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LLM Construction Law and Practice

UAE Construction Law: A UK Perspective on Payment and Liabilities

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10 September 2010

Abstract

The credit crunch was a turning point in UAE that marked the end of an era of great cash flow in construction and the beginning of an era of payments collection problem.

This research examines some aspects of UAE construction law in comparison with UK construction law, the aspects are uncustomary liabilities that do not exist in the English law and the lack of a statutory payment mechanism as opposed to UK's **Housing Grants Construction and Regeneration Act 1996** and its amendment by the **Local Democracy, Economic Development and Construction Act 2009**.

The liabilities that were found to be uncustomary in UAE are Penalties, uncertainty of Liquidated Damages, Decennial Liability and quantity risk in re-measured contracts. The research examined these liabilities and tried to propose solutions to reduce its risk by reference to the English law.

The research then examined the payment provisions under UAE Civil Code and established the need for a statutory payment mechanism similar to the one in UK. Subsequently, the UK Acts were examined and a proposed act to be adopted in UAE based thereupon was recommended.

The research conclusion summarized the problems and recommendations and advised of the need to develop the less mature UAE construction law by reference to the deep-rooted English law.

Dedication

I would like to dedicate this dissertation to my lovely patient wife, *Dina* who supported me during the long hours of research and to my new born baby girl *Malak* who brightened our life just a couple of months prior to the submission date of the dissertation.

I also would like to thank my supervisor Mr. *Brodie McAdam* for all the personal and technical support he extended to me during my dissertation journey.

Finally, I would like to thank the *University of Salford* for turning me into a researcher by virtue of this wonderful course.

Mohamed Shafik

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Definitions/Abbreviations

| | | |
|--------------------|---|---|
| UAE | : | United Arab Emirates. |
| FIDIC | : | Federation Internationale Des Ingenieurs-Conseils. |
| FIDIC 87 | : | Conditions of Contract for Works of Civil Engineering Construction, Furth Edition 1987 reprinted 1992. |
| FIDIC 99 | : | Conditions of Contract for Construction, First Edition 1999. |
| Civil Code | : | UAE Federal Law No. 5/1985 amended by Federal Law No.1/1987. |
| Scheme | : | The Scheme of Construction Contracts or the Scheme of UAE Act (as the context requires.) |
| The Act | : | The Housing Grants Construction and Regeneration Act 1996. |
| The New Act: | | The Local Democracy, Economic Development and Construction Act 2009. |
| The Acts | : | The Act and the New Act collectively. |
| UAE Act | : | The proposed Act to be adopted in UAE based on the Acts. |
| Common law: | | The English law. |
| Muqawala | : | Arabic word for ' <i>doing a service</i> ' generally, but mostly used for ' <i>doing construction</i> ' |
| Muqawala Contract: | | Contract to perform Construction (or a service generally) in UAE. |

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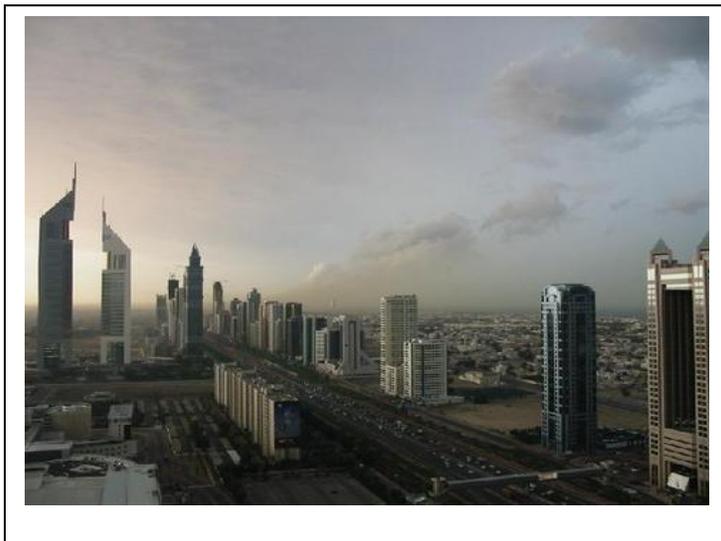
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Introduction

The United Arab Emirates (hereinafter 'UAE') is currently one of the most active construction areas in the world. In 2006 many reports stated that Dubai alone has around 25% of the world cranes operating in its construction sites. Whilst the accuracy of this percentage is not confirmed, it is indubitable that UAE (and Dubai specifically) is one of the busiest construction places in the World. The unprecedented construction development can be illustrated by the following photos (<http://www.dubai-architecture.info/DUB-GAL1.htm>)



Dubai in 1990



Same Street in 2003



Same Street in 2008

At this time, UAE became the most desired destination for the construction professionals.¹ Wages and project profits started hitting records; the race began in UAE for achieving unrivaled luxurious projects, such as Burj Khalifa which is said to be the tallest tower in the world. Cost was not a concern to developers, instead achieving unique structures in the shortest time to generate revenue, was.

As a logical result, construction professionals started flowing to UAE from all around the world, it was hard to resist the temptation of getting very high remuneration and getting involved in some of the world's unique structures, especially in a tax free environment, which was more than tempting for expatriates from the heavily taxed society of Europe and more specifically UK.

Considering that the contract administration expertise is somehow lacking in UAE, it was only logical to seek this profession from abroad, more particularly from UK. As a result, the construction industry was filled in no time with contract administrators from UK administering contracts in UAE, but how much were they aware of the local

¹ Pranay Gupte 2008 'It Turns Out, Mecca Is in the Middle East'
<http://www.portfolio.com/executives/features/2008/03/31/Dubais-Gold-Rush> accessed on 23 July 2010.

law and customs, this was a big question mark. The UK professionals came with a heavy backup of common law and legal principles such as *Precedents* and *Contra Proferentem*, and started administering the UAE contracts on these bases.

However, no much concern was directed towards conditions of contract in UAE², contracts were drafted as a mere formality and not a necessity. At start, this conflict did not float to surface because construction was quite a smooth operation, payments were being made on time, the major focus was to get the job done in the highest quality and fastest time, there was no room for contractual disputes, all being solved by negotiation. Then the credit crunch occurred, and this picture was more or less reversed. Payment stopped flowing, projects were put on hold or arbitrary terminated, disputes started increasing, contractors were faced with liabilities that were somehow strange and uncustomary back home. Suddenly, contracts administrators reverted back to their contracts, only to face how weak their contracts were and how little they do know about the UAE law.³

Prolead⁴ stated that the size of projects that were put on hold during 2008 and January 2009 are in the order of \$400bn, moreover the Association of Consulting Engineers (ACE)⁵ estimated that UK engineers are owed a total of £400m by clients in the Middle East. This reflects how payment collection is a problem in UAE due to the lack of statutory payment mechanism to overcome the shortness of contracts and law.

In addition to the hardship that was faced for payment collection, professionals were faced with uncustomary liabilities that they are not used to back home. For instance, the ten year long liability called Decennial Liability, the adaptation of penalties unlike

² Norton Rose 'Boom and recovery: Understanding the Middle East construction market' (Report 2009)

http://www.nortonrose.com/knowledge/publications/2009/pub21430.aspx?lang=en-gb&page=all#publication_page_090608120822 accessed on 15 July 2010

³ CW Guest Columnist, 2008, 'LEGAL OPINION: A huge thirst for knowledge', ConstructionWeekonline.com,

<http://www.constructionweekonline.com/article-3955-legal-opinion-a-huge-thirst-for-knowledge> accessed on 15 July 2010

⁴ Prolead 'Insights-United Arab Emirates, an investigation into the current and future state of the construction industry'(Report) (2009) http://www.projectsandleads.com/proscope/report_insights_uae_const_jan09.html accessed on 15 July 2010

⁵ Richard Spencer July 2010, 'Mandelson called in to help recoup £400m Dubai debt'

<http://www.telegraph.co.uk/finance/newsbysector/constructionandproperty/5324191> accessed on 15 July 2010

UK which only upholds a liquidated damages if it was a genuine pre-estimate of the damages, the uncertainty of agreed liquidated damages amount and the risk contractors bear for any excess quantities in a re-measured contract. All these liabilities may come as a shock for contract professionals coming from a different environment and unwary about their existence.

Consequently, this research will approach UAE construction law, and try to examine the existing uncustomary liabilities and payment mechanism available under the UAE law and how to enhance them, all in comparison with UK construction law.

The Aim

To determine how the payment and uncustomary liabilities under UAE construction law can be enhanced by reference to UK construction law.

The Objectives

The following are the main objectives of the research:-

1. Examination of UAE judicial system and construction law.
2. Determination of uncustomary liabilities under UAE law.
3. Examination of how to enhance uncustomary liabilities under UAE law in comparison to UK Law.
4. Examination of payment provisions under UAE law.
5. Examination of the Act and its amendment by the New Act.
6. Assessing what can be incorporated from the Act and the New Act for introducing legislation similar to the Act of UK.

The Methodology

The research will be a comparative research; the first step will be to determine the existing construction law in UAE (doctrinal research). This will be followed by assessing the problems affecting this law and highlighting its flaws in comparison to the English law. Finally, the research will propose changes to the law (law reform).⁶

The primary source for the English law will be case laws, legislations and secondary sources such as books, journals, etc. Whilst for UAE no much primary sources such as case laws or legislation commentaries are available and the focus will be on secondary sources such as journals, Internet articles, and a specific focus on two books published in Egypt, both discussing the Egyptian Law, which is the source of UAE law.

The first book is '*Explanation of Provisions of Muqawala Contract*'⁷ by Dr. Mohamed Labib Shanab, the word '*Muqawala*' which is used in the book title and will be used throughout the research, is the local term for construction operation, and contracts professionals working in UAE are advised to be aware of it.

The second book is '*the Muqawala Contract in the Egyptian legislation and the comparative*'⁸ by Dr. Kadry Abd Elfatah Elshahawy, and it also discusses the Egyptian Law with a brief comparison with neighboring laws of Iraq, Syria and Lebanon, but unfortunately not UAE.

The research will be split into four chapters as follows:-

Chapter One will briefly introduce the UAE judicial system and the sources of construction law.

⁶ McConville, M., and Hong Chui, W., '*Research Methods for Law*' (Edinburgh: Edinburgh University Press, 2007) p 20

⁷ Mohamed Labib Shanab, '*Explanation of Provisions of Muqawala Contract*' (2nd edn Monshaat El Maaref, Alexandria 2008)

⁸ Kadry Abd Elfatah Elshahawy, '*Muqawala Contract in the Egyptian legislation and the comparative*' (Monshaat El Maaref, Alexandria 2004)

Chapter Two will examine the uncustomary liabilities in UAE and come up with recommendations for its enhancement.

Chapter Three will discuss the payment provisions under UAE law, analyze the lack of statutory payment mechanism and will discuss how UAE can implement a payment mechanism similar to the one provided by the Act.

Chapter Four will introduce a proposal of the UAE Act with commentaries.

Finally, the research will end by a conclusion and recommendations.

Chapter 1

UAE Construction Law

Introduction

Construction Law is not a specific branch of law like Criminal Law for instance, instead it is as defined by Wikipedia '*the body of law that deals with all matters relating to the construction process*'⁹. In general it refers to the aspects of law which deals with the obligations of the participants in the construction industry.

This area is somehow ambiguous in UAE, with not enough information or literatures and expatriates working in the area assuming that the same construction law of their countries applies in UAE, as Richard Harding said:

It has been apparent that there is a huge thirst for knowledge in relation to local construction law in the Gulf, and it is apparent that this demand had not been satisfied by the commercial sector. The industry is not interested in what has been decided by the High Court in London, or the latest developments in international arbitration.

In the Gulf there is a stark deficiency in information and understanding in relation to local construction law. Worse, there is widespread misinformation and misunderstanding based on the assumption that '*things must be pretty much like back home.*' No one in the Gulf had heard of phrases such as 'time at large' or 'time of the essence' until English construction professionals arrived.¹⁰

⁹ http://en.wikipedia.org/wiki/Construction_Law

¹⁰ CW Guest Columnist, 2008, 'LEGAL OPINION: A huge thirst for knowledge', ConstructionWeekonline.com, http://www.constructionweekonline.com/article-3955-legal_opinion_a_huge_thirst_for_knowledge accessed on 15 July 2010

UAE Judicial System¹¹

The United Arab Emirates, which comprises seven emirates, namely Dubai, Abu Dhabi, Sharjah, Fujairah, Ajman, Umm Al Quwain and Ras Al Khaimah, was formed in 1971 and therefore has a short legal history. Its judicial system is based on the constitution that determines all federal laws and the creation of local laws. Whilst it is stated in the constitution that Islamic Law (Sharia in Arabic) shall be '*main source of legislation in the union*¹²', practically it is only applicable for personal matters such as marriage, divorce, etc and it is not applied to matters with non Muslims.

Following the constitution there is the Civil Law which was based on the Egyptian Law which in turn was based on the French Law (The Napoleonic Code.) This comprises both federal law (law applied generally to all emirates) and local law (pertaining to a specific emirate), both laws apply to parties of the construction industry, but in case of conflict the federal laws prevails.

Types of Courts¹³

Courts are divided into three stages of litigation as follows:

First Instance

The court of first instance is the first stage in judicial process. The court of first instance is the process which deals with the judiciary in order to claim the right or to obtain one of the services performed by the court regardless of the type of right or service claimed.

¹¹ Al Tamimi, *the framework for litigation in the United Arab Emirates* <http://www.tamimi.com/Legal-Brochures.aspx> P1

¹² UAE Constitution, Article 7

¹³ Dubaicity, 'Dubai Courts' <http://www.dubaicity.com/government-departments/dubai-court.htm> accessed on 7 September 2010

The Court of Appeal

The court of appeal is the second stage in the judicial process. This stage resorts the judicial process to contest the decisions of the court of First Instance through filing an appeal with the Court of Appeal.

The Court of Cassation

The Court of Cassation is the third stage in the judicial process to which resort those who challenge the decision of the Court of Appeal by filing a further appeal against the judgment of the court of appeal. However, the value of the claim must be in excess of 200,000 Dirham or is undetermined at the time of filing the appeal.

Precedent Doctrine

The precedent¹⁴ is an English law doctrine under which the previous decision of a court is treated as an authority for similar cases, this follows the English legal maxim of *stare decisis* (Latin for, to stand by things decided), in which a previous decision of a court will be binding on the same and lower courts. Thus a decision of Court of Appeal will be binding on the same court and the Court of First Instance, unless a party was able to prove either the dissimilarity of the two cases, or that the previous case was wrongly decided. These precedents are compiled and published for the lawyers use and for public awareness, which can help parties to predict the outcome of a case.

This principle is not applied in civil law and by virtue not applied in UAE¹⁵, Whilst local courts will consider the previous judgments, however they are not compelled to do so as in UK, each judge is free to interpret the law as he sees suitable and might use the previous judgment for guidance only, and if he opted to use it partially or

¹⁴ Wikipedia <http://en.wikipedia.org/wiki/Precedent> accessed on 25 August 2010

¹⁵ Tamimi (n10) 1-2

even neglect it entirely, this will not render his judgment unenforceable. This creates an atmosphere of uncertainty towards the outcome of any case, adding to this the non availability of case reporting in UAE, which is treated as confidential matter and was one of the hurdles of preparing this research. Contractors are left practically in the dark with a complete ignorance of how the court can react towards each situation. This problem is currently being rectified by the Ministry of Justice of UAE, which started publishing court judgments on their website¹⁶, however to protect confidentiality, parties' names are kept anonymous.

Whilst, it is not possible to propose a radical change to a civil law system to adopt the precedent principle, but it is still recommended to try and enhance the people awareness of the reaction of judges towards different situations, whether in the form of regularly published judgments or more articles and publications simplifying the UAE law.

Construction Law in UAE¹⁷

The construction industry in UAE does not have a dedicated law, instead some provisions of the existing laws are relevant to construction, viz:-

1. Articles 872 to 896 of the UAE Federal Law No. 5 of 1985 amended by Federal Law No.1 of 1987 (the 'Civil Code') related to construction works, as well as general maxims and principles set out in the same law, form the basis of the legal framework relating to construction.
2. The provision of the UAE Commercial Transactions Law No. 18 of 1993, (the 'CTL') would also apply to the extent that the parties to a construction contract

¹⁶ United Arab Emirates-Ministry of Justice <http://www.elaws.gov.ae/EnLegislations.aspx> accessed on 17 July 2010

¹⁷ Al Tamimi, 'UAE Construction Law and Dispute Resolution' <http://www.tamimi.com/Legal-Brochures.aspx> accessed on 10 August 2010

can be defined as traders carrying out commercial business in accordance with Articles 6 and 11 of the CTL.

3. Articles 203 to 219 of the Civil Procedure Law (Law No. 11 of 1992) (the 'CPL') relating to Arbitration and appointment of arbitrators as well as authentication of arbitral awards.

The most relevant above laws to construction "*Muqawala*" is the Civil Code which contains dedicated provisions for a '*Muqawala*' contract and will be the focus of the research.

Relation between Egyptian and UAE Laws

As explained in the introduction, the reference literatures to UAE are two books discussing the Egyptian law and not the UAE law. The reason for this is the lack of books discussing the UAE law itself and that is the main reason the research will depend on the origin of UAE law (and all G.C.C countries' law) which is Egyptian Law. This fact was clearly stated by various legal sources.

For a starter, the Society of Construction Law-Gulf stated in their home page that their honorary president Mr. *Mohamed Labib Shanab* is the author of the only academic text book on construction law in the Middle East which is '*Explanation of Provisions of Muqawala Contract*'.¹⁸ Moreover, the renowned law firm *Tamimi* stated that "*the UAE legal system has been influenced to a large extent by the Egyptian legal system...*"¹⁹, also *Adam Webster* stated that "*The legal systems of the Middle East are founded upon civil law principles (most heavily influenced by Egyptian law, which is itself based on the Napoleonic Code)*".²⁰ Confirming the same view, *Sabina Cerimagic* stated "*The UAE's law system is*

¹⁸ Society of Construction Law-Gulf www.scl-uae.org accessed on 1 July 2010

¹⁹ *Tamimi* (n10) 1

²⁰ Adam Webster, "*GCC in catch-22 over FIDIC forms*" <<http://cmguide.org/archives/2031>> accessed on 28 July 2010.

*based on the Egyptian law system, which in turn is French based"*²¹. Finally, Dr Hussam Talhouni, director of Dubai International Arbitration Centre (DIAC) stated "*Our old law was based on Egyptian law, but we're looking at the United Nations model of arbitration law now, so that the final laws meet with international standards.*"²²

Accordingly, with the absence of books discussing UAE law, the Egyptian Law is a very relevant resource to base the research on.

²¹ Sabina Cerimagic, "The effects of Islamic law on business practices" (2010) < <http://www.emeraldinsight.com/journals.htm?issn=1753-7983&volume=3&issue=1&articleid=1839533&show=html>> accessed on 28 July 2010

²² Conrad Egbert, "Keeping parties out of the courts" (May 2007) < <http://www.arabianbusiness.com/property/article/13065-keeping-parties-out-of-the-courts>> accessed on July 2010

Chapter 2

Uncustomary Liabilities

Introduction

This chapter will discuss the various uncustomary liabilities that constitute a unique feature of UAE law when compared to UK law. The focus will not be on each and every liability, instead only on liabilities that are not present in common law such as the acceptance of penalty clauses and their uncertainty, Decennial Liability and the inherent risk in re-measured contracts.

Criteria for determining uncustomary liabilities

There is no hard and fast rule in defining what constitutes uncustomary liability under a certain law, but the job is easier if it is benchmarked to another law, in this case the benchmark is the English law.

The research examined all the contractors' liabilities existing under the Civil Code in Article 871-896 pertaining to a Muqawala Contract, which are:-

1. In case the contractor is supplying material he is liable to provide material of good quality²³, and in case the employer is supplying the material, contractor is liable to provide work of good workmanship²⁴

This liability exists in the English law, as per **the Supply of Goods and Services Act 1982 (as amended)** which states in s 4(2) that the Goods supplied should be of a '*satisfactory quality*'. In fact in other cases a higher liability of fitness for purpose is implied as per ss 4(4) and (5) which specifies that if the recipient of the goods makes known to the supplier the purpose for which the goods are supplied, then a term is implied that the goods shall be '*reasonably fit for that purpose*', an exception to this implied duty is specified in s 4(6) that if the recipient does not rely on the skill or judgment of the supplier no fitness for purpose duty will be implied.

Accordingly, this Article did not impose any uncustomary liability to the one imposed under the English law; in fact it might be even a softer liability since it did not impose any fitness for purpose liability.

2. Contractor must perform work in accordance with conditions of contract. If work can be rectified the contractor is allowed to rectify it, but if it cannot be rectified the employer can assign it to another contractor on the expense of the existing contractor²⁵.

This liability exists under English law which in case of non-rectifiable defects, the court may allow the employer to determine the contractor's employment. This view was reflected in *Sutcliffe v Thackrah*²⁶ where Judge Stabb stated:

[the] ... admission that in May and June the quality of work was deteriorating and the number of defects multiplying ... all point to the plaintiff's expressed view that the Contractor had neither the ability, competence or the will ... to complete the work in the manner required by the contract.

²³ Civil Code-Article 875-1

²⁴ Civil Code-Article 875-2

²⁵ Civil Code-Article 877

²⁶ [1974] AC 727; 1 All ER 859; 2 WLR 295 (HL)

Accordingly, I find that the plaintiff was justified in determining the contract

Accordingly, this liability cannot be considered uncustomary to the English law.

3. Contractor is liable for any loss or damage resulting from his act or work²⁷.

This is a normal damages provision and it exists in the English law, as defined by Wikipedia '*In law, damages is an award of money to be paid to a person as compensation for loss or injury*'²⁸. Accordingly, it is not an uncustomary liability.²⁹

4. Contractor and Engineer are jointly liable for ten years for any defects threatening safety of building (the Decennial Liability.)³⁰

There is no match in English law for this ten year long liability imposed jointly on contractors and engineers, as stated by *Al Tamimi*:

The 'no fault' concept of decennial liability contained in the Civil Code is somewhat onerous for supervising architects and contractors when compared with many common law jurisdictions, where liability will generally only attach to architects and contractors if they have failed to perform their professional obligations in accordance with the requisite standards of professional skill and care.³¹

Moreover, *Charles Lilley* confirmed contractors' concern about this liability:

The most often discussed Muqawala provisions, and the ones which cause most concern to contractors and professional

²⁷ Civil Code-Article 878

²⁸Wikipedia http://en.wikipedia.org/wiki/General_damages#General_damages accessed on 2 September 2010

²⁹ But see Liquidates Damages in Page 18 below

³⁰ Civil Code-Articles 880-883

³¹ Al Tamimi & Co 'Decennial Liability and Latent Defects Contractors' and Developers' Liability in Dubai' <http://altamimi.newsweaver.ie/Newsletter/ok2y0onmugl19l1lmamxc9> accessed on 2 September 2010

consultants new to the region, relate to what is widely known as “decennial liability”.³²

He further declared that this liability has no match in English law: *‘This wording will be unfamiliar to contractors/consultants new to the region as it does not feature in UK or international standard forms of construction and engineering contract.’*³³

Accordingly, the Decennial Liability was selected as an uncustomary liability to be examined under this research.

5. Contractor is liable for any excess in quantities in case of a re-measured contract³⁴

The liability of a contractor towards the excess quantities under a re-measured contract does not have any match under the English law, and hence the selection of this liability as an uncustomary liability was a straight forward exercise.

Accordingly, the selected uncustomary liabilities under Muqawala provisions of the Civil Code are the Decennial Liability and Re-measured contracts. Although the research could have focused on these two liabilities only, since they satisfied the selection criteria, however there is a distinct uncustomary liability that exists in the Civil Code but outside the scope of the Muqawala Articles 871-896 and it is a very important liability that could not be neglected, namely Liquidates Damages.

It is not clear why such important liability in the construction industry are not included or even referred to in the articles dedicated to Muqawala. Instead, Liquidates Damages are covered by Article 390 which deals with compensations.

What is uncustomary about Liquidates Damages in UAE is twofold:-

³² Charles Lilley 2010 ‘Contracts of muqawala and decennial liability: a middle eastern perspective’ <http://construction.practicallaw.com/blog/construction/blp/?p=214> accessed on 2 September 2010

³³ ibid

³⁴ Civil Code-Article 886

- There is no distinction between Liquidated Damages and penalties in UAE.
- The agreed Liquidated Damages can be re-assessed by the judge, who can increase, keep or decrease it.

Construction Week expressed the notable difference when UAE law deals with penalties ‘Furthermore, it should also be noted that direct translation of English legal terms into an Arabic form (and vice-versa) does not always produce an equivalent result, and the distinction between liquidated damages and penalties is unclear upon translation.’³⁵ It further stated when commenting on the court ability to change a pre-agreed liquidated damages clause ‘To those familiar with English common law principals, this may come as something of a shock, as in short, the court can retrospectively change the parties’ express agreement.’³⁶

Furthermore, *Maxwell Winward* summarized the Middle East approach towards penalties and its uncertainty and how it differs from the common law:

Pre-agreed liquidated damages will in principle be enforceable in the Middle East, even when expressly labelled as a “penalty”. This is because, whilst Middle Eastern laws recognise and permit the pre-agreement of the financial consequences of breach, they make no conceptual distinction between “penalties” and “liquidated damages”.

Liquidated damages under common law cannot be unilaterally adjusted after they have been agreed, nor can they usually be adjusted by the Court to better reflect the loss actually suffered by the innocent party. By contrast, and alarmingly for the unwary, Middle Eastern systems do allow for adjustment of pre-agreed compensation’.³⁷

³⁵CW staff 2006 ‘How does local law deal with liquidated damages?’ <http://www.constructionweekonline.com/article-324-how-does-local-law-deal-with-liquidated-damages/> accessed on 1 September 2010

³⁶ *ibid*

³⁷ Maxwell Winward LLP (undated) ‘Liquidated damages and Penalties in the Middle East’ <http://www.maxwellwinward.com/pdf/Revised%20LADs%20article%20-%20NL%20version-notvisible.pdf> accessed on 2 September 2010

Accordingly, the subject of allowance of penalties and the court ability to change the pre-agreed delay compensation can be easily distinguished as uncustomary liabilities to the English law and were added to the scope of this research.

The final outcome was to consider the followings as uncustomary liabilities:

1. Penalties.
2. Certainty of Liquidated Damages.
3. Decennial Liability.
4. Re-measured Contracts.

Each of these liabilities will be discussed in the following sections.

1. Penalties

One of the major differences between UAE law and English Law is their approach towards compensation for Contractor's delays which is usually in the form of Liquidated damages.

In UK, the Court will assess whether a Liquidated damages clause is meant to be a genuine pre-estimate of the losses or a mere penalty clause meant to punish the Contractor for his delay, if the latter case is proved, the Liquidated damages clause will be waived and the only recourse for the employer will be to seek un-liquidated damages under the law.

The primary authority for striking down a Liquidated damages clause for being a penalty clause is *Pneumatic Tyre co. v New Garage Motor Co. Ltd*³⁸, in which the distinction between penalties and liquidated damages is explained as follows:-

- LAD is a mechanism by which the innocent party (the Employer) is being put in the place he would have been, *had the damage not happened*, Liquidated damages is

³⁸ [1915] AC 75

a genuine pre-estimate of the damages or in other words a liquidation of the damage, hence the name Liquidated damages.

- Whilst, penalty clause is a clause that is meant to put one party *in terrorem* to avoid committing the damage. If a Liquidated damages clause is established as being a penalty clause, the court will strike it down.

Furthermore, in *Pneumatic Tyre* Lord Dunedin set out series of tests to judge whether a liquidated damages clause is a penalty or not:

- a) If the sum stipulated is extravagant in comparison with the greatest loss.
- b) If the breach consists only in not paying a sum of money which is less than the stipulated sum.
- c) When a single lump sum is made payable even for trifling damage.
- d) If precise-estimation is an impossibility that is the situation when it is probable that pre-estimated damage was the true bargain between parties.³⁹

On the other hand, UAE law does not have a similar weight to the nature of Liquidated damages clause, in the matter fact some forms of contracts based on FIDIC, rename the Liquidated damages clause in their particulars conditions a Penalty clause. This fact was confirmed-inter alia- by the Dubai Court of Cassation judgment 138/94⁴⁰, which involved a dispute between a contractor and a subcontractor regarding delay to the completion of a contract which contained an express penalty clause. Whilst the clause was described and construed in this case as a penalty the court did not draw a strict distinction between a pure penalty provision and a pure liquidated damages provision in this instance.

Construction Week commented on this judgment:

³⁹ *Pneumatic* (n 37), per Lord Dunedin at p 86ff

⁴⁰ CW staff 2006 'How does local law deal with liquidated damages?' <http://www.constructionweekonline.com/article-324-how-does-local-law-deal-with-liquidated-damages/> accessed on 1 September 2010

With that in mind, it may well be that the distinction between the two phrases (that English law has sought to maintain) is in fact much less significant in the UAE because the court views its powers, under Article 390 in particular, as equally applicable to penalties and liquidated damages.⁴¹

This means that UAE allows that the contractor be put *in terrorem*⁴² to avoid committing the damage, hence strongly adding to the adversarial relation between a contractor and his employer.

The equal weight UAE puts for both penalties and liquidated damages are unfair to contractors, especially in the current market condition, that is the post crisis market, in which the negotiation power is not being balanced between contractors and employers. It was expected as one of the measures UAE should have implemented after the crisis was to introduce a more fair regulation into delay damages to ensure that contractors are not being abused by their employer with extravagant delay damages.

Finally, foreign contractors are advised to deal with the current situation of law and do not depend that a clear penalty clause will be waived, and they should negotiate whatever sum stipulated in the contract, regardless or not if it is a genuine pre-estimate of loss.

2. Certainty of Liquidated damages

Against a common Contractor's belief, the Liquidated damages clause is not only beneficial for the employer, but for the contractor also. Obviously, the benefit for employer is getting a compensation for the damages he suffered from the

⁴¹ *ibid*

⁴² Latin for "in [order to] frighten"

Contractor's culpable delay, on the other hand the Contractor benefits from the certainty of the extent of his liability towards delay, and he most probably will make provisions for this risk within his priced tender. However, such certainty is not provided to the Contractor in UAE.

Article 390 of the UAE Civil Code states that parties can predetermine the delay compensation in contract or afterwards and it further states that the judge can revise it based on a party's application, to make the compensation equal to the loss and parties cannot contract out of this.

Hence, the judge can re-assess the agreed Liquidated damages based on the application of one party. This means that the Employer can apply for increasing it and also the Contractor can apply for decreasing it, and the burden of proof will lie with the applicant. Practically it might be difficult for the Contractor to prove the employer's actual loss, so this provision is rarely used by Contractor.⁴³

On the other hand, the Employer might be in a much easier position to prove that he sustained more loss than what was envisaged by the pre-agreed Liquidated damages and thus increase the damages compensation. This concept significantly contravenes the freedom of contract adopted by the English Law, in *Trollope & Colls Ltd v North West Regional Hospital Board*⁴⁴ Lord Pearson said:

'[T]he basic principle [is] that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.

⁴³ Erin Miller Rankin 2007 'How the law of liquidated damages can be applied in the local jurisdiction' <http://www.constructionweekonline.com/article-941-how-the-law-of-liquidated-damages-can-be-applied-in-the-local-jurisdiction/> accessed on 9 September 2010

⁴⁴ [1973] 1 WLR 601, HL

The common law concept of freedom of contract exists In UAE pursuant to Article 2 of the UAE Commercial Code which states that the parties are entitled to agree on any contractual terms that they deem fit, provided that such terms are not inconsistent with the provisions of law or contrary to public order or public morals. Accordingly, the law imposes exceptions to such freedom; one of them is the concept of re-assessment of delay damages. In this regard, reference is given to the judgment of Court of Cassation⁴⁵ which confirmed this legal principle by stating *'the Liquidated damages clause of any contract is merely an agreed compensation and pursuant to Article 390 of Civil Code the judge can (upon the application of one party) adjust this compensation to make it equal to the actual loss suffered and any contracting out of this Article will be held null and void'*

On the other hand, this process is not to be applied arbitrary, as advised by *Al Tamimi Law Firm*, the court will examine how much is the difference between the actual loss suffered and the one stipulated in the contract in addition to whether or not the employer tried to limit his losses.

Accordingly, before the judge decides to interfere in the contract agreement, the employer should at least⁴⁶:

1. Substantiate his actual loss,
2. Prove the direct link between the contractor's delay and his loss,
3. Show the significant difference between the actual loss and the contractual liquidated damages, and
4. Prove that he exercised all possible recourses to mitigate his loss.

⁴⁵ No. 222/2005 dated 19 September 2006

⁴⁶ Al Tamimi & Co, 'Construction Law' <<http://www.tamimi.com/Legal-Articles.aspx>> p15 accessed on 2 September 2010

One of the major drawbacks of this concept, is the uncertainty it introduces into the construction industry⁴⁷, the usual measure any Contractor adopts which is including the liquidated damages within his price (or a part thereof) to avoid this risk is no longer available. It is unclear why the law allows such intervention from the Court, if two parties agree on the assessment of the delay damages, how can one of them claim more than what was agreed. Furthermore, if such contemplation is allowed, why not considering the Contractor's right to apply to the court to increase his contract price, because he sustained losses more than what was envisaged at the contract signature, for factors such as sudden increase of material cost, labors strike, etc.

In conclusion, if the court is allowed to correct a wrong or unfair provision in a contract against the parties' freedom of contract, it should be applied as a general rule and not only pertaining to damages.

In this regard, it is recommended to omit this provision from the law, in order to restore liability certainty within construction industry. On the other hand, there is no recommendation of any measures to be undertaken by contractors to limit this risk, apart from insurance if it exists, because as it is outlined in the UAE court judgment stated above parties cannot contract out of this Article. However, this does not mean that the limit of damages is of no use and can be omitted, in the contrary the limit of damages will be regarded carefully by the judge and its existence will often make the judge reluctant to vary an agreed limit.⁴⁸

3. Decennial Liability

Under the UAE law and the majority of Middle east Countries such as UAE, Qatar, Egypt, etc. the contractor and the Engineer are jointly liable for any collapse or any

⁴⁷ Maxwell Winward LLP (undated) 'Liquidated damages and Penalties in the Middle East' <http://www.maxwellwinward.com/pdf/Revised%20LADs%20article%20-%20NL%20version-notvisible.pdf> accessed on 2 September 2010

⁴⁸ *Tamimi* (n 46) P16

defect affecting the building safety and integrity for a period of ten years starting from the date the Employer took over the works, this liability is imposed by law and parties cannot contract out of it⁴⁹. The only allowable exception of this rule is in case it was the intention of parties that the building is supposed to last less than ten years; this must be proved based on the parties' intentions and not a simple clause in their contract⁵⁰. In addition, the Engineer is exempted from this liability if he was not responsible for supervising the works unless the defect or collapse is due to a design mistake⁵¹. On the other hand, the law did not deal with the case of the Contractor's liability if the sole reason of collapse is a design mistake. Hence, it will be open for interpretation, however law books stated that if the collapse is due to a design mistake it will be the sole liability of designer (should it be the contractor or the engineer)⁵². However, regardless of the owner of the default, the employer can recover damages from any or all of them based on their joint liability, and either of them can seek recovery of damages from the other, if they can prove that they were not responsible for the defect⁵³, however this will be through tort and not contract, since contractor and engineer have no contractual relationship.⁵⁴

This liability is not waived if the collapse is caused by a defect in the land itself or by wrong instruction from the employer by imposing a wrong design or inappropriate specification or the like, because both engineer and contractor owe the employer a duty to warn, considering the prevailing consideration of the employer's ignorance of construction principles. In case, in spite of the duly provided warning, the employer insisted on adopting his wrong design/specifications, they should both refrain from continuing their contracts, or else they will be liable. The only exception is the case where the employer is an expert in construction, in which complying with wrong information therefrom will waive their liability⁵⁵

⁴⁹The Civil Code, Article 880

⁵⁰ *Shanab* (n6) P186

⁵¹ The Civil Code, Article 881

⁵² *Shahawy* (n7) P166

⁵³ *Shanab* (n6) p182-183

⁵⁴ *ibid* p183

⁵⁵ *ibid* p177

Further the following are conditions precedent to the application of this Article⁵⁶:

1. The defects are dangerous enough to threaten the building safety and integrity, accordingly defects in painting, cladding or the like does not satisfy this condition, since it does not affect the building integrity.
2. The defect is latent. If it is a patent defect, the employer final taking over after the expiry of the defects liability period of the building can be considered as an implied waiver of such liability.
3. The defect occurred during the ten years period and proceedings began within three years from that date, which is the UAE limitation period⁵⁷, this can extend the Decennial Liability to be a total of thirteen years.

In addition, if the application of this article entailed rectification work, a further ten years liability will be imposed for the rectified work.⁵⁸

On the other hand, there is no Decennial Liability under the English law and latent defects is only governed by the **Limitation Act 1986** as amended by the **Latent Damages Act 1986**, which states the following limitation periods:-

- Under simple contracts six years from the date of damages accrual.
- Under deed twelve years from the date of damages accrual.
- In Tort the later of six years from the date of damages accrual or three years from the date of awareness of damage subject to a long stop of fifteen years from the date of accrual.

Tort is not discussed in this research since the focus is on contractual liability, but it is worth mentioning that the date of accrual of damage in tort is the date on which damage is suffered. Moreover, in tort if the damage is classified under pure economic

⁵⁶ *Shahawy* (n7) p160-162

⁵⁷ The Civil Code, Article 883

⁵⁸ *Shanab* (n6) p169

loss, it will not be recoverable except in limited cases such as the establishment of the *Hedley Byrne*⁵⁹ relationship.

As for claims under contract, the date of damage accrual is the date on which the contract was breached, and as broad as this may be but it will be no later than the date of practical completion of the construction, since after completion of construction no breach can occur.⁶⁰

Moreover, unlike UAE, which specified that parties cannot contract to reduce the Decennial Liability, in UK the limitation period can be reduced. This was stated by Ramsey J in *Oxford Architects Partnership v Cheltenham Ladies College* 'In principle, parties could agree any period, for instance one year, although in practice a short period is unlikely to be acceptable to clients.'⁶¹

Accordingly, the UAE' prolonged liability of ten years can be compared to a UK' maximum of six years (twelve years in deed) from the date of practical completion (or earlier depending on the actual date of breach) and it is therefore quite exaggerated to hold a contractor and the Engineer liable for ten years.

This can be considered as a large risk factor of construction in UAE, especially that specific insurance policies to cover decennial liability are not generally available in the UAE and it falls outside the scope of contractors' "all risks" policies and consultant's professional indemnity insurance. Moreover, majority of professional indemnity policies provide cover for negligent errors and omissions, but as decennial liability can arise without evidence of negligence, insurers may not respond to such claims.⁶² Accordingly, most of the Contractors will allow for this risk within their

⁵⁹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575; [1963] 1 Lloyd's Rep. 485; (1963) 107 S.J. 454

⁶⁰ *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] B.L.R. 74; (2001) 3 T.C.L.R. 25; 85 Con. L.R. 194

⁶¹ [2006] EWHC 3156 (TCC) [2007] P.N.L.R. 18, at Para. 18

⁶² Clyde & Co 2009 'The Works- Construction Bulletin'

www.clydeco.co.uk/attachments/.../The%20Works_Issue%202_July2009.pdf accessed on 28 August 2010

tenders, thus employers end up with much higher prices than they would have obtained if this law provision did not exist.

Furthermore, it is not uncommon that some employers incorporate this article in their standard conditions of contract and add to the liability of integrity/safety of buildings, the liability of normal defects. Thus extending the defects liability period to be ten years instead of the usual one or two years and probably making use of a naïve uninformed contractor who will consider it a duplication of his liability under the law and will not question its authenticity. Any Contractor, who does not perform a thorough check of the conditions of contract, can easily find himself inadvertently committed to a ten year defects liability period. The law imposes the liability of **collapse or defects threatening the building integrity**, it does not impose a liability for normal defects that may turn out in the building and this should be limited to the agreed defects liability period under the contract. As *Antonios Dimitracopoulos* puts it *'far too many consultants sign off on deadly clauses or proceed with the works for months with no contract signed at all. For example, very few contractors are aware of a 10-year-long liability clause for any defects including minor ones, used in certain contracts issued by Dubai Government departments. If signed, this amounts effectively to a 10-year-long maintenance guarantee'*.⁶³

In conclusion, it is recommended that this exaggerated liability be revisited by the law to be reduced to a more acceptable period maybe to a maximum of five years. This will benefit both parties, the contractors on one hand will have a reduced risk factor and this will reduce their pricing for this risk factor which will reflect on their tenders thus providing the employers with lower tenders. Moreover, contractors are advised to check carefully their conditions of contract to make sure that this liability is not being converted into a ten years long defects liability period.

⁶³ Antonios Dimitracopoulos, "UAE Law for Architects-What's it all about in a nutshell"
<http://www.bsa.ae/pdf/UAE%20Law%20for%20architects.pdf>> accessed on 2 July 2010

4. Re-measured Contracts

This is quite a unique liability that exists in UAE law, as it is known each contractual arrangement comes with its pros and cons, the most famous ones being the re-measured contracts and the lump sum contracts.

In lump sum contracts, the contractor provides a fixed price to execute the works as per drawings and specifications, he is not allowed for any variation in this regard, even if the bill of quantities did not include any item, as long as it is shown in drawings or specifications, it will be included in his price, that is why normally this type of contractual arrangement is more expensive.

On the other hand, in re-measured contracts, the risk is shifted towards employers, and the contractor is only committed to execute the items of the bill of quantities at a fixed unit rate, but at variable quantities, that is why it is cheaper than the lump sum contracts. As stated by *Atkinson*: *'The Unit Price payment mechanism thus places the risk with the Owner, for estimating the extent of the Works at the time of tender.'*⁶⁴ The quantity risk in re-measured contracts was further confirmed to be the employer's by *Chau Ee Lee*: *'For this method, the employer accepts the risk of variations in the quantities originally estimated...'*⁶⁵

However, in UAE, Article 886 of the Civil Code states that in a re-measured contract the contractor owes an obligation to notify the employer in case it is necessary to exceed the quantities substantially, failing which he can lose his right for the value of excess quantities. Subsequent to the contractor's notice, the employer can then decide whether he wants to terminate the contract and pay the contractor for the value of work done, or he wants to proceed in the contract.

⁶⁴ Atkinson Law 2006 'Contract Strategies' <http://www.atkinson-law.com/library/article.php?id=131> accessed on 2 September 2010

⁶⁵ Chau Ee Lee July 2008 'Deciding on the best way to price contracts' <http://www.arabianbusiness.com/524292-deciding-on-the-best-way-to-price-contracts> accessed on 5 September 2010

This Article operates to grant the employer with the beneficial lower price of re-measured contracts and in the mean time waives his risk of quantity excess.

Furthermore, it imposes a liability on the contractor to warn the employer in case of a significant excess, and if he did not, he will lose any entitlements for the excess quantities, and if he did but the final quantity turned out to be more than what he advised, he will not be reimbursed for the unadvised excess.⁶⁶ Quite a huge obligation on the contractor and it has to be a very accurate estimate of the exact quantity excess.

Subsequent to the contractor's notice, the employer has an option to terminate the contract. Although termination is not due to contractor's default, he is not granted the correspondent benefits of such termination, merely the work done, with no compensation for demobilization, repatriation of staff, loss of opportunity and loss of profit, etc. On the other hand, if the employer was advised and unreasonably delayed his response, it will be implied that the employer accepted the excess quantity and the contractor can proceed in construction as per contract.⁶⁷

Another ambiguous matter is who will assess whether or not the excess is substantial, noting that in a re-measured contract, the final actual quantity is only known after the completion. In court this is determined by the judge of first instance⁶⁸ , but whose judgment is it during construction, prior to reverting to litigation, how is the contractor expected to determine that any excess is a substantial one. In such a risky article, it was expected to find some guidelines or a percentage to consider the excess quantity a substantial excess. For a small sized employer maybe 15% is a substantial excess, for other large sized maybe they don't consider 50% as a substantial excess (or vice versa.) Moreover, why the contractor is the one responsible for advising the employer whilst the employer's consultants were the ones who prepared the bill of

⁶⁶ *Shahawy* (n7) p205

⁶⁷ *Ibid* p206

⁶⁸ *Ibid* p204

quantities, moreover the engineer is expected to inspect the execution and keep track of the executed quantities. Finally, it is quite strange that this obligation which is unfairly imposed on the contractor is classified under the general heading '*Obligations of Employers*'!

FIDIC which is the most used forms of contracts in UAE (94% of Middle East contracts as per a poll conducted by Norton Rose)⁶⁹ highlighted the ambiguities in this Article: '*This situation is made worse by ambiguities within Article 886(1). For instance, it requires that notice is given if the increase in quantities is substantial, but what is the measure of a substantial increase? Similarly, if a notice was given, how do you determine whether it was given in sufficient time?*'⁷⁰

It was further stated that this Article contradicts with FIDIC 99 conditions of contract in respect of the following:-

- In FIDIC 99, there is no requirement to give a notice in case of quantity increase.
- Notice is only required in case contractor is seeking additional payment for various criteria but additional quantities is not one of them, since additional quantity is expected in re-measured contracts.
- The giving of a notice is not a condition precedent to the payment of additional quantities.⁷¹

This reflects that experts of FIDIC, the most used form of contracts in UAE, think that this article is ambiguous and contradictory to FIDIC' provisions.

If we contrast this with English Law, there is not such limitation or imposed duty on the contractor to warn of a substantial excess of quantities, again the freedom of contract is respected. The employer and his consultants are expected to be wary

⁶⁹ Norton Rose, Boom and recovery: Understanding the Middle East construction market (Report) http://www.nortonrose.com/knowledge/publications/2009/pub21430.aspx?lang=en-gb&page=all#publication_page_090608120822 accessed on July 2010

⁷⁰ Chris Larkin August 2008 'Quantity clause needs update' http://www1.fidic.org/resources/contracts/larkin07_quantity.asp accessed on 5 September 2010

⁷¹ Ibid.

enough to inspect the work progress and estimate the final quantities. The contractor is only expected to carry the work as per contract.

It is suggested, either to waive this article on its entirety, or at least some sort of guidance to what constitutes a substantial excess and timely manner of serving notice should be provided. In addition, a contractor terminated under this article must be provided by compensation as if he was terminated for convenience. In this regard, the law can follow the provision provided for in FIDIC 1999, Sub-Clause 19.6 (Optional Termination, Payment and Release), which grants the contractor, in case of termination for convenience, to be compensated for plant, materials, cost incurred in the expectation of completing the works, demobilization and repatriation of staff.

There is no reason why termination under this Article should be any different than the optional termination provided by the FIDIC, and hence the same compensation should be granted to the Contractor.

Chapter 3

Payment Mechanism in UAE and UK

Introduction

This chapter will discuss the available payment provisions under UAE law and the existing payment problem, and then will discuss the payment mechanism provided by the Act as a proposed solution for the lack of a similar statutory payment mechanism in UAE.

Each section of the Act will be assessed by examining the problems that generated from its application and how the New Act helped reducing these problems, which will guide the way towards proposing what can be adopted from the Acts in the UAE proposed Act.

Payment Provisions in UAE law

Payment is considered to be the biggest worries of any contractor, how much he will get paid, when he will get paid and what if he did not get paid. These three questions are invariably the most important questions in the mind of any contractor. The reason for this is that the construction industry relies greatly on cash flow.

If we scrutinize the Civil Code only a handful of provisions deal with payment mechanisms and remedies for non-payment.

For instance, Article 879 states that if the work has a '*beneficial*' effect on the property the contractor can retain it till he is paid and if it does not have a '*beneficial*' effect he shall not retain it, but if he did and the property is lost he will liable for the loss.

This article did not define the '*beneficial*' effects, although it can be deduced that it means a change to the property, such as construction in a land or the like.

Moreover, it entitles the Contractor to retain the property till paid, however it did not specify the procedures or the duration of payment delay that will confer such right, also it did not request any serving of notices by the Contractor before such act.

On the other hand, *Shanab*⁷² states that the contractor is not entitled to retain the property only, but also any plant provided by the employer for the purpose of completing the works, any material supplied by the employer whether already used in the works or not and any document pertaining to the works. However, if the contract was only for excavation works, the contractor cannot retain the land. Moreover, if the employer provided financial guarantee for the pending payments, the contractor cannot hold the property.

Another article dealing directly with payment is Article 885 which stipulates that the employer shall be obliged to pay the consideration upon delivery of the property contracted for, unless there is an agreement or a custom to the contrary. It is to be noted that the payment obligation is placed upon delivery of the property unless there is an agreement to the contrary, which means if a contract did not contain a payment mechanism, the law will force the employer to pay only after work is completed and property is delivered. Moreover, if the contractor is delayed in completing a certain milestone, the employer can hold all payments pertaining to this milestone, regardless of the quantity of work achieved at the time of milestone.⁷³

⁷² *Shanab* (n6) p130

⁷³ *Shahawy* (n7) p230

In practice, if such condition is imposed on a contractor it might drive him into insolvency, since not many contractors have the financial capability to fund a project from inception till completion without getting paid.

Furthermore, Article 247 of the Civil Code states: *'In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do'*. This Article is silent on the explanation of when the obligation of the employer (which is payment) will be due for performance; again if a contract did not specify a payment mechanism, and by reading this Article in conjunction with Article 885 the due date for payment will be construed as the completion of the obligation, which is the completion of construction.

Payment Problems in UAE

As result of the credit crunch, payment collection in UAE became a very hard task. For instance, *David Mark*⁷⁴ stated that his employer has not paid its invoices for 15 months and that their present arrears are in the order of £700,000 which represents 30% of Marks Barfield's 2008 turnover, they faced lots of troubles in chasing their entitlements, including being forced to substantiate their already certified payments and being forced to offering discounts that reached 50% of their total entitlements and lastly they reverted to the very old way of debt collectors. The inadequate legal coverage was reflected by two quotes, first of their employer who stated: *'It will take two years for the case to get to court and even then the settlement will leave you receiving £80 a year from us'* and *David Mark* who stated: *'We considered the legal route but I don't trust the system in Dubai. The legal process is dysfunctional because the courts are backed up, and*

⁷⁴ Roxane McMeeken, 28 August 2009, *My Dubai hell: David Marks breaks the silence on payment problems*, Building.co.uk, <http://www.building.co.uk/comment/my-dubai-hell-david-marks-breaks-the-silence-on-payment-problems/3147427.article>

*even if you get the judgment you want, that could take two years and then it's doubtful it will be enforced.'*⁷⁵

Although both statements are subjective but it reflects that construction professionals are not aware of how the legal system in UAE works and what are the main differences between the one they are used to in UK and the one they are involved in currently in UAE, in addition of the lack of a statutory payment mechanism to revert to.

Confirming this view, Michael Grose told Reuters: *'There has been a marked increase in the number of contractors asking for help to obtain payment, including payments certified months ago on some of Dubai's largest projects'*. An anonymous contractor further stated *'Contracts are not worth the paper they are written on. They don't understand that the work gets done and you have to pay for it.'*⁷⁶ All this reflects to what extent construction professionals have little reliance on contracts drafted in UAE, and how the absence of a statutory payment mechanism affected professionals in the region. It is to be noted that both *Reuter* and *Building* stated in their report that they tried to contact some Dubai developers mentioned in this article to comment on these statements but failed to obtain any response, such lack of response to esteemed entities such as *Building* and *Reuters* may reflect that the reported problems do not fall far from the truth.

In a poll conducted by Construction Week⁷⁷, 77.8% of respondents have said they are facing *'serious difficulty getting clients to pay'* for work they have carried out on projects with only 22.2% saying they have *'had some delays but cash is still coming through.'* Whilst No one (0%) clicked on the option *'we have been fairly paid, and paid on time.'*

Moreover, Sachin Kerur confirmed the dilemma common law practitioners are facing in UAE for debt collection: *'When working overseas, however, the different cultural, legal*

⁷⁵ Ibid.

⁷⁶ Reuter, 'Dubai contractors face bankruptcy as cash dries up', <http://www.reuters.com/article/idUSL250376720090203> accessed on 25 July 2010

⁷⁷ Conrad Egbert November 2009 '77.8% face non payment issues: poll' <http://www.constructionweekonline.com/article-6956-778-face-non-payment-issues-poll/> accessed on 4 September 2010

*and practical issues can make the whole process much more challenging. In the UAE, this challenge is in part due to the local civil legal system. Those instruments that common law practitioners are so used to wielding are not present in quite the same form*⁷⁸

The above is an indication that whilst UAE currently suffer from a payment collection problem, the UAE law did not provide an adequate payment mechanism in case the contract lacked one. This is to be contrasted with the UK which faced the same problem and assigned sir *Michael Latham* to seek a solution which resulted in the **Housing Grants Construction and Regeneration Act 1996** (hereinafter the 'Act') and amended by the **Local Democracy, Economic Development and Construction Act 2009** (hereinafter the 'New Act'.)

Both Acts will be discussed as a proposed statutory payment mechanism to be implemented in UAE.

Background of the Act and the New Act

The UK was a pioneer in addressing the controversial nature of the construction industry, when Sir *Michael Latham* produced his 1994 report *Constructing the Team*⁷⁹ based on which the Act was developed. Only Part II of the Act is considered here, which deals with changes to the law of construction contracts. Moreover, whilst Part II contains provisions of adjudication and payment, only payment provisions are considered in this research as a proposed solution for the lack of a statutory payment mechanism in UAE, hence no study will be conducted to the adjudication provisions.

The degree of success/failure of the Act is debatable, for instance *J L Riches & C Dancaster* recognized the Act as one of the major drivers of shifting the dispute

⁷⁸ Sachin Kerur February 2010 'Debt Recovery in the UAE' <http://kluwerconstructionblog.com/2010/02/11/debt-recovery-in-the-uae/> accessed on 4 September 2010

⁷⁹ Latham, M. (1994), *Constructing the Team*, London: HMSO

resolution away from litigation, when they stated '*...after more than five years there have probably been between 9,000 and 12,000 notices of adjudication...In that context the number of cases where parties have had to resort to the courts is less than 2% of the total number of adjudications and probably nearer 1.5%*'⁸⁰.

On the other hand, *Sir Michael Latham*, whose report ⁸¹formed the basis of the Act, had some concerns in his 2004 review of the Act, where he stated: '*it is sadly apparent that not all the section 110 notice procedures for payment have been effective and not all payment concerns, which the 1996 Act was meant to address, have disappeared*' ⁸²

Moreover, *Paul Robert Lynch* stated that '*Whereas statutory adjudication under the Act has undoubtedly aided the Sub-contractor and re-addressed the balance of power, it has been argued that, due to loop-holes in the Act, the beneficial effects are being minimised, or even evaded*'.⁸³

Accordingly, the Act was subject to further review for enhancement which resulted in the **Local Democracy, Economic Development and Construction Act 2009**, the UK government said that the reason for the New Act was that: '*Extensive consultation with the construction industry has identified that while the Construction Act has improved cash flow and dispute resolution under construction contracts it is ineffective in certain key regards.*' ⁸⁴ It also stated that the policy objectives and the intended effects are to improve the existing regulatory framework in order to:-

- increase transparency and clarity in the exchange of information relating to payments to enable the better management of cash flow

⁸⁰ J L Riches & C Dancaster *Construction Adjudication* (2004) 2nd edition Blackwell Publishing

⁸¹ *Latham* (n 79)

⁸² Latham, M. (2004), '*Report on Part II of the Housing Grants, Construction and Regeneration Act 1996*', London: HMSO

⁸³ Paul Robert Lynch, '*HGCRA: Re-Addressing The Balance of Power Between Main Contractors and Subcontractors?*' (MSc Thesis, University of Glamorgan)

<http://www.nadr.co.uk/articles/published/construction/TheBalanceOfPowerBetweenContractors.pdf>

⁸⁴ Jeremy Glover '*The new draft Construction Contracts Bill: changes to the HGCRA finally announced*'

<http://www.fenwickelliott.co.uk/files/New%20Draft%20Construction%20Contracts%20Bill%20changes%20to%20HGCRA.pdf>
accessed on 2 September 2010

- encourage the parties to resolve disputes by adjudication, where it is appropriate, rather than by resorting to more costly and time consuming solutions such as litigation and
- Strengthen the right to suspend performance under the contract.⁸⁵

This research will start from where UK ended, by discussing the Act as amended by the New Act.

Provisions of the Act/New Act

Definitions/limitation sections s.104-s.107

Sections 104 to 107 are dedicated to provide a definition to what constitutes a construction contract (and hence falls under the scope of the Act) and what does not.

As will be explained in the following sections, these exclusions created lots of ambiguities and led to various disputes, this of course was against the initial aim of the Act to reduce disputes. Unfortunately, the reason for these exclusions were not an objective one, instead it is said to be *'a result of compromise and lobbying. 14 years after the Construction Act 1996 became law, we are still seeing the discrepancies that this throws up.'*⁸⁶ Moreover Riches and Dancaaster stated *'The "in" or "out" lobbies had their extensive interests aired when the Bill which formed this part of the Act was debated in Parliament.'*⁸⁷

⁸⁵ Ibid.

⁸⁶ Lucy Garrett 2010 'Construction contracts and construction operations: confusion over exclusion?' <http://construction.practicallaw.com/blog/construction/plc/?p=423> accessed on 28 August 2010

⁸⁷ Riches (n80) p25

104. Construction contracts

This section defines what constitutes a construction contract for the purpose of the Act, which is a contract to perform a construction operation. It states that a construction contract is a contract to carry, arrange to carry or provide labor to carry construction operation, and it also includes works like design and advices. Finally, it excludes employment contracts and grants the secretary of state rights of amendment.

105. Meaning of “construction operations”

Following Section 104, this section provides a list of what is a construction operation and another list of what is not a construction operation.⁸⁸

Unfortunately, this section generated various disputes due to the inadequate or broad definitions included therein, some of disputes were reflected by the following law cases, inter alia:-

- In *Palmers Ltd v ABB Power Construction Ltd*, it was confirmed that it is possible that main contractor’s work is not a construction operation, whilst his subcontractor’s work is. The judge stated: “...it is perfectly possible, and within the statutory scheme, for a contractor’s operations to fall outside the definition of a construction operation yet for a subcontractor providing building, foundation or painting services for that contractor’s work to come within the definition.”⁸⁹
- In *Gibson Lea Retail Interiors Ltd v Makro Self Service Wholesalers Ltd*⁹⁰, Makro managed to establish that the shop fitting works concerned was for the installation of fittings and not fixtures. Hence, excluded from being a construction operation.

⁸⁸ For a detailed list of exclusions refer to Appendix C.

⁸⁹ [1999] BLR 426 HHJ Thornton QC.

⁹⁰ [2001] BLR 407.

- In *Homer Burgess Limited v Chirex (Annan) Ltd*⁹¹, the court had to decide whether installing pipe works in a pharmaceutical process falls under the exclusion of s 105 c(ii) or not. Ultimately, the court decided that pipe works is an integral part of the process, and hence falls under the exclusions of the said section.
- In *ABB Power Construction Ltd v Norwest Holst Engineering Ltd*⁹², it was held that insulation for a power station falls under the exclusion of s 105 2(c). This has been termed the “broad construction” as opposed to the narrow interpretation considered in *Palmers*.
- Both the ‘broad construction’ in *ABB Power* and the ‘narrow interpretation’ in *Palmers* of s 105 (2)(c) was considered by Mr Justice Ramsey in *North Midland Construction Plc v A E & E Lentjes UK Ltd*⁹³, where he decided in favour of the ‘narrow interpretation’. A decision that both unified the approach and ensured wider application of the Act.
- In *ABB Zantingh v Zedal Building Services Ltd*⁹⁴ and *Conor Engineering Ltd v Les Constructions Industrielles de la Mediterranee*⁹⁵, the controversial exclusion of power generation plant was confirmed to apply only if it is the primary activity of the site and not an ancillary one.

As it is shown, against the purpose of the Act to reduce disputes, the construction industry in UK went through a significant amount of disputes just trying to clarify what qualify as a construction operation and what is excluded. Building on the fact that these exclusions were not based on constructive criteria, instead they were based on mere lobbying as explained above, moreover legal experts have suggested that it should be removed, it was stated by *Atkinson Law*: ‘Also in need of amendment is the

⁹¹ [1999] CILL 1580.

⁹² 77 ConLR 20.

⁹³ [2009] EWHC 1371 (TCC); CILL 2736.

⁹⁴ [2000] 77 ConLR 32.

⁹⁵ [2004] CILL 2157.

*very scope of the Act: it currently applies only to part of the construction industry and it is time it became effective in all areas of construction activity.'*⁹⁶

This direction is pretty logic, it is unfair to have main contractor and subcontractor working side by side in one project, yet the Act applies to one of them and not the other, as further stated by *Atkinson Law*: '*This decision highlights the difficulty in understanding the logic behind the scope of the Act. Why should certain sections of the industry be excluded? It is time for the exclusions in Section 105(2) to be re-examined in the light of the experience gained of the workings of the Act.*'⁹⁷

Furthermore, why is a contractor building a power plant not protected by the Act whilst another one building a commercial complex be protected, the differentiation is not acceptable. The Act aimed to enhance the construction industry, so it should cover the whole of it.

It was suggested by *Riches and Dancaster* '*It is arguable that the more liberal definition of construction found in Regulation 2 of the Construction (Design and Management) Regulations 1994 (SI 1994 No. 3140) would have been more appropriate and consistent with the 'mischief' the Act is seeking to correct.*'⁹⁸ The referred Regulation 2 provides a broad application as follows: '*3. – (1) Subject to the following paragraphs of this regulation, these Regulations shall apply to and in relation to construction work.*'⁹⁹ This definition is followed by very few exceptions such as cancelling the required coordination between designers/contractors if there is only one designer/contractor. Accordingly, it did not limit the broad application of the Regulations.

⁹⁶ Atkinson Law 2000 'Exclusion Clause' <http://www.atkinson-law.com/library/article.php?id=98> accessed on 28 August 2010

⁹⁷ *ibid*

⁹⁸ *Riches* (n80) p25

⁹⁹ Statutory Instrument 1994 No. 3140-The Construction (Design and Management) Regulations 1994-Section 3 (1)

106. Provisions not applicable to contract with residential occupier.

A section dedicated to excluding residential occupiers from the scope of the Act. This exclusion applies if a party to the construction contract (as defined in the Act) will occupy the building after completion (or intends to). The basis of this inclusion is that residential occupier is viewed as a consumer and not a business trader.

Furthermore, the Act defined a construction contracts with a residential occupier as '*a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence*'¹⁰⁰. Dwelling is further defined as a dwelling-house or a flat, but not a dwelling-house including a flat, and the disputes generating from this definition can be expected.

As with s 105 above, various disputes generated from s 106, such as:-

- In *Shaw & Anr v Massey Foundation & Pilings Ltd*¹⁰¹, it was found that a separate building to a dwelling-house does not fall under the exclusion of residential occupiers, even if both buildings was referred to as one entity in the Land Registry.
- In *Absolute Rentals Limited v Gencor Enterprises Limited*¹⁰² the court held that a company cannot be a residential occupier.
- In *Samuel Thomas Construction Ltd v Anon*¹⁰³ it was held that a residential occupier who was to occupy part of the development did not fall under the exclusion of s106.

The New Act did not interfere effectively in this section and only provided for the various ministers for England, Wales and Scotland to disapply any of the provision of this Part! This is in spite of the fact that the deletion of this exclusion was suggested

¹⁰⁰ The Act, s-106 (2)

¹⁰¹ [2009] EWHC 493 (TCC).

¹⁰² [2000] CILL 1637

¹⁰³ (2000) TCC

by the Task Group who stated: '2.2.1 Respondents also suggested that the residential occupiers' exclusion (Section 106(1)(a)) should be deleted.'¹⁰⁴

107. Provisions applicable only to agreements in writing.

Section 107(1) requires that a construction contract must be in writing.

This is further defined/qualified in section 107 (2) by the following:-

- Even if the agreement is not signed s. 107 (2)(a)
- Can be made through an exchange of written communication s. 107 (2)(b)
- Not in writing but referring to written terms s. 107 (3)
- Is recorded by one of the parties or a third party, with the authority of the parties (even if not in writing) s. 107 (4)
- Not in writing, but not denied by any of the parties. s. 107 (5)

However, the New Act repealed this section in its entirety and only added some requirements to apply in adjudication (which is not discussed in this research.)

Hence, for the payment provisions of the Act the requirement to be in writing no longer exists.

The following law cases will further explain the problems that led to the repeal of this requirement:-

- In *RJT Consulting Engineering Ltd v DM Engineering (NI) Ltd*¹⁰⁵, it was held that all of the agreement and not only a part of it must be evidenced in writing, with the exception of LJ Auld who referred only to '*material terms*' and not the whole agreement to be in writing.

¹⁰⁴ Report Of The Construction Umbrella Bodies Adjudication Task Group On Adjudication Under The Construction Act 2004 <http://www.bis.gov.uk/files/file15096.pdf> - P3 accessed on 28 August 2010

¹⁰⁵ [2002] CILL 1841..

- In *Redworth Construction Limited v Brookdale Helathcare Ltd* ¹⁰⁶ the judge held no written contract existed as certain terms were not agreed in writing e.g. date of possession, the contract period and the completion date.
- In *Mast Electrical Services v Kendall Cross Holdings Ltd* ¹⁰⁷ the courts doubted that a contract existed at all and concurred in the adjudicator's action in resigning on the basis that there was no written contract.
- In *A.R.T. Consultancy Limited v Navera Trading Limited* ¹⁰⁸ the parties had an oral agreement covering design and a written agreement covering the site activities. The adjudicator only had jurisdiction covering the on-site activities i.e. that is covered by the written agreement.

One of the debatable questions was whether or not a letter of intent satisfies the requirements of s-107, this was discussed in the following cases:-

- In *Bennett Electrical Services v Inviron Ltd* ¹⁰⁹, it was held that any agreement based on a letter of intent would not have complied with the requirements of s.107. For an agreement in writing to come within s.107(2)(b) the whole contract had to be evidenced in writing, and not merely part of it.
- In *Hart Investments Ltd v Fidler* ¹¹⁰, it was held that even if the letter of intent constituted a binding and enforceable contract, which the court did not accept, such an arrangement, where nothing of importance was defined in writing, was not a contract for the purposes of s.107(2)(c) of the Act.

¹⁰⁶ [2006] CILL 2373

¹⁰⁷ [2007] EWHC 1296 (TCC).

¹⁰⁸ [2007] EWHC 1375 (TCC).

¹⁰⁹ [2007] EWHC 49 (TCC).

¹¹⁰ (2006) 109 ConLR 67.

- In *Mott Macdonald Limited v London & Regional Properties Limited*¹¹¹, it was held that a letter of intent can be enforceable in law but if all the terms are not in writing it will not fall within s.107(2)
- On the other hand, in *Harris Calnan Construction Co Ltd v Ridgewood (Kensington) Ltd*¹¹², the court was satisfied that the letter of intent included all terms in writing by referring to a standard form of contracts in addition to specifying essential terms such as contract price, liquidated damages, duration, etc.
- In conclusion, the court was of a view that the letter of intent generally will not satisfy the requirements of s.107, unless all terms were in writing even if by reference.
- Moreover, the matter of whether an oral variation to a construction contract would still fall under s.107 was discussed in *Total M E Services Limited v ABB Building Technologies Ltd*¹¹³, where it was held that if the varied work is identical in nature to the executed work and therefore was part of an "enlarged" contract rather than forming separate contract. The fact that oral agreements were made did not prevent the contract as a whole being a single written contract capable of coming within the 1996 Act.

Accordingly, as far as s.105 went into increasing disputes, also s.107 had a greater share of negating the spirit of the Act, and imposed a great deal of jurisdiction disputes, which made the repeal enacted by the New Act an acceptable amendment.

As for Section 108, it deals with adjudication and not being discussed in this research.

¹¹¹[2007] EWHC 1055 (TCC); 113 Con. L.R. 33; [2007] C.I.L.L. 2481

¹¹² [2007] EWHC 2738 (TCC); [2008] Bus. L.R. 636; [2008] B.L.R. 132; [2008] I.L.Pr. 13; [2007] C.I.L.L. 2525

¹¹³ [2002] EWHC 248 (TCC)

The research will now discuss sections 109 to 113 which are dedicated to provide a statutory payment mechanism that regulates what constitutes a compliant payment mechanism that should be included in any contract, and failure to include a compliant mechanism (partially or totally) will enforce the application of the relevant section of the Scheme into the contract.

Payment Provisions sections s.109-s.113

109. Entitlement to stage payments.

This section grant the contractor the right for a staged payment unless it was intended that the work last less than 45 days. The amount and intervals of payment are left to parties' discretion. However, if none was present, the provisions of the Scheme will apply.

110. Dates for payment.

This section specifies that every contract must contain a mechanism specifying:-

- What payment becomes due; (s.110(1)(a))
- When it becomes due; (s.110(1)(a))
- Final date for payment (s.110(1)(b); and
- A notice for payment due, no later than five days after the due date, specifying the amount due and the basis of calculation. (s.110(2))
- The same notice must be given in circumstances where a payment is not due but *would* have become due if the other party had carried out its obligations under the contract (s.110(2)(a)) and no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts (s.110(2)(b)).

If the contract does not contain such mechanism, or is non compliant therewith, the Scheme applies.

The aim of sections 109 and 110 was to overcome the problem of contracts lacking a **proper** payment mechanism; however the actual effect of both sections as drafted was to overcome the problem of contracts lacking **any** payment mechanism. To clarify this statement, a staged payment for instance can be two stages one after work completion and the second after the end of defects period¹¹⁴, not much different from an entire contract. Similarly, the contract may specify a very long time for payment, hence overcoming the conditional payments (i.e. pay when paid) prohibited by the following s.113. Unfortunately, the Act did not oversee this problem by providing minimum requirements for the stages duration, monthly payment for instance, and the acceptable date of payment, the only control exercised was the five day notice of payment after to the due date, whenever this is. As *Lynch* stated:

The problem has been highlighted by the Confederation of Construction Specialists, who point out that this section does not take into account the unequal bargaining powers of upstream parties. They state: *'this is not freedom at all because it gives supreme power to Main Contractors to impose whatever terms and conditions they like'*. Indeed, Sutton notes *'while the Act requires some agreement between the parties [as to payment intervals] this might be regarded by a subcontractor as merely one more clause in the "take it or leave it standard terms"'*.¹¹⁵

Furthermore, as the right to staged payments only applies to contracts over forty-five days in duration, instead of issuing one contract, sometimes the payer split it into various small contracts each of which is less than 45 days just to escape the staged payments requirements.¹¹⁶

¹¹⁴ Meara, C (1999) *'Law and its limits'* Building, 26 March. p.63.

¹¹⁵ *Lynch* (n 83) p20 citing Rideout, G (1998) *'Will the Scheme of construction contracts make a monkey out of you?'* Contract Journal. 18 March. p.18. and Sutton, G (1998) *'Cash injection'* Welsh Builder and Engineer. May. Issue 9.

¹¹⁶ *Ibid* p20

Regarding the notice of payment, one fall back of the Act is that it did not provide any sanction in case this notice was not served. One of the arguments raised by this absence of sanction, is whether the failure to provide this notice will result in the sum claimed by payee be treated as due without checking the merits of this sum, this proposition was held to be wrong in *SL Timber Systems Ltd v Carillion Construction Ltd*¹¹⁷ where Lord Macfadyen stated that such failure does not alter the fact that failure to give a Section 110(2) notice does not, in any way or to any extent, preclude dispute about the sum claimed.

Accordingly, the New Act tried to rectify some of the problems of section 110 by introducing new subsections (1A), (1B), (1C) and (1D) after subsections (a) and (b) of s.110 and replacing s-110 (2) with subsections 110A and 110B. Before these amendments are explained in more details as follows, it is worth noting that the way the New Act used repeatedly the letters, one time as a normal subsection (a), the other as (1A) and finally as a letter directly after the section as in (110A) is quite confusing and may drive the reader of the New Act to lose track of the amendments.¹¹⁸

New subsections (1A), (1B) and (1C)¹¹⁹

The provision of the new subsection (1A) secures that it is not an adequate mechanism for these purposes to make the determination of what payments are due, or when, dependent upon the performance of obligations in a different contract (for example, in a superior contract) or upon someone's decision as to whether obligations have been performed in a different contract (for instance the Architect under the main contract to certify payment for a subcontractor). This term was considered unfair since subcontractor may not be aware that a certificate has been issued in a superior

¹¹⁷ [2001] BLR 516

¹¹⁸ A more comprehensive numbering system will be adopted in the proposed UAE Act (next chapter)

¹¹⁹ Based on the explanatory notes provided by Legislation.gov.uk (s.142)

<http://www.legislation.gov.uk/ukpga/2009/20/notes/division/7/8/3?type=en> accessed on August 2010

contract and, where such a certificate covers work undertaken by other subcontractors, payment to the subcontractor is often delayed until all of the other work has been completed. As for subsection (1B) it excludes the payment obligation from the obligations but refers to s.113 in which conditional payment is prohibited, unless in insolvency cases. On the other hand, subsection (1C) confirms that this prohibition does not apply the other way around, this means that an employer and a contractor can still agree in their contract that a certain payment will be made to the contractor when his subcontractor performs certain work. Subsection (1D) confirms that the due date of payment cannot be determined based on the date of giving the required notice of payment.

New subsections (110A) and (110B)¹²⁰

These new added subsections 110A and 110B repealed the old subsection 110(2).

Section 110A indicates that a payment notice specifying the amount due (or in case of the amount was partially or totally already paid, what would have been due) and the basis of calculation of the said amount. This notice must be given no later than five days after the payment due date. Moreover, this notice can be given by the payer or a specified person (normally the Architect, or the Engineer as best known in UAE) or by the payee himself (the person entitled for the payment). Subsection 110A(4) states that the amount can be zero and 110A(5) implies the provision of the Scheme in case of non compliance with the mandatory provision of this section.

On the other hand, section 110B deals with the situation where the contract requires the payer or a specified person to give the notice but he fails to do so (or is late), in this case the payee has an implied right to give the notice himself, provided that the contract did not specify that he has to do so in the first place, in which case he has to comply with the provision of the contract and not this subsection. The final date of

¹²⁰ Ibid s.143

payment is postponed by the time lapsing from the date the notice should have been given by the payer and the actual date the notice was given by the payee. To simplify the complication of this provision, a numeric example may do the trick, If, for example, a sum becomes payable on the 2nd day of the month (such that the date by which the “payment notice” should have been given was the 7th day) and must be paid, at the latest, on the 17th day, the effect of a payee’s notice in default served on the 14th day would be to postpone the date on which the relevant sum must finally be paid to the 24th day of the month (17 +7 = 24)¹²¹.

These amendments rectified the problem of lack of sanction in case the payment notice was not served as explained above. Moreover, it also resolved the attempt of replacing the prohibited “*pay when paid*” provision with “*pay when certified*”.

These amendments are quite effective and help in solving many practical problems such as¹²²:-

- The certificate being received by the payer from a supervising officer without the knowledge of a subsequent payee;
- The payer not issuing any form of notice to the payee of the payment to be made to him, possibly on the basis that an individual item of work has not been certified;
- The payee being left unaware that the payment process is now underway;
- The payment, or a withholding notice under section 111, or both, being issued very late in the payment cycle after the payer has been paid;
- The payer only explaining the payment or grounds for withholding in response to a referral to adjudication;
- Little or no opportunity for the payee to respond;

¹²¹ Ibid s.143 (No.334)

¹²² Chairman’s Final Report of the deliberations of the Payment Working Group www.bis.gov.uk/files/file15091.pdf section 2.2.2 accessed on 1 September 2010

- The agreed mechanism for payment required by the Act becomes ineffective as a result.

111. Notice of intention to withhold payment

This section states that no party can withhold payment, unless a notice of intention to withhold payment was served complying with the following:-

- The amounts proposed to be withheld and the grounds for withholding
- Given no later than the prescribed period agreed by the parties, if none prescribed, no later than the period prescribed in the Scheme.¹²³
- A notice served under s.110 (2) would suffice as s.111 notice provided it complies with the provisions of this section.

As per the s.110 Notice, s.111 did not serve the required aim because it lacked to impose any sanction if the notice is not served, and it opened a floodgate of cases trying to define the consequences of not serving the withholding notice, what sum is due under contract, and whether or not abatement can be applied, this can be summarized as follows:-

- These cases resulted in two interpretations; the first is that if a certificate of interim payment is issued and no s.111 notice was issued then the claimed sum must be paid (*Millers Specialist Joinery Co v Nobles Construction*)¹²⁴. The second is that the failure to provide the Notice does not relieve the payee from proving what amount is due under the contract (*SL Timber Systems Ltd v Carillion Construction Ltd*)¹²⁵
- Furthermore, the allowance of abatement is also controversial, and was split into 'narrow interpretation' as in *Woods Hardwick Ltd. v Chiltern Air Conditioning* ¹²⁶

¹²³ Since adjudication is not part of the research, the adjudication provision (s.111 (4)) is not stated here.

¹²⁴ (2000) CILL 1770

¹²⁵ [2001] BLR 516

¹²⁶ [2001] BLR 23

where it was held that abatement would not be caught by section 111 of the Act. In contrast, with the '*wide interpretation*' expressed in *Whiteways Contractors v Impresa Castelli* ¹²⁷ where it was held that the Act made no distinction between set-off and abatement and if abatement was sought it must be included within a withholding notice.

Against its aim, The Act has created a debatable area, which needed to be clarified (if it was) through law cases. That was the driver of the amendments enacted by the New Act.

New section 111 "*Requirement to pay notified sum*" replaces the old one "*Notice of intention to withhold payment*" in doing so, it replaces the provision in respect of "withholding notices" with (generally speaking) a requirement on the part of the payer to pay the sum set out in such a notice. By virtue of the new section a Payer must pay the notified sum, unless he gave a notice of a different sum and the basis thereof, either before the prescribed period before the final date of payment (as per contract, or if none, seven days before the final date of payment as per the Scheme) or not before the notice given by the payee (if any) pursuant to 110A (3) or 110B (2). Moreover, the amount notified can be zero, such in cases of set off or abatement. If such notice was successfully given, the new notified amount (or zero as the case may be) must be paid before the final date for payment.¹²⁸

112. Right to suspend performance for non-payment.

This section grant the contractor the right to lawfully suspend work, without being in breach of contract, if the payment was not paid by the final date for payment and no effective notice to withhold payment was given. However, suspension must be preceded by a seven days notice specifying the grounds for suspension, and must be ceased as soon as the payment is made. Any suspended period based on this section will entitle the contractor for the correspondent extension of time.

¹²⁷ (2000) 16 Const LJ 453

¹²⁸ Legislation.gov.uk (n119) s.144

Although this section was not a problematic one as the previously discussed sections, however the New Act also amended it briefly, but with very effective amendments. The first amendment is to grant the non-paid party the option to stop only part of the work and not the whole work as previously stated, although this section was interpreted generally that it can apply only to part of the work, but the amendment will operate to waive any doubts in this regard. The other important amendment is providing the non-paid party the respective cost he incurred from this suspension, for instance for re-deploying staff or remobilization. The final amendment is including the period elapsed in the consequence of exercising the suspension (such as remobilization), and not only the period of suspension, in the granted extension of time.

113. Prohibition of conditional payment provisions.

This section prohibits the infamous ‘*pay when paid*’ or ‘*pay if paid*’ clauses, with only one exception if the third party paying the paymaster of the contract becomes insolvent.

Kelin stated: ‘*well over 80% of the subcontracts we were told about put in a provision which elongated the payment period for subcontractors in some way, whether it was through pay when-certified or something else*’¹²⁹. Consequently, such clauses allowing long periods for payment are effectively being used to circumvent the prohibition on pay-when-paid clauses,¹³⁰ with examples of 60 and even 90-day payment periods being imposed¹³¹, the situation is even worse in UAE where it sometimes reaches 180 days.¹³²

¹²⁹ Cited in Barrie, G (1999) ‘*Specialists call for overall of act*’ Building, 23 April. p11.

¹³⁰ Per Meara, C (1999) *Op. cit.*

¹³¹ Cited in *Lynch (n 82)* citing Russell, J. *The Construction Act 1996 including tricks, dodges and loopholes used by clients and builders.* <http://www.jrconsultant.co.uk/construction%20Act.htm> (visited 29th July 2002)

¹³² Sona Nambiar and Joseph George ‘Payment delays rise to 180 days’

<http://www.zawya.com/pdfstory.cfm?storyid=ZAWYA20090928045252&l=045200090928> accessed on 6 August 2010

Scheme of Construction Contracts

The Scheme is a set of provisions that will be enforced into a contract in case the parties failed to¹³³:-

- Agree the amount and intervals of staged payment as per s-109.
- Agree the prescribed period for providing a withholding notice as per s-111,
- Agree on payment terms as per s-113 (pertaining to insolvency and not discussed in this research)
- Provide for a payment mechanism as per s-110.

The Scheme is split into Part I pertaining to adjudication, which as explained previously will not be discussed in this research, and Part II pertaining to payment, which will be discussed in the following sections.

Part II-Payment

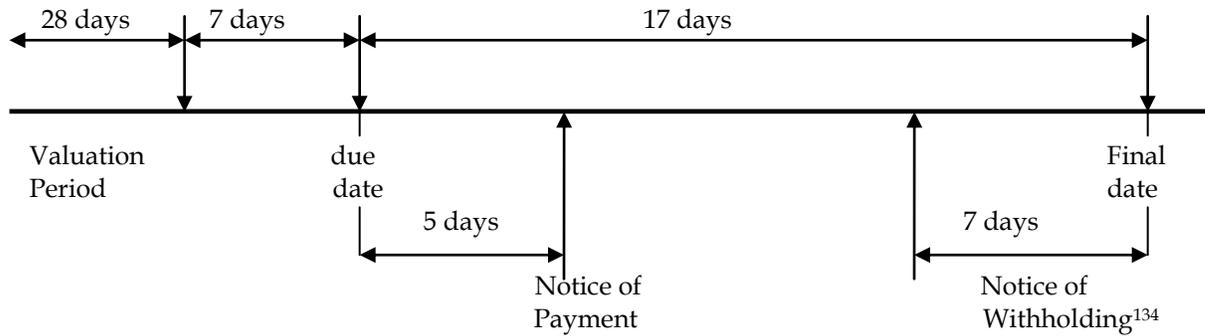
- For better comprehension, it is advised to read paragraph 12 as the first paragraph, since various definitions are mentioned therein without which the Scheme will be hard to understand, these are:-
 - Claim by the payee means a claim by the party carrying out work.
 - Contract price means the entire sum payable under the contract.
 - Relevant construction contract means any construction contract, the duration of which is more than 45 days.
 - Relevant period means a period specified for staged payment under the contract, or 28 days in case none is specified.
 - Value of work means value calculated as per contract, or in case of none, the cost of work performed in addition to any overhead or profit included in the contract price.
 - Work means any work or services mentioned in s.104 of the Act.

¹³³ The Scheme, s-3 (sections pertaining to payment provisions only are discussed)

- Paragraph 1 states that in case parties failed to agree the amount or intervals of payment, paragraphs 2 to 4 shall apply.
- Paragraph 2(1) to (4) specify the amount to be the total of the value of work done, with making regards for material and other contractual amount, less the sum paid previously or have become due, this amount should not exceed the contract price less due payments. In other words, this is a typical FIDIC 99 provision for interim payments.
- Paragraph 3 specifies that where parties fail to provide an adequate payment mechanism, paragraph 4 to 7 shall apply.
- Paragraph 4 specify that payment becomes due either after 7 days from the expiry of the relevant period (which is either the contractual period or 28 days in case none is specified) or making a claim by the payee, whichever is later.
- Paragraphs 5 and 6 deal with final payment under a relevant construction contract and payment of contract price under a non-relevant construction contract. In both cases payment will become due either after 30 days of work completion or payee's claim, whichever is later.
- Paragraph 7 states that any other payment under a construction contract shall become due either after 7 days of the completion of the relevant work or payee's claim, whichever is later.
- Paragraph 8 specifies that final date for payment, if none is specified in the contract, shall be 17 days from the due date of payment.
- Paragraph 9 specifies that payment notice should be given no later than 5 days after payment became due or should have become due.
- Paragraph 10 specifies that any notice of intention to withhold payment shall be given no later than 7 days before the final date for payment.

- Finally, paragraph 11 prohibits the conditional payment, and enforces the provisions of the Scheme in case no other payment terms were agreed between the parties.

The following diagram summarizes the Scheme payment provisions:



¹³⁴ This was renamed as 'Notice of intention to pay less than the notified sum' as per s. 111(3) of the New Act

Chapter 4

UAE Proposed Act

Introduction

This chapter will provide a proposal of the UAE Act based on the assessment conducted in the previous chapter for each section of the Act. Sections of the proposed UAE Act will be followed by a commentary highlighting the changes done to the original provisions of the Acts and explaining the reasons for these changes.

UAE Proposed Act

1. Scope of Application

This Act applies to a Muqawala contract as defined under Article 872 of UAE Federal Law No.5- 1985 as amended by the Federal Law No.1-1987.

Commentary on Section 1

Section 1 of the proposed UAE Act is based on sections 104 to 107 of the Acts, which provided various limits to the application of the Act such as excluding certain types of works, residential occupiers and contracts not in writing from the scope of the Act.

This is replaced by a simple section stating that the Act applies to any Muqawala Contract as defined by the UAE law, and hence providing the widest application coverage to the UAE Act.

The changes to the Act are explained as follows:-

Section 105

This section included various exclusions to the types of constructions operations covered by the Act. These exclusions generated significant amount of disputes trying to clarify what falls under the Act and what is excluded. The reasons these exclusions were introduced in the Act, is said to be '*a result of compromise and lobbying*'¹³⁵

As explained in details in Chapter Three various legal literatures recommended removing these exclusions.

Based on above, the research also recommends that this section not to be adopted in the proposed UAE Act.

Instead, a definition of construction contract can follow the definition of a Muqawala Contract as defined in Article 872 of the Civil Code: '*A 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*'. A simple definition will help to provide the widest possible application and will spare UAE court to go the same dispute path the UK court had to.

Section 106

This section excluded residential occupiers from the scope of application of the Act, and it also created disputes in trying to define what qualifies as a dwelling for the purpose of this section.

¹³⁵ Lucy Garrett 2010 'Construction contracts and construction operations: confusion over exclusion?' <http://construction.practicallaw.com/blog/construction/plc/?p=423> accessed on 28 August 2010

The research agrees with the suggestion of the Task Group to delete this exclusion¹³⁶, a contractor should be able to recover his payment regardless if he is building it to the benefit of an end user intending to occupy it, rent it or sell it.

Section 107

This section included a condition for a construction contract to be in writing based on various criteria included therein. As a result of the significant amount of disputes the New Act repealed this section in its entirety.

The research also recommends following the lead of the New Act and refraining from having a requirement that contracts must be in writing, it is enough to follow the rules of contract formation prescribed by the Civil Code.

Conclusion

In conclusion, Sections 104-107 are limitation sections whose primary purpose is to define the applicability of the Act, and was heavily criticized in UK as *Edwards and Anderson* noted that the list and wording of the included/excluded operations, '*some of which was the result of intense lobbying, is not as clear as the drafters intended*'¹³⁷, and *Atkinson* stated '*the difficulty in identifying the exact scope of the Act is that the terms adopted in the Act to describe construction are not precisely defined. So it is hardly surprising that disputes would arise on the exact scope of the Act and the meaning of its terms*'¹³⁸. That is why these sections are not recommended to be adopted in the proposed UAE Act and was replaced by a simple reference to Muqawala Contract to provide the widest scope of application.

¹³⁶ Chapter 3, Page 42

¹³⁷ Edwards, L. & Anderson, R.N.M (2002) *Practical Adjudication for Construction Professionals*. Thomas Telford Publishing. p.10

¹³⁸ Atkinson, D (2000) 'Understanding the scope of the 1996 Act' *Const.News*. 2nd March. p.14

2. Entitlement for Staged payments

- 2.1 A party to a construction contract is entitled to payment by installments, stage payments or other periodic payments for any work under the contract unless:
- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- 2.2 The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due, provided that such intervals do not exceed 30 days.
- 2.3 In the absence of such agreement or if the intervals exceed 30 days, the relevant provisions of the Scheme of UAE Act apply.
- 2.4 References in the following sections to a payment provided for by the contract include a payment by virtue of this section.

3. Dates for payment.

- 3.1 Every construction contract shall:
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

3.2 The requirement in subsection (3.1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on:

- (a) the performance of obligations (including payment obligation) under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.

3.3 Subsection (3.2) does not apply where –

- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
- (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.

3.4 The requirement in subsection (3.1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.

3.5 For the purpose of subsection 3.1, the parties are free to agree when a sum becomes due and how long the period is to be between the date on which a sum becomes due and the final date for payment. Provided that these periods do not exceed the following:-

- (a) Due date is no later than 15 days after the end of each payment interval.
- (b) Final Date for Payment is no later than 45 days after the due date.

3.6 If or to the extent that a contract does not contain such provision as is mentioned in subsection (3.1) and/or not complying with the minimum durations set out in subsection (3.5), the relevant provisions of the Scheme of UAE Act apply.

4. Payment Notices: contractual requirements

4.1 A construction contract shall, in relation to every payment provided for by the contract:

- (a) require the payer or a specified person to give a notice complying with subsection (4.2) to the payee not later than five days after the payment due date, or
- (b) require the payee to give a notice complying with subsection (4.3) to the payer or a specified person not later than five days after the payment due date.

4.2 A notice complies with this subsection if it specifies:

- (a) in a case where the notice is given by the payer:
 - i. the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
 - ii. the basis on which that sum is calculated;
- (b) in a case where the notice is given by a specified person:

- i. the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
- ii. the basis on which that sum is calculated.

4.3 A notice complies with this subsection if it specifies:

- (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
- (b) the basis on which that sum is calculated.

4.4 For the purposes of this section, it is immaterial that the sum referred to in subsection (4.2)(a) or (b) or (4.3)(a) may be zero.

4.5 If or to the extent that a contract does not comply with subsection (4.1), the relevant provisions of the Scheme of UAE Act apply.

4.6 In this and the following sections, in relation to any payment provided for by a construction contract:

“payee” means the person to whom the payment is due;

“payer” means the person from whom the payment is due;

“payment due date” means the date provided for by the contract (or imposed by the Scheme) as the date on which the payment is due;

“specified person” means a person specified in or determined in accordance with the provisions of the contract.

5. Payment Notices: payee’s notice in default of payer’s notice

5.1 This section applies in a case where, in relation to any payment provided for by a construction contract the contract requires the payer

or a specified person to give the payee a notice complying with subsection (4.2) not later than five days after the payment due date, but notice is not given as so required.

5.2 Subject to subsection (5.4), the payee may give to the payer a notice complying with subsection (4.3) at any time after the date on which the notice referred to in subsection (5.1) was required by the contract to be given.

5.3 Where pursuant to subsection (5.2) the payee gives a notice complying with subsection (4.3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (5.2) that the notice was given.

5.4 If:

- (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (5.1) is required by the contract to be given, to notify the payer or a specified person of—
 - i. the sum that the payee considers will become due on the payment due date in respect of the payment, and
 - ii. the basis on which that sum is calculated, and

(b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with subsection (4.3) given pursuant to subsection (5.2) (and the payee may not give another such notice pursuant to that subsection).

Commentary on Sections 2 to 5

Sections 2 to 5 are based on sections 109 and 110 of the Act. In general it adopted all the amendments done by the New Act as is, with the following exceptions:-

Section 110 (1A) and (1B)

Subsection 3.2 (a) of the UAE Act, added the payment obligation to the prohibited performance of obligation, this is because section 113 of the Act concerning the prohibition of conditional payment and insolvency is deleted for the inadequacy of referring to a foreign insolvency law whilst UAE has its own law, yet the conditional payment was still required to be included in the UAE Act. Hence it was incorporated in subsection 3.2(a), following the same concept subsection 1B of the Act which excluded the payment obligation was deleted.

Section 110 (3)

Subsection 3.5 of the UAE Act adopted the provision of parties' freedom to agree due date and final date for payment; however unlike the Acts it introduced an overall cap for the due date to be no more than 15 days from the end of each interval and another cap for final date to be no more than 45 days from the due date. If a contract provided for longer intervals, the relevant Scheme provisions apply.

As explained in Chapter Three, the New Act managed to overcome various problems in section 110 that existed in the Act, such as the absence of any sanction in case of non complying with the requirements of this section. Accordingly, the research recommends adopting all the amendments of the New Act.

In addition, it is recommended to include the prohibition of conditional payment in subsection 110 (1A), since it is suggested not to adopt s-113, which deals with conditional payment and makes some exclusion in case of insolvency, and having

regard to the fact that UAE has its own insolvency law, it is proposed not to include it in this statutory mechanism, and hence it will be easier to adopt the provision of prohibition of conditional payment from s.113 and insert it in 110 (1A). As for cases of insolvency, it can be either referred to the UAE law, or a future research can discuss the implementation of similar provision to the proposed UAE Act.

Moreover, construction contracts in UAE have a bad reputation of specifying long payment terms. Meed stated *"This is another issue highlighted by international contractors working in the region. Payment terms tend to be as long as 90 days in the Gulf, compared with 45 days in Europe and the US. When cash is tight, this longer payment time can make a major difference. "We are paid late every month," one senior contractor tells MEED. "We then pay our subcontractors late and site morale is very low."*¹³⁹ Also Graham Wood stated *'However looking forward, I think payment terms will hold the key to managing risk combined with legally binding contracts that can be enforced. One of the early features of the slowdown was the lack of cash flow due to late or non-payment. That situation had a knock-on effect and exasperated the situation.'*¹⁴⁰

Accordingly, in order to overcome this problem, it is recommended to include an overall cap, if the contract provisions exceeded it the provision of the Scheme applies. For this purpose, it is suggested that the valuation intervals should not exceed 30 days, the due date for payment should not exceed 15 days thereafter, and the final date for payment should not run for more than a further 45 days. If the contract failed to provide for a payment mechanism that does not exceed these durations, the Scheme applies. It is noted that the proposed mechanism is longer than the one provided for in the Scheme, which specifies 12 days for notice of payment and 24 days for final date for payment, both calculated from the end of the valuation period. Hence, the knowledge of a much preferable payment mechanism under the Scheme that can be imposed into a contract can encourage employers/engineers to comply

¹³⁹ 'Meed 2010 'Construction 2010: Public sector offers best opportunities' <http://www.meed.com/supplements/2009/meed-yearbook-2010/construction-2010-public-sector-offers-best-opportunities/3003023.article> accessed on 4 September 2010

¹⁴⁰ Ben Roberts April 2010 'Payment terms key to new projects, director says' <http://www.constructionweekonline.com/article-8035-payment-terms-key-to-new-projects-director-says/> accessed on 4 September 2010

with the proposed payment mechanism of the UAE Act to avoid the imposition of the shorter one provided in the Scheme. Thus reaching the sought result of providing better cash flow for contractors and avoid employers abuse based on the unbalanced negotiation power in the prevailing market.

These sections can be very beneficial if applied in UAE as it helps overcoming the problems discussed above caused by the UAE law providing for payment when obligation is fulfilled¹⁴¹, which in construction language means when construction is completed.

The problem of cash flow is one of the biggest problems that contractors face, and usually it cause work delays and sometimes can drive contractors to insolvency.

As Matt Stevens puts it: 'A cash flow problem is a drag on the performance of a construction firm. Just as a foot of water in the bottom of a ship would cause it to ride lower, move slower and be a foot closer to sinking, it is problematic...Negative cash flow is the leading predictor of construction contractor bankruptcy'.¹⁴²

Cash flow in simple terms is money going into the company and out of it, if the difference is negative this means the company is paying more than it is collecting and vice versa. No company can avoid insolvency if the period of negative cash flow is prolonged.¹⁴³

Moreover, Dubai especially faced this cash flow problem post the credit crisis, with the delay of payment being reported in September 2009 to be dragged from 90 to 180 days.¹⁴⁴ That is the main reason the research is recommending to include an overall cap for payment periods (payment intervals, due date, final date and withholding notices) and not to leave it to parties freedom, which might result in exaggerated periods that will negate the purpose of having such act in UAE, which is to protect

¹⁴¹ Civil Code, Article 885

¹⁴² Matt Stevens 'Cash Flow: Keep Water Out of Your Ship' <http://www.allbusiness.com/construction/4353554-1.html> accessed on 6 August 2010.

¹⁴³ ibid

¹⁴⁴ Sona Nambiar and Joseph George 'Payment delays rise to 180 days' <http://www.zawya.com/pdfstory.cfm?storyid=ZAWYA20090928045252&l=045200090928> accessed on 6 August 2010

the supply chain from unfair payment provisions imposed on them by their employers.

Accordingly, the introduction of these sections along with the suggested caps can help effectively to reduce the cash flow problem in UAE and ensure that the construction operation moves smoothly and of course reduce the amount of payments disputes.

6. Requirement to pay notified sum

- 6.1 Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
- 6.2 For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means:
- (a) in a case where a notice complying with subsection (4.2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
 - (b) in a case where a notice complying with subsection (4.3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
 - (c) in a case where a notice complying with subsection (4.3) has been given pursuant to and in accordance with subsection (5.2), the amount specified in that notice.
- 6.3 The payer or a specified person may in accordance with this section give to the payee a notice of the payer’s intention to pay less than the notified sum.

- 6.4 A notice under subsection (6.3) must specify –
- (a) the sum that the payer considers to be due on the date the notice is served, and
 - (b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

- 6.5 A notice under subsection (6.3):
- (a) must be given not later than the prescribed period before the final date for payment, and
 - (b) in a case referred to in subsection (6.2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

- 6.6 Where a notice is given under subsection (6.3), subsection (6.1) applies only in respect of the sum specified pursuant to subsection (6.4)(a).

- 6.7 In subsection (6.5), “prescribed period” means –
- (a) such period as the parties may agree provided it is not less than 5 days prior to final date for payment, or
 - (b) in the absence of such agreement or if less than 5 days prior to final date for payment, the period provided by the Scheme of UAE Act.

Commentary on Section 6

Section 6 replaced Section 111 of the Act, with the following changes:-

Section 111 (7)

Subsection 6.7 of the UAE Act adopted the provision of parties' freedom to agree the prescribed period for giving the withholding notice; however unlike the Acts it introduced a minimum period of five days prior to final date for payment. If a contract provides for a shorter period, the relevant Scheme provisions shall apply (which is seven days prior to final date for payment.)

Sections 111 (8) and (9)

These subsections are deleted from the UAE Act because it is related to adjudication, which is not adopted in the proposed Act.

Sections 111 (10) and (11)

These subsections are deleted from the UAE Act because it is related to insolvency of payer, and as explained above it is not adequate to refer to a foreign insolvency law whilst UAE has its own law.

Section 6 adopted section 111 of the Act as amended by the New Act, it only waived the amendment pertaining to adjudication since it is out of the research scope, and also the amendment pertaining to the insolvency is omitted, since UAE has its own insolvency law and it is impractical to include a reference to a foreign law here in the proposed UAE Act. The effect of this section will be to reduce the abuse of under paying certificates as explained earlier in this chapter.¹⁴⁵

The only addition recommended by the research was to introduce a minimum period of five days prior to final date for payment to overcome employers providing the notice one day prior to final date for payment, in case the contract contained a shorter period the provision of the Scheme applies.

¹⁴⁵ See section 'Payment Problem in UAE' in Chapter Three

7. Right to suspend performance for non-payment

- 7.1 Where the requirement in subsection (6.1) applies in relation to any sum but is not complied with, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of any or all of his obligations under the contract to the party by whom payment ought to have been made (“the party in default”).
- 7.2 The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- 7.3 The right to suspend performance ceases when the party in default makes payment in full of the sum referred to in subsection (7.1).
- 7.4 Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right
- 7.5 Any period during which performance is suspended in pursuance of, or in consequence of the exercise of, the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

Commentary on Section 7

Section 7 adopted section 112 of the Act as amended by the New Act as is with no recommendation for any changes.

This section can be read in conjunction with Article 879 of the Civil Code which grant the contractor the right to hold the property if he was not paid, but it has the benefit of providing a clear mechanism as of the grounds and the periods. Hence, being implemented in the proposed UAE Act, will help regulate the initial provisions of the Civil Code. It is to be noted that a similar provision exists in FIDIC; however it is not unusual that engineers omit it in the particular conditions of contract. Thus, leaving contractors with no contractual recourse, which is why such provision will be very effective and needs to be implemented in a statutory form.

Commentary on the deletion of Section 113

Section 113 deals with the conditional payment and the case of insolvency of the payee. Whilst the part of conditional payment is strongly recommended to be maintained, however the part of insolvency can either be omitted, or it is worthy a discussion on its own merit, since UAE have its own insolvency law which is set out in Book Five of the Commercial Transaction Law, Federal Law No. 18 of 1993. This covers the rules and procedures in relation to the bankruptcy of individuals as well as the insolvency of commercial entities. It should be noted that although the Commercial Companies law, Federal Law No. 8 of 1984 (the “Companies Law”), regulates commercial entities in the UAE, the provisions regulating the bankruptcy of companies and other businesses are provided for under the Law, which does not differentiate between individual and corporate bankruptcy.¹⁴⁶

¹⁴⁶ Altamimi & Co, 'Bankruptcy on the UAE- Laws and relative procedure'- p3< <http://www.tamimi.com/Legal-Brochures.aspx>>

Accordingly, the research can not recommend the inclusion of UK insolvency law with the existence of a local insolvency law.

In conclusion, it is recommended to maintain the prohibition of conditional payment and not to adopt the insolvency part, or alternatively it can be the subject of another dedicated research. Accordingly, the prohibition of conditional payment was added to subsection 3.2 above.

8. The Scheme of UAE Act

Where any provision of the Scheme of UAE Act applies by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

Commentary on the Scheme of UAE Act

The Scheme of UAE Act will be based on the Scheme of Construction Contracts with no changes recommended, since the provided payment mechanism is fairly balanced between employers and contractors.

Conclusion

This research examined the UAE law related to two areas of concern for any contractor which are the fruit of the contract, i.e. his payment and the liabilities or risks he has to bear in order to reach this fruit. Examination was conducted in comparison to the more mature English law in attempt to propose measures for enhancing the UAE law and flagging uncustomary liabilities to foreign contractors coming to work in UAE.

UAE is a civil law country, the law of which was based on the Egyptian law which in turn was based on the French law. Federal law is governing all emirates in addition to specific laws for some of emirates, in case of conflict the federal law prevails. In addition the UAE law does not recognize the precedent doctrine and previous court judgment are not binding as is the case in UK, they can be however persuasive, and if a judge based his judgment on a precedent, it will not invalidate it.

The credit crunch was a turning point for UAE construction industry. Before its occurrence the industry was governed by a win-win approach, and the concern of all parties was to finalize high quality project in the shortest duration. The picture was reversed after the crunch, when money stopped flowing and projects were cancelled or freezed and rights and obligations started to be discussed. It was only then that the lack of adequate conditions of contract as well as statutory payment mechanism, were highlighted.

Contracts are mainly a tool to allocate risks between parties, and each contract imposes rights and obligations on both parties, which in a perfect world should be balanced between parties, but this is not the case generally in construction industry and more specifically in UAE the subject of this research.

Liabilities are a very broad item, and the research aim was not to examine all liabilities present in the UAE law, instead only liabilities that are unique in UAE law were discussed.

The first uncustomary liability is the adoption of penalty provision unlike the situation in UK which prohibits the inclusion of penalty clause and will waive any such clause if proven to be a penalty. In UAE, no such distinction exists and contracts actually contain clauses titled as penalties, and the court will not even attempt to assess if it was a genuine pre-estimate of damage or not. It was recommended that UAE law introduce such a prohibition in penalty clauses and meanwhile contractors discuss firmly the penalty clause and be aware that no distinction between liquidated damages and penalties is currently available in UAE law.

The second uncustomary liability is the uncertainty of liquidated damages or penalties. The inclusion of a damages clause benefits both parties, employers will have a ready recourse to be reimbursed for the damages they suffered, and contractors will be aware of the maximum liability they owe under the contract, and hence can make provisions for this risk or insure it. However, in UAE law the judge is allowed to re-assess the agreed compensation for damages on the application of any party, and can either maintain, increase or decrease the agreed sum. Practically speaking, proving the actual loss is much easier to employer than contractors, and hence this provision is more used by employers. However, employers have to substantiate their actual loss, prove its direct link to contractor, show the significant difference between agreed compensation and actual loss and prove they tried to mitigate their loss.

This provision introduces uncertainty into contracts and may end up imposing a huge risk on contractors, if an employer successfully managed to impose all losses he incurred on his contractor, and it is to be contrasted with the fact that if a contractor incurred losses due to factors such as sudden increase of material prices, labors strikes, etc. he is not allowed to apply to the court for re-assessing his contract price.

Accordingly, it was recommended that UAE law either respects the parties' freedom of contract, and waive such provision, or apply it to both parties and allow contractors to apply for re-assessment of an agreed contract price for unforeseen circumstances.

The third uncustomary liability is the Decennial Liability which is a period of ten years after the handing over of a construction project, during which the contractor and engineer will remain liable to the employer for any collapse or defect threatening the safety of the building, even if this collapse was due to a defect in the land itself. The employer can recover damages from both or any of them regardless of who was responsible, however the innocent party can recover the sum paid from the other party, but this will be through tort and not contract, since engineer and contractor do not have a contractual relationship. Moreover, parties cannot contract out of this liability or reduce it.

This can be contrasted with the English law which allows for a six years liability for claims under contract if the contract is simple (twelve if deed), and this liability starts from the date of breach which can be any point during contract but no later than handing over, since no contract can be breached after handing over. Moreover, parties are free to contract to reduce this liability.

This exaggerated liability does not have a readily available insurance policy and it falls outside the scope of the 'all risk' policy, moreover employer sometimes attempt to manipulate their conditions of contract to apply this ten year liability to minor defects also, which ends up imposing a ten year defects liability period on unwary contractors. Accordingly, it was recommended that UAE law revisits this liability and tries to reduce it to a more acceptable period, on the other hand contractors are advised to check their conditions of contract carefully to make sure that this liability is not twisted into a ten year defects liability period.

The last uncustomary liability is the re-measured contracts, the UAE law imposes an obligation on contractor to advise employer if the estimated quantities will be

substantially increased, or else he will not be reimbursed for the excess quantity. Furthermore, contractor must advise of the accurate increase in quantity and again he will not be reimbursed for any unadvised quantity. Following the advice, the employer may terminate the contract at his discretion and the contractor is only compensated for the work done with no other compensation although the termination can be classified as a termination for convenience. Accordingly, this provision grants employers the benefit of the lower price of re-measured contracts and removes the risk of excess quantity that was the reason for the lower price. In addition, the definitions of significant excess and timely advice are not provided and are open for interpretation.

It was recommended to waive such unique liability from UAE law, or at least more guidance to be given to contractors for identifying what amount to a significant increase and in the same time granting the innocent contractor fair benefits if the contract was terminated on this basis, such as the ones provided for termination for convenience by FIDIC 99.

After discussing the uncustomary liabilities, the research moved to assess how payment is covered under UAE law and how it can be enhanced by a statutory payment mechanism similar to the one provided by the Acts.

The Civil Code provided few provisions for payment, it allowed the contractor to retain property if not paid¹⁴⁷ and enforced employers to pay the consideration upon delivery of property¹⁴⁸ thus not enforcing staged payment, and finally allowed contractors to refuse performing their obligations if employer did not perform his¹⁴⁹. Thus the UAE law did not provide an adequate payment mechanism to regulate payment; this is in spite of the various payment collection problems that appeared in UAE after the credit crunch.

¹⁴⁷ Civil Code-Article 879

¹⁴⁸ Civil Code-Article 885

¹⁴⁹ Civil Code-Article 247

The research proposed the adoption of legislation similar to the Acts in UAE, and moved to scrutinize these Acts. After examining the problems that were generated from the application of the Act, and the ones that were solved by the New Act and what remained to be solved, a proposal for a UAE Act was provided.

For starter, the limitations/ definitions sections of the Acts¹⁵⁰ were reduced to a much simpler form that provides a wider scope of application. Secondly, various duration caps were introduced to provide an acceptable outline not to be exceeded by employers in their contracts or the Scheme will apply (which contains much shorter periods than the provided caps.) Duration caps were 30 days for payment intervals, 15 days for due date after the end of payment interval, and 45 days for final date for payment after the due date, finally the prescribed period for giving a notice of withholding was proposed to be not earlier than 5 days prior to the final date for payment. The final proposed change to the Acts was the removal of the insolvency law of UK, since the UAE has its own law and the proposed Act cannot refer to a foreign law, this waiver is not to be taken as an advice that the UAE Act should not include provisions for insolvency, it is advised that it includes one, however the examination of UAE insolvency law is outside the scope of this research.

Finally, it is a fact that UAE construction law is quite premature when compared to the English law, and this research tried to highlight the importance of starting the enhancement of UAE construction law, especially with the significant amount of construction operations currently taking place in UAE.

¹⁵⁰ The Act s-104-107

Appendix A

Civil Code Provisions for Muqawala Contract- English

Provisions of the UAE Civil Transactions Code concerning Contracts of Work

An unofficial translation into Arabic of the relevant provisions of the UAE Civil Transactions Code (Federal Law No. 5 of 1985 as amended) concerning Contracts of Work ('Muqawala') viz. Articles 872 to 896 reads as follows:

Definition and scope of Muqawala

Article 872

A 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

Article 873

- (1) The agreement in a Muqawala contract may be restricted to the contractor undertaking to provide work on condition that the employer provides the materials to be used, or that (the contractor) makes use of them in carrying out his work.
- (2) It shall also be permissible for the contractor to provide the materials and the work.

Article 874

In a Muqawala contract, there must be a description of the subject matter of the contract, and particulars must be given of the type and amount thereof, the manner of performance, and the period over which it is to be performed, and the consideration must be specified.

Effects of a Muqawala

Obligations of the Contractor

Article 875

- (1) If the employer stipulates that the contractor should provide the materials for the work, either in whole or in part, he shall be liable for the quality thereof in accordance with the conditions of the contract if any, or in accordance with current practice.
- (2) If it is the employer who is bound to provide the materials for the work, the contractor must take due care of them and observe proper technical standards in his work, and return the balance of the materials to the owner, and if he makes default and the materials are destroyed, damaged or lost, he shall be liable therefore.

Article 876

The contractor must provide, at his own expense, such additional equipment and tools as are necessary to complete the work, unless there is an agreement or custom to the contrary.

Article 877

The contractor must complete the work in accordance with the conditions of the contract. If it appears that he is carrying out what he has undertaken to do in a defective manner or in a manner in breach of the agreed conditions, the employer may require that the contract be terminated immediately if it is impossible to make good the work, but if it is possible to make good the work it shall be permissible for the employer to require the contractor to abide by the conditions of the contract and

to repair the work within a reasonable period. If such period expires without the reparation being performed, the employer may apply to the judge for the cancellation of the contract or for leave to himself to engage another contractor to complete the work at the expense of the first contractor.

Article 878

The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented.

Article 879

- (1) If the work of the contractor produces (a beneficial) effect on the property in question, he may retain it until the consideration due is paid, and if it is lost in his hands prior to payment of the consideration, he shall not be liable to the loss, nor shall he be entitled to the consideration.
- (2) If his work produces no (beneficial) effect on the property, he shall not have the right to retain it pending payment of the consideration, and if he does so and the property is lost, he shall be liable in the same manner as if he had misappropriated it.

Article 880

- (1) If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties

intend that such installations should remain in place for a period less than ten years.

(2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations.

(3) The period of ten years shall commence as from the time of delivery of the work.

Article 881

If the work of the architect is restricted to making the plans to the exclusion of supervising the execution, he shall be liable only for defects in the plans.

Article 882

Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void.

Article 883

No claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect.

Obligations of the Employer

Article 884

The employer shall be bound to take delivery of the work done when the contractor has completed it and placed it at his disposal, and if, without lawful reason, he refuses, despite being given official notice, to take delivery, and the property is destroyed or damaged in the hands of the contractor without any wrongful act or default on his part, the contractor shall not be liable.

Article 885

The employer shall be obliged to pay the consideration upon delivery of the property contracted for, unless there is an agreement or a custom to the contrary.

Article 886

- (1) If a contract is made under an itemized list on the basis of unit prices and it appears during the course of the work that it is necessary for the execution of the plan agreed substantially to exceed the quantities on the itemized list, the contractor must immediately notify the employer thereof, setting out the increased price expected, 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.
- (2) If the excess required to be performed in carrying out the plan is substantial, the employer may withdraw from the contract and suspend the execution, but he must do so without delay and must pay the contractor the value of the work he has carried out, assessed in accordance with the conditions of the contract.

Article 887

- (1) If a Muqawala contract is made on the basis of an agreed plan in consideration of a lump sum payment, the contractor may not demand any increase over the lump sum as may arise out of the execution of such plan.
- (2) If any variation or addition is made to the plan with the consent of the employer, the existing agreement with the contractor must be observed in connection with such variation or addition.

Article 888

If the consideration for the work is not specified in a contract, the contractor shall be entitled to fair remuneration, together with the value of the materials he has provided as required by the work.

Article 889

- (1) If the architect who has planned the building and supervised the performance thereof has not agreed upon a fee, he shall be entitled to fair remuneration in accordance with custom.
- (2) If any unforeseen event occurs which prevents the completion of the performance of the work in accordance with the plan prepared, he shall be entitled to fair remuneration for what he has done.

Sub-contracting

Article 890

- (1) A contractor may entrust the performance of the whole or part of the work to another contractor unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he do it in person.
- (2) The first contractor shall remain liable as towards the employer

Article 891

A sub-contractor shall have no claim against the employer for anything due to him from the first contractor unless he has made an assignment to him against the employer.

Termination of a Muqawala

Article 892

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

Article 893

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

Article 894

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

Article 895

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

Article 896

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

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

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

Appendix B

Civil Code Provisions for Muqawala Contract- Arabic

الفرع الأول- تعريف المقاولة ونطاقها

المادة رقم 872

المقاولة عقد يتعهد أحد طرفيه بمقتضاه بان يصنع شيئاً أو يؤدي عملاً لقاء بدل يتعهد به الطرف الآخر

المادة رقم 873

- 1- يجوز أن يقتصر الاتفاق في عقد المقاولة على أن يتعهد المقاول بتقديم العمل على أن يقدم صاحب العمل المادة التي يستخدمها أو يستعين بها في القيام بعمله.
- 2- كما يجوز أن يتعهد المقاول بتقديم المادة والعمل.

المادة رقم 874

يجب في عقد المقاولة وصف محله وبيان نوعه وقدره وطريقة أدائه ومدة إنجازه وتحديد ما يقابله من بدل.

الفرع الثاني- آثار المقاولة

(1) التزامات المقاول

المادة رقم 875

- 1- اذا اشترط صاحب العمل أن يقدم المقاول مادة العمل كلها أو بعضها كان مسئولاً عن جودتها طبقاً لشروط العقد اذا وجدت وإلا فطبقاً للعرف الجاري.
- 2- وإذا كان صاحب العمل هو الذي قدم مادة العمل وجب على المقاول أن يحرص عليها وان يراعي في عمله الأصول الفنية وان يرد لصاحبها ما بقي منها فان وقع خلاف ذلك فتلفت أو تعيبت أو فقدت فعليه ضمانها

المادة رقم 876

على المقاول أن يأتي بما يحتاج إليه في إنجاز العمل من الأت وأدوات إضافية على نفقته ما لم يقض الاتفاق أو العرف بغير ذلك.

المادة رقم 877

يجب على المقاول إنجاز العمل وفقاً لشروط العقد. فإذا تبين أنه يقوم بما تعهد به على وجه معيب أو منافٍ للشروط فيجوز لصاحب العمل أن يطلب فسخ العقد في الحال إذا كان إصلاح العمل غير ممكن وأما إذا كان الإصلاح ممكناً جاز لصاحب العمل أن يطلب من المقاول أن يلتزم بشروط العقد ويصحح العمل خلال أجل معقول فإذا انقضى الأجل دون إتمام التصحيح جاز لصاحب العمل أن يطلب من القاضي فسخ العقد أو الترخيص له في أن يعهد إلى مقاول آخر بإتمام العمل على نفقة المقاول الأول.

المادة رقم 878

يضمن المقاول ما تولد عن فعله وصنعه من ضرر أو خسارة سواء أكان بتعديه أو بتقصيره أم لا وينتفي الضمان إذا نجم ذلك عن حادث لا يمكن التحرز منه.

المادة رقم 879

1- إذا كان لعمل المقاول أثر في العين جاز له حبسها حتى يستوفي الأجرة المستحقة وإذا تلفت في يده قبل سداد أجره فلا ضمان عليه ولا أجر له.

2- فإذا لم يكن لعمله أثر في العين فليس له أن يحبسها لاستيفاء الأجرة فإن فعل وتلفت كان عليه ضمان الغصب

المادة رقم 880

- 1- إذا كان محل عقد المقاولة إقامة مبان أو منشآت ثابتة أخرى يضع المهندس تصميمها على أن ينفذها المقاول تحت إشرافه كانا متضامنين في التعويض لصاحب العمل عما يحدث خلال عشر سنوات من تهدم كلي أو جزئي فيما شيده من مبان أو أقاماه من منشآت وعن كل عيب يهدد متانة البناء وسلامته إذا لم يتضمن العقد مدة أطول. كل ذلك ما لم يكن المتعاقدان قد أرادا أن تبقى هذه المنشآت مدة أقل من عشر سنوات.
- 2- ويبقى الالتزام في التعويض المذكور ولو كان الخلل أو التهدم ناشئاً من عيب في الأرض ذاتها أو رضي صاحب العمل بإقامة المباني أو المنشآت المعيبة.
- 3- وتبدأ مدة السنوات العشر من وقت تسليم العمل

المادة رقم 881

إذا اقتصر عمل المهندس على وضع التصميم دون الإشراف على التنفيذ كان مسؤولاً فقط عن عيوب التصميم

المادة رقم 882

يقع باطلا كل شرط يقصد به إعفاء المقاول أو المهندس من الضمان أو الحد منه

المادة رقم 883

لا تسمع دعوى الضمان بعد انقضاء ثلاث سنوات على حصول التهدم أو اكتشاف العيب

(2) التزامات صاحب العمل

المادة رقم 884

يلتزم صاحب العمل بتسليم ما تم من العمل متى أنجزه المقاول ووضعه تحت تصرفه فإذا امتنع بغير سبب مشروع رغم دعوته الى ذلك بإنذار رسمي وتلف في يد المقاول أو تعيب دون تعديده أو تقصيره فلا ضمان عليه.

المادة رقم 885

يلتزم صاحب العمل بدفع البديل عند تسليم المعقود عليه إلا اذا نص الاتفاق أو جرى العرف على غير ذلك.

المادة رقم 886

- 1- اذا ابرم عقد بمقتضى مقايسة على أساس الوحدة وتبين في أثناء العمل أن من الضروري لتنفيذ التصميم المتفق عليه مجاوزة المقايسة المقدرة مجاوزة محسوسة وجب على المقاول أن يخطر في الحال صاحب العمل بذلك مبينا مقدار ما يتوقعه من زيادة في الثمن فان لم يفعل سقط حقه في استرداد ما جاوز به قيمة المقايسات من نفقات.
- 2- فإذا كانت المجاوزة التي يقتضيها تنفيذ التصميم جسيمة جاز لرب العمل أن يتحلل من العقد ويقف التنفيذ على أن يكون ذلك دون إبطاء مع إيفاء المقاول قيمة ما أنجزه من الأعمال مقدرة وفقا لشروط العقد.

المادة رقم 887

- 1- اذا ابرم عقد المقاولة على أساس تصميم متفق عليه لقاء اجر إجمالي فليس للمقاول أن يطالب بأية زيادة في الأجرة يقتضيها تنفيذ هذا التصميم.

2- وإذا حدث في التصميم تعديل أو إضافة برضى صاحب العمل يراعى الاتفاق الجاري مع المقاول بشأن هذا التعديل أو الإضافة.

المادة رقم 888

إذا لم يعين في العقد أجر على العمل استحق المقاول أجر المثل مع قيمة ما قدمه من المواد التي تطلبها العمل

المادة رقم 889

1- إذا لم يتفق المهندس الذي قام بتصميم البناء والإشراف على تنفيذه على الأجر استحق أجر المثل طبقاً لما جرى عليه العرف.

2- فإذا طرأ ما يحول دون إتمام تنفيذ العمل وفقاً للتصميم الذي أعده استحق أجر مثل ما قام به.

الفرع الثالث- المقاول الثاني

المادة رقم 890

1- يجوز للمقاول أن يكل تنفيذ العمل كله أو بعضه الى مقاول آخر إذا لم يمنعه شرط في العقد أو لم تكن طبيعة العمل تقتضي أن يقوم به بنفسه.

2- وتبقى مسؤولية المقاول الأول قائمة قبل صاحب العمل.

المادة رقم 891

لا يجوز للمقاول الثاني أن يطالب صاحب العمل بشيء مما يستحقه المقاول الأول إلا إذا أحاله على صاحب العمل.

الفرع الرابع- انقضاء المقاولة

المادة رقم 892

ينقضي عقد المقاولة بإنجاز العمل المتفق عليه أو بفسخ العقد رضاً أو قضاء.

المادة رقم 893

إذا حدث عذر يحول دون تنفيذ العقد أو إتمام تنفيذه جاز لأحد عاقديه أن يطلب فسخه أو إنهائه حسب الأحوال.

المادة رقم 894

إذا بدا المقاول في التنفيذ ثم أصبح عاجزاً عن إتمامه لسبب لا يد له فيه فإنه يستحق قيمة ما تم من الأعمال وما انفق في سبيل التنفيذ بقدر ما يعود على صاحب العمل من نفع

المادة رقم 895

للمتضرر من الفسخ أن يطالب الطرف الآخر بتعويضه في الحدود التي يقرها العرف

المادة رقم 896

- 1- ينتهي عقد المقاولة بموت المقاول إذا كان متفقاً على أن يعمل بنفسه أو كانت مؤهلاته الشخصية محل اعتبار في العقد.
- 2- وإذا خلا العقد من مثل هذا الشرط أو لم تكن مؤهلات المقاول الشخصية محل اعتبار في التعاقد جاز لصاحب العمل أن يطلب فسخ العقد إذا لم تتوافر في الورثة الضمانات الكافية لحسن تنفيذ العمل.
- 3- وفي كلا الحالتين يؤول للتركة قيمة ما تم من الأعمال والنفقات وفقاً لشروط العقد وما يقتضيه العرف

Appendix C

The Act(Payment Provisions Only)

104.— Construction contracts.

(1) In this Part a “construction contract” means an agreement with a person for any of the following—

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement—

(a) to do architectural, design, or surveying work, or

(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations.

(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).

(4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of House of Parliament.

(5) Where an agreement relates to construction operations, and other matters, this Part applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

(6) This Part applies only to construction contracts which—

(a) are entered into after the commencement of this Part, and

(b) relate to the carrying out of construction operations in England, Wales or Scotland.

(7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

105.— Meaning of “construction operations”.

(1) In this Part “construction operations” means, subject as follows, operations of any of the following descriptions—

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

- (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, [electronic communications apparatus]¹, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
- (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
- (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
- (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
- (f) painting or decorating the internal or external surfaces of any building or structure.

(2) The following operations are not construction operations within the meaning of this Part –

(a) drilling for, or extraction of, oil or natural gas;

(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is –

- i. nuclear processing, power generation, or water or effluent treatment, or
- ii. the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals; oil, gas, steel or food and drink;

(d) manufacture or delivery to site of –

- i. building or engineering components or equipment,
- ii. materials, plant or machinery, or
- iii. components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.

(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106. – Provisions not applicable to contract with residential occupier.

(1) This Part does not apply –

(a) to a construction contract with a residential occupier (see below), or

(b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection “dwelling” means a dwelling-house or a flat; and for this purpose –

“dwelling-house” does not include a building containing a flat; and

“flat” means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

(3) The Secretary of State may by order amend subsection (2).

(4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

107.— Provisions applicable only to agreements in writing.

(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions “agreement”, “agree” and “agreed” shall be construed accordingly.

(2) There is an agreement in writing –

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

- (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
- (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
- (5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
- (6) References in this Part to anything being written or in writing include its being recorded by any means.

109.— Entitlement to stage payments.

- (1) A party to a construction contract is entitled to payment by installments, stage payments or other periodic payments for any work under the contract unless—
 - (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme of Construction Contracts apply.
- (4) References in the following sections to a payment under the contract include a payment by virtue of this section.

110. – Dates for payment.

- (1) Every construction contract shall –
 - (a) Provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) Provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

- (2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if –
 - (a) the other party had carried out his obligations under the contract, and

- (b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

- (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme of Construction Contracts apply.

111.— Notice of intention to withhold payment.

- (1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

- (2) To be effective such a notice must specify –
 - (a) the amount proposed to be withheld and the ground for withholding payment, or
 - (b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme of Construction Contracts.

(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than—

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment,

whichever is the later.

112.— Right to suspend performance for non-payment.

(1) Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of his obligations under the contract to the party by whom payment ought to have been made (“the party in default”).

- (2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- (3) The right to suspend performance ceases when the party in default makes payment in full of the amount due.
- (4) Any period during which performance is suspended in pursuance of the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

113.— Prohibition of conditional payment provisions.

- (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
- (2) For the purposes of this section a company becomes insolvent –

[

(a) when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986,

]1

(b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,

(c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or

(d) on the making of a winding-up order under Part IV or V of that Act.

(3) For the purposes of this section a partnership becomes insolvent –

(a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or

(b) when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.

(4) For the purposes of this section an individual becomes insolvent –

(a) on the making of a bankruptcy order against him under Part IX of the Insolvency Act 1986, or

(b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.

(5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.

(6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.

In the absence of such agreement, the relevant provisions of the Scheme of Construction Contracts apply.

114.— The Scheme of Construction Contracts.

(1) The Minister shall by regulations make a scheme (“the Scheme of Construction Contracts”) containing provision about the matters referred to in the preceding provisions of this Part.

(2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.

(3) In this section “the Minister” means —

(a) for England and Wales, the Secretary of State, and

- (b) for Scotland, the Lord Advocate.
- (4) Where any provisions of the Scheme of Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.
- (5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

Appendix D

The Act as amended by the New Act (Payment Provisions only)

104.— Construction contracts.

(1) In this Part a “construction contract” means an agreement with a person for any of the following—

- (a) the carrying out of construction operations;
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
- (c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) References in this Part to a construction contract include an agreement—

- (a) to do architectural, design, or surveying work, or
- (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

in relation to construction operations.

(3) References in this Part to a construction contract do not include a contract of employment (within the meaning of the Employment Rights Act 1996).

(4) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1), (2) or (3) as to the agreements which are construction contracts for the purposes of this Part or are to be taken or not to be taken as included in references to such contracts.

No such order shall be made unless a draft of it has been laid before and approved by a resolution of each of House of Parliament.

(5) Where an agreement relates to construction operations, and other matters, this Part applies to it only so far as it relates to construction operations.

An agreement relates to construction operations so far as it makes provision of any kind within subsection (1) or (2).

(6) This Part applies only to construction contracts which—

- (a) are entered into after the commencement of this Part, and
- (b) relate to the carrying out of construction operations in England, Wales or Scotland.

- (7) This Part applies whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract.

105.— Meaning of “construction operations”.

- (1) In this Part “construction operations” means, subject as follows, operations of any of the following descriptions —
- (a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);
 - (b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power-lines, [electronic communications apparatus]¹, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
 - (c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or security or communications systems;
 - (d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
 - (e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;
 - (f) painting or decorating the internal or external surfaces of any building or structure.
- (2) The following operations are not construction operations within the meaning of this Part—
- (a) drilling for, or extraction of, oil or natural gas;
 - (b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is –

- i. nuclear processing, power generation, or water or effluent treatment, or
- ii. the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals; oil, gas, steel on food and drink;

(d) manufacture or delivery to site of –

- i. building or engineering components or equipment,
- ii. materials, plant or machinery, or
- iii. components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

(3) The Secretary of State may by order add to, amend or repeal any of the provisions of subsection (1) or (2) as to the operations and work to be treated as construction operations for the purposes of this Part.

(4) No such order shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106. – Provisions not applicable to contract with residential occupier.

(1) This Part does not apply –

~~(a)~~ to a construction contract with a residential occupier (see below), ~~or~~

~~(b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.~~

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection “dwelling” means a dwelling-house or a flat; and for this purpose –

“dwelling-house” does not include a building containing a flat; and

“flat” means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

- (3) The Secretary of State may by order amend subsection (2).
- (4) No order under this section shall be made unless a draft of it has been laid before and approved by a resolution of each House of Parliament.

106A Power to disapply provisions of this Part .(1)

- (1) The Secretary of State may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations (not being operations in Wales) which is specified in the order. .
- (2) The Welsh Ministers may by order provide that any or all of the provisions of this Part, so far as extending to England and Wales, shall not apply to any description of construction contract relating to the carrying out of construction operations in Wales which is specified in the order. .
- (3) The Scottish Ministers may by order provide that any or all of the provisions of this Part, so far as extending to Scotland, shall not apply to any description of construction contract which is specified in the order. .
- (4) An order under this section shall not be made unless a draft of it has been laid before and approved by resolution of – .
 - (a) in the case of an order under subsection (1), each House of Parliament; .
 - (b) in the case of an order under subsection (2), the National Assembly for Wales; .
 - (c) In the case of an order under subsection (3), the Scottish Parliament.

107.— Provisions applicable only to agreements in writing.

REPEALED.

109.— Entitlement to stage payments.

- (1) A party to a construction contract is entitled to payment by installments, stage payments or other periodic payments for any work under the contract unless –
 - (a) it is specified in the contract that the duration of the work is to be less than 45 days, or

- (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
- (3) In the absence of such agreement, the relevant provisions of the Scheme of Construction Contracts apply.
- (4) References in the following sections to a payment ~~under the contract~~ **provided for by the contract** include a payment by virtue of this section.

110.— Dates for payment.

- (1) Every construction contract shall –
 - (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on –

- (a) the performance of obligations under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.

(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).

(1C) Subsection (1A) does not apply where –

- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
- (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.

(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be

determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.

~~(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if—~~

~~(c) the other party had carried out his obligations under the contract, and~~

~~(d) no set off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,~~

~~specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.~~

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) ~~or (2)~~, the relevant provisions of the Scheme of Construction Contracts apply.

110A Payment notices: contractual requirements

- (1) A construction contract shall, in relation to every payment provided for by the contract—
 - (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or
 - (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
- (2) A notice complies with this subsection if it specifies—
 - (a) in a case where the notice is given by the payer—
 - (i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated;
 - (b) in a case where the notice is given by a specified person—
 - (i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated.
- (3) A notice complies with this subsection if it specifies—
 - (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
 - (b) the basis on which that sum is calculated.
- (4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.
- (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme of Construction Contracts apply.

- (6) In this and the following sections, in relation to any payment provided for by a construction contract:
- “payee” means the person to whom the payment is due;
 - “payer” means the person from whom the payment is due;
 - “payment due date” means the date provided for by the contract as the date on which the payment is due;
 - “specified person” means a person specified in or determined in accordance with the provisions of the contract.

110B Payment notices: payee’s notice in default of payer’s notice

- (1) This section applies in a case where, in relation to any payment provided for by a construction contract:
- a. The contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
 - b. notice is not given as so required.
- (2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.
- (3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.
- (4) If—
- (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—
 - i. the sum that the payee considers will become due on the payment due date in respect of the payment, and
 - ii. the basis on which that sum is calculated, and
 - (b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

~~111.— Notice of intention to withhold payment.~~

- ~~(5) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.~~

~~The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.~~

~~(6) To be effective such a notice must specify—~~

~~(a) the amount proposed to be withheld and the ground for withholding payment, or~~

~~(b) if there is more than one ground, each ground and the amount attributable to it,~~

~~and must be given not later than the prescribed period before the final date for payment.~~

~~(7) The parties are free to agree what that prescribed period is to be.~~

~~In the absence of such agreement, the period shall be that provided by the Scheme of Construction Contracts.~~

~~(8) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than—~~

~~(a) seven days from the date of the decision, or~~

~~(b) the date which apart from the notice would have been the final date for payment,~~

~~whichever is the later.~~

111 Requirement to pay notified sum

- (1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
- (2) For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means:
 - (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
 - (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
 - (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
- (3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer’s intention to pay less than the notified sum.

- (4) A notice under subsection (3) must specify –
 - (a) the sum that the payer considers to be due on the date the notice is served, and
 - (b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

- (5) A notice under subsection (3):
 - (a) must be given not later than the prescribed period before the final date for payment, and
 - (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
- (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
- (7) In subsection (5), “prescribed period” means –
 - (a) such period as the parties may agree, or
 - (b) in the absence of such agreement, the period provided by the Scheme of Construction Contracts.
- (8) Subsection (9) applies where in respect of a payment –
 - (a) a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or
 - (b) a notice under subsection (3) is given in accordance with this section, but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.
- (9) In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than:
 - (a) seven days from the date of the decision, or
 - (b) the date which apart from the notice would have been the final date for payment,

whichever is the later.
- (10) Subsection (1) does not apply in relation to a payment provided for by a construction contracts contract where:
 - (a) the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and
 - (b) the payee has become insolvent after the prescribed period referred to in subsection (5)(a).

- (11) Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.

112. – Right to suspend performance for non-payment.

- (1) ~~Where a sum due under a construction contract is not paid in full by the final date for payment and no effective notice to withhold payment has been given,~~ Where the requirement in section 111(1) applies in relation to any sum but is not complied with, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend performance of any or all of his obligations under the contract to the party by whom payment ought to have been made (“the party in default”).
- (2) The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- (3) The right to suspend performance ceases when the party in default makes payment in full of ~~the amount due~~ the sum referred to in subsection (1).

(3A) Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right

- (4) Any period during which performance is suspended in pursuance of, or in consequence of the exercise of, the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

113. – Prohibition of conditional payment provisions.

- (1) A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person, or any other person payment by whom is under the contract (directly or indirectly) a condition of payment by that third person, is insolvent.
- (2) For the purposes of this section a company becomes insolvent –

[

- (a) when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986,
-]
- (b) on the appointment of an administrative receiver or a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part,
- (c) on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act, or
- (d) on the making of a winding-up order under Part IV or V of that Act.
- (3) For the purposes of this section a partnership becomes insolvent –
- (a) on the making of a winding-up order against it under any provision of the Insolvency Act 1986 as applied by an order under section 420 of that Act, or
- (b) when sequestration is awarded on the estate of the partnership under section 12 of the Bankruptcy (Scotland) Act 1985 or the partnership grants a trust deed for its creditors.
- (4) For the purposes of this section an individual becomes insolvent –
- (a) on the making of a bankruptcy order against him under Part IX of the Insolvency Act 1986, or
- (b) on the sequestration of his estate under the Bankruptcy (Scotland) Act 1985 or when he grants a trust deed for his creditors.
- (5) A company, partnership or individual shall also be treated as insolvent on the occurrence of any event corresponding to those specified in subsection (2), (3) or (4) under the law of Northern Ireland or of a country outside the United Kingdom.
- (6) Where a provision is rendered ineffective by subsection (1), the parties are free to agree other terms for payment.

In the absence of such agreement, the relevant provisions of the Scheme of Construction Contracts apply.

114. – The Scheme of Construction Contracts.

- (1) The Minister shall by regulations make a scheme (“the Scheme of Construction Contracts”) containing provision about the matters referred to in the preceding provisions of this Part.
- (2) Before making any regulations under this section the Minister shall consult such persons as he thinks fit.
- (3) In this section “the Minister” means –
 - (a) for England and Wales, the Secretary of State, and
 - (b) for Scotland, the Lord Advocate.
- (4) Where any provisions of the Scheme of Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.
- (5) Regulations under this section shall not be made unless a draft of them has been approved by resolution of each House of Parliament.

Appendix E

UAE Proposed Act

1. Scope of Application

This Act applies to a Muqawala contract as defined under Article 872 of UAE Federal Law No.5- 1985 as amended by the Federal Law No.1-1987.

2. Entitlement for Staged payments

- 2.1 A party to a construction contract is entitled to payment by installments, stage payments or other periodic payments for any work under the contract unless:
- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
 - (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
- 2.2 The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due, provided that such intervals do not exceed 30 days.
- 2.3 In the absence of such agreement or if the intervals exceed 30 days, the relevant provisions of the Scheme of UAE Act apply.
- 2.4 References in the following sections to a payment provided for by the contract include a payment by virtue of this section.

3. Dates for payment.

- 3.1 Every construction contract shall:
- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
 - (b) provide for a final date for payment in relation to any sum which becomes due.
- 3.2 The requirement in subsection (3.1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on:
- (a) the performance of obligations (including payment obligation) under another contract, or
 - (b) a decision by any person as to whether obligations under another contract have been performed.
- 3.3 Subsection (3.2) does not apply where—
- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
 - (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.
- 3.4 The requirement in subsection (3.1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to

the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.

3.5 For the purpose of subsection 3.1, the parties are free to agree when a sum becomes due and how long the period is to be between the date on which a sum becomes due and the final date for payment. Provided that these periods do not exceed the following:-

- (a) Due date is no later than 15 days after the end of each payment interval.
- (b) Final Date for Payment is no later than 45 days after the due date.

3.6 If or to the extent that a contract does not contain such provision as is mentioned in subsection (3.1) and/or not complying with the minimum durations set out in subsection (3.5), the relevant provisions of the Scheme of UAE Act apply.

4. Payment Notices: contractual requirements

4.1 A construction contract shall, in relation to every payment provided for by the contract:

- (a) require the payer or a specified person to give a notice complying with subsection (4.2) to the payee not later than five days after the payment due date, or
- (b) require the payee to give a notice complying with subsection (4.3) to the payer or a specified person not later than five days after the payment due date.

4.2 A notice complies with this subsection if it specifies:

- (a) in a case where the notice is given by the payer:
 - i. the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
 - ii. the basis on which that sum is calculated;

- (b) in a case where the notice is given by a specified person:
 - i. the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
 - ii. the basis on which that sum is calculated.

4.3 A notice complies with this subsection if it specifies:

- (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
- (b) the basis on which that sum is calculated.

4.4 For the purposes of this section, it is immaterial that the sum referred to in subsection (4.2)(a) or (b) or (4.3)(a) may be zero.

4.5 If or to the extent that a contract does not comply with subsection (4.1), the relevant provisions of the Scheme of UAE Act apply.

4.6 In this and the following sections, in relation to any payment provided for by a construction contract:

“payee” means the person to whom the payment is due;

“payer” means the person from whom the payment is due;

“payment due date” means the date provided for by the contract (or imposed by the Scheme) as the date on which the payment is due;

“specified person” means a person specified in or determined in accordance with the provisions of the contract.

5. Payment Notices: payee’s notice in default of payer’s notice

- 5.1 This section applies in a case where, in relation to any payment provided for by a construction contract the contract requires the payer or a specified person to give the payee a notice complying with subsection (4.2) not later than five days after the payment due date, but notice is not given as so required.
- 5.2 Subject to subsection (5.4), the payee may give to the payer a notice complying with subsection (4.3) at any time after the date on which the notice referred to in subsection (5.1) was required by the contract to be given.
- 5.3 Where pursuant to subsection (5.2) the payee gives a notice complying with subsection (4.3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (5.2) that the notice was given.
- 5.4 If:
- (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (5.1) is required by the contract to be given, to notify the payer or a specified person of—
 - i. the sum that the payee considers will become due on the payment due date in respect of the payment, and
 - ii. the basis on which that sum is calculated, and

(b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with subsection (4.3) given pursuant to subsection (5.2) (and the payee may not give another such notice pursuant to that subsection).

6. Requirement to pay notified sum

6.1 Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

6.2 For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means:

(a) in a case where a notice complying with subsection (4.2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with subsection (4.3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with subsection (4.3) has been given pursuant to and in accordance with subsection (5.2), the amount specified in that notice.

6.3 The payer or a specified person may in accordance with this section give to the payee a notice of the payer’s intention to pay less than the notified sum.

6.4 A notice under subsection (6.3) must specify –

- (a) the sum that the payer considers to be due on the date the notice is served, and
- (b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

6.5 A notice under subsection (6.3):

- (a) must be given not later than the prescribed period before the final date for payment, and
- (b) in a case referred to in subsection (6.2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

6.6 Where a notice is given under subsection (6.3), subsection (6.1) applies only in respect of the sum specified pursuant to subsection (6.4)(a).

6.7 In subsection (6.5), “prescribed period” means –

- (a) such period as the parties may agree provided it is not less than 5 days prior to final date for payment, or
- (b) in the absence of such agreement or if less than 5 days prior to final date for payment, the period provided by the Scheme of UAE Act.

7. Right to suspend performance for non-payment

7.1 Where the requirement in subsection (6.1) applies in relation to any sum but is not complied with, the person to whom the sum is due has the right (without prejudice to any other right or remedy) to suspend

performance of any or all of his obligations under the contract to the party by whom payment ought to have been made (“the party in default”).

- 7.2 The right may not be exercised without first giving to the party in default at least seven days' notice of intention to suspend performance, stating the ground or grounds on which it is intended to suspend performance.
- 7.3 The right to suspend performance ceases when the party in default makes payment in full of the sum referred to in subsection (7.1).
- 7.4 Where the right conferred by this section is exercised, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right
- 7.5 Any period during which performance is suspended in pursuance of, or in consequence of the exercise of, the right conferred by this section shall be disregarded in computing for the purposes of any contractual time limit the time taken, by the party exercising the right or by a third party, to complete any work directly or indirectly affected by the exercise of the right.

Where the contractual time limit is set by reference to a date rather than a period, the date shall be adjusted accordingly.

8. The Scheme of UAE Act

Where any provision of the Scheme of UAE Act applies by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned.

Words Count

19,951 words (excluding footnotes, pages i-xi, appendices and bibliography)

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