

Employment law
companies law
commercial law law
contract essay

[Law](#)



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In theory a verbal bargain concluded in a coffee shop, located within the DIFC freezone, by two individuals, will if needing an arbiter be required to submit to DIFC laws and procedures. By Dubai's own legislation DIFC has been allowed to have complete independence in its treatment and promulgation of civil and commercial laws. These laws are written in English and are based on common law principles. The DIFC laws and regulations are developed by the DIFC Authority (DIFCA) and the Dubai Financial Services Authority (DFSA). As well as financial activities, the DIFCA is also responsible for the laws that cover: employment law, companies law commercial law real estate law. The DIFC has its own court system with senior judges gathered from common law jurisdictions worldwide. The internationally respected bench of judges is comprised of: Chief Justice Michael Hwang, SC (Singapore); Deputy Chief Justice Sir Anthony Colman (UK); Justice Sir John Chadwick (UK); HE Justice Ali Al Madhani (UAE); HE Justice Omar Al Muhairi (UAE); Justice Sir David Steel (UK); Justice David Williams (New Zealand); Justice Tan Sri Siti Norma Yaakob (Malaysia). All legal practitioners registered with the DIFC Courts are subject to The Code of Professional Conduct, this ensures the highest of legal professional standards are maintained, The DIFC Courts will use the DIFC's own laws and regulations; unless that is the parties explicitly choose to have another law govern the dispute. The DIFC Courts have the power to make Orders and give directions as to the conduct of any proceeding before the DIFC Courts that it considers appropriate[1]including:-Orders prescribed by any legislation under DIFC law; Injunctions, including requiring an act to be done; Interim or interlocutory Orders; Orders made without notice to any other party and the

circumstances in which such Orders are appropriate; Contempt Orders; Orders made in the interest of justice or Referral of matters to the Attorney General of Dubai[2] Judgments, Orders and Awards which made by DIFC Courts but are to be executed out with the DIFC, will be enforced by the Dubai Courts. Such Judgments, Orders and Awards will however only be accepted by the Dubai Courts if the Judgment, Order or Award is: " final, appropriate for enforcement and translated into Arabic"[3]. In early 2008, the DIFC Courts made history by appointing the UAE's first female judge, Justice Tan Sri Siti Norma Yaakob, later the same year, two Emirati judges were appointed who were the first Emiratis to become common-law judges. The DIFC has its own Arbitration Centre (DIFC-LCIA) which is an independent centre of international arbitration. The DIFC-LCIA uses the London Centre of International Arbitration. Rules.

The Special Tribunal related to Dubai World (the ‘Tribunal’)

In December 2009, a Decree was issued[4] establishing a special Tribunal to hear matters arising from the settlement of the financial crisis that had engulfed Dubai World, one of Dubai's most successful semi-government conglomerates. The tribunal was to hear all cases related to Dubai World and its many subsidiaries. The powers of the Tribunal were later affirmed and amended by Decree No. 11 of 2010 This Special Tribunal was established within the DIFC and indeed DIFC court procedures were intended to govern the hearings throughout its tenure. The appointed Judges who were borrowed from the DIFC courts came from common law backgrounds but are dealing with contracts agreements based upon the Civil Code and Dubai

laws. The Tribunal has the powers to rule upon and jurisdiction to hear and decide any demand to dissolve or liquidate the state-owned corporation. The judge's bench is comprised of: Sir Anthony Evans, former Chief Justice of DIFC Courts, Michael Hwang SCSir John Chadwick. Sir David Steel later joined as the fourth Member of the Tribunal. Sir Anthony Evans, chairman of the panel explained the purpose of the Tribunal as[5]:" The purpose this tribunal is to is to provide a framework for company re-organisation. Dubai World being a flagship company for Dubai and with some of its subsidiaries having flirted with financial disaster and in the process of dealing with its creditors had created a lot of court cases. The Tribunal was the ideal fair and completely transparent judicial tool to resolve these issues." in an orderly fashion and in the best interests of the companies and their creditors and all interested parties including bondholders and shareholders. The three members appointed by the Decree are all Justices of the DIFC Courts. The DIFC Courts exercise a common law jurisdiction within the area of the DIFC, itself part of the Emirate of Dubai. I should emphasise that the Tribunal is an independent judicial body established by the Decree and that its existence has no effect whatsoever on the separate existence and independence of the DIFC Courts. The Courts' jurisdiction is unaffected by the Decree and it will continue to be exercised by the appointed Judges of the Courts including two resident Justices and three other non-resident judges, including Justice Sir Anthony Colman, who is present in the Courts today. This meeting of the Tribunal takes place in the Courtroom of the DIFC Courts for reasons of convenience only. Future meetings may be held here, or in other and possibly larger spaces within the DIFC. The Tribunal's procedures will be

governed by the Rules of Court which have been adopted by the DIFC Courts, with suitable amendments by the Tribunal as may prove desirable from time to time; but I should emphasise, again, that the Tribunal is an independent body, established by His Highness's Decree.

The Legal System

Hierarchy of laws - Federal law trumps Emirate law.

While both Dubai and Abu Dhabi have introduced various separate legislation in regard to contract law. In theory commercial activities, including construction activities are governed by Federal Law No. 18 of 1993, however the most important law for such commercial construction contracts is the Federal Law No 5 of 1985. While the Federal law covers much of the principle of UAE contract law it does not always delve into the minutia involving definitions of various aspects to contract law. Dubai, for example, partially fills that gap, with the Dubai Contracts Law of 1971, which while still in force has been buttressed by Dubai Law No6 of 1997. Between them these laws codify many of the legal concepts familiar to 'western' legal practitioners. For example:

Article 3[6]: Interpretation

This article, with the precluding caveat of: " Unless the context requires otherwise, the following terms and expressions shall, wherever they may appear in this Law, have the following meanings:" And it provides concise definition for familiar contract law principles for example: Offer: the proposal made by a person to another to do or omits to do any act, purported to obtain the consent of the other party to such act or mission[7]. Acceptance:

the expression of consent by the person to whom the proposal is made, and thereby the proposal becomes accepted. When the proposal is accepted, it shall become a promise[8]. Promisor: a person that provides the proposal[9]. Promisee: a person that accepts the proposal[10]. Consideration of the Promise: anything done or omitted to be done, is being done or omitted to be done or shall be done or omitted to be done by the promisee and anything that the promisee arranges to do or omit to do, subject to the provisions of this Law, provided that all is done or omitted to be done as demanded by the promisor[11]. Agreement: every promise with a consideration[12]. Counter Promises: such promises that constitutes all or any of the consideration by either party to the other party[13].

There are no sources in the current document.

Invalid Agreement: any agreement not enforceable by law[14]. Contract: such agreement enforceable by law[15]. Void Contract: any agreement that any of its parties can enforce by the power of the law, while the other parties cannot enforce it[16]. Invalid Contract: any contract not enforceable by the power of the law.

Federal Laws on Contract

Federal Law 5 of 1985 (the Civil Code) , Law No. 1 of 1987 and Law of Commercial Transactions Federal law No 18 of 1993 (Commercial Code)

The Law of Civil Transactions of the State of the United Arab Emirates was promulgated under Federal Law No. 5 of 1985. This law is commonly referred to in English as the 'Civil Code', or just the 'Code'[17]Article 1 of the Civil

Code states that:" The accompanying law shall have effect in civil

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transactions in the State of the United Arab Emirates." The amending law, Federal Law No. 1 of 1987, added the following sentence to article 1 quoted above: 'Commercial transactions shall continue to be governed by the laws and regulations in force in that regard until the Federal Commercial Code is enacted' Later the ' Commercial Code' - officially known as the Law of Commercial Transactions - was promulgated under Federal Law No. 18 of 1993. James Whelan[18] comments that it is important to understand that although the Commercial Code exists in tandem with the Civil Code and applies in its own terms to commercial transactions[19], the Civil Code will still apply to commercial transactions, to the extent that a question arising out of a commercial transaction is not determined by reference to the agreement between the parties, or commercial custom, or the Commercial Code itself, or other commercial statutes specifically governing differing types of transaction such as for instance the Maritime Code. Therefore the authoritative reference to matters of contract construction and meaning, under federal law is the Civil Code. James Whelan has produced the most authoritative and respected English translation of the Civil Code His first translation was published in 1987 and a second, more comprehensive, transition together with a limited commentary, was published in 2010. Where referred to within this paper the 2010 translation/commentary is used. The UAE Civil Code has a specific chapters and for example Articles 872 to 896 of the UAE Civil Code, under the heading called " Muqawala" contain provisions that govern the relationships between employers, contractors, subcontractors and engineers/architects. Article 872, in translation, states that " Muqawala" is " 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." As importantly perhaps, the basic questions arise of: How a contract is formed? What constitutes offer and acceptance? Questions about the capacity of parties to contract. Fraud. Mistake. the interpretation of agreements the ability to withdraw from an agreement Remedies for breach These together with numerous other general basic questions of contract law, are resolved by the provisions of the Civil Code, neither the Commercial Code nor any of the other specialised commercial laws. The Code also 'outlaws' certain categories of contractual clause, such as those that seek to exclude a party's right to apply to the court for relief for excessive hardship[20], and such clauses will be invalid in both commercial and civil transactions. Therefore Clauses that are amended within FIDIC by an employers PCC to exclude a contractor from seeking, for example, inflationary costs or other similar measures to recover unforeseen costs that are rights within the unamended FIDIC may be challenged in the UAE's courts, providing that of course these clauses themselves do not in some way challenge the local laws.." Thus, despite its title, and the existence of the Commercial Code and other specialised commercial statutes, 'the Code' remains the foundation of both commercial and of civil law within the UAE. It has been recorded[21] that in cassation judgments (the highest court of the UAE), when dealing with commercial matters, it is the Civil Code that is cited more than any other statute. General principles to contract formation that are familiar to English legal professionals and are defined by the Civil Code (such as good faith)

Interpretation of a Contract

Article 265(2) says that where there is need for an interpretation of a contract, " the Court shall make an enquiry into the intentions of the parties, as well as the nature of the transaction and current business practice[22]."

Article 266 continues that where there is any doubt as to the meaning of a contract term: " it will be construed by the Court against the party who put it forward or the party who benefits from it (This is analogous to the principle of ' contra proferentem' in English law except that where the English principle will be to always construe term against the party that drafted the term it the UAE definition allows for the decision to go to either party according to who gets the benefit.

Good Faith.

" Allah's Messenger (s. a. w.) said: the seller and the buyer have the right to keep or return the goods so long as they have not parted or till they part and if both the parties spoke the truth and described the defects and qualities (of the goods) then they would be blessed in this transaction, and if they told lies or hid something then the blessings of their transaction would be lost." [23] The doctrine of ' good faith' within a contract is perhaps the most fundamental of principles within UAE, Emirate, federal and indeed Islamic Contract law.

Implied Terms

The discovery and approval of implied terms is allowed in contract interpretation when uncertainty exists and when it can be ascertained by construction of the evidence drawn from the surrounding circumstances

and/or by common practice or custom. However Article 256 of the Fed law no 5 states that:" The implied shall be disregarded in the face of the express." James Whelan reveals in his ' commentary on the Civil Code' that the Arabic word , dalāla , translated as , " implied' means showing, pointing, indicating and also, by extension, ' evidence those points to a fact' rather than the actual fact itself. The word is commonly used in judgments to mean " indicative evidence drawn from the surrounding circumstances."[24]

Unfair contract terms

" It is a shari'ah responsibility of mankind to observe fairness and justice in all spheres of their everyday lives, while refraining themselves from unjustified whatsoever dealings and attitudes, as enshrined by Almighty Allah (s. w. t.)"[25]

An aggrieved party may, upon discovery of an unfair term within the contract, apply to set aside the agreement in the following circumstances: [26]" If the party acting unfairly acknowledges his unfair treatment of the other after the accord is made."" If facts become known to the aggrieved party after the accord was made and he swears that he was unaware of such facts at the time the accord was made."" If there is evidence[27]not available to such person which cannot be made available during the currency of the proceedings and he testifies upon making the accord that he will adduce that evidence upon its becoming available."

Misrepresentation

" Abdullah ibn 'Amr ibn al-'As reported that the Messenger of Allah, may Allah bless him and grant him peace, said, " If anyone has four characteristics, he is a pure hypocrite, and if anyone has one of them, he has an aspect of hypocrisy until he gives it up: whenever he is trusted, he betrays his trust; whenever he speaks, he lies; whenever he makes an agreement, he breaks it; and whenever he quarrels, he deviates from the truth speaks falsely." [28]

Misrepresentation

The concept of misrepresentation within the UAE is defined by Federal Law No 5 of 1985 the Civil Code. Articles 185-192[29]of the Civil Code defines misrepresentation as follows:" Article 185: Misrepresentation is when one of the two contracting parties deceives the other by fraudulent means by word or act which leads the other to consent to what he would not otherwise have consented to."" Article 186: Deliberate silence concerning a fact or set of circumstances shall be deemed to be a misrepresentation if it is proved that the person misled thereby would not have made the contract had he been aware of that fact or set of circumstances." There for there to be, misrepresentation or deception it must be proven the existence of a fraud, which in turn leads to the other party to entering into a contract. UAE law does not acknowledge the principle of negligent misrepresentation as can be seen from Islamic jurisprudence, as previously quoted in my introduction to this paper:" Allah will not take you to task for inadvertent statements in your oaths, but He will take you to task for the intention your hearts have made." (2: 225) (my own emphasis added)Indeed as Articles 185-186 clarify, there

must be an intention, a deliberate action or inaction in order to commit the fraud or misrepresentation. The victim of the misrepresentation however would bear the burden of proof to establish that: " they were deceived by the misrepresentation"[30]" that the deception was intentional".[31]

THE CONSEQUENCES OF A MISREPRESENTATION

The Civil Code[32]informs us about the legal repercussions of proven misrepresentation under UAE Federal Law:" If one of the contracting parties makes a misrepresentation to the other and it transpires that the contract was concluded with gross unfairness (lesion, the person so misled may cancel the contract."[33]Article 187 therefore instructs that the Civil Code will view, when misrepresentation can be proven to have existed and has had an effect that was grossly unfair, then the agreement is voided and any apparent previous ' consent' to the term by the parties' is irrelevant.' The Pillars' is a common term in Islamic laws to define the fundamental principles that hold up and support the particular principle being espoused, in this case the contract structure. It has been said[34]that the pillars of contract law are: the Consent, the capacity of the contracting parties, the detailed subject of the contract (there must be certainty)its proper formation. When one of these elements is missing or unsound, the contract collapses. And it is voided or terminated depending upon which pillar is defective. Misrepresentation then, although critical to a lack of informed consent, may not necessarily be a fundamental breach of contract and therefore insufficient grounds for its termination.

FIDIC in Abu Dhabi law

In 2006 a law was introduced in Abu Dhabi known as Law No. 21 of 2006 which in turn was superseded by Law No 1 2007. These Laws introduced officially for the first time 'new' forms of construction contracts based on the 1999 FIDIC forms, in particular the Red Book. The law, in Abu Dhabi at least, now requires the contracts to be adopted for use on Government public sector projects to be FIDIC based and with appropriate amendments.. FIDIC, of course whilst offering an accepted and familiar international standard to western practitioners will, nevertheless, require appropriate changes, to individual contract clauses, to meet with the local conditions and Laws. This is especially so within the UAE for compliance with other local and Federal laws that can fundamentally be different from the intention of FIDIC. The 2006 law that was introduced in Abu Dhabi was the first among the Emirates to specifically mention the FIDIC suite of contracts in any official way. Although it should be noted that the ubiquitous and often 'bastardised', 4th edition of the Red Book (1987) had formed the unofficial foundation of many construction contracts throughout the UAE in the previous decade or longer.

The perceived benefits of the use of FIDIC in Abu Dhabi government contracts.

As well as providing a familiar standard form of contract that contractors will be happy to use FIDIC also introduces and develops a defined and clear dispute procedure that has been long awaited in the UAE. FIDIC contracts have a well defined and 'battle-proven' alternative dispute resolution mechanism, which based upon the "Dispute Adjudication Board" or DAB. The format of the DAB can be defined by the parties but by default such a

board typically consists of three experts, one of whom is nominated by each Parties to the contract with the third nominated by the other two nominated experts. Providing that these clauses are not removed or substantially altered Employer we will effectively see the government take part in a regularised and familiar alternative dispute resolution process which will provide to international contractors the comfort that the concept of fairness is being transparently applied. The problem is however those FIDIC contracts are often extensively modified and not just for the dispute resolution clauses.

How FIDIC balances Risk between the Employer and the Contractor.

FIDIC is considered by many, but by no means all contractors, to exist to strike a fair balance between the contracting parties. Risk within the unamended FIDIC does tend to lie with who best can deal with it. By officially adopting the FIDIC philosophy within their construction contracts, the Abu Dhabi Government would like to be perceived as acting fairly and more transparently so as to encourage international contractors to commit to tendering for major projects. With the necessary amendments being clearly identified in a separate Particular Conditions of Contract (PCC) document Indeed has been common, and proper, practice within the UAE to produce both the FIDIC form and any amendments to it as separate documents (GCC and PCC) . The tide has perhaps begun to turn again however, early in 2013, with at least two semi-government bodies^[35] who had previously used FIDIC as the GCC with their own Particular PCC as a separate documents, but recently they have begun, in their latest tender documents to merge their own ' particular conditions' with the original FIDIC

form of contract to create one singular document that includes all their own changes. The effect of this is to obscure the changes made to the standard form of contract and thereby perhaps unintentionally (or intentionally ?) 'trip up' an unsuspecting contractor into accepting more risk and more onerous terms that perhaps his familiarity with FIDIC might provide him. This introduction of FIDIC suite of contracts was indeed welcomed by the construction industry as it provided some familiar contract terms and meanings but that is now threatened by these more 'hidden changes' that are being introduced. While the Abu Dhabi government would like to see a more enthusiastic influx of international contractors in the emirate, perhaps some of its own government bodies may well be undermining that process with their own 'hidden' modifications to FIDIC. The Abu Dhabi government's move to adopt FIDIC officially is meant to ensure that international contractors can see familiar contract terms when entering into contracts with the various government bodies, especially when many projects could be classed as 'mega-projects' by any objective standards elsewhere in the world.

FIDIC Clauses and principles, clarifications and potential clashes with UAE laws.

FIDIC RED BOOK Clauses 1. 1 and 1. 2 Definitions and Interpretation.

Judge Abdul Aziz Fawdah, President of the Court said in his judgment on 12 June 2001:" Pursuant to articles 258 and 265 of the Civil Code, the criterion in contracts is intentions and meanings and not words and constructions." [36] He went on to say that:" There is a presumption that

speech is true. The interpretation of obligations and contracts and the abstraction of the true facts from them and the ascertainment of the joint intention of the contracting parties are matters within the discretion of the trial court, provided that its judgment in that respect is sound and based on matters proved in the papers, and provided that the court does not depart from the overt meaning of the expressions used in the contracts and documents." [37] The UAE courts will not therefore generally interfere with the contract if, in its opinion, the intention can be seen to be clear and that 'playing' with words and definitions to construe different meanings is to be avoided.

[contrast with English laws]

FIDIC RED BOOK Clause 1.4 - Law and language

Within the 'Contract Data' of all FIDIC contracts in the UAE, it will be found that the wording should almost always indicate that: "The Contract shall be governed by the law of the United Arab Emirates as applicable in the Emirate of xxxx", although of course the parties are entitled to stipulate any jurisdiction within this clause. However the courts of the UAE, have avoided and ignored any agreements as to jurisdiction being anything other than that of the emirate concerned. The courts as 'as a matter of public policy' retain jurisdiction by right of the Civil Procedure Law or CPL [38] to hear the case themselves. Upon then having secured the proceedings within its jurisdiction, the courts will apply UAE law irrespective of any agreement otherwise within the contract itself. Thus, broadly speaking, all parties, but especially contractors who seek the certainty of a foreign or common law legal system should be aware that there is little hope of escape from the UAE

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courts system in practice, unless of course they exercise the only exit gate permitted by the CPL and execute a valid notice of arbitration, assuming that the seat of the Arbitration is located in a jurisdiction that will honour the agreement to specify the law as chosen by the parties. Of course the parties are entitled to stipulate any jurisdiction within this clause but in practice, this is rarely if ever exercised in the UAE. So if Dubai were to be the Emirate that is specified therein, then any 'Dubai laws' in regard to contracts will apply unless they are also covered by federal law, in which case federal law shall apply. If Federal law is silent on a matter then the courts will decide based upon reference to Sharia law principles and by reference to other Arabic country civil codes should they cover the topic. Occasionally civil law principles enshrined in French or other European codes may be applied.

FIDIC CLAUSES and appropriate UAE laws and principles that may apply.

FIDIC RED BOOK Clause 1.13 - Compliance with laws Compliance with laws of course means not only the laws in connection with contracts of course by all other civil and criminal laws. For example contractors should be aware that there is extensive law published on the damage of utilities. A set scale for cost repairs is set that would seem excessive to the contractor and serious fines for the contractor should utilities be disrupted. Further as a result of such disruption a prison sentence, not exceeding one year, can be given to the workmen and supervisors who negligently damage public utilities causing disruption to the service in question[39]. Working hours for labour are stipulated within Federal Law and also religious and Government public holidays are also so stipulated. It should also be noted that reduced working

hours are mandatory for the Holy Month of Ramadan and that 3 or 4 hour mid-day breaks are compulsory during the summer months. The requirements for these periods where working hours are stipulated are changed frequently so may also be relevant to 'Changes in Laws' (Clause 13.7 of the Red Book) FIDIC RED BOOK Clause 3.5 - Determinations This is a critical link between an Engineer's 'fair determination' and the next step to any form of dispute resolution specified within the contract. FIDIC says that an Engineer's determination may be disputed by the contractor by his issuance of a 'notice of dissatisfaction'[40] and the stipulated dispute process is begun with this. In a case where an Engineer has not yet made a determination the courts will rule that an arbitration or court hearing will not be heard until He has done so and a notice of dissatisfaction issued by the contractor. This has procedural link, a condition precedent if you prefer, been ruled upon in the Dubai Courts of Cassation in 2007[41]: "Under the general rules of contracts, arbitration is a contract between two parties, and they may include any appropriate condition that they wish provided that it is not contrary to public order or morals. They have the right to make prior conditions that must be satisfied before recourse is had to arbitration, in the sense that if any of those conditions is not satisfied then a request to conduct arbitration will not be accepted, in application of the rule that the contract is the law of the parties. The burden of proving that those conditions have in fact been satisfied prior to having recourse to arbitration falls upon the contracting party who applies for arbitration." In that particular case, the Court of Cassation ruled that if the parties have agreed that the dispute should be referred to 'the Engineer' in a construction contract for a

determination, as is clearly specified within Clause 3.5 of FIDIC, before proceeding to a 'request for arbitration' as per the arbitration clause, then neither of the parties may go directly to an arbitration without firstly presenting the said 'dispute' to the Engineer for his determination. The judgement went on to state that any perceived lack of neutrality of the Engineer would not be a ground for appeal against this process (and this is perhaps also so for the FIDIC Gold Books equivalent person, the Employer's Representative, who is not specifically required by FIDIC to be 'impartial', as it is the 'process', that assumes the greater importance here not the perception of impartiality)

[contrast with English laws about impartialness of Engineer and state uae points]

FIDIC RED BOOK Clause 4.2 - Performance Security It is a stipulation of the Employer within most FIDIC contracts in the UAE that the contractor should provide an unconditional, on demand, bond that is issued by a nominated or otherwise acceptable local bank. This practice is supported in local laws such as Abu Dhabi Law No (6) of 2008^[42] and Dubai Law No (6) of 1997^[43] here both laws allow unconditional and irrevocable on-demand bonds equal to 10 percent of the contract value to be held. It is almost certain that the term contained within the 'Contract Data', which is referred to within the FIDIC Contract clause 4.2 will specify that a bond for 20 percent of the Contract Value is to be procured by the contractor. If called upon for non-performance of the contractor, the bank will have to pay to the employer, upon its demand, without any need for the employer to provide proof or any further substantiation, that the contractor is indeed in default of his obligations or has

breached the contract in any way. The Employer is, in fact, the sole judge of the contractor's perceived non-performance and any dispute about that issue, involving a contractor's claim that would justify his alleged non-performance will have to be pursued through the contract dispute mechanism. Unfortunately, it is increasingly common to find the Employer uses the demand as a means to provide income when other liquid funds are scarce and without any legitimate cause to call upon the bond. This may seem shocking to experienced contract professionals but following the recent global financial meltdown, developer-employers, especially in Dubai it seems, are lowering their standards and venturing into the 'dark-side' of financial management. For example developer entities such as Nakheel, Istithmar and Maydan have called in bonds that were strongly contested by the contractor as being inappropriately called upon for the project in question. All three developers are semi-government bodies in Dubai, and while Maydan may now be getting close to a settlement with its contractor, Arabtec (also a Dubai owned business) other contractors dealing with Nakheel and Istithmar are still pursuing the matter through the courts[44], which has been created specifically for dealing with the DP World and its then subsidiary companies such as Nakheel and Istithmar. The doctrine of good/bad faith does of course cover this situation and could, in theory be used by a contractor to stop the bank from paying the bond called upon by the employer, if the case could be heard in time. Once again though the correct procedure is important as the Dubai World Tribunal has ruled on more than one occasion against the application for a 'freezing order'[45] on the grounds that the contract (in the form of the wording of the bond itself)

specifically lays out the procedure for the calling of the bond and the employer had indeed followed the procedure. The Tribunal faced with the facts in front of it concluded that the bond should be paid as it was an ' unconditional, irrevocable guarantee. Albeit that the wording used in the ruling and the lengthy ' obiter dictum' about what would have happened ' if' a particular fact or word employed within the contract were different. A Dubai World Tribunal Judge, Sir John Chadwick[46], hearing case in Dubai and subject to Dubai and UAE Federal laws. Was under the jurisdiction set up by xxxxxxxxxxxx legislated position of the Dubai World tribunal to use common law principles in their rulings, commented that:" It is common ground that a guarantee in this form is to be treated as imposing a payment obligation on the issuing bank which is to be met on demand made by the beneficiary: subject only to the condition that the demand is accompanied by a written statement of the matters specified in the guarantee itself. The issuing bank is not required to investigate the truth or otherwise of that statement." And he referred to English case law to define the purpose of a demand guarantee citing *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563." Such a bond is, effectively, as valuable as a promissory note and is intended to effect the 'tempo' of parties obligations, in the sense that when an allegation of breach of contract is made (in good faith), the beneficiary can call the bond and receive its value pending resolution of the contractual disputes. He does not have to await the final determination of his rights before he receives some moneys." It must be noted that in the three cases relevant to this topic that have come before the DWT in Dubai in the first Bin Balaila

Baytur v Nakheel[47]the bond had already been paid so the DWT could not stop it. The second case[48]ruled upon the bond in question was an advance payment certificate that had been called upon despite considerable money having been certified to the contractor but not actually paid to him. The court ruled that the wording of the bond did not require any monies owed to be offset against the outstanding value of the bond and the bond could legitimately be called upon by the employer. The court added that the contractor was free to pursue the unpaid certificates through the court system in a separate action (DWT itself would of course preside. That follow on action is still to be heard for ruling[49]The third case, Al Shafer v Nakheel[50]was also concerning an advance payment bond and although the judge differentiated the case of Gammon & Billmoria from the case in question, as the wording on the bond was not as restrictive as in the Gammon case, and that the contractor had rightfully terminated the contract on the grounds of non-payment (Gammon had been terminated ' for convenience' by Nakheel) he nevertheless came to the same conclusion that the advance payment bond was in fact an on demand bond and required no ' off-setting' of monies owed to be considered when payment was demanded. However this ruling was not without a long and well considered obiter dictum about what would have happened had the bond been a ' performance bond' and had the employer, Nakheel, acted as he had and been proven to have acted in bad faith. The learned Judge then diverting into the realms of a more modern concept than ' Good Faith', that of "' Unconscionability", which he said had supplanted Good faith in the jurisdiction of Singapore[51]

[contrast with English laws]

There would, of course be severe penalties if the employer is eventually found to have called upon the bond in bad faith. However, that would most likely be of little satisfaction to a contractor who is, meanwhile, considerably out of pocket due to the issuing bank having seized any fund or property that had been pledged as security at the time of the issuance of the advance payment or performance bond. Because of the above, still ongoing cases, contractors would be strongly advised to negotiate with the employers, the wording of the bond and include certain, conditions precedent, to be satisfied, before the issuing bank is obliged to pay an on-demand bond to the employer.

4. 5 Assignment of benefit of subcontract

5 generally NOMINATED SUBCONTRACTORS

, unless a subcontractor has provided a collateral or direct warranty to the employer, or there exist some special circumstances that create a legal relationship between them, an employer will not have the right to pursue claims directly against a subcontractor.

8 commencement, delays and suspension

8. 1 commencement ---- MOU?

8. 3 notice of commencement

Many projects within the UAE have either been put on hold or scaled back considerably. It is not uncommon to find that a contractor has been issued a valid letter of acceptance of the Contractor's tender only to find the employer then delaying to issue the required contractual notice to commence work. Accordingly until such a notice is given no obligation for

payment will begin.[above from Law Update 2009, 214, 13]8. 4 Extension of Time for Completion (9. 3 gold book) -[see also notices and conditions precedent]In English law it is an implied term that an employer to a construction contract must not prevent or hinder the contractor from completing the contracted work. This is known, in English law, as " business efficacy"[52]and defined as " it goes without saying" that is was a contract term[53]Prevention and The UAE's Civil CodeIn English law the prevention principle applies when an employer causes a contractor from completing of time but has not awarded an EOT. The Contractor may prevent the deduction of LDs by applying to the courts claiming that the prevention principle does not allow the employer to profit from his own delays. LDs will not then be deducted until and unless the cause of the delay is established. The effect of this prevention principle is that if the employer's conduct, prevented or interfered with the contractor and so prevented him from completing the works by the contractual date for completion, without an appropriate provision in the contract to allow an award of an extension of time (EOT) to be awarded. Then time for completion would be said to be " at large". This subsequently renders any agreed contractual terms for LDs or Delay damages to be unenforceable. Without such an EOT mechanism the employer would be prevented from deducting the Liquidated Damages on the prevention principle. FIDIC does provide such a mechanism, however it is possible that overly restrictive application of conditions precedent if applied strictly and perhaps in bad faith, were to be used then it is arguable that the EOT mechanism is not able to function as intended and either ' constructive notice' will have been deemed to have been given or in the extreme that

time has become at large because of the failure of the mechanism. The UAE's Civil Code does not recognise this prevention principle in the way it operates in the UK. If the contractor has not completed by the due date and there are delay damages stated within the contract then the employer is entitled to deduct them in strict accordance with the contract even if he has failed to award a valid EOT. Any entitlement to an EOT that may be due to the contractor can still be perused after the LDs have been deducted. However if the employer could be proven to have acted in bad faith it is possible to prevent the deduction or have it restored. Notices for Claims of EOT and Conditions Precedent the clause 20. 1English law has considered and agreed albeit with certain exceptions in particular circumstances[English laws], that a condition precedent notice for the making of a claim for cost or time is acceptable in principle and FIDIC Clause 20(1) clearly provides the certainty required for the test devised by the House of Lords[54]. [I can expand upon this if needed]The UAE laws at first reading would also seem to agree with the English law agreement, in principle, with this notice mechanism. For example, The U. A. E Civil Code Article 246, clearly states that " the contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith" And implies a condition precedent for notices under Article 886(1). This article is concerned with Muqawala contracts, a category of contract that includes construction contracts, and it states that " if it appears ... it is necessary for the execution of the plan, ..., substantially to exceed the quantities on the itemized list, the contractor must immediately notify the employer thereof, ..., and if he does not do so he shall lose his right to recover the excess cost over and above

the value of the itemized list." The intent and import of the notice required under Article 886(1) is shown by the the next section which states[55]:"(2) If there is a gross² excess in the quantity required to implement the plan, the employer shall be entitled to withdraw from the contract and to suspend the execution, but provided that he must do so without delay and must pay the contractor the value of the works that he has completed, assessed in accordance with the conditions of the contract." The reasons for the 'immediate' notice then are clear, should the quantities involved greatly exceed that which he had intended to contract for and if the employer can be given sufficient warning, then he may withdraw from the contract and thereby mitigate his losses. The contractor who is not giving his notices in the stipulated time allowed could be in breach the contract and may therefore be considered as the party who performs in a bad faith.

Consequently, a notice too late under clause 20. 1 may cause the employer to suffer from losses and prevent him from mitigating that harm done to him. On the other hand, If the Employer is already aware of the delay, after all he may well have caused it himself by his own act or omission, and if he then rejected the claim and so failed to award an extension or time, thereby enabling him to deduct delay damages from the contractor, then would the employer not then be acting in good faith but indeed be acting in bad faith? Alternatively it may well be be obvious to the Engineer, there is a delay that falls under his risk, as he is also resident on the project and so he should also be aware day to day events on the site, that may cause a delay the import of which should be passed onto the employer? Or at least mention his concerns for delay within his regular monthly report to the Employer? Indeed the

regular monthly progress meetings are usually attended by Contractor, Engineer and the Employer and all progress, and by necessity delays, are discussed in detail. Should the Contractor not put the required notice in writing to the employer in the due time allowed is it fair to say that notice had not already been given at least verbally and in all probability recorded in the progress meeting minutes? However the above argument, which may be successful in the UAE would not currently work in the UK[56]where it has been decided that the notice had to emanate from the contractor making the claim and could not be construed from minutes recorded by a third party.

[contrast more with English laws]

So under there are perhaps several ways within the UAE with its concept of good/bad faith to undermine the condition precedent for a notice as set out under the FIDIC contract? Another avenue of challenge to the condition presented is under Article 318 and 319 of the Civil Code which provides that ' unjust enrichment' is unlawful. Depending upon the facts in any particular case it could be that the employer benefitting from a claim rejection for late notice could be term unjustified enrichment, even if a written notice were not given. Also the UAE Civil Code[57]stipulates that " the exercise of right shall be unlawful if, the interests desired are disproportionate to the harm that will be suffered by the other party". consequently if a contractor's claim time barred for failing to comply with the Clause 20. 1 notice provision such a rejection will cause financial loses to the contractor not only through the possible application of Delay Damages but also by incurring his own prolongation costs.

From the above it seems that time-bar notices under clause 20 (1) of FIDIC 1999 is accepted in principle both in the courts of England and UAE, But in both jurisdictions the condition precedent may be challenged and perhaps with slightly more optimism in the UAE. Indeed in other common law jurisdictions other than England, Australia, for example[58], the law is already developing such that the prevention principle may yet prevent the strict application of conditions precedent. [contrast fully with Aussie case law?]It seems then that the condition precedent stipulated in the clause 20. 1 will be ruled valid by the U. A. E court but perhaps only when the reason for the delay or the additional cost is not specifically due to Employer's own action or inaction then the formality of the Clause 20. 1 notice can be overlooked in the UAE law if the principle of good faith principle and unjust enrichment is argued successfully on the particular facts. [make less optimistic as I fly against conventional opinion here]

8. 5 Delays caused by authorities (9. 4 in gold book)

8. 7 delay damages

8. 8 suspension of work art 8xx

8. 9 Consequences of suspension

8. 11 prolonged suspension

10 employers taking over generally

11 Defect generally and especially decennial liability art 880

12 measurement and evaluation

quantities covered by Dubai law if not federal ..[check PERCENTAGE ALLOWED....]Omissions good faith and civil code ... not to be given to other contractors

13 Variations and adjustments

Changes in legislation

Changes in cost

Clause 13. 7 Changes in Laws

The risk for any changes to the local laws that may increase the project's cost or duration are addressed within this clause and the risk of such a change is placed firmly in the hands of the Employer. However It common practice, for developers and government bodies in UAE to amend this clause by adding the following words, or similar:"... which were not in the Employer's Representative's[59]opinion reasonably foreseeable..."[60]This now places the decision for any element of foreseeability of any law changes in the hands of the Red Book's Engineer (or Employer's representative in the above instance) and introduces doubt into the apportionment of risk[61]. See also notes on Clause 1. 13 above. 14 contract price.' The price is the price' except where the contract, law provides for changes of course. In recent years the chances of an employer delaying or defaulting on his obligation to make a certified payment is high. So likely in fact that certain developers have amended the clause regarding interest on late payments by deleting it. The contractor's right under FIDIC to suspend work for late payment is not affected by these changes but in practice rarely exercised. This is either

because the payment is made late but not too late, i. e within 21 days of the due date for payment, to trigger the suspension by reference to FIDIC Clause 16. 1 (Gold Book) or the contractor fears, in the current climate that he may be terminated and his performance bond called upon should he exercise this right[62]. (see Clause 4. 2 above re the performance security provisions)

Both actions are of course against the principle of Good faith but it can happen. During this period of downturn, the likelihood of. There are provisions in the FIDIC forms of contract which address such situations. For instance, there are provisions which allow a contractor to receive financing charges on those amounts outstanding from its employer. The contractor's right to financing interest does not take away its right to suspend work or terminate the contract pursuant to the conditions of the contract for non-payment of either the interim or final amount duly certified under the contract. Al Tamimi [Law Update 2009, 214, 13]In conjunction with the express terms of a contract, the Federal UAE Civil Code also provides certain remedies to contracting parties in times of financial crises. Under the Civil Code either party may suspend the performance of its obligation should the other party fails to carry out its side of the bargain. 14. 2 Advance payment Bond14. 8 Time for payment in particular 14. 8 delayed payment and interest

Payment and late payment Interest

It is a commonly held belief, in the UAE, that interest is ' harram' (forbidden by Islamic law), especially amongst employers who, although they may be muslim themselves, may not have a complete understanding of Sharia law, and this view is sometimes shared even amongst some lower court judges,

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and as such it is not uncommon to find that the clause for the payment of interest for late payment of the certificate under the FIDIC contract has been struck out or otherwise amended within the contract's PCC. This is of course contrary to UAE federal law and the more pragmatic, modern, interpretation of Sharia law. Any such clause amendment, if challenged in court, should be successful. Judge Abdul Aziz Fawdah has ruled that^[63]:" It is settled law in the shari'ah that delay in payment of money owed without lawful excuse amounts to an injustice. It is the settled practice of this court that a creditor will be entitled to compensation for the delay made by the debtor in payment of the debt, as from the time the claim is made, if the debt is of ascertained amount and due for payment..... the delay on the part of the debtor has prevented the creditor from having enjoyment of the money. In the present case, the [lower] court held that the application for delay interest amounted to an application for usurious interest. That was an error in the application of the law. It was a permissible claim". Judge Abdul Wahhab Abdoul, is also quoted as saying, albeit reluctantly, or so it would seem, that interest is a valid head of claim and payable under UAE law. This ruling was in a federal case related to the banking industry but is no less applicable, to construction, industry:^[64]" The basic rule in the Islamic shari'ah is that interest is not permitted, whether compound or simple, accruing in consideration of a deferment granted to the debtor for payment of a debt. However, necessity has dictated that simple interest be allowed in banking transactions, so long as that necessity remains in existence in the country, and until it is removed by the creation of an economic alternative which will take the place of current banks. It is

settled law in the shari'ah that a delay in satisfying an obligation that is due, without any excuse for the delay, amounts to an injustice. Interest due on late payment of a debt is akin to compensation, which is consistent with the law and the Islamic shari'ah." In regards to the rate of interest that may be payable, we can refer to a case heard by the Dubai Court of Cassation. In this instance the Court ruled that:".. if the debtor is late in making payment, the creditor may charge interest as compensation for loss and delay from the due date of the debt at either the rate agreed in the written contract or at the market rate prevailing at the time of the transaction." [65] 15 Termination by employer 16 suspension and termination by contractor 17 risk and responsibility 17. 6 limit of liability art 878 The UAE Courts of Cassation and Union Supreme Court have on many occasions under articles 282 and 283 of the Civil Code, ruled that any contractor who causes an event resulting in harm to another, whether it was done directly or indirectly, will oblige that contractor to make good the damage. The English tort principle for causation and intervening acts [cite some English case law to demonstrate the principle and compare or differentiate it from the case below] in the ascertainment of damages is dealt with in UAE court judgements and it has been ruled that an intervening act may limit or avoid the liability:" The harm may be direct, if there is a link between the harmful act and the occurrence of the harm, such as the link between the instrument of destruction and the property destroyed. The same applies to any act done by the wrongdoer without any other act intervening, from which the damage results. The damage will be by indirect causation if there intervenes between it and the doer thereof another act out of which the damage arises,

or something that is a cause of the damage, but if the original act did not of itself cause the damage save indirectly. If damage occurs by direct causation then the doer must unconditionally make it good, whether the doer is acting wrongfully or not. If the act is by indirect causation, then it is a condition of the doer being liable for it that he should have been guilty of a wrongdoing, that is to say that he should not have had the right to do the act out of which the damage arose, or he did it deliberately or with the intention of causing damage as opposed to the intention of doing the act, and the act must have led causatively to the damage." [66] Should however events occur concurrently and the effects combine to cause damage, and one of them was a direct act and the other an indirect act, then the basic rule is that compensation or repair will be payable by the doer of the direct act. The court will decide which act was the cause of the damage and direct accordingly. [67]

Design liability, Decennial liability and Defects liability.

Like many 'civil law' countries the UAE imposes a ten year unlimited liability for major defects affecting the integrity or safety of the structure. This is known as 'decennial liability'. This period of the liability commences at the date the Employer takes over the works. Both the contractor who constructs the structure and the architect who designs it [68], share in the decennial liability for both design and quality (poor workmanship and/or materials) of the work equally. Should one cease of the parties cease to be a legal entity, then the other would assume the full liability for both design and quality of construction." The contractor shall be liable for any harm or loss resulting from his act or work product whether by his wrongful act or default or not,

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but such liability shall be negated if it arises from an event that could not have been guarded against"[69].

Civil Code Article 880:

"(1) If the subject matter of the contract of ' muqwala' is the erection of buildings or other fixed structures the plans for which have been made by an architect with the intention that the contractor shall carry them out under his supervision, they shall be jointly liable to pay compensation to the employer for any total or partial destruction occurring within ten years to the buildings they have constructed""(2) The liability to pay compensation as foresaid shall endure notwithstanding that the defect or collapse arises out of a fault in the land itself or that the employer consented to the erection of defective buildings or installations". "(3) The period of ten years shall commence as from the time that delivery of the work is taken". An architect may escape decennial liability, for poor workmanship only, if he does not actually supervise the construction itself. However another appointed consultant who does supervise the construction would then take on that liability in his stead. This situation is contrasted by FIDIC that would only hold the Engineer liable if he was negligent, Article 880 imposes a strict liability. An architect cannot escape his decennial liability for any design faults whether he supervises construction or not." If the work of the architect is restricted to making the plans and excludes supervision of the carrying out, heshall be liable only for defects in the plans." [70] As a matter of public policy the Contractor and architect cannot negotiate any clause within their contracts that would reduce or limit their liability [71] It is perhaps worth noting that the ' Dubai Municipality Contract' which has a strong

resemblance to FIDIC as it is based heavily upon it, includes a decennial liability clause, which states that "the contractor shall be liable for any defects that become apparent during the period of ten years from the issue of the Taking-Over Certificate for the parts of the work in question. The approval of the Engineer shall not in any way absolve or relieve the contractor from any such obligation, responsibility or liability." This liability is therefore very much stricter than the decennial liability of the UAE Civil Code. The Code refers to 'major defects affecting stability or safety' where the Dubai Municipality clause would apply to any defect whether it is major or otherwise.

In event of amended conditions to exclude profit:

In the case of USC 435 and 516 of Judicial year 21 it was reported that a lower court had made an award in favour of the subcontractor on the basis that he had a reasonable expectation of profit, and then the contractor had by terminating the subcontract had deprived him of the opportunity to make it. The USC ruling confirmed that this was the correct approach." Where it is probable that a profit would have been made, then the loss of that opportunity amounts to a loss that has in fact materialised. In calculating the compensation for missed earnings, account will be taken of what the aggrieved party expected to earn out of the contract, provided that such expectation was based on reasonable grounds[72]. the court Union Supreme court, 435 and 516/Judicial Year 21The Right to Suspend Work Clause 14. 8 9 FIDIC Red BookTo reduce the contractors' risk in regard to payment, The FIDIC contract provides for remedies should the employer fail to make payment of the certificate strictly in accordance with the timescales

stipulated within the contract. The remedies include the right to recover interest or financing charges on any late payments. This topic is covered separately herein and it also allows for of course the right to suspend the works or part of the works. In the UAE, a contractual right to suspend work for non-payment is also allowed by application of Article 247 of the civil code namely:

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" In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refrain from performance of his obligation if the other contracting party does not perform that which he is obliged to do"[73].

Also Article 414, states that:

" Any person who is obliged to perform a thing may refrain from so doing so long as the obligor has not discharged an obligation of his arising by reason of an obligation of the obligee and connected with it[74]".

Remedy of specific performance

Should a party to a contract not do what they are contracted to do under the agreement the other party may, after giving proper notice, require the contract be performed or cancelled[75]. The court may then require that the defaulting party perform the contract, as specified, immediately or it may defer the order for performance to specified date depending upon the circumstances. The court may also order that the contract be cancelled and compensation paid if appropriate[76]. The Dubai Court of Cassation[77]has ruled that by the application of Articles 381, 872, 873/2, 875, 877, 878, 894 <https://assignbuster.com/employment-law-companies-law-commercial-law-law-contract-essay/>

and 895 of Federal Law No. 5/1985 taken collectively and considered in line with the facts that if a contractor has violated the execution of the assigned work under the contract or his performance was contrary to the agreed conditions and specifications, then if a correction was impossible the employer would be entitled to request rescission of the contract,. If a correction was possible then he shall be allowed to require that the contractor to fix it within a reasonable period. Then should the period lapse without the contractor having implemented the correction, then the employer shall have the right to request the judge to rescind the contract or allow him to hire another contractor to finish the job at the expense of the first contractor. While the above case refers to the contractor's default it would apply equally to any employer's default.

Termination mechanism within FIDIC

The conditions of the 1999 FIDIC standard form entitle an employer to terminate a contract at any time, for lack of performance or for the employer's own convenience. For a termination for convenience there is no need for the employer to give reasons to the contractor is sufficient that a proper notice, as set out within the contract, is given. In recent years many an employer has indeed terminated a contract which is under construction for reasons of financial difficulties. Al Timimi strongly advises an employer to be cautious of invoking a right to terminate at will in order, with the intention to to engage other contractor to continue with the works at perhaps a more favourable cost that was originally contracted for. To do so on that basis would be construed as bad faith. And he continues; should the employer choose to terminate for persistent lack of progress or other breaches on the

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part of the contractor he is on very safe ground but if it were proven that he had a eye of saving money by using a cheaper contractor then but may face difficulties if challenged in the courts.

Completion – taking over

It has been seen recently that on occasion the employer is reluctant to take over the works after the contractor has substantially completed it in accordance wit the contract. This may be to avoid certification of monies, to retain various bonds or to try and avoid liability for the works itself, however the provisions of article 884 of the civil code should be noted: The employer is obliged to take delivery[78]of the work done when the contractor has completed it and placed it at his disposal. If the employer refuses without lawful reason and despite being called to do so by official notice to accept and take over the works and it is subsequently lost or damaged in the hands of the contractor without the contractor’s wrongdoing or default, the contractor will not be liable for this damage.[79]

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In the arena of construction law within the UAE, it can often be seen that that common law or principles are often referred to and more often than not erroneously relied upon.

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Liquidated Delay Damages - Clause 8. 7 of the 1999 FIDIC Red Book
ConditionsThe agreed upon completion date or contract duration of a project is a fundamental term of the construction contract. To ensure that the
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contract duration is adhered to, the contracting parties will often agree in advance to a formula that will allow Delay Damages to be calculated should the contractor fail, without acceptable cause, to complete the works on time or to a new agreed date for completion after an Extension of Time Award has been properly made for any ' employer delay'. This formula will calculate the amount of compensation that a contractor is obliged to pay to his employer in the event of the Contractor's Culpable delay and it is intended to offset any anticipated consequential cost that the employer may suffer due to the delay. This is often referred to as Liquidated damages or LDs in the UK but is properly known as Delay Damages under FIDIC terms. In practice, this compensation formula is usually set at a daily rate, for example, every day or part day of delay beyond the agreed date for completion would incur a charge of say, AED 100, 000 per day. And the standard FIDIC limits to a maximum amount of damages that can be charged by the employer to 10% of the original contract price. Under English jurisdiction the sum calculated at the time of tender, or date of subsequent final contract negotiation, the delay need not be a factually correct damage in all the circumstances at the time the damages were applied or incurred but it must be a genuine pre-estimate of the likely cost of the damage incurred. This process provides a certainty of risk for both parties to a contract enabling them to accurately assess the risk and cost of project delay[80]. If it is established that the Delay damage stated was indeed a genuine pre-estimate that the English courts will not interfere with its deduction even if subsequently the actual damage is very different. This is due to the general presumption that parties are free to contract on their own terms and if the estimate of damage was

genuine then the figure did not constitute a penalty, which is not acceptable in English law[81]. However the situation is different in the UAE as despite the fact that the damages may be fixed and agreed by both parties[82]and indeed they will be a genuine presentment of the likely damage the courts can, upon application from either of the parties, adjust the Delay Damage up or down according to the proven actual cost of the delay[83]. The Federal Supreme Court also ruled[84]that the Civil Transactions Act[85]provides that the parties may previously determine the value of delay damages by stipulating the level of delay damage within the contract agreement. However the judge may subsequently amend, in all cases, upon a request of one party, this agreed delay damage to make the amount equivalent to the actual damage, and any other agreement that attempts to bar the court's action shall be void. It is assumed that the pre-agreed value of delay damages is equal to the damage caused. The debtor must then prove that the agreed estimation of the value of delay damages is exaggerated, and in this case the judge may then reduce the estimation in proportion to the damage caused to the creditor.[86]DISSCONTEC HERE>>>>> WHERE DOES THIS GO???????

- However, before attempting to suspend work, through the contract provisions a contractor should take into consideration and address any issues that the employer may have raised as his justifications for non-payment. This is so that the contractor is not then later judged to have acted in bad faith[87]. It is to be noted that the Dubai Court of Cassation[88]decided that the requirements of ' good faith' under Article 246 <https://assignbuster.com/employment-law-companies-law-commercial-law-law-contract-essay/>

is applicable to the right to suspend performance. Indeed it was ruled that " a party cannot invoke the right to suspend work if the other party has substantially discharged its part of the obligations leaving only a minor part of it unperformed". Therefore, if the employer had given reasons for his non-payment it may be considered that he had in fact fulfilled his obligations. The Dubai Court of Cassation case also referred to Article 243 (2) of the Civil Code, to justify its ruling which provides that:" with regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which the contract obliges him to do." Therefore for a court to order that a contract be performed or terminated, the claimant seeking the restitution cannot have neglected his own obligations under the contract and the other party's breach must be due to his own neglect.[89]

Force Majeure

Article 249:

" If exceptional events of a public¹ nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes onerous 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 interests⁴ of each party, to reduce the onerous obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void."[90]The unamended FIDIC contract[91]when dealing with suspension, may provide for a contractor's entitlement to receive an extension of time and payment in respect of additional costs, but the UAE Civil Code does not expressly provide that if caused by a suspension or any reduction in the rate of work

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resulting from an employers default.. However on the principle of the requirements of good faith, it is arguable that the employer would not be able to recover any liquidated delay damages from the contractor for delays resulting from the contractor's justified suspension because of non- payment. The contractor should then also be able recover his additional costs incurred resulting from the suspension by way of damages.