pay the Contractor the rate existed in the Contract for excavation in rock (AED 25) or otherwise to agree on another rate falling between AED 7 and AED 25 with the Contractor.

⁹¹ The Arabic verse reads as follows: "... يا أيها الذين آمنوا، أطيعوا الله وأطيعوا الرسول وأولي الأمر منكم ..."

In the Arabian Ranches Interchange claim, the Contractor was given the soil investigation report during the tender period which reveals the fact that the Contractor was aware that he would encounter sandstone and not normal loose material. Furthermore, the definition of the rock in the specification document confirms undoubtedly that the material encountered during excavation (sandstone) cannot be classified as rock. Hence, the question which arises why the Contractor had used the hydraulic breakers when he was carrying out excavation; a machine which is usually used to cut rocks and hard materials in lieu of the heavy duty excavators or rippers which normally can be used to excavate in sandstone layers?⁹² According to the Engineer's report, the Contractor could not have demonstrated the reason behind him using the hydraulic breakers for which the author thinks that the Contractor has not suffered loss or damage and if he had, that was due to his own decision to use a more effective and powerful machinery in order to expedite the process of excavation and not because the type of material encountered required that expensive equipment.

In addition, the price entered against the item for excavation in material other than rock is not low and considered comparable to the prevailing market price at that time. Therefore, it can be concluded that the engineer's decision to reject the above claim is in compliance with Islamic rules and principles.

In the cost escalation claim for Multistory Car Park project, it is clear that there was an unexpected and unforeseen hyperinflation in cost of materials during the year 2008. The same was supported by the UAE Central Bank which confirmed that the inflation index was around 20%. Some practitioners in the industry even estimated the inflation of cost of cement and steel to be over 50%. The intervention of the government to exempt the steel and cement from custom duties was an indication of how critical the crisis became. Therefore, the author thinks that the DM rejection of the claim based on article 70.1 of the Conditions which does not allow for any adjustment to the Contract Price was not compatible with the rules and principles of Islamic law. By paying the Contractor the same price of the Contract before escalation occurred is viewed as obliging the Contractor to perform his obligations with excessive harm or loss not deserved or not obligated in the Contract, a concept which is forbidden in Islam and therefore, the prices

⁹² See (n 34) above

should be adjusted to take into consideration the prevailing market price at the time of carrying out the work and not the tendered prices. By this way the risk of hyper inflated materials will be distributed equally between the parties. This would be done as mentioned in section 2.4 above by letting the Contractor bear the normal increase in the price which should be expected by any contractor and then distribute the difference equally between the parties.

In the other escalation claim for Arabian Ranches Interchange project, the foregoing argument will be presented here except for the part that the Contractor has to demonstrate that the structural works represent a major part of his project. This is due to the fact that cement and steel are used mainly in structural works. The other thing is to compare the Contract rates for concrete and steel (not available with the author) with the market rates of the same items. If the output of comparison showed undoubtedly that the Contractor would suffer excessive damage and loss by applying the Contract rates, then the rates should be adjusted in a manner to remove the excessive loss that was not allowed for in the contract, otherwise, the rates should not be modified.

2.6 Conclusion

This chapter attempted to explore whether the contingent events clauses exist in DMCC are in compliance with Islamic law or not. Clause 12.2 of DMCC which talks about the adverse physical obstructions or conditions seem not to be in compliance with Islamic rules and principles due to the following reasons:

- i) Foreseeability: DMCC requires the event to be unforeseeable while the Islamic notion of Al-Udhr and Alja'eha do not require the same. However, the fluctuations in monies value usually occur exceptionally and by an act of the government.
- ii) According to DMCC, the Contractor has to continue the work once he encounters the obstruction unless it is legally or physically impossible. In Al-Udhr, the party usually stops the work and terminates or requests the judge to terminate the hire contract. In Alja'eha, the contract is to be continued but the total price will be adjusted if the destroyed crops exceeded 30%. In fluctuations of money value, the contract will be amended and the risk of the fluctuations will be distributed equally between the parties.

iii) The Contractor to be in strict compliance with the time bar mentioned in the DMCC, otherwise his claim for additional money and/or extension of time due to the event will be invalid and will not be entertained by DM. while in Islamic law, the right does not extinguish and the contractor may still proceed for his right even if he missed out to serve notices or send particulars of his claim as per the time specified in the conditions. On the other hand, it is in the Contractor's interest to submit his claims on time in order to finalize his account on the project and send his written discharge to the Municipality in order to get his outstanding money.

Further, Clause 70.1 of DMCC which does not allow for any adjustment to the contract price due to any change in cost of materials, labor and plant is not in compliance with Islamic rules and principles. Islam forbids any party to bear excessive losses not allowed for or not obligated in the contract.

The chapter also concluded that clause 70.2 of DMCC is not in compliance with Islamic jurisprudence. From Islamic point of view, any subsequent legislation which impacts the contract price should be considered if the damage resulted is excessive and not obligated by the party at the time of concluding the contract.

Chapter Three

Compensation for Delays

3.1 Compensation for Delays in DM General Conditions of Contract

Clause 47.1 of the DMCC talks about the Compensation that the Contractor has to pay to the Employer in case of any delay in completing the Works. According to Webster's dictionary, compensation among its other meanings; is "the payment to an injured worker".⁹³ This implies that the injured party should incur harm or loss in order to claim for compensation. However, the text of compensation clause in DMCC does not require the Employer to suffer any harm or damage in order to claim for compensation. It simply states that the Contractor has in case of any time delay which is the difference in days between the actual completion date and the contractual one, to pay to the Employer an amount mentioned in the Appendix to tender and the amount can be deducted from the monies due or becomes due to the contractor.⁹⁴ The compensation per day is calculated as per a specific formula and the maximum compensation is subject to a limit. Both, the formula and the limit of compensation are mentioned in the Appendix to tender and not in the General Conditions. The formula used is 10% of Contract Price over one fifth of the Time for Completion of the project. The limit of compensation is always 10% of Contract Price regardless to the size of the project. Having said that, the above limit is the maximum compensation that the Employer can deduct from the Contractor's dues for such default of delay and he has no right to deduct more even if his losses due to the said default exceeded that limit.⁹⁵

Suppose the Municipality has entered into a contract with a contractor to construct a kindergarten. The Contract Price of the project is Dhs.10m and the Time for Completion is 270 days, then the maximum compensation that the Municipality can recover due to the delays of Works as per the above formula is $0.10 * 10,000,000 = \text{AED}1,000,000$ which can be reached to in 54 days of delay. According to this clause, no more compensation can be recovered from the Contractor if his delays persisted for more than 54 days or if Municipality's actual losses exceeded this limit unless the Municipality

⁹³ *Webster's New Collegiate Dictionary* (G&C Merriam Co, Massachusetts 1980) 227

⁹⁴ DMCC, Clause 47.1

⁹⁵ See (n 94)

decided to take other courses of action like expulsion from site which is beyond the scope of this dissertation.

On the other hand, it is worth noting that the word “Penalty” was there in the 1991 version of the conditions and the clause 47.1 was titled “Penalty for Delays”. In addition, the formula used to calculate the Penalty was exactly the formula used to calculate the Compensation in the current conditions. This implies that according to DM practice, the terminology does not matter, whether it is penalty or compensation, the resulted figure would be the same. Nevertheless, the decision to change the word from Penalty to Compensation seems to be right at least from UAE law perspective. The CTC uses the word compensation throughout its contracts related provisions. The concept and the articles of compensation dealt in UAE Law will be discussed later in this chapter.

3.2 Penalty in Dubai Government Departments Contracts Law

Article 63 of Law no.6 of 1997 deals with penalty imposed on the contractor in case of late completion of works. Unfortunately, the reader may easily note the inconsistency in language used between the DMCC and Law no.6. The drafter of Law no.6 by using the word Penalty emphasizes the concept that the contractor has breached the contract and therefore he has to be penalized and punished for his late completion. It is worth noting that although the current DMCC was produced in May1999 which is two years later after the issuance date of Law no.6, the drafter of the DMCC did not take the word “Penalty” into consideration and used instead the word compensation following what has already been existed in the CTC. It was the right decision to be made because as mentioned previously in the introduction chapter, the UAE law has the priority over Dubai law in governing the provisions of the DMCC.

Furthermore, article 65 of the said law requires imposing the penalty on the contractor as soon as the delay occurs without the need to serve a notice, take any judicial procedures or prove any losses incurred. The clause also specifies the maximum penalty to be 10% of the contract price. However, this limit of 10% may not be the total amount of money which the department can deduct from the contractor’s payments as it is the case in the DM Conditions. It may exceed to include the additional fees paid to the supervising consultant during the delay period. In addition, the clause allows the department to take any of the several listed options mentioned in article 63 should the penalty exceed 10%.

The details of those options are out of the scope of this paper and hence they will not be discussed herein. Article 65 also allows for exemption of the penalty by following certain procedures mentioned in clause 49 and within a specific period of 30 days, otherwise, the contractor loses his right in objecting to the penalty imposed. Again, this period of 30 days contradicts with the limitation period mentioned in the standard DMCC mentioned in chapter 2 above.

3.3 Compensation for Delay in UAE Law

There is nothing mentioned about compensation for delay in “Muqawala” contract. Instead, compensation is mentioned in the general provisions of contracts. In chapter 2, section 2 of CTC, Compensation is considered as a means of performing an obligation if the defaulted party failed to discharge his duty by way of specific performance. At the same time, compensation can be applied in case of any delay in fulfilling the obligation. Article 386 states as follows:

“If it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor delays in the execution of his obligation.”

What concerns us in this dissertation is the last sentence of the above article which talks about compensation for delay. The law considers that by delaying the works by the obligor, harm and damage likely to occur and the affected party is probably to suffer loss. Therefore, if the contractual responsibility is established between the delay and the loss incurred, then the obligor is to compensate the obligee for the losses the latter incurred. Thus, not any delay in executing an obligation may result in compensation. As said before, unless a relationship of cause and harm can be established, no compensation can be decided by the court.⁹⁶ In case no prior compensation is agreed upon in the contract, the burden of proof of the loss incurred shall be borne by the affected party who claims for compensation. However, in construction industry, the situation differs slightly. Both parties; the employer and the contractor; agree in advance at the time of making the contract on an amount of money to be paid to the employer in case the contractor has

⁹⁶ A A Alsanhoury, *‘Alwaseet’ in Explaining the Civil Law*, vol. 1 (Alma’aarif, Alexandria 2004) 556-557

delayed in completing the works. This pre-determined compensation in the contract is permitted and considered legitimate by the law because it is presumed that any delay in the works shall cause damage and harm and as a result losses will be incurred by the affected party (employer) unless the contrary can be proved by the contractor. The concept of predetermined compensation is stated in article 390 of CTC. Paragraph 1 of the said article states:

- (1) “The contracting parties may fix the amount of compensation in advance by making a provision therein in the contract or in a subsequent agreement, subject to the provisions of the law.”

According to the above stated paragraph, the employer does not need to prove any loss incurred in order to be eligible for compensation. However, the employer cannot proceed and deduct the amount of compensation from the payments of the contractor as soon as the delay occurs without prior notice unless the same is stated in the contract between them. This is illustrated very clearly in article 387 of CTC which states:

- “Compensation shall not be due until after the obligor has been put on notice, unless there is a contrary provision in the law or in the contract”.

Further, according to CTC, the amount of predetermined compensation can be changed and reduced if the contractor objected to it and raised an action in the court requesting the judge either to revoke the compensation if no loss has been incurred or reduce it to become proportional to the loss incurred by the employer. In other words, the contractor is the one to bear the burden of proof in the court if he wishes to annul the compensation or reduce it.⁹⁷ On the other hand, if the employer has incurred greater losses than what has been fixed in the contract, then he has to bear the burden of proof in the court and show that the pre-determined compensation does not cover his losses and therefore, claims for greater amount.

The above is stated in paragraph 2 of article 390 of CTC as follows:

- (1) “The judge may in all cases, upon the application of either party vary such agreement so as to make the compensation equal to the loss and any agreement to the contrary shall be void.”

⁹⁷ A A Alsanhoury, *Alwaseet* (n 96) 557

The above provision is mandatory and has the precedent on any other provisions agreed between the parties. Therefore, any attempt to include any limitation to the agreed compensation or prevent any adjustment to it in the contract is impermissible under the law and considered void. The intervention of the judge to adjust the compensation should not be thought of as if UAE law is against the freedom of contract. On the contrary, the law does permit the parties to include whatever provisions they wish and agree in their contract as long as those provisions do not conflict with the public policy or the morals of the society. However, the law allows for court intervention when justice principles distorted. The court intervention is viewed as an attempt to restore the equilibrium between the choice of freedom that the parties possess when they make their contracts and the justice principles and public interest.⁹⁸

3.4 Compensation for Delay in Islamic Law

In Islam, parties are required to fulfill their obligations as per the terms they agreed upon in their contract. The notion of committing oneself to fulfill the obligations can be found in several locations of the holy book of Quran. Verse 1 of Surat *Al-Ma'ida* (The Table Spread) says: "O ye who believe, fulfill all obligations".⁹⁹ As well as, Verse 177 of Surat *Al-Baqarah* (Heifer) says: "To fulfill the contracts which ye have made; ...".¹⁰⁰

In addition, the party which breaches the contract intentionally will be asked and enquired about it on the Day of Judgment. The said meaning has been illustrated in Verse 34 of Surat *Al-Isra* which says: "...; and fulfill every engagement, for every engagement will be enquired into (on the day of reckoning)".¹⁰¹ Therefore, if the contractor agreed to handover the work within a specific time for completion, he has to take all the measures which enable him to fulfill that obligation and achieve that target. However, if he failed to handover the project as per the stipulated date in the contract, he is considered to be in breach and therefore, he will be subject to pay compensation to the affected party if the latter suffered any loss due to the delay. The Islamic principle which governs the compensation concept has been extracted from the Prophet Mohammad (PBUH) Saying: "*La darar wala dirar*" which has been explained in detail in chapter 2. Islam looks to the

⁹⁸ A A Alsanhoury, *Alwaseet* (n 96) 126

⁹⁹ The Arabic verse reads as follows: "يا أيها الذين آمنوا أوفوا بالعقود..."

¹⁰⁰ The Arabic verse reads as follows: "... والموفون بعهدهم إذا عاهدوا ... "

¹⁰¹ The Arabic verse reads as follows: "... وأوفوا بالعهد إن العهد كان مسؤولاً... "

contract as a means for the parties to avail from each other. Therefore, no party should cause harm to the other. So, if a stipulated term or condition may result in harm to a party, then the harm should be removed. Thus, based on the above Hadieth, an Islamic rule has been extracted which is the “Harm shall be removed” which has been also adopted by CTC.¹⁰² The statement obliges for removal of harm to any of the parties of the contract. Therefore, if the employer did not suffer any loss by late completion of the project, it would not be acceptable from Islamic Law perspective, to get compensation from the contractor even though the compensation has been agreed upon in advance by both parties at the time of contract. The above shows that justice and equality principles should be prevalent in any transaction dealt with under Islamic law. Kasani¹⁰³ says: “equality in contracts is the thing which is sought for by the contractual parties”.¹⁰⁴

3.5 Conclusion

Loss or damage not allowed for in the contract is a condition precedent to any compensation claimed under Islamic law. However, to include a predetermined compensation amount for delay in completing the work in the contract is acceptable from Islamic law perspective based on the assumption that delay usually causes damage. However, the contractor in order to nullify the compensation or reduce its amount has the obligation to prove to the judge that the employer has suffered no damage or less damage compared to the amount entered in the contract. The DM’s clause for compensation seems to be against Islamic point of view since it does not link between the late completion of the work and the harm caused or resulted. The DMCC considers the limit of compensation which is 10% of Contract Price is fixed and cannot be changed (neither increased nor decreased); a concept which is rejected by Islamic law in which that the compensation should be proportional to the loss incurred.

¹⁰² CTC, A.42(2)

¹⁰³ Alaa Uddine Abubakr Alkasani is a Hanafi jurist known as king of the scholars for his remarkable knowledge in Hadieth, jurisprudence and interpretation. He was born in Uzbekistan. He is known for his famous book *Bada’ea Alsana’ea fi Tartib Alshara’ea*. He travelled to Aleppo in which he stayed and taught his students at Alhallawiyah School until he died in 587 H. He was buried in Aleppo.

¹⁰⁴ A A Alkasani, *Bada’ea Alsana’ea fi Tartib Alshara’ea* [in Arabic], vol.5 (2nd edn Dar Alkitab Alarabi, Beirut 1982) 237

Chapter Four

Conclusion

This dissertation has investigated the contingent events and delay damages clauses of DMCC. The aim of the investigation was to determine whether the DMCC are compatible with Islamic law or not. The contingent events covered the Adverse Physical Conditions or Obstructions (Clause 12.2 and 11.1); the forces of nature and man-made events (Clause 20.4 Employer's Risk); Changes in Cost (clause 70.1) and Subsequent Legislation (Clause 70.2).

The study has shown that preventing harming others and forbidding eating up people's properties without justification are the main two general bases which govern the business transactions between people under Islamic law.

The study has also shown that if harm occurred, then it should be removed and made good. Removing harm may take one of the following forms in Islamic Law:

- Termination as a result of Al-Udhr in case of Hire Contracts.
- Adjustment to the price of crops due to Alja'eha.
- Adjustment to the contract price in case of fluctuation in money value in a manner that the risk to be shared between both of the parties.

The harm above is the harm which exceeds the one obligated in the Contract. In other words, it is the harm which was not allowed for at the time of concluding the contract. Therefore, the normal market fluctuations in cost of materials, labor or plant which deem to shall have been allowed for in the contract price by the contractor is not considered and would not be compensated for under the Islamic law.

The study has also found that DMCC are not compatible with Islamic jurisprudence as far as the contingent events and delay damages concerned for the reasons mentioned in chapter 2 and 3. In order for the subject matter clauses be compatible with Islamic law, the following shall be taken into consideration:

- Clause 12.2 Adverse Physical Conditions: un-foreseeability shall become a condition precedent for entitlement only if the data is made available to the contractor during the tender stage and if it is correct reflecting the actual condition

of subsurface. Then, if harm incurred by the Contractor, in spite of fulfilling the data requirement by the Employer, it would be due to Contractor's misinterpretation of the data as a result of his ignorance or carelessness.¹⁰⁵ Further, the condition that the work is to be continued regardless to the harm incurred is to be looked into. The work may be stopped if the Employer did not show any indication of his willingness to remove the harm and compensate the Contractor for it. Finally, the condition that the Contractor has to comply with the time periods defined in Clause 12.2 for serving notices and/or sending claim particulars, otherwise his claims will be invalid has to be looked into by Muslim jurists in a manner to keep the balance between the parties interests of the construction contracts and in line with the Islamic principle that right does not extinguish by passage of time.

- Clause 20.4 Employer's Risks: As far as to man-made events or forces of nature, the clause seems to be in compliance with Islamic rules in which the Employer bears the risk of compensation if the contractor is requested to rectify the damage. No party shall indemnify the other if no damage has been rectified.
- Clause 70.1 would be acceptable from Islamic point of view if the changes in cost of materials, labor and plant are within the normal range of the construction market fluctuations. However, it should allow for adjustment to the Contract Price if the escalation or the reduction in costs exceeds the expected normal range.
- Clause 70.2 shall allow for adjustment to Contract Price to take account for any changes in legislation which affect the Contractor's performance after signing the Contract.¹⁰⁶

The clause of Compensation for Delay should not be fixed and shall be linked to the amount of loss incurred by the Employer in order to seek compatibility with Islamic law. It is worth noting that the compensation article mentioned in CTC is compatible with Islamic principles in which the predetermined compensation may be increased or decreased by the judge to be proportional to the damage incurred.

¹⁰⁵ M N Noor Mohammed (n 73) 227

¹⁰⁶ *The FIDIC Contracts Guide* (FIDIC, Lausanne 2000) 227

One of the key findings to emerge from this study is that the contingent events article included in UAE law i.e. article 249 of CTC is not in compliance with Islamic law. The article does not take into account the personal excuses and also requires the loss to be burdensome and oppressive to such a limit that threatens the party to a contract with grave loss. Thus, the loss which is not so oppressive but at the same time is not obligated by the party at the time of concluding the contract will not be entertained according to this article. The Islamic jurisprudence does take into account the personal excuses under *Al-Udhr* notion. It also considers the harm which is not obligated by the contractual party at the time of contract.

The dissertation has only discussed few key clauses due to space constraint. Therefore, it is recommended that further research to be undertaken in other areas of the DMCC such as variations, insurances and indemnities.

The findings of the dissertation suggest that FIDIC task group, which is responsible for revising the FIDIC forms of contract periodically, issues versions of the contracts which fulfill the Islamic rules and principles to be used mainly in countries whose laws are based on or affected by Islamic shari'ah. In order for the task group to achieve this goal, it is necessary to appoint among its members individuals who possess both shari'ah and construction knowledge.

Appendix A: Extracts from DMGCC¹⁰⁷

- Inspection of Site 11.1** (A) The Employer may have made available to the Contractor, before the submission of the Tender by the Contractor, such data on hydrological and subsurface conditions as have been obtained by, or on behalf of, the Employer from investigations undertaken relevant to the Works. However, the Contractor shall be responsible for his own interpretation thereof.
- (B) The Contractor shall be deemed to have inspected and examined the Site and its surroundings and information available in connection therewith and to have satisfied himself, so far as is practicable, having regard to considerations of cost and time, before submitting his Tender, as to:
- (a) The form and nature thereof, including sub-surface conditions,
 - (b) The hydrological and climatic conditions,
 - (c) The extent and nature of work and materials necessary for the execution and Completion of the Works and the remedying of any defects therein, and
 - (d) The means of access to the Site and accommodations he may require.
- (C) In general, the Contractor shall be deemed to have obtained all necessary information, subject as above mentioned, as to risks, contingencies and all other circumstances which may influence or affect his Tender.

¹⁰⁷ For full text of the conditions, refer to http://login.dm.gov.ae/wps/wcm/connect/d7d0088046b821da8598e5cd2513503e/GCC1999_2.pdf?MOD=AJPERES accessed 13th May 2012

- (D) The Contractor shall be deemed to have based his Tender on the data made available to him by the Employer and on his own inspection and examination, all as aforementioned.

Adverse Physical Obstructions or Conditions 12.2

- (A) If during the execution of the Works on the Site, the Contractor encounters physical obstructions or physical conditions, other than climatic conditions, which obstructions or conditions were, in his opinion, not foreseeable by an experienced contractor, then the Contractor shall forthwith proceed according to the time schedule and procedures specified in Clause 12.3 below. Additional provisions are specified in Clauses 44 and 53.
- (B) Wherever the conditions stated in Sub-Clause (A) above are encountered by the Contractor, the Engineer shall proceed according to the time schedule and procedures specified in Clause 12.4.
- (C) The Employer shall not unreasonably delay any consultation, or withhold any consent, determination, or decision requested by the Engineer.

Procedures for the Contractor 12.3

- (A) In the case of unforeseen physical obstructions and conditions defined under Clause 12.2, the Contractor shall alert the Engineer verbally as soon as possible, but not later than the end of the day of the event and give a written notice (Physical Obstruction or Condition Notice) to the Engineer, with a copy to the Employer, within three (3) days, which shall be extended by the duration of public holidays, which falls within the 3-day period, from the day of the event, as day number 1, describing:

- (a) the event (details about date, hour, method of work leading to the event, observations, estimated geometric dimensions, nature of the problem)
 - (b) details of the anticipated effects and consequences thereof
 - (c) measures the Contractor has undertaken already and is proposing to take to overcome the problem, and
 - (d) a preliminary estimate of the anticipated delays in the Work Program and interference with the Contractor's other activities in connection with the Works.
- (B) If the Physical Obstruction or Condition Notice states explicitly the Contractor's intention to prepare a claim, then the Contractor is not obligated to submit another claim notice within 28 days from the event pursuant to Clauses 44 and/or 53 to be eligible for claiming time extensions and/or extra costs. However, if the Physical Obstruction or Condition Notice does not make this statement, the Contractor must still meet the 28 days deadline for notice of claim under Clauses 44 and/or 53. In all cases, the provisions of Sub-Clause (A), above, must be fully satisfied.
- (C) In the event the Contractor believes that he is entitled to a time extension, or an additional cost, or both, provided he satisfied the requirements stated in Sub-Clauses (A) and (B) above, he may prepare a detailed claim according to the:
- requirements of the Engineer (documentation, format, level of details, proof, arguments, supporting documents etc.), and

- provisions of Clauses 12, 44 and 53 as applicable to the case.

Employer's Risks 20.4 The Employer's Risks are:

- (A) insofar as they directly affect the execution of Works in Dubai:
 - (a) war and hostilities (whether war be declared or not), invasion, hostile acts of foreign enemies;
 - (b) restrictive acts of Government, rebellion, revolution, insurrection, or military or usurped power, or civil war;
 - (c) ionizing radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;
 - (d) pressure waves caused by aircraft or other aerial devices traveling at sonic or supersonic speeds;
 - (e) riot, commotion, or disorder, unless solely restricted to the employees of the Contractor, or of his Subcontractors and arising from the conduct of the Works;
- (B) loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the Contract;
- (C) damage to crops on the Site, save so far as possession has not been given to the Contractor,
- (D) damage, other than that resulting from the Contractor's method of construction, which is the unavoidable result of

the construction of the Works in accordance with the Contract;

(E) any interference, whether temporary or permanent with any right of way, light, air, water, or other easements which are the unavoidable results of the construction of the Works in accordance with the Contract;

(F) loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor, or for which the Contractor is responsible; and

(G) any operation of the forces of nature (insofar as it occurs at the Site) which an experienced contractor:

(i) could not have reasonably foreseen, or

(ii) could have reasonably foreseen, but against which he could not reasonably have taken at least one of the following measures:

(a) prevent loss or damage to physical property from occurring by taking appropriate measures, or

(b) insure against such loss or damage.

Forces of nature include, but are not restricted to, bad weather, flood, earthquake, meteorite, etc.

Definition of “Provisional Sums”

58.1 (A) “Provisional Sums” means a sum included in the Contract and so designated in the Bill of Quantities for the execution of any part of the equipment, or services, or for contingencies, which sum may be used, in whole or in part, or not at all, on the instructions of the Engineer, but subject to the provisions of Clause 2.1(C).

(B) The Provisional Sum includes some or all of the following headings:

(a) Service Authorities

(b) Contingencies (unpredictable expenses):

(1) re-measured quantities exceed BOQ estimates

(2) variations:

- Engineer initiated

- DM initiated

(3) claims

(c) Estimates for items defined in general terms, without knowing the details, particulars, or specifications at the time of the award of the contract:

(1) extra tests, if any, under Clause 36.4

(2) other items, as identified

(d) Subcontractors and Suppliers

(e) Daywork

(C) The Contractor shall be entitled to only such amounts in respect of the work, supply, or contingencies to which such Provisional Sums relate as the Engineer shall determine in accordance with this Clause 58 and subject to the provisions of Clause 2.1(C). The Engineer shall notify the Contractor of any determination made under this Clause 58.1, with a copy to the Employer.

Appendix B: Extracts from Law no. 6 of 1997 (Dubai Government Departments Contracts Law)

ARTICLE (49)

The contractor should execute the contract in accordance with the terms and conditions stated therein, especially the commitment not to delay the execution otherwise the penalties and fines stated in the contract shall be imposed. In case of force majeure, emergencies or any reason by the Department

the Contractor should submit an application for the exemption from such penalties and fines supported by the relevant evidence within thirty days from the occurrence thereof.

The said application shall be presented to the Committee

for the examination and verification of the authenticity thereof. The Committee

shall take its decision whether to grant such exemption or not. The said decision shall not be deemed effective unless approved by the Director General.

If such application is not submitted within the said period, this shall be deemed as a declaration by the contractor for the non-existence of any reasons forcing him to violate the execution and his right to objection shall abate.

ARTICLE (63)

If the Contractor delayed in the commencement of works, or obviously shows the execution down, so that he would not honour the execution in due time, or suspend the works for more than 15 successive days, or withdraws or violates the conditions of contract, the Department shall have the right to withdraw the job from him and take any of the following actions.

(1) to execute all the incomplete works under direct order and its own knowledge without and right of the contractor to claim for any surplus realized.

(2) to engage any contractor to complete the work.

To ensure the completion of the work, the Department shall have the right to hold whatever equipment or materials of the Contractor in default in the work site and to use the same in the completion of the work without any liability for any damage sustained by such equipment. The Contractor shall - as a result of withdrawal of work from him - bear all the compensations payable to the Department for any losses incurred plus 10% of the

value of the uncompleted works against the administrative expenses borne by the Department.

To ensure the settlement of such amounts, the Department shall have the right to hold any equipment or accessories belonging to the Contractor in the work site.

ARTICLE (65)

The Contractor shall complete all the works as per the terms and conditions stated in the contract. In case of delay a certain penalty to be determined in the contract per day with a maximum 10% of the contract value shall be imposed against him. The said penalty shall be calculated upon the occurrence of such delay without any notice or legal proceedings, or to substantiate the damage and without prejudice to the right of the Department to charge the fees of the supervising consultant to the Contractor. The provisions of Article (63) hereof may apply thereto in case the penalty so imposed exceeds 10% of the value of the contract.

Moreover, the Contractor may be exempted from the said penalty pursuant to the provisions and procedures stated in Article (49) hereof.

ARTICLE (66)

In case of emergencies, contingent incidents, or force majeure as a result of which the execution of works is threatened and the contractor sustains damages, he shall continue the execution thereof and shall be entitled to claim for a reasonable compensation under an application to be presented to the Tenders & Bids Committee. The Committee shall study the said application and present its recommendations to the Director General for the approval thereof.

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