Applicability of the 2017 FIDIC Red Book in Civil Law Jurisdictions

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Abstract

In 2017, the FIDIC launched a new edition of its Red Book—a recommended construction-related contract for building and engineering works designed by the employer. The roots of this book were influenced by the common law legal system, whereas many countries follow the civil law legal system. Amongst the latter countries is the United Arab Emirates, which has attracted construction parties from all over the world. Those who wish to use the Red Book amongst such parties should be acquainted with the local limitations on its applicability. Such acquaintance can provide them with a proper understanding of their rights and obligations. This article discusses these limitations using the doctrinal research method, which included, inter alia, an examination of all relevant decisions by local higher courts during the 2009-2019 period. The discussion shows that such limitations can be confronted owing to conflicts with local judicial jurisprudence and/or mandatory statutory provisions.

Keywords

International Federation of Consulting Engineers (FIDIC) Red Book – construction disputes – United Arab Emirates (UAE)

1 Introduction

Standard construction contracts are principal components of the contractual documents for many projects. Their use provides several advantages to the parties such as saving time and costs. Internationally, contracts framed by
the International Federation of Consulting Engineers (FIDIC) are the most widespread standard construction contracts. In 2017, FIDIC launched a new suite of the Red, Yellow, and Silver Books to replace the 1999 editions. Although the three books are still a matching set, this study deals only with the Red Book, which is recommended for building and engineering works designed by the employer.

The Red Book’s roots are influenced by the common law legal system, whereas the civil law legal system is the one applied in many countries, including the United Arab Emirates (UAE). According to BNC’s Construction Analytics, the UAE is the second largest construction market, after Saudi Arabia, among the members of the Gulf Cooperation Council (GCC), with more than USD785 billion worth of planned and ongoing projects. This very active market has attracted both local and international construction parties from all over the world. Among these parties, those that choose to rely on the Red Book (especially those who are accustomed to common law jurisdictions) should be acquainted with the local limitations on its applicability. This will help them gain a proper understanding of their rights and responsibilities. This article identifies and discusses these limitations, and is therefore hoped to be a useful reference for many employers, contractors, researchers, contract managers, and legal practitioners.

1 That is, as was the case in the 1999 editions, as similar formulations used in the three books except where otherwise required.

2 In comparison with the Yellow and Silver Books, the Red Book is the most commonly used in the United Arab Emirates. Although this usage is of the 1999 version, the 2017 version is expected to dominate as, inter alia, it provides more details and addresses issues raised by users of the 1999 version over 17 years. Another reason for choosing the Red Book is the author’s 11-year practical experience with construction cases involving this book. See, C. Ingmire, ‘United Arab Emirates,’ in C. Lovatt & E. Smith (eds.), Construction Law and Practice: Jurisdictional Comparisons (London: Sweet and Maxwell, 2012), p. 248; see also A. Mackenzie, G. Prestige, S. Kotb, K. Mechanta, K. Roberts, ‘Construction and projects in United Arab Emirates: overview’, Global Arbitration News, available at: https://globalarbitrationnews.com/construction-and-projects-in-united-arab-emirates-overview. All websites were accessed on 16 June 2020.

3 The first edition of the Red Book was modelled on the Association of Consulting Engineers’ form that was issued in 1956. The latter was based on the Institute of Civil Engineers’ form which was created in 1954 for domestic use in the United Kingdom. For further information, see N. Bunni, The FIDIC Forms of Contract (Oxford: Blackwell Publishing, 2005), pp. 3, 4, and 17.

4 The UAE is a federation of seven Emirates. The two main Emirates are Abu Dhabi and Dubai. The others are Ajman, Fujairah, Ras al-Khaimah, Sharjah, and Umm al-Qwain. It should be noted that, whilst the UAE is a civil law country, its legal system has been influenced by the Shari’ah, and, as indicated below, it has two free zones that follow the common law system.

The analysis in this article shows that the limitations can be confronted because of conflicts with local judicial jurisprudence and/or mandatory statutory provisions. As to the jurisprudence, it should be noted that UAE courts do not have a formal system of binding precedents. However, lower courts do not generally deviate from judgments issued by higher courts, and the latter usually establish a consistent approach in dealing with recurring legal matters. As to the jurisprudence, it should be noted that UAE courts do not have a formal system of binding precedents. However, lower courts do not generally deviate from judgments issued by higher courts, and the latter usually establish a consistent approach in dealing with recurring legal matters.6 Concerning the mandatory provisions, with a few exceptions, all of these are stated by the UAE Civil Transactions Code No. 5 of 1985,7 which, in Article 31, clearly stipulates that its mandatory provisions shall prevail over any contrary agreements. Meanwhile, it is a well-established principle that ignorance of the law is no excuse.

Although this article is concerned only with the UAE, it is worth noting that the UAE Civil Code is closely based on the Jordanian Civil Code,8 and is broadly similar to the civil codes of Bahrain, Kuwait, Qatar, Oman, and Egypt.9 In addition, the main draftsman of the Egyptian Civil Code, the jurist Al-Sanhuri, was also the key draftsman of the civil codes of Iraq and Syria, and he had imprints on the drafting of the civil codes of other Arab countries, such as Libya.10 Therefore, there are many similarities among these codes. Accordingly,

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7 Hereafter referred to as ‘the Civil Code’ or ‘the UAE Civil Code’. The civil code is the backbone of any civil law jurisdiction. Construction contracts fall under what the Civil Code calls معاوضة contracts. (In contradiction to the assertions by Kanakri & Massey, the term ‘معاوضة contracts’ has a broader meaning than ‘contracts to build’. As Joshi & Pislevik rightly note, it refers to the making of things or the carrying out of work. See C. Kanakri & A. Massey, ‘Legal issues relating to construction contracts in the United Arab Emirates’, available at: https://uk.practicallaw.thomsonreuters.com/3-619-1946?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1; C. Joshi, ‘The Use of Modified FIDIC Forms in the UAE’, available at: https://www.probyn-miers.com/perspective/2015/10/the-use-of-modified-fidic-forms-in-the-uae/; S. Pislevik, ‘Constructive Acceleration in the UAE: A Matter of Contract, Law or Good Faith’, International Construction Law Review 1 (2019): 50, 63. In addition to being subject to the Civil Code’s general provisions on contracts, معاوضة contracts are also governed by special provisions stated in Articles 872 to 896 of the Civil Code. They thus fall under nominate contracts—that is, contracts named by the legislator and distinguished by special provisions. In case of conflict, a special provision shall take precedence over a general one. See Article 128 of the Civil Code which provides that the general rules on contracts provided by the Code are applicable to nominate and innominate contracts and that ‘[a]s for the rules that are specific to some contracts, they are determined by the special provisions regulating them in this law [...]’.
9 See Grose, supra note 6 at 7.
10 See Saleh, supra note 8 at 161, 162, and 163.
this article’s analysis, as a whole, can be useful for construction projects in all these countries. It can also be useful for projects carried out in other civil law jurisdictions.

However, this article is limited to the private-sector contracts. Thus, a contract to which a governmental entity is a party is outside its scope.\textsuperscript{11} It is also beyond its scope to deal with contracts governed by the laws of the Abu Dhabi Global Market and the Dubai International Financial Centre, both of which are free zones in which the common law system is applied.

This article is based on the doctrinal research method. Accordingly, relevant contractual and legislative provisions, literature, and higher court decisions\textsuperscript{12} were located, analysed, and compared to identify the local limitations on the applicability of the \textit{2017 Red Book}. It is divided into 13 Sections followed by a Conclusion.

\section{The Language of the Contract}

Whereas the \textit{Red Book} does not require a certain language to the parties’ agreement, Article 4 of the UAE Ministerial Decision No. 255 of 2010 provides that a construction contract shall be drafted in Arabic. The same Article adds that,

\textsuperscript{11} Unless there are exceptional reasons and subject to obtaining a pre-written approval from the Ruler, a governmental entity in Dubai is not permitted to enter into a contract that refers to, or includes as an annexure, the \textit{FIDIC Conditions of Contract} or any of these Conditions. This ban is stated by Law No. 6 of 1997 (Art. 37) with its requirements all construction-related, or any other, contracts concluded by a Dubai governmental department must comply. The following are examples of these requirements: 1. Granting the governmental department the right to claim not only delay damages but also any extra fees paid to the supervising consultant due to the contractor’s delay (Art. 65). This is not in line with the \textit{2017 Red Book} which states that the employer is not entitled to any compensation for the contractor’s delay other than delay damages except in the event of termination for the contractor’s default (Sub-Clause 8.8). 2. Imposing on the contractor a 10-year liability period, that is not imposed by the \textit{2017 Red Book}, for any substantial defect that may appear in the work (Art. 69). 3. Stipulating that any arbitration should take place in Dubai, and that Dubai laws should be applied to the substance of the dispute unless the Ruler provides an exemption from any of these requirements (Art. 36). No explicit similar ban exists in any of the other Emirates. However, contracts with governmental entities are subject to other pieces of legislation that include differences from the provisions of the \textit{2017 Red Book}. See, for example, the 10-year liability period imposed on the contractor by Article 120 of the Ministerial Decision No. 20 of 2000 which governs contracts with Federal ministries.

\textsuperscript{12} For the purpose of this research, the author reviewed all construction-related judgments issued by the UAE Union Supreme Court and the UAE Courts of Cassation during the 2009-2019 period.
if another language is used in combination with Arabic, the Arabic text shall prevail. This is not in line with Sub-Clause 1.4 of the Red Book under which the ruling language can be a different one. (The language of the Red Book’s conditions should be used unless another language is determined in the Contract Data.) However, despite the mandatory formulation of Article 4, in practice, many contracts are drafted in English only (or, although uncommon, in other languages) or English is chosen as the prevailing language with no effect on the contract’s validity (with the indication that in litigation any document that is not drafted in Arabic must be accompanied by a certified translation).

3 Governing Law of the Contract

Under Sub-Clause 1.4 of the Red Book, parties can subject their contract to a foreign law. However, by virtue of Articles 27 and 28 of the Civil Code, a foreign law cannot be applied in the UAE if it conflicts with Islamic Sharīʿah or with the UAE’s public order or morals, or if the concerned party is unable to prove its existence or determine its effect.

4 Sub-contracting

Article 890 of the Civil Code states that ‘[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’. The Article adds that ‘[t]he first contractor shall remain liable as towards the employer’. This is in line with Sub-Clause 5(1) of the Red Book which states that: ‘the [c]ontractor shall be liable for the work of all [s]ub-contractors [...] and for the [...] defaults of any [s]ub-contractor [...] as if they were the [...] defaults of the [c]ontractor’. Accordingly, both the Civil Code and the Red Book hold the main contractor liable to the employer for any defaults by all sub-contractors. However, sometimes, in the UAE market, a sub-contractor enters into a contract with an employer. UAE courts have approved this practice and have emphasised that it is the employer and not the main contractor who should be held responsible

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13 It should be noted that Article 890 is not mandatory. Therefore, the main contract may stipulate that any sub-contractor will solely be responsible toward the employer with regard to its scope of work. See the judgment of the Union Supreme Court in Case No. 108/22 Civil, dated 23 January 2002.
for the sub-contractor’s defaults in this situation. For example, in Case No. 117/2011 Civil,\(^{14}\) the Dubai Court of Cassation held that ‘the criterion for determining whether the main contractor or employer is responsible for the sub-contractor’s works is to see who contracted with the sub-contractor’. In Case No. 756/2016 Commercial,\(^{15}\) the same Court decided that the main contractor was not responsible for the delay attributable to the sub-contractor appointed by the employer. However, it is important to note in this context that an employer will not be held liable for such defaults on the mere ground that it has sometimes directly paid a sub-contractor whose contractual relationship is with the main contractor.\(^{16}\)

5 Variations

The Red Book empowers the engineer to instruct the contractor to execute one or more variations. For this purpose, a written notice by the engineer is required.\(^{17}\) However, if such a notice is not provided, a contractor’s variation claim can still succeed in the UAE. To clarify this, practical experience as well as court judgments show that the UAE courts submit most construction cases to experts. Whereas an expert may ascertain whether a variation has actually occurred with the employer’s or engineer’s consent, despite the absence of such a contractually agreed written notice, the courts usually rely heavily on reports by experts. This argument can be enhanced by citing judgments such as that of the Union Supreme Court in Case No. 358/29.\(^{18}\) The parties to this Case had agreed that any verbal variation order should be confirmed in writing within 7 days. Despite the absence of such a confirmation, a panel of three experts, and subsequently the Court, thought that the contractor should be paid for additional work on the grounds that the employer or engineer must have been aware of their performance.

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\(^{14}\) Dated 12 June 2011.

\(^{15}\) Dated 12 February 2017.

\(^{16}\) As confirmed, e.g., by the Dubai Court of Cassation in Case No. 569/2017 Commercial, dated 21 January 2018 and Case No. 257/2017 Commercial, dated 19 November 2017. When a sub-contractor enters into a contract with an employer, the subcontractor can bring a direct claim against the employer for any dues that arise from the contract. This was confirmed, e.g., by the Dubai Court of Cassation in Case No. 464/2012, dated 28 May 2013. A sub-contractor can also directly sue an employer even when its contract is with a main contractor if the main contractor has made an assignment to the sub-contractor against the employer (see Article 891 of the Civil Code).

\(^{17}\) See Sub-Claus 13.3 and 1.1.56.

\(^{18}\) Dated 21 March 2010.
6 Limitation of Liability

Sub-Clause 1.15 of the Red Book states that ‘[n]either Party shall be liable to the other Party for loss of use of any Works, loss of profit, [...] which may be suffered by the other Party in connection with the Contract, other than under’ Sub-Clauses 8.8, 13.3.1(c), 15.7, 16.4, 17.3, 17.4(a), and 17.5. These sub-clauses do not cover the contractor’s non-excludable liability under Article 880 of the Civil Code, which makes the contractor liable for a period of 10 years from the date of delivery to compensate the employer for any total or partial collapse, or any defect threatening the safety, of a building or any other fixed installation constructed by the contractor.¹⁹

The same sub-clause also states that the contractor’s total liability toward the employer shall not exceed the amount ‘stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount’.²⁰ Nevertheless, it can be argued that such an agreed-upon amount might be exceeded by a UAE court based on its power under Article 390 of the Civil Code, which reads that ‘(1) The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement [...] (2) The judge may, in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be deemed void’.

The Civil Code also nullifies, in Article 296, any contractual condition purporting to provide exemption from liability for a harmful act.²¹ Accordingly, any agreement such as that stated in Sub-Clauses 14.4 and 14.5 of the Red Book may be deemed invalid. These sub-clauses hold the employer harmless against any damages caused to a third party through the use of access routes and for any unnecessary or improper interference with the convenience of the public.

¹⁹ Article 881 of the Code explicitly nullifies any agreement that limits, or exempts the contractor from, this liability.
²⁰ With the exception of any liability relating to Sub-Clauses 2.6, 4.19, 17.3, or 17.4(a), and with the indication that Sub-Clause 1.15 does not limit any liability connected with fraud, gross negligence, deliberate default, or reckless misconduct.
²¹ It is a controversial issue in the UAE of whether a party to a contract can validly base a claim against another contractor on tortious liability for damage sustained by the former as a result of the latter’s breach of its contractual obligations. The prevailing view, however, does not accept this unless there is evidence of a crime, fraud, or gross negligence. For further info, see Grose, supra note 6 at 18.
The parties may agree upon an amount of damages that the employer will be entitled to for each day of delay by the contractor in completing its works, and may determine a payment cap for such damages. However, a UAE court can increase or decrease any such sum to make it equal to the loss if requested to do so by a party. The basis for any such amendment is Article 390 of the Civil Code which is quoted above.

In addition, according to the Red Book, the imposition of delay damages does not relieve the contractor of the responsibility of completing the works. This means that delay damages can be claimed even if the works have not been wholly completed. Thus, an employer may be confronted by many UAE judicial decisions confirming that a delay damages clause can be used only if the

22 According to Sub-Clause 8.8 of the Red Book, any such agreement or determination is binding unless there is ‘fraud, gross negligence, deliberate default or reckless misconduct by the Contractor’.

23 With the indication that a UAE court may also rely on the Islamic rule, embodied in Article 42 of the Civil Code, that ‘Harm shall be made good’. This rule was relied on, e.g., in the UAE Union Supreme Court’s judgment in Case No. 154/24, dated 7 June 2003, which stressed that the damages must be equivalent to the actual loses. As Pinsent Masons & Smith rightly note, Article 390 grants a wider power than the one given to Qatari courts because, unless there is gross negligence or fraud, a Qatari court can only reduce the rate of the agreed delay damages. See Article 287 of the Qatari Civil Code, Pinsent Masons, ‘Adapting FIDIC provisions for use in Qatar’, available at: https://www.pinsentmasons.com/out-law/guides/adapting-fidic-provisions-for-use-in-qatar. B. Smith, ‘Design Risk Unforeseeable Ground Conditions and Time for Completion under the UAE and Qatar Civil Codes’, International Construction Law Review 1 (2018): 76, 90. Grose rightly notes that ‘[i]n some jurisdictions the underlying nature of a delay damages provision determines whether it is enforceable. Specifically, if the underlying nature is that of a penalty the provision is unenforceable at common law. A penalty provision differs from a delay damages provision in that whereas the primary purpose of the former is to incentivise a contractor to complete on time by way of a punitive financial consequence of failure, the primary purpose of the latter is to compensate for loss. A delay damages provision should, at common law, represent a genuine pre-estimate of loss if the provision is to be categorised as a delay damages clause rather than a penalty. As common law courts decline to enforce a penalty (being incompatible with the role of the civil courts to compensate not to punish) the distinction is significant. Although the Gulf’s courts share common law’s compensatory philosophy there is no corresponding tradition of rendering penalty provisions void. Reflecting the pragmatic nature of civil law the Gulf’s domestic courts instead have an overarching power to adjust an award in a manner consistent with the compensatory philosophy that underpins the assessment and award of damages’, see Grose, supra note 6 at 138.

24 See, e.g., the judgments of the Abu Dhabi Court of Cassation in Case No. 346/2016 Commercial, dated 18 May 2016 and Case No. 829/2016, dated 11 January 2017 as well as the
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A contractor has performed all the works but was late in delivering them; that is, in case of partial performance, the employer is not entitled to such damages.25

8 Compound Interests

While Sub-Clause 14.8 of the Red Book entitles the contractor to receive compound interests on unpaid due payments, UAE courts have not taken a unified stance on the legitimacy of such interests. For example, the Dubai Court of Cassation has approved these interests,26 whereas the Union Supreme Court has deemed them illegal based on Islamic Shari’ah rules.27

9 Termination

Prior to the launch of the 2017 Red Book, it was argued that FIDIC contracts did not have regard to ‘potential limitations’ of civil law countries on parties’ freedom to regulate the termination of their contracts.28 Although Sub-Clause 1.16 of the 2017 Red Book clearly subjects the book’s termination clauses to any mandatory provisions that the governing law may stipulate, it is useful to show any conflict between the Book’s termination clauses and the Civil Code so that the parties can be made aware of such a conflict at the time of contracting. Clauses 15 and 16 of the Red Book permit termination in the event of default by either party. This requires compliance with the termination procedures described therein, which include, inter alia, the issuance of a termination notice. The mentioned clauses do not envisage that a court’s termination order will be necessary.

25 However, in such a case, the employer may invoke the general rules of compensation under the Civil Code if he can prove that he has suffered damages because of the contractor’s failure to comply with the contract. This was successfully done, e.g., in the Dubai Court of Cassation Case No. 785/2017 Commercial, dated 6 May 2018.
27 See, e.g., Case No.711/24, dated 23 October 2005.
Ahmed argues that such an order must be obtained because Article 267 of the Civil Code states that ‘[i]f the contract is valid and binding, it shall not be permissible for either of the contracting parties to resile from it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law’. While such an order is necessary, it is Article 892 of the Civil Code that should have been relied upon. Unlike Article 267, Article 892 was tailored specifically to govern Muqāwalah contracts. However, the two provisions are similar in content as according to the latter ‘[a] Muqāwalah contract shall terminate upon the completion of the agreed-upon work, or upon the cancellation of the contract by consent or by order of the court’.

Kanakri & Massey, Singh, and Rankin & Hill believe that parties can dispense with the requirement of obtaining a court order by expressly providing so in their contract. This view refers to Article 271 of the Civil Code, which states that: ‘[i]t shall be permissible to agree that a contract shall be regarded as being cancelled spontaneously [i.e., automatically] without the need for a judicial order failing performance of the obligations arising thereout [...].’ However, like Article 267, this provision is stated under the Civil Code’s general provisions on dissolution of contracts, whereas Article 892, which provides for mutual consent or a court’s order, is a special provision and should therefore prevail. An explicit addition to Clause 15 or 16 of the Red Book that a court order is not required cannot validly be deemed as ‘mutual consent’ within the meaning of Article 892 as such a consent is supposed to occur after the conclusion of the contract. It should also be noted in this context that whilst Article 271 refers to automatic cancellation, Clauses 15 and 16 of the Red Book require, inter alia, a termination notice.

30 See supra note 7.
32 See supra note 7.
33 Article 268 of the Civil Code provides that ‘[t]he contracting parties may mutually revoke the contract by their mutual consent after it has been concluded’.
In addition to termination for default, Clause 15 empowers the employer to terminate the contract for his convenience. This means that the employer can end the contract without any breach on part of the contractor, and it poses the following question: Is this termination permissible under the Civil Code?

It is suggested that Article 892 assumes that the contract is binding. It can therefore be read as if it states that ‘[a] binding Muqāwalah contract shall terminate [...] etc.’. Based on this, and in light of Article 218 of the same Code, which provides that ‘[a] contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of the court’, it would appear that a contractual right of termination for convenience is permissible.34

34 This is so despite the fact that the legal framework of termination of contracts under the UAE Civil Code is not supportive to termination for convenience as much as the frameworks of some comparative laws such as the Egyptian Civil Code. This can be clarified as follows: Article 663 of the Egyptian Civil Code states that ‘(1) An employer may terminate the contract and halt its performance at any time before its completion, provided that he compensates the contractor for all expenses he has incurred, the work he accomplished, and the profit he could have realised had he completed the work. (2) The court may, however, reduce the compensation due to the contractor for profits foregone if the circumstances justify such a reduction’. Based on this article, Shafik and others have rightly cited that the Egyptian Civil Code grants the employer a statutory right of termination for convenience (see, N. Shafik, S. Qodsi, E. Serag & M. Helmi, ‘Application of FIDIC Contracts under the Egyptian Civil Code’, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction (2016): 3, 5). (As Fawzy and others rightly state, Article 663 is not mandatory. See S. Fawzy, I. El-adaway, L. Perreau-Saussine, M. Abdel Wahab & T. Hamed, ‘Analyzing Termination for Convenience Provisions under Common Law FIDIC Using a Civil Law Perspective’, Journal of Legal Affairs and Dispute Resolution in Engineering and Construction (2018): 4, 5.) In his justification for Article 663, jurist Al-Sanhuri (The main draftsman of the Egyptian Civil Code, see p. 3) hinted at the long-term nature of Muqāwalah projects, which escalates the risk of changing conditions. It is, of course, the employer who spends on his project, and due to commercial or other new circumstances, he may find it better to not proceed with the project. See, A. Al-Sanhuri, Al-Waseet in Explaining the Civil Law (al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadid), Vol. 1/7 (Beirut: Dār Ehya‘a al-Turath al-Arabi, 1964), pp. 242. While Al-Sanhuri’s encyclopedia (that is, Al-Waseet in Explaining the Civil Law, which consists of 10 parts in 12 volumes) on the Egyptian Civil Code is a major reference for many judges (and other legally qualified persons) in the Arab World, the above-mentioned nature has been referred to in UAE judicial judgments approving employers’ terminations for convenience (see, e.g., the judgments of the Dubai Court of Cassation in Case No. 218/2005 Commercial, dated 20 February 2006 and Case No.869/2016 Commercial, dated 26 February 2017) although the UAE Civil Code does not contain a provision similar to Article 663 which is mentioned above. Moreover, UAE courts have approved the same remedies that a contractor may be awarded under Article 663. In some judgments, this has been done without indicating the supporting legal provision(s) of the UAE Civil Code (see, e.g., the
Accordingly, it can be concluded that the requirement of obtaining a court’s termination order is the only limitation on the applicability of Clauses 15 and 16.

10 Exceptional Events

During a project’s period, various events may arise that can affect at least one participating party’s ability to fulfil its duties. Such events may sometimes amount to force majeure. The Red Book deals with force majeure events and provides examples thereof, such as wars, rebellions, and riots.35 Besaiso and others criticised the 1999 Red Book for not providing ‘a decisive and conclusive
definition of what constitutes a *force majeure* [...] situation. While the 2017 edition also does not provide such a definition, its absence does not seem to be a defect; this is because whether a specific event constitutes a *force majeure* may sometimes vary from country to country. The Red Book, however, provides certain conditions that must be present in order for an event to be deemed *force majeure*. These are as follows: beyond a party’s control; the party could not reasonably have provided against before concluding the contract; having arisen, such a party could not reasonably have avoided or overcome; and it is not substantially attributable to the other party. These conditions seem less restrictive when compared to those required by UAE courts, which have stressed that a *force majeure* event shall be unordinary, public, unpreventable, and, not only a party could not provide against but also, could not be predicted. Any agreement by the parties that a specific event shall be considered as *force majeure* or that it should be considered as such if it meets certain conditions will not be binding on a UAE court, as such a court will ascertain whether the agreement is in line with the above-mentioned requirements of UAE courts. This legal position can be enhanced by citing cases such as Case No. 509/2016 Real Estate in which the parties (purchaser and seller) had agreed that failure by a third party (master developer) to fulfil its obligations (toward the seller) would constitute *force majeure*. The Dubai Court of Cassation did not approve this agreement because it did not meet the above-mentioned requirements and, as the Court stated, did not accord with ‘the correct legal definition of *force majeure*’. This is with the indication that the Civil Code does not define the term ‘*force majeure*’. It only states, in Article 273, that:

(1) In contracts that are binding upon both parties, if *force majeure* supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.

(2) In the case of partial impossibility, that part of the contract which is impossible to fulfil shall be extinguished, and the same shall apply to the temporary impossibility in continuing contracts, and in those two cases, it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.

37 See, e.g., the judgments of the Dubai Court of Cassation in Case No. 92/2018 Civil, dated 12 April 2018 and Case No. 18/2018 Real Estate, dated 23 May 2018.
38 Dated 12 April 2017.
In addition to force majeure, the Civil Code also deals with events that make the performance of contractual obligations oppressive rather than impossible. Article 249 thereof states that:

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

Obviously, this provision is mandatory and, therefore, cannot be deviated from by agreement.

11 Post-delivery Defects Liability

Under the Red Book, the contractor remains liable for only 1 year from the date of completion to rectify defects or damages in its works as notified by, or on behalf of, the employer, with the indication that the parties may agree on a different period and that the period may be extended but not for more than two years from its expiry date.\(^{39}\)

Liability of a wider scope is imposed on the contractor by Article 880 of the Civil Code, which states that:

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 engineer to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of 10 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 that threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend such installations to remain in place for a period of less than 10 years.

\(^{39}\) The contract may provide that the period shall be extended for any defects or damages that are remedied during its running. See Clause 11.
2) The said obligation to make compensation shall remain even if the defect or collapse arises out of a defect in the land itself, or if the employer consented to the construction of the defective buildings or installations.

3) The period of 10 years shall commence from the time of delivery of the work.

The Code adds, in Article 882, that any agreement limiting this decennial liability or exempting the contractor therefrom shall be deemed void. This is because such an agreement would contradict the public interest and be detrimental to third-party rights. Since preventing the occurrence of such structural defects is a matter of public policy, a contractor should not implement contract specifications or plans in which he discovers a mistake that can lead to any such defect. If the contractor implements them, his responsibility cannot be mitigated by showing written evidence that he notified the employer or engineer of the mistake. In addition, ambiguity with regard to the cause of any such structural defect does not relieve the contractor of the liability. The liability, however, is negated if a force majeure event or a foreign cause is proved.

12 Notices of Claims

According to Sub-Clause 20.2.1 of the Red Book, the first step in raising a claim for payment and/or extension of time is to notify the engineer of the claim within 28 days after the claiming party became aware, or should have become aware, of the event or circumstance giving rise to the claim. The sub-clause further provides that failure to adhere to the 28-day period will make the claim time-barred.

42 Dubai Court of Cassation, Case No. 253/2010 Civil, dated 9 January 2011.
43 Such as adjacent trenching and tunneling works, see Union Supreme Court, Case Nos. 722 and 735/22, dated 9 October 2001.
44 Abu Dhabi Court of Cassation, Case No. 71/2013 Commercial, dated 12 June 2013.
45 This, as Fawzy and others rightly state, is a strict procedural requirement (see S. Fawzy, I. El-adaway, L. Perreau-Saussine, M. Abdel Wahab & T. Hamed, ‘Civil Law Context for

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As Grose and others have rightly noted, the effect of non-compliance with contractual time limits for raising claims is not a clear issue in the UAE.⁴⁶

Singh believes that such non-compliance does not necessarily prevent claims from being pursued because Articles 106, 246, 318, and 319 of the Civil Code ‘act against [...] time bar clauses’.⁴⁷ Article 106 states that '[a] person shall be held liable for an unlawful exercise of his rights [...] [and] [...] the exercise of a right shall be unlawful ... if the interests desired are disproportionate to the harm that will be suffered by others'. By virtue of Article 246, '[t]he contract must be performed in accordance with its contents, and in a manner that is consistent with the requirements of good faith'. Articles 318 and 319 deal with unjust enrichment. The former provides that '[n]o person may take the property of another without lawful cause, and if he takes it, he must return it', and the latter article adds that '[a]ny person who acquires the property of another person without any legal disposition entitling him to do so must return it if that property still exists, or similar property or the value thereof if it no longer exists [...]'. However, the argument that these articles ‘act against [...] time bar clauses’ is questionable. Article 106 does not seem to permit such a wide


⁴⁷  Singh, supra note 31. The argument that it is possible in the UAE to pursue a claim despite such non-compliance may be enhanced by the fact that even some laws in the UAE recognise what is known as ‘regulatory time limits’—that is, time limits that are stated for regulatory purposes only and can be deviated from with no impact on validity. For example, article 3 of Law No. 13 of 2008 Regulating the Interim Real Estate Register in the Emirate of Dubai states that '[a]ny developer who made a sale or any other disposition that transferred or restricted title prior to the coming into force of this Law should approach the Department to get it registered in the Real Estate Register or the Interim Real Estate Register, as applicable, within 60 days after the date on which this Law came into force', and it was decided in many cases that the 60-day period is a regulatory one—that is, a developer’s failure to approach the Department within 60 days would not make the sale, or any other disposition, null and void (See, e.g., Dubai Court of Cassation, Case No. 37/2009 Real estate, dated 7 February 2010 and Dubai Court of Cassation, Case No. 43/2009 Real estate, dated 1 April 2010). Another example is Article 6 of the 1980 Labor Law, which provides that a labor dispute must be transferred to a competent court within 2 weeks if no amicable settlement can be reached, and similarly, it has been held that this period is a regulatory one (see, e.g., Dubai Court of Cassation, Case No. 263/2006 Civil, dated 20 February 2007).
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and it is difficult to see why a party’s exercise of its contractual right to insist on the necessity of compliance with the 28-day period can be deemed unlawful despite the fact that the non-complying party agreed to this period at the time of contracting. Regarding Article 246, one may argue that performing the contract ‘in accordance with its contents’ entails compliance with the 28-day period, and/or that it contradicts the good faith principle to cause financial instability to a party by postponing a claim until after the expiration of this period. As to Articles 318 and 319, it has been rightly argued that unjust enrichment cannot be raised within the contractual context.

In fact, the Civil Code contains provisions that act in favour of time-bar clauses; these include Articles 70 and 265 which, respectively, state that ‘[n]o person may resile from what they have performed’ and ‘[i]f the wording of a contract is clear, it may not be departed from’. It can be added that in Case No. 167/1998, the Dubai Court of Cassation endorsed a time-bar clause relating to the finality and binding effect of an engineer’s decision.

Nevertheless, it is of paramount importance to refer to Article 487 of the Civil Code. This Article does not permit deviations from statutory prescription periods. It states that ‘(1) It shall not be permissible to waive a time-bar defence

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48 One possible application of this article is when deep excavations in the backyard of someone’s house have detrimental effects on the foundations of his neighbour’s building.

49 See, e.g., Kanakri & Massey, supra note 7.

50 Although they are not specifically related to time limits, some provisions of UAE laws, including the Civil Code, may be cited to enhance the argument that the notice requirement of Sub-Clause 20.2.1 of the Red Book must, as a whole, be strictly complied with. Under these provisions, parties must send notices in order to preserve their claiming rights, which means that such a notice requirement is recognised by UAE laws. For instance, Article 886 of the Civil Code states that ‘[i]f 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 to significantly exceed the quantities on the itemized list in order to execute the agreed-upon plan, the contractor must immediately notify the employer thereof and set out the increased price expected; if the contractor does not do so, he shall lose his right to recover the excess cost over and above the value of the itemized list’. Another example is Article 1028 of the same Code, which reeds that a provision in a policy of insurance that ‘the right of the assured shall lapse by reason of his delay in giving notice of the incident insured against’ shall be deemed void when there is a reasonable excuse for the delay. In other words, as stated by the Dubai Court of Cassation in Case No. 491/2017 Civil, dated 18 January 2018, where the Court rejected the Plaintiff’s compensation claim for his failure to adhere to the notice requirement, such a contractual provision in a policy of insurance is valid, and the assured must therefore comply with unless the delay in notification is due to a reasonable excuse. Sub-Clause 29.2 of the Red Book also allows for the acceptance of late submission of a claim notice when the delay is justified.

51 Dated 6 June 1998.
prior to the establishment of the right to raise such defence, nor shall it be permissible to agree that a claim may not be brought after a period differing from the period laid down by law. (2) It shall be permissible for any person having the competence to make dispositions in respect of his rights to waive the defence, even by way of implied waiver, after the right has been established, but provided that such waiver shall not be effective in respect of obligees if it is made so as to cause them detriment. Accordingly, as Rankin and Hill rightly note, a party may encounter difficulties in relying on its opponent’s failure to comply with the 28-day period as a ground for discharge from legal liability.

Furthermore, the UAE courts’ usual reliance on experts’ reports, and the fact that such experts may not pay attention to contractually agreed notices, may limit the practical effectiveness of the notice requirement stipulated under Sub-Clause 20.2.1.

13 Arbitration

Sub-Clause 20.6 of the Red Book stipulates that disputes shall be settled through arbitration conducted pursuant to the Rules of the International Chamber of Commerce. When drafting particular conditions of the Red Book, parties should be aware that this sub-clause will be inapplicable under UAE law if these conditions do not clearly show that the sub-clause is a part of the parties’ agreement.

14 Conclusion

Local and international entities that intend to participate in the UAE’s highly active construction industry, especially in Dubai, using the 2017 FIDIC Red Book, must be aware of certain local limitations on the Book’s applicability in this civil law jurisdiction. Such awareness can provide such entities with a proper understanding of their rights and obligations and, consequently, reduce the number of disputes. This article identified and discussed these limitations, which can be summarised as follows:

52 Rankin & Hill, supra note 31 at 395.
53 The parties may exclude the arbitration clause of the Red Book.
54 See the discussion above under Section 5.
55 See Article 7 of Federal Law No. 6 of 2018 on Arbitration. See also Abu Dhabi Court of Cassation, Case No. 214/2014 Commercial, dated 8 May 2014.
1. A choice of a foreign law to govern the parties’ contract is limited by Articles 27 and 28 of the Civil Code, which prevent the application of such a law if it is in conflict with the Islamic Sharīʿah or the UAE’s public order or morals, or if the concerned party is unable to prove its existence or determine its effect.

2. According to UAE courts, the main contractor’s liability toward the employer for subcontractors’ defaults is inapplicable when a subcontractor contracts with the employer.

3. The written notice requirement for instructing a variation by the engineer is limited by the fact that UAE courts may approve a variation claim despite the absence of such a notice.

4. Imposing on the contractor, under Article 880 of the Civil Code, a 10-year liability period for any total or partial collapse or any defect threatening the safety of its works despite the exclusivity provided in Sub-Clause 1.15 and Clause 11.

5. The power of UAE courts, under Article 390 of the Civil Code, to exceed an agreed-upon total liability amount of the contractor if it is less than the loss suffered by the employer.

6. The power of UAE courts, under Article 296 of the Civil Code, to declare invalid any contractual condition purporting to provide exemption from liability for a harmful act.

7. The power of UAE courts, under Article 390 of the Civil Code, to increase or decrease an agreed-upon delay damages amount, and the confirmation of these courts that the employer is not entitled to such damages in case of partial performance by the contractor.

8. The fact that compound interests have not been approved by all UAE courts.

9. Article 892 of the Civil Code restricts the contractual right of a party to terminate the contract for the other party’s default through the necessity of obtaining a termination order from the competent court.

10. The power of UAE courts, under Article 249 of the Civil Code, to reduce oppressive obligations to reasonable levels when exceptional and unforeseeable circumstances of a public nature occur, and the more restrictive stipulations determined by these courts for considering an event as force majeure.

11. The fact that, in light of Article 487 of the Civil Code, a party may encounter difficulties in relying on its opponent’s failure to comply with the 28-day period for raising a claim for payment and/or time extension as a ground for discharge from legal liability.
12. Finally, pursuant to Article 7 of the UAE Federal Law No. 6 of 2018 on Arbitration, when drafting particular conditions of the Red Book, parties should be aware that Sub-Clause 20.6 of the Book will be inapplicable if these conditions do not clearly show that the sub-clause is a part of the parties’ agreement.

It is hoped that these limitations will be considered and that future research will strive to examine the applicability of other standard construction contracts in the UAE.