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Thesis Title: The Difference in how UAE and EW Law controls *Gharar* (Risk) and so *Riba* in a Construction Contract in the Emirate of Dubai, UAE

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Abstract

This research critically analyses and compares how the United Arab Emirates (UAE)[1] Law and English and Welsh (EW) Law regulates obligations in a contract, for a thing that is to come into existence in the future, namely a construction contract. Uncertainty/speculation as to how an obligation is to be performed in UAE Law is termed *gharar*. The word that is synonymous with this terminology in EW Law is "risk". The extent of *gharar* or 'risk' (these terms are used on an interchangeable basis in this thesis) in an obligation plays a fundamental role in the profitability of a construction contract. Where losses become unacceptable, particularly for the Contractor, a dispute will arise. These circumstances may be in conflict with UAE Law, which obligates parties to a contract to ensure circulation of wealth by maintaining the anticipated profit to be made from a contract. This analysis also reviews how the level of *gharar* or 'risk' can be increased by operation of two types of provision that are included in standard forms of construction contract such as the International Federation of Consulting Engineers, Geneva, Switzerland (FIDIC) Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1st Ed. 1999 (FIDIC99). The first is a provision that releases the Employer from liability where the Contractor does not give timely notice of an Employer's act of prevention. The second is a provision giving the Employer a discretion to act in an opportunistic manner, and exempt or limit his liability. It considers how FIDIC99 should be applied to control *gharar* or 'risk' in a positive way. It also identifies similarities between how UAE Law controls *gharar* and that of the notion of parties' reasonable expectations in contract Law (herein referred to as parties' expectations), and how relational contracts operate to ensure parties achieve their expectations.

Keywords

Construction*, gharar*, risk, certainty, *riba*, unjust enrichment, implied terms, exemption and discretionary clauses, penalties, forfeiture, FIDIC.

[1] Through the Civil Code Federal Law #5 of 1985 as amended by Federal Law #1, 1987 (UCC).

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Preamble

1. What this thesis demonstrates

This thesis demonstrates the differences in how UAE and EW Law control what is termed *gharar*[2] in UAE Law, and what is considered as 'risk' in EW Law in a contract of mutual obligations for a thing that comes into existence in the future, namely a construction contract, in the Emirate of Dubai.

In UAE Law the Civil Code Federal Law #5 of 1985, as amended by Federal Law #1, 1987 (UCC), is the legislation which regulates contractual relations in the UAE and so the Emirate of Dubai. This legislation enacts the Holy Law of Islam, also termed Islamic Sharī'a or *fiqh*[3], (the terms Islamic Sharī'a/*fiqh* are used on an interchangeable basis in this thesis). *Fiqh* has two prohibitions, the *gharar* and *riba*[4] prohibitions, which parties to a construction contract must obey. These prohibitions, as illustrated in this thesis, are incorporated into the UCC.

The aim of the *gharar* prohibition is to prevent what in *fiqh* is termed misappropriation, which in this thesis is referred to as 'unfair gain' (with the exception of section 1.4 below) that results from a party

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[2] *Gharar* translates to hazard, speculation, risk or uncertainly - Saleh, N., A.O. (1986); Unlawful Gain and Legitimate Profit in Islamic Law, and Islamic Banking. Cambridge University Press: Cambridge, UK, pp 49-55; Comair-Obeid, N., A.O. (1996), The Law of Business Contracts in the Arab Middle East; Kluwer Law International, Arab & Islamic Law Series, The Hague, The Netherlands, pp. 57-64; Rayner, S.E., A.O. (1991); The Theory of Contracts in Islamic Law, Graham & Trotman, London, UK, pp. 289-297; Schacht, S., A.O. (1964, reprinted 1982), An Introduction to Islamic Law, Oxford University Press, Oxford, UK, pp. 146-147; Hammond, C.G., A.O. (2005) FIDIC An Analysis of International Construction Contracts, Saudi Arabia, Kluwer Law International and the International Bar Association, pp. 262-264; Crone, P., A.O. (1987) Roman Provincial and Islamic Law, Cambridge University Press, Cambridge, UK, p 18; Ballantyne W.M. (1985-1986), 'The Shari'a: A Speech to the IBA Conference in Cairo, on Arab Comparative and Commercial Law, 15-18 February 1987, Arab Law Quarterly (ALQ), pp. 12-28.

[3] Ballantyne W.M. (1985-1986), 'The New Civil Code of the United Arab Emirates: A Further Reassertion of the Sharī'a', Arab Law Quarterly (ALQ), pp. 245-264; Kamali, M. H., A.O. (2006, reprinted 2008), Principle of Islamic Jurisprudence, The Islamic Text Society, Cambridge, UK. p. 1; Fyzee A.A.A. A.O. (1949 4th Edition 2008); Outlines of Muhammadan Law ,Oxford University Press, New Delhi, India, p. 1; Schacht, *op cit.,* n. 2, p. 1; Khadduri, M. & Liebesny, H.J, A.O. (1955), Law in the Middle East Vol. 1, The Middle East Institute, Washington DC, USA, pp.85-86; Coulson, N.J. A.O. (1964 reprinted 2007) A History of Islamic Law, Edinburgh University Press, Edinburgh, Scotland, UK, pp. 75-85;

[4] *Riba* translates to unlawful gain or excess or illicit profit - Saleh, *op cit.,* n. 2, p. 13; Comair-Obeid, *op cit.,* n. 2, p. 51; Rayner, *op cit.,* n. 2, pp. 266-269; Schacht, *op cit.,* n. 2, p. 145; Hammond *op cit.,* n. 2, pp. 262-263.

speculating, caused by a lack of knowledge as to what is required to discharge an obligation[5].

Fiqh considers *gharar* a root cause of a dispute in a contract[6]. An obligation lacking in precision prevents a party having adequate control over how to perform an obligation. In the context of a construction contract the obligation is the delivery of a structure. To do this there must be no speculation in any attributes which form the basis of the contract that causes the Contractor to lose control of his mode of performance[7]. Where there is speculation then the contract price or countervalue[8] is either enough, not enough, or too much. This is the same as gambling which is forbidden[9] in *fiqh*. The Contractor either makes the anticipated profit, a loss, or an excessive profit, which if the latter the Employer will resent.

The excessive loss or benefit being the unfair gain. In either instance, one of the party's feels cheated and so regrets entering into the agreement resulting in a dispute between the parties[10]. Consequently, for a valid construction contract to come into existence in UAE Law, the services/goods provided must be equivalent to the countervalue paid. This equivalence ensures circulation of wealth, a primary aim of *fiqh*[11], and which is an obligation under article 3, UCC.

The way the UCC controls *gharar* is there has to be precision in all attributes of the contract so there can only be nominal speculation as to what an obligation entails, i.e. the risk intrinsic to a contract must be

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[5] Ibn Rushd, M., translated by Prof. Imran Ahsan Khan Nyazee, Reviewed by Prof. Mohammed Abdul Rauf, A.O. (1996), The Distinguished Jurist's Primer Vol II, Bidāyat al-Mujitahid wa Nihāyat al-Muqtasid, Garnet Publishing, Reading, UK, p. 179.

[6] Whelan, J., A.O. (2011), UAE Civil Code and Ministry of Justice Commentary - 2010. London, UK: Thomson Reuters (Legal) Ltd, p. 110, Art. 203 commentary; Imam Malik, *Al-Muwatta* "The Approved," Book 31.

[7] Coulson, N.J. A.O. (1984) Commercial Law in the Gulf Sates The Islamic Tradition, Graham & Trotman, London, UK, p. 45.

[8] The term commutative contract used in the translation of article 203, UCC illustrates that parties to a transaction are to give and receive the equivalent hence the term countervalue.

[9] Vogel, F. E. & Hayes, S.L., A.O. (1998 Reprinted 2006); Islamic Law and Finance Religion, Risk, and Return. Liedden, The Netherlands: Koninklijke Brill NV. p. 63; Comair-Obeid, *op cit.,* n. 2, pp. 40-42; Rayner, *op cit.,* n. 2, pp. 291-292; Saleh, *op cit.,* n. 2, pp. 53-54; Schacht, *op cit.,* n. 2, p. 146.

[10] Imam Malik, *op cit.,* n. 6, Book 31; Comair-Obeid, *op cit.,* n. 2, p. 24.

[11] Shimizu H., Philosophy of the Islamic Law of Contract a Comparative Study of Contractual Justice; IMES –I.U.J Working Papers Series #15, the Institute of Eastern Studies 1989; Vogel & Hayes, *op cit.,* n. 9, pp. 26-27; Rayner, *op cit.,* n. 2, pp. 269, 273 -292; Comair-Obeid, *op cit.,* n. 2, p. 40-42. Ibn Rushd, *op cit.,* n. 5, p. 180; Qur'anic verse II:276-6.

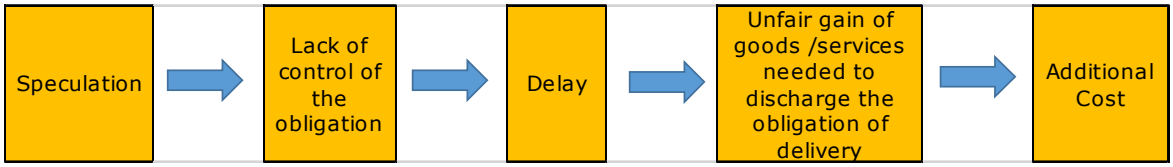
nominal[12]. This in turn ensures the benefit (profit) gained by the parties from a transaction is equivalent, i.e. the countervalue paid corresponds to the true value of the thing bought so neither party makes an excessive profit[13]. To disobey either of these prohibitions makes the contract void in UAE Law[14].

The author of this thesis proposes a novel definition of *gharar* in respect of a Contractor in the present day construction environment in Dubai as:

> "*…uncertainty caused by insufficient knowledge resulting in speculation as to what a Contractor's obligations are in order to control and prevent the unfair gain by an Employer (appropriation of the goods/services (quality, type and quantity of work to be done, and mode of performance)), needed to complete the structure by the stipulated delivery date to the design stated in the Contract…*"

The flow chart presented in Figure 1 illustrates how *gharar* manifests itself:

Figure 1 – Flow Chart as to how *gharar* manifests



The aim of the *riba* prohibition is to prevent any excess gain (profit) by a party from a contract[15]. Such gain in *fiqh* is unethical/immoral and so illicit. *Riba* arises where the contract entered into is unbalanced. The form of the unbalance is that party A can control his liability towards party B, or is able to exert some influence over party B to decide party

[12] Vogel & Hayes, *op cit.,* n. 9, pp. 78 & 93; Saleh, *op cit.,* n. 2, pp. 50-52; Coulson, *op cit.,* n. 7, pp. 44-45; Ibn Rushd, *op cit.,* n. 5, p. 179.
[13] Comair-Obeid, *op cit.,* n. 2, pp. 55-56; Vogel & Hayes, *op cit.,* n. 9, pp. 78 & 93; Saleh, *op cit.,* n. 2, pp. 50-52.
[14] Whelan *op cit.,* n. 6, Art. 203; Imam Malik, *op cit.,* n. 6.
[15] Coulson, *op cit.,* n. 7, p. 43; Saleh, *op cit.,* n. 2, p. 13; Comair-Obeid, *op cit.,* n. 2, p. 51, 55, 56; Rayner, *op cit.,* n. 2, pp. 267-273; Schacht, *op cit.,* n. 2, p. 145.

B's rights. In either circumstance, this allows party A to increase its profit at the expense of party B[16].

Riba manifests in a construction contract where *gharar,* in the form of an Employer's act of prevention, causes the Contractor to lose control of its mode of performance and so its ability to deliver by the agreed date. The Employer, despite causing the delay, can exempt or limit his liability by operation of a time-bar or discretionary clause[17]. This allows him to exploit the Contractor to make an unfair gain.

The author of this thesis proposes a novel definition of *riba* in respect of a Contractor in the present day construction environment in Dubai as:

> "*…the Employer, by having the ability to control the rights of the Contractor, may exploit the Contractor to gain some form of excess profit/gain…*"

The flow chart presented in Figure 2 illustrates how *riba* manifests itself:

Figure 2 – Flow chart as to how *riba* manifests

As demonstrated, in UAE Law there is a duty to control *gharar* and its effect as it can lead to an unfair gain, *riba*.

The control of 'risk' in EW Law is different. EW Law abides by the doctrine of freedom of contract[18]. Consequently, parties to a contract are at liberty to decide the terms of their bargains. However, the downside is that parties to the contract consciously or unconsciously accept the risk associated with the obligations they have to discharge. In EW Law, where it is demonstrated that the risk falls to a party either

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[16] Schacht, *op cit.,* n. 2, p. 145; Coulson, *op cit.,* n. 7, pp. 43-44; Coulson, *op cit.,* n. 3, p. 38-39; Comair-Obeid, *op cit.,* n. 2, p. 51; Money lenders exploited the position of the holder of the debt as when the debt was due and it could not be paid the money lender demanded payment or that the interest be doubled - Vogel & Hayes, *op cit.,* n. 9, pp. 73 & 82; Hammond *op cit.,* n. 2, pp. 262-264.

[17] Coulson, *op cit.,* n. 7, pp. 53-54; Vogel & Hayes, *op cit.,* n. 9, pp. 101-102.

[18] Peel, E., A.O. (2003 reprinted 2012), The Law of Contract 12 Ed., Thompson Reuters (Legal) Ltd., pp. 2-3.

expressly or by implication[19], the party has to accept the loss or gain associated with it. Whether a gain or loss, the same situation arises as under *fiqh,* one of the party's regrets entering into the contract.

Parties can therefore include in their contract notice requirements or discretionary clauses that exempt or limit the liability of party A towards party B, or which allows party A to control party B's rights and obligations. This is on the proviso that the provision(s) does not offend the rules against penalties or forfeiture[20], or contravene the Unfair Contract Terms Act 1977 (UCTA). If any of these forms or relief are/is demonstrated to apply, then the party suffering the loss can claim redress.

In saying this, EW Law, by the use of implied terms, can control the balance of the contract by assigning risk to the party most suited to handle it, provided such risk is not expressly assigned[21]. The implied terms which provide such control for a construction contract are those of fairness, reasonableness and efficacy, such as a party will do nothing to impede the others performance, 'the prevention principle'[22]. It also has the *contra proferentem* rule to control notice and discretionary clauses. The combined effect of these controls in EW Law promotes the concept that contracts be carried out in good faith, and so mirrors, to some extent, the objectives of the *gharar* and *riba* prohibitions as demonstrated in this thesis.

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[19] Collins, H., Implied Terms: The Foundation of Good Faith and Fair Dealing, Current Legal Problems, Vol. 67 (2014) pp. 297-331; Atkins Chambers Ltd A.O. (2010) HUDSON'S Building and Engineering Contracts, Thomson Reuters (Legal) Ltd., London, UK., pp. 43-46; Peel, *op cit.,* n. 18, p. 2; Crossly v Faithful & Gould Holdings Ltd [2004] 4 All E.R. 447.

[20] Photo Productions Ltd v Securicor Transport Ltd [1980] A.C. 827; Makdessi v Cavendish Square Holdings BV [2015] UKSC 67; Lord Wilberforce determined that a time bar provision was an exemption clause "*…I treat the words 'exceptions clause' as covering broadly such clauses as profess to exclude or limit, either quantitatively or as to the time within which action must be taken, the right of the injured party to bring an action for damages…*" Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361; Makdessi v Cavnedish Square Holdings BV [2015] UKSC 67; ParkingEye Limited v Beavis, [2015] EWCA Civ 402; Elliot, R. F. Penalties: a brief guide to three recent revolutions, Const. L.J. 32(6), 644-658.

[21] Peel, *op cit.,* n. 18, p. 223.

[22] Collins, *op cit.,* n. 19; Mackay v. Dick (1881) 6 A.C. 251; Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274; The Moorcock (1889) 14 PD 64 CA; Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd, [1949] 2 All E.R. 1014.

EW Law, by the use of implied terms, is reflecting to some extent concepts of parties' expectations and relational contracts[23]. These methods of contracting, as recorded in this thesis, mirror a primary aim of *fiqh,* that of circulation of wealth, as the aim is to promote a balanced contract so a win/win scenario is achieved. For this to happen in EW Law parties to the contract must make a conscious effort as to whether or not an act or provision will detract from the other party's interests. This reflects the same moral approach required by *fiqh* in the performance of a contract.

Thus, as presented in this thesis, there are similarities in the underlining aims in EW and UAE Law to ensure equity in a contract through:

1) EW Law concepts equivalent to good faith in a contract; and
2) The Courts interpretation of parties' expectations and relational contracts under EW Law.

[23] McKendrick, E., A.O. (2005) Contract Law, Texts, Cases and Materials 2ed, Oxford University Press, Oxford UK. pp. 400-403; Chan, A.P., Chan D.W., J.F., Yeung A.O. (2010) Relational Contracting for Construction Excellence, Principles, Practice and Case Studies, Spons Press, Oxon, UK; Bakri, A.S, Ingirige, B and Amaratubga, D., Key Issues for Implementing Knowledge Management in Relational Contracting Project Settings, School of Built Environment, University of Salford, UK.

2. Intellectual Isolation

The *gharar* and *riba* definitions above are novel. The reason, as illustrated by Crone[24], is that Islamic studies have been in 'intellectual isolation' since the First World War. Saleh confirms this, although he does record that during the 1970-1980's greater attention by the West was given to Islamic Sharī'a but subsequently declined[25].

Gulf Arab States, such as Yemen, Kuwait, UAE[26], Bahrain and Qatar, have declared in their Constitution that Islamic Sharī'a will be the primary source of Law[27].

Islamic Sharī'a/*fiqh* is the corpus of the doctrines of Law as evolved through the classical theory of Islamic Law[28]. These doctrines developed prior to the 10th century, with further development curtailed as the Jurists, (pious Islamic scholars of the schools of Islamic Jurisprudence who developed the doctrines of *fiqh* from the primary sources, the Qur'an and Sunnah of the Prophet), considered that such doctrines could no longer be advanced[29]. The sources of *fiqh* is the Qur'an and the Sunnah of the Prophet. Consequently, as *fiqh* is derived from the commands of Allah they cannot be challenged and have to be followed without question. This in turn limits the autonomy of parties' in the Law of contract.

Due to this 'intellectual isolation' there has been a lack of understanding of *fiqh* (although the Organisation of Islamic Conference has made efforts to address this[30]). This isolation has led to a lack of knowledge as to how such doctrines are to be interpreted and applied in respect of

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[24] Crone, *op cit.,* n. 2, p. 1.

[25] Saleh, S., A.O. (2006) Commercial Arbitration in the Arab Middle East, Hart Publishing, Oxford and Portland. Oregon USA, p. 1.

[26] Ballantyne W.M. (1985-1986), 'The New Civil Code of the United Arab Emirates: A Further Reassertion of the Sharī'a', Arab Law Quarterly (ALQ), pp. 245-264; all of these States are Sunni's.

[27] Saleh *op cit.,* n. 25, p. 4 - Yemen Article 3, Kuwait Article 2, UAE Article 7, Bahrain Article 2 and Qatar Article 1.

[28] Rayner, *op cit.,* n. 2, p. 20; Coulson, *op cit.,* n. 3, pp. 75-85; Schacht, *op cit.,* n. 2, pp. 57-68; Khadduri & Liebesny, *op cit.,* n. 3, pp. 87-91; Liebesny H.J., A.O. (1975), The Law of the Near and Middle East, State University of New York Press, New York, USA, pp. 12-19 & 21-26; Fyzee, *op cit.,* n. 3 , p. 11.

[29] Coulson, *op. cit.,* n. 3, pp. 81-82; Rayner, *op. cit.,* n. 2, p. 22; Schacht, *op. cit.*, n. 2, pp. 69-73; The four Sunni schools were that of Ibn Maliki, Ibn Hanbal, Ibn Al Shafi^{c}i and Ibn Hanifa.

[30] Vogel & Hayes, *op cit.,* n. 9, p. 48.

the relevant articles of the UCC that govern the formation and performance of a construction contract.

3. Justification for this research

As recorded by Coulson, the UAE Courts, when determining a case, will apply the principles of Islamic Sharī'a. In order to understand the substantive Law which applies, it is necessary to ascertain from the relevant texts[31] the basis of these principles and to have a knowledge of Islamic Jurisprudence. He further states, that without such knowledge, Islamic Sharī'a is inaccessible and this is the reason for western business persons and lawyers approaching the subject of Islamic Sharī'a with "…*a naturally exaggerated apprehension of the unknown*…"[32]. For the same reason Ballantyne states there is a "…*lamentable, if understandable, ignorance, even an aversion to* [understanding] *Islamic Shari'a among Western Lawyers*…"[33] This thesis seeks to shine a light on how certain of these principles apply in a particular context.

In addition, Comair-Obed records that parties, when Islamic Sharī'a is the basis of the Law governing the contract, are uncertain as to whether they can unreservedly determine the provisions of their contracts or whether they are restrained, not only by legislation but by specific Islamic Sharī'a requisites. This question is answered by Professor Schacht who records that as a result of the ethical control which Islamic Sharī'a places on legal transactions, such freedom of contract is limited[34]. This thesis will assist parties to UAE construction contracts to understand how UAE construction contracts are affected by certain Sharī'a principles.

There are two principal Sharī'a prohibitions, *gharar* and *riba*, which must not be infringed upon in respect of a construction contract, and for which the UCC incorporates measures to prevent infringement. However, without the background knowledge as to the origins of the relevant doctrines upon which these prohibitions are based, there is a lack of understanding as to how and what is behind the aim of the relevant articles of the UCC which can be considered to apply to a construc-

[31] The Qur'an and Sunnah of the Prophet.
[32] Coulson, *op. cit.,* n. 3, pp. 5-6.
[33] Ballantyne *op cit*., n. 2.
[34] Comair-Obeid, *op cit.,* n. 2, p. xi.

tion contract. These doctrines are that there has to be precision as to what an obligation entails, and that contract provisions cannot increase the profit of one party without providing a benefit to the other[35].

This lack of appreciation of the influence that Islamic Sharī'a has on contractual rights and obligations is considered a major cause of disputes arising in construction contracts in the UAE. This is illustrated in the next section and demonstrates that often parties to a construction contract have no knowledge of how the UCC regulates their legal relationship.

A purpose of this thesis is to address this lack of knowledge as it effects the formation of the contract and the application of discretionary and notice clauses. Both of these types of clauses are found in standard forms of construction contracts such as FIDIC99, allowing an opportunistic Employer to increase his profit.

It is appreciated by the author that parties to a construction contract at present often conduct their transactions in a manner that at best is in ignorance, or at worse, deliberately contravene the obligations placed on them by the UCC, and that eventually parties do resolve any disputes that may arise in respect of their contract through negotiation. However, this does not detract from their obligation to comply with the requirements of the UCC. Compliance with these requirements, as demonstrated in this thesis, would, in the opinion of the author, minimise construction disputes by balancing the contract and ensuring the benefits gained are equivalent. This is particularly important now that Gulf Arab states are seeing a strong resurgence of Islamic Sharī'a as illustrated by Ballantyne[36].

[35] El-Ahdab J. (A.O. 2011), Arbitration with Arab Countries, 3rd ed., Kluwer Law International, The Netherlands, p.22

[36] Ballantyne *op cit*., n.2.

4. Aim of the thesis

The aim of this thesis is to illustrate that the UCC has enacted the *gharar* and *riba* prohibitions into the Legalisation by setting out:

1. Specific obligations which the parties must abide by at the formation of the contract; and
2. Parties' obligations and rights when performing the contract.

To achieve this aim a comparative approach has been adopted by distinguishing how UAE and EW Law addresses *gharar* (risk) in a construction contract, with particular regard to a Contractor.

The investigation reflects these differences by contrasting the sources of the Law of the two jurisdictions and the differing approaches in applying the Law. In doing this, it illustrates that EW Law has developed certain doctrines, *inter alia* that of implied terms, the *contra proferentem* rule, to balance risk where the parties have not expressly apportioned it in their agreement. Failure to apportion such risk expressly allows the EW Courts to use such doctrines to re-balance the risk where the EW Courts considers it equitable to do so. The more defined the scope of the risk, the more limited is the ability of the EW Courts to apply such doctrines. Consequently, there is a greater potential for a Contractor not to be reimbursed for resources provided, thereby causing the equivalence of the contract to be lost. The exception to this is unjust enrichment as this concept only applies where no contract exists in EW Law.

Conversely, the UAE applies a nominate contract system so the contracting parties must comply with obligations placed on them by the general and specific articles of the UCC that apply to their kind of contract. To interpret correctly the requirements of the UCC a knowledge of *fiqh* is requisite for two reasons: 1) in order to grasp the meaning of the text of the UCC articles; and 2) to ensure that the *gharar* and *riba* prohibitions are not disobeyed. Consequently, the texts of the articles of the UCC cannot be taken at face value but must be interpreted based on the objectives of these injunctions, the aim of

which is to ensure that obligations that arise from a contract only contain nominal *gharar* so the equivalence of the contract is ensured. At the same time, the *riba* prohibition prevents any form of profiteering and applies whether or not the parties have entered into a contract. This requirement is imposed through the text of articles 1, 2 and 3 of the UCC.

The need to have a background knowledge of *fiqh* is similar to that in EW Law that requires knowledge of relevant and current case law in order to understand how and when terms can be implied to a contract, and how doctrines such as the *contra proferentem* rule and unjust enrichment apply to determine how risk/*gharar* will be allocated. This approach in EW Law is understood, whereas due to the religious nature of *fiqh* there is uncertainty as to who can research and apply the doctrines. This is evident by parties' reluctance to revert to the UCC as a basis to support their argument for a right to compensation.

This is further compounded by the use of standard forms of construction contract, whether they are altered or not by Employers, as parties see the provisions of the contract as the primary source of their rights and obligations and not the requirements of the UCC. Thus, a primary objective of the examination carried out in this thesis is to demonstrate that the UCC obligates parties to apply the provisions of the contract in a manner that is consistent with the obligations placed on them by *fiqh*, through the relevant articles of the UCC, by interpreting them in a manner that does not disobey the *gharar* and *riba* prohibitions as required by article 2, UCC.

Establishing this allows the author to illustrate how two types of provisions (namely notice and discretionary clauses incorporated into a standard form of construction contract such as FIDIC99), are to be operated in EW, and UAE Law. The examination reflects how such clauses may be operated as exemption or limitation clause in EW Law allowing an Employer to benefit from his own breach. Whereas if these clauses are operated in such a manner in UAE Law they would violate the aims of the *gharar/riba* prohibitions. This again is a primary

objective of the thesis, with the investigation continuing to illustrate how circumstances evolve allowing an Employer to use notice and discretionary clauses as to exempt or limit liability.

In examining this, the thesis demonstrates that the contracting parties are obligated, by the UCC, to avoid violating the said prohibitions, not only to have to perform the contract in a manner consistent with good faith but also their pre-contract negotiations. This again illustrates a distinction between EW and UAE Law, as although EW Law does not *prima facie* recognise the doctrine of good faith, it does not allow acts of bad faith which would include that of an Employer benefitting from his own breach. However, the examination demonstrates that in the case of a construction contract, where a Contractor fails to abide by the notice clause in EW Law, an Employer can *prima facie* benefit from his breach. It also examines how the circumstances which arise both prior to and during the contractual performance (causing the *gharar* and *riba* prohibitions to be violated) can be addressed through the operation of FIDIC99.

This in turn leads to investigating two contractual approaches which parties can adopt to ensure their contract is performed in a manner consistent with good faith. These approaches are: 1) parties' expectations; and 2) relational contracts. These approaches, although different, require parties to act in a manner that not only protects their own interests, but that of the other party where they do not conflict with the aim of the contract.

This is considered by examining the operation of notice and discretionary clauses in FIDIC99. The notice clause is reviewed first by analysing the legality of its operation. The comparative analysis illustrates that EW Law seeks to ensure that notice clauses are fair in their operation but does not prevent them being exemption clauses, whilst demonstrating that in the UAE such clauses must comply with the Law, and once issued, the defaulting party cannot be exempt from compensating the injured party.

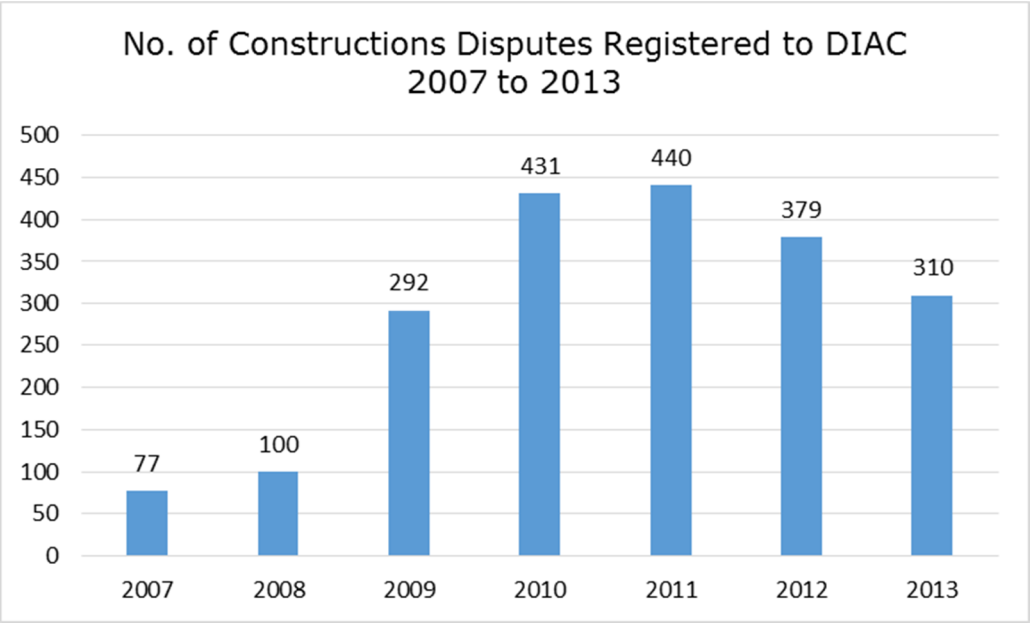
The thesis concludes by analysing the different forms that discretionary clauses take in FIDIC99 and how they operate. The comparative analysis considers what obligations are placed on the party holding the discretion, both in EW and UAE Law, and how such obligations can be controlled. It is clear that UAE Law enforces a stricter control of such clauses, not only through the good faith obligation placed on the contracting parties, but by enacting specific requirements to prevent any unfair gain from any inappropriate operation. It also reflects how the contractual relationship in parties' expectations and relational contracts require an Employer to operate such clauses, confirming that these contractual approaches are consistent with how construction contracts are to be performed in the UAE.

This thesis seeks to modernise the understanding of how *fiqh* is to be applied in regulating each parties' obligations and rights to a construction contract, by providing novel but Islamic compliant interpretations for the relevant articles of the UCC which regulate a construction contract in respect of these two prohibitions.

The author has already succeeded in applying these novel interpretations for the *gharar* and *riba* prohibitions in resolving disputes in the State of Qatar on two major projects on behalf of an Arab company who have confirmed the basis of these prohibitions. In addition to this the author prepared a referral for arbitration to the ICC for a loss and disruption claim applying the said definitions for *gharar* and *riba* which is now subject to arbitration. The research by the author, when preparing the statement of claim for these projects, found that the Qatar Court of Cessation ruling 89/2007(14) illustrates that these prohibitions apply to all contracts. The author has acted as a tribunal appointed Expert in Arbitrations in the Emirate of Dubai, UAE to provide opinions in the valuing of quantum and the operation of contract provisions. In these circumstances the tribunal comprised of Arabic members who referred to the UCC, and gave the decision in a manner consistent with the interpretations set out in this document.

Figure 3 below, presents the number of construction disputes referred to Dubai International Arbitration Centre (DIAC) during the period 2007 to 2013. This increased six-fold from 77 to 440 during the period 2007 - 2011. The value of the disputes between 2007 and 2013 was in the region of US$65m[37].

Figure 3 – No. of Construction Disputes Registered with DIAC 2007-2013



In addition to or as a precursor to arbitration, other methods used to resolve disputes included direct negotiations and engaging intermediaries to negotiate a settlement[38], which if the dispute was with a government entity of the Emirate of Dubai would be by referring the dispute to the Ruler's Court of the Emirate of Dubai. If these methods failed, then parties reverted to litigation[39].

The main issues in these disputes were changes, extra work and contract ambiguities (incomplete drawings, poor design management, and incomplete contract documentation etc.), causing *gharar* to be

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[37] "Construction disputes in Middle East drag on" The Nation 21 May 2013.

[38] Zaneldin, Essam, Construction Claims in the United Arab Emirates: Types, Causes, and Frequency, Association of Researchers in Construction Management, Vol 2, pp. 813-822; Ren Z., Atout M. and Jones J., Root Causes of Construction Project Delays in Dubai, Built Environment Division, Glamorgan University, Pontypridd, Wales, UK, p. 751; Top Five Causes of Contract Delays, Arabianindustry.com/construction, 23 February 2014.

[39] Zaneldin, *op cit.,* n. 38; Ren, Atout & Jones J., *op cit.,* n. 38.

present in the design which effected affected the Contractor's mode of performance, period for delivery and price. In addition to these causes were other Employer's acts of prevention such as late instructions and delayed handover of Site[40]. This data provides evidence that Jurists were correct when they determined that *gharar* is the core reason for a dispute to arise[41].

The essence of these disputes was generally the reduction in the agreed time the Contractor had to build the structure. This in turn leads to a dispute over who was responsible for the Contractor failing to meet the agreed delivery date, the price or countervalue (note, these terms are used on an interchangeable basis in this thesis) to be paid by the Employer, and whether the Employer had a right to deduct damages.

Although EW Law has no control as to the form a construction contract will take, it is interesting to note that the traditional methods[42] developed in EW Law to procure a structure, Measure and Value (M&V) or Lump Sum (LS) contracts, provide the level of precision required by Jurists as set out in the UCC. This thesis explains why this is so and therefore why such methods can be considered Islamic compliant.

Figure 4 reinforces this. This figure presents data compiled from seventy questionnaires, issued to Contractors to identify the most common standard form of construction contract used in the Emirate of Dubai. The most common standard form was the Conditions of Contract for Works of Civil Engineering Construction 4th Edition (1992) (FIDIC4) as published by the International Federation of Consulting Engineers, Geneva, Switzerland (FIDIC).

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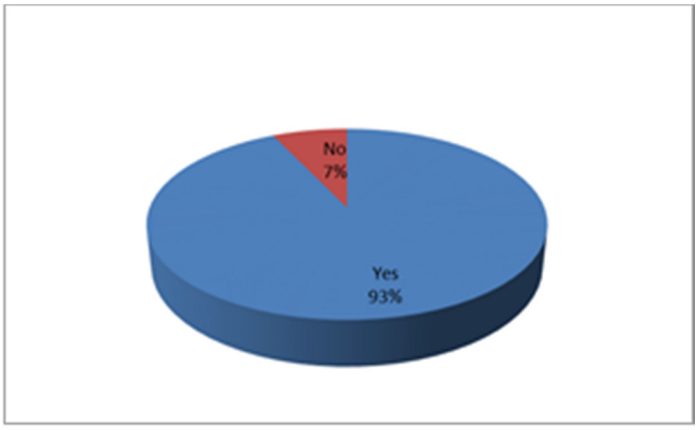
[40] Zaneldin, *op cit.,* n. 38; Ren, Atout & Jones J., *op cit.,* n. 38.

[41] Whelan *op cit.,* n. 6, p. 110, Art. 203 commentary.

[42] Ren, Atout & Jones J., *op cit.,* n. 38; Atkins Chambers Ltd *op cit.,* n. 19, pp.760-769; Furst, S., & Ramsey, V., A.O. (2006) Keating on Construction Contracts, Sweet & Maxwell, London UK, pp. 119-121; Baker, E., Mellors, B., Chalmers, S., & Lavers, Anthony., A.O. (2009) FIDIC Contracts Law and Practice 5th Ed., Routledge Taylor & Francis Group, London & New York, UK & USA, pp. 58-60.

Figure 4 - Percentage of Projects where FIDIC4 was used



The primary use for this standard form of contract is M&V contracts, but with amendments is useable with LS contracts. During the research stage of this thesis, parties to new construction contracts started switching to the latest version of the FIDIC form of contract provisions which is specifically for use with M&V and LS contracts. This standard form was the Conditions of Contract for Building and Engineering Works designed by the Employer 1st Edition 1999, the New Red Book (FIDIC99).

The questionnaire exercise also highlighted that whilst the language of the Contract is English, article 18 UCC applies the doctrine of *Lex Situs,* i.e. the governing Law for real property in the UAE, and the agreements stating the governing Law is that of the UAE. The author's extensive experience in working in dispute resolution in the construction industry in Dubai is that parties interpret and apply FIDIC99 in accordance with EW Law as there is a prevalence of literature in this respect[43]. It should be noted, that as the UAE is a Muslim State, it is mandatory that parties to a contract abide by the Holy Law of Islam[44] and therefore the obligations placed on them by the UCC.

[43] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42; Glover, J., & Hughes, S., A.O. (2006), Understanding the New Red Book a Clause by Clause Commentary, Sweet & Maxwell. London, UK; Totterdill, B. W., A.O. (2001), FIDIC user's guide a practical guide to the 1999 red book, Thomas Telford Ltd, London UK; Bunni, N, G, A.O. (2005), The FIDIC Forms of Contract 3rd Ed., Blackwell Publishing, Oxford, UK; https://www.amazon.co.uk/s/ref=nb_sb_ss_c_2_5?url=search-alias%3Dstripbooks&field-keywords=fidic&sprefix=FIDIC%2Caps%2C269.

[44] Article 27, UCC provides it shall not be lawful to apply principles of law that are contrary to Islamic Shari'a or public policy or morals in the UAE, Ballantyne, *op cit*., n. 27.

5. Notice and discretionary clauses

In both M&V and LS contracts the Employer is obligated to provide a full design and not to delay the Contractor's performance[45]. Where the Employer fails to discharge these obligations, delaying the Contractor's performance, the Employer in EW Law can avoid liability.

The reason for this is that standard forms of construction contract such as FIDIC99 contains two clauses which allow the Employer, through his agent the Engineer, to control the Contractor's rights.

The first is a notice clause which obligates the Contractor to notify the Employer of an Employer's act which delays the Contractor's performance within a strict timeframe. Failure to issue such notice within the said timeframe releases the Employer from liability[46].

The second is discretionary clauses which allow the Engineer to decide the level of compensation due to the Contractor which results from the Employer's acts of prevention[47].

The aleatory (profitability is dependent on the outcome of an uncertain event or contingency) nature of these clauses is analogous to gambling, in that the control the Contractor needs to maintain the anticipated profit now rests with the Employer[48]. Thus, both of these clauses provide great potential for unfair gain by an Employer.

Consequently, as there is potential for these clauses to be operated in an opportunistic manner by the Employer, they are repugnant to Islamic Sharī'a as they go against the ethics and morals imposed on

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[45] Atkins Chambers Ltd *op cit.,* n. 19, pp. 760-769; Furst & Ramsey *op cit.,* n. 37, pp. 119-121; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, pp. 58-60; Glover & Hughes, *op cit.,* n. 43, p. 74.

[46] An example of such clause is Sub-Clause 20.1 FIDIC99; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, pp. 316-322; Glover & Hughes, *op cit.,* n. 43, pp. 377-379; City Inn Ltd v. Shepherd Construction Ltd 2003 SLT 885; Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2) [2007] EWHC 447 (TCC); B.L.R. 195; Steria Limited v. Sigma Wireless Communications Limited [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC).

[47] An example of such clause is Sub-Clause 3.5, FIDIC99; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, pp. 286-289 & 294 -301; Glover & Hughes, *op cit.,* n. 43, pp. 65-68; Totterdill, *op cit.,* n. 38, pp. 90-96.

[48] Coulson, *op cit.,* n. 7, p. 44; Vogel & Hayes, *op cit.,* n. 9, pp. 100-102; Comair-Obeid, *op cit.,* n. 2, p. 37; Ibn Rushd, *op cit.,* n. 5, p. 155.

parties by the *gharar* and *riba* prohibitions[49] as defined above, and so against the Law of the UAE.

For this reason, party agreed provisions have to be interpreted in a manner to avoid or prevent contravening the *gharar* and *riba* prohibitions; otherwise such provision(s) has to be severed from the contract[50] to keep the contract valid.

To illustrate this and demonstrate how the UCC has enacted the *gharar* and *riba* prohibitions into the Law this thesis establishes:

1) How the operation of these two types of provision in UAE Law can cause *gharar* and *riba* to be present in a construction contract;
2) Why the interpretation and construction of these provisions in EW Law allows *gharar* and *riba* to be present in a construction contract; and
3) How these provisions are to be applied in UAE Law so they do not infringe these prohibitions.

By establishing how these types of provision can cause *gharar* and *riba* to be present in a contract, it also illustrates that the intention of these prohibitions are that each party derives the anticipated benefit from the contract which has similar aims of parties' expectations in contract law and relational contracts.

[49] Ballantyne W.M., (1988), 'The Second Coulson Memorial Lecture: Back to the Sharīa', Arab Law Quarterly (ALQ), pp. 317-328 which as illustrated at page 325 both *Gharar* and *Riba* are considered repugnant to *fiqh*.

[50] Whelan, *op cit.*, n. 6, art. 31, 52, 206 & 210; Comair-Obeid, *op cit.*, n. 2, pp. 43-55; Coulson, *op cit.,* n. 7, pp. 50-55; Vogel & Hayes, *op cit.,* n. 9, pp. 100-102. Ibn Rushd, *op cit.,* n. 5, pp. 192-194.

6. Structure of the thesis and findings

Part 1 Background to the development of UAE Law – this part examines and establishes:

1) That the primary sources of Islamic Sharī'a are the basis of the *gharar* and *riba* prohibitions; the effect these prohibitions have on parties' rights and obligations, which form the basis for the novel definitions for these prohibitions and which are to prevent *gharar* being inherent to a contract allowing an excessive benefit being made; the morals that these prohibitions enforce, put into the context of EW Law by examining the concepts of an unconscionable bargain and unjust enrichment, and how these prohibitions are enacted into the UCC to apply in the modern construction environment;

2) How the legal requirements, developed by the Jurists to prevent parties contravening the *gharar* and *riba* prohibitions, control the types of transaction which makeup the nominate contract system in the UCC. The analysis establishes, (taking cognizance of the novel definitions proposed by the author), the effect the *gharar* and *riba* prohibitions have on the interpretation of the specific articles of the nominate contract system that apply to a construction contract. From the analysis it is demonstrated that there are two permissible methods of procurement for a construction contract since they provide the precision required under UAE Law for a Contractor to control his mode of performance, and to ensure delivery by the agreed date. These methods are M&V and LS. It also sets out the methodology applied to identify when such articles enact these prohibitions;

3) The effect of the *gharar* and *riba* prohibitions on the interpretation and application of the general articles of the UCC in relation to a construction contract. The examination again takes cognizance of the novel definitions for the *gharar* prohibition, as proposed by the author, which are considered to apply to a construction contract

using the same methodology applied in respect of the specific articles that apply to a construction contract; and

4) The methods applied to illustrate that the interpretation of the English translation of the UCC are accurate.

The analysis demonstrates there is a fundamental difference in the principles upon which EW Law is based and that of UAE Law. The difference is that EW Law is discovered by the Courts from the provisions parties agree to apply to their contract. Such decisions of the EW Courts set the precedents to be followed. In UAE Law it is derived from the preordained Laws of Allah and his Prophet. Man cannot challenge these Laws. Thus, any provision that the parties agree which contradicts these prohibitions has no effect. Hence, unlike EW Law (where freedom of contract allows parties to decide their own provisions), such a power is limited under UAE Law.

Part 2 – *Gharar,riba and the* influence of English Law - this part examines and establishes:

1) How, due to the influence of the English language, EW Law has become the main reference point for the construction, understanding and interpreting of contract provisions. This in turn has resulted in parties being unaware of the obligations that arise in UAE Law in respect of the construction, interpretation and applications of such provisions, particularly notice and discretionary clauses. These two clauses cause *gharar* and *riba* to become intrinsic to a construction contract and so create great potential for unfair gain by an Employer;

2) How the application of notice and discretionary clauses, based on the current approach in EW Law, conflict with the aims of the *gharar* and *riba* prohibitions. Where such provisions are applied in an opportunistic manner they could be reclassified as exemption/exclusion of liability clauses. Consequently, EW principles that regulate the use of such clauses should apply where they are used. Where these principles are applied to the use of such provisions, there are strong similarities between the

prevention principle in EW Law and the doctrines upon which the *gharar* and *riba* prohibitions are based; and

3) There are differences in the application of the concepts of fair dealing and good faith in EW and UAE Law. The ability to apply principles of fair dealing and good faith in EW Law is dependent on how parties have agreed to apportion the 'risk' (*gharar*). The effect of this is that in EW Law, what would be considered an implied right or obligation can and is often negated. Consequently, there is plenty of potential for the *gharar* and *riba* prohibitions in EW Law to be infringed. Whereas, good faith in UAE Law is a legal requirement and has to be abided by. The examination also illustrates that parties' expectations and the concept of relational contracts, when applied to a construction contract, have strong similarities as to how a contract of mutual obligations should be performed in UAE Law.

This is to illustrate that there is a fairer or moral approach available to parties to operate their contract which will avoid a dispute by ensuring that each party attains the anticipated benefit (profit) from the bargain.

Part 3 – How *gharar* and *riba* are being neglected in UAE construction contracts - this part examines and establishes:

1) That *gharar* becomes intrinsic to a construction contract due to an incomplete design, ambiguities in the Employer's requirements, late instructions/variations proving the design was deficient, and Employer's acts which impede the Contractor's mode of performance and so cause disputes to arise in a construction contract; and

2) Which articles of the Law are not being complied with, and the effect non-compliance has on a contract. The examination takes cognizance of the novel definitions proposed for the *gharar* prohibition and presents the obligations that the Employer is failing to perform. It illustrates how this allows *gharar* to manifest, what obligations the Employer has, and the rights of the Contractor in such circumstance. It also provides a

comparison of the principles of UAE Law and the EW Law's parties' expectations in relational contracts. The comparison demonstrates that the parties' expectations and relational contracts reflect the morals that UAE Law promotes in the performance of a contract of mutual obligations.

Part 4 – How to fix the neglect of the effect of these prohibitions - this part examines and establishes:

1) There are two methods available to negate the effect of the *gharar* prohibition and the potential for *riba*. The first is through the Contractor's obligation to prepare a Programme of Works. This document presents the Contractor's mode of performance, which in turn informs the Employer of his input so he does not delay the Contractor's performance. In UAE Law this document forms part of the contract documents and allows the parties to identify when *gharar* has manifested and what is needed to remove its effect. The second is the Contractor's right to notify the Employer that his acts will, or are, preventing the Contractor's performance, thereby allowing *gharar* to infect the contract. Such notice under UAE Law is a notice for specific performance, which if the Employer fails to comply with makes him liable to compensate the Contractor; and
2) Where *gharar* has infected the contract, the parties, by following the mechanism set out in the contract provisions can negate *gharar* and so the potential for *riba* by compensating the Contractor accordingly. This requires that any notice or discretionary clause, for which this thesis considers the clauses in FIDIC99 as an example, are to be applied so they do not operate as an exclusion of liability clause thereby contravening the *riba* prohibition. This in turn ensures that the requirements of article 206 UCC are satisfied, with the provisions being interpreted in a manner that allows their application to prevent *gharar* and *riba* infecting the contract.

Part 5 – Findings and Conclusion

The findings from the analysis concludes that there is a fundamental difference in the formation and performance of a construction contract between these two jurisdictions; and that parties' expectations and relational contracts reflect the manner in which UAE Law obliges parties to perform a construction contract.

In addition to the above, the author of this thesis recommends that further research be carried out in the following areas:

1) How the level of business efficacy applied in parties' expectations and relational contracts can be developed in a manner that ensures parties comply with these approaches to contracting, taking cognizance of the *gharar* and *riba* prohibitions, so that a balanced set of contract provisions are adopted by the contracting parties; and

2) Design and build methods of procurement that can be developed to obtain a level of certainty equivalent to that of traditional methods of procurement, as defined in this thesis, to minimise the risk of disputes.

7. Contribution to the body of knowledge

This thesis gives parties an insight as to how the *gharar* and *riba* prohibitions, that are considered unethical/immoral to *fiqh* and so against the morals of the UAE, are being overlooked when parties enter into a construction contract. The reason for the oversight is due to a lack of knowledge as to how the articles of the UCC were derived from their principle source, Islamic Sharī'a, and that they are to be applied in a manner that does not contravene these prohibitions.

The contribution to knowledge this thesis makes is it illustrates:

1) That the UCC enacts *fiqh* into legislation and in doing so obligates the contracting parties to abide by the *gharar* and *riba* prohibitions if a valid construction contract in the UAE is to come into existence. This is because these prohibitions are considered immoral in *fiqh* and so the morals and public policy of the UAE.

2) Parties to a construction contract are unaware of how these two prohibitions operate to regulate parties' rights and obligations from inception, the preparation of design and contract provisions, parties' obligations during negotiations, contract formation and during the performance of their contract so the structure satisfies the Employer's expectations and that the true countervalue is paid.

3) To enlighten parties as to how these prohibitions do this the author proposes novel definitions as to what these prohibitions mean in the modern day construction environment. In addition the author proposes the prohibition test, a test which parties can use to identify how the relevant articles of the UCC that apply to a construction contract are to be interpreted so parties do not contravene the requirements of such articles.

4) There are two permitted forms of construction contract that can be termed Islamic compliant, M&V and LS which includes fast track variants of these forms procurement, Management Contracting and Construction Management.

5) That standard forms of construction contract such as FIDIC99, if applied based on EW Law where the substantive Law is that of the UAE, then parties will contravene the obligations placed on them by the UCC. The two forms of provision that contravene these prohibitions are notice and discretionary clauses. The reason is they can be operated as exemption or limitation of liability clauses, causing an imbalance in the equivalence of the benefits gained by each party to the contract. This is a direct contravention of article 3 of the UCC.

6) That notice and discretionary provisions in such standard forms of construction contract such as FIDIC99, should be operated in a manner that protects the legitimate interests of the Employer. Thus, a notice clause that allows an Employer to exempt himself from liability towards the Contractor as the Contractor failed to issue timely notice of the Contractor's right for compensation will, in UAE Law contravene the *riba* prohibition. In EW Law such a notice clause for the same reasons may be considered a penalty clause and so should be subject to the rules against penalties or forfeiture. Discretionary clauses which give the Employer the right to decide a Contractor's obligations and rights may be operated in a manner by an Employer to obtain additional services/goods for free, or may be operated to release or limit an Employer from liability towards the Contractor. Hence, such a clause will disobey the *gharar* and *riba* prohibition in UAE Law and may be subject to rules against penalties or forfeiture in EW Law.

7) UAE Law has specific articles that are aimed at an Employer operating notice and discretionary clauses in a manner which is not detrimental to a Contractor, and that no clause can release the Employer from being liable to compensate the Contractor provided the requirements of the applicable articles of the UCC have been complied with;

8) Parties in UAE Law have an obligation to perform their contract in a manner consistent with good faith. Hence, this obligation reinforces the requirement that the Employer operate notice and discretionary

clauses in a manner that protects his legitimate interests. Such obligation requires parties perform their contracts to reflect business efficacy, particularly that of cooperation, and that each of the contracting parties take account of the implicit understandings of the other as to how the provisions of their contract are to operate. This plays a fundamental role in the performance of a construction contract.

9) How standard forms of construction contract, such as FIDIC99, compliment the applicable articles of the UCC, and how the clauses of FIDIC99 that are considered in this thesis are to be operated to remove *gharar* and so the potential for *riba* infecting the contract which are: 1) in UAE Law the Programme of Works is a fundamental element for a valid construction contract to come into existence and is a primary document for removing *gharar* and *riba*; 2) how notice and discretionary clauses included in FIDIC99 are to be operated.

10) There are two types of contractual approach in EW Law that can be considered to comply with how the UCC require the parties to a construction contract perform their contract. These are: parties' expectations in contract law and 2) relational contracts. Alliance contracting would also be another option.

Contents

Figures

Table of Abbreviations

UCC	:	United Arab Emirates Civil Code, Federal Law #5 of 1985 as amended by Federal Law #1 of 1987.
LCP	:	Law of Commercial Procedure, Federal Law #18 of 1993.
FIDIC99	:	FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1st Ed. 1999.
Additional Work	:	An increase in the quantity of work for which there is a work item included in the BoQ.
BoQ or Bill of Quantities	:	Document that sets out the quantity of work which the Contractor has to do to construct the structure. The form that this document takes is to describe an item of work to be done, 'work item', against which a quantity is stated with a unit of measurement also being stated, i.e. linear metre (lm), square metre (m^2), cubic metre (m^3) or number (No.). The Contractor inserts the rate it requires to be paid for each work item, which by multiplying the rate against the quantity gives a total sum for each work item. These totals are added together to arrive at the total Countervalue for building the structure. Such work items include Site Administration costs.
Countervalue/ Price	:	The amount paid by the Employer to the Contractor which reflects the equivalent benefit gained by each of the parties to the transaction.
Extra work	:	Work for which there is no work item and so no unit quantity of work included in the BoQ[51].
Lump Sum Contract	:	Contracts where the design is fully detailed and the BoQ has been prepared, which in order to correct a design defect the Employer is obliged to instruct a variation.

[51] Chappell. D., Marshall. D., Powell-Smith. V., Cavender. S., A.O. (2001) Building Contract Dictionary 3rd edn; Blackwell Science Ltd, Oxford, UK.

Jurists	:	Pious Islamic scholars of the schools of Islamic Jurisprudence who developed the doctrines of *fiqh* from the primary sources the Qur'an and Sunnah of the Prophet. The four Sunni schools were that of Ibn Maliki, Ibn Hanbal, Ibn Al Shafiᶜi and Ibn Hanifa.
Nominate Contracts	:	A system which has been enacted in the UCC to control the different types of transactions which parties can enter into, in order they do not contravene the *gharar* and *riba* prohibitions which is achieved by setting out essential elements that have to be satisfied for a valid contract to come into existence.
Programme of Works	:	An activity over time schedule which depicts all activities required to build the structure in sequence with their associated durations which as a result of the logic links demonstrates a critical path of activities, which if any of these activities are delayed then the stipulated delivery date for the structure will not be met.
Re-measurable Contract	:	A construction contract where the countervalue due to the Contractor is calculated by measuring the quantity of work actually done and substituting these quantities for those in the initial BoQ.
Site administrative costs	:	Costs for resources required to administer the building of the structure which are directly related to the time required for delivery.
Variation	:	A definition used in a construction contract to describe an addition or omission to the Scope of Work which is defined in the contract provisions.
Works/ Structure	:	A definition used in a construction contract to describe the Scope of Work to be done by the Contractor for which the Employer provides a design.

Glossary of Terms of Sharī'a

Al-Qūwat Al-Qāhira	:	A somewhat wider concept of force majeure.
Badal	:	Literal meaning an exchange, that which is given in exchange *fiqh* requires the value of the exchange be equivalent in the benefit gained by each of the parties otherwise the contract will be of an aleatory nature and so be void. This is achieved in modern society by using the medium of money which translates to countervalue.
Fiqh	:	The corpus of the theory of all Laws evolved from the classical theory of Islamic Law as developed by the Scholars of Islamic Jurisprudence, the basis of Islamic Sharī'a, the Holy Law of Islam.
Gharar	:	Uncertainty caused by a lack of knowledge due to the contracting parties failing to fully identify parties' obligations which arise from their contract that allows one party to make an unfair gain at the expense of the other.
Ijtihad	:	Innovative reasoning by exercising one's own judgement by a variety of mental processes of which analogical reasoning is central, but also includes consensus, personal/juristic preference and having regard for public interest.
Istihsān	:	Discretionary opinions to exercise equity by juristic preference.
Istishāb	:	To keep the *status quo* where the present circumstance is fair.
Istiṣlāh	:	Consideration for public interest.

Glossary of Terms of Sharī'a Continued

Qiyās	:	Analogical reasoning in its widest sense.
Riba	:	1) Any unjustified increase of capital for which no compensation is given, with such gain materialising in a usurious manner; 2) enrichment without justification; 3) receiving monetary advantage without giving a countervalue; and 4) profiteering of all kinds.
Sunnah of the Prophet	:	Records the normative custom/living of the Prophet Mohammed (pbuh) as illustrated by his beliefs, what he approved tacitly or implied by his conduct and teachings which established rules/principles in respect of what the Qur'an had not revealed or was silent on, or upon which the Qur'an was ambiguous.

Part 1 Background to the development of UAE Law

1.1 Introduction

This Part examines the primary sources of Islamic Sharī'a upon which the pious Jurists developed the doctrines of *gharar* and *riba,* and how these prohibitions are enacted into the UCC and establishes in:

1. **Subsection 1.1.1 - Primary Sources of Islamic Sharī'a** – that the primary sources of Islamic Sharī'a are divine, and so the doctrines of *fiqh* take precedence over laws made by man. It records that analogy was applied to develop the legal doctrines of *fiqh* from these divine sources. This in turn means the doctrines are also immutable, obligating the parties to a contract to abide by the *gharar* and *riba* prohibitions;

2. **Subsection 1.1.2 - *Gharar* and *Riba*** – what the effect of the definitions, given by Jurists to the *gharar* and *riba* prohibitions have on parties' rights and obligations in contractual relationships. To ensure the equivalence of the contract all obligations must be fully defined. To prevent *gharar* and *riba* being intrinsic to a contract Jurists adopted a nominate contract system which has to be complied with at contract formation. Consequently, contract provisions must be balanced to prevent *gharar/riba* infecting the contract during its performance, that the contemporary definitions proposed by the author in respect of the *gharar* and *riba* prohibitions are valid and that they play an important role in interpreting how parties' rights and obligations are to be discharged in respect of a construction contract; and

3. **Subsection 1.1.3 - *Gharar, riba* and the morals they enforce put into context with EW Law** – that there are similarities between the morals that the *gharar* and *riba* prohibitions enforce in the Law of contract in the UAE, and the concept of an unconscionable bargain and unjust enrichment in EW Law, despite a fundamental difference in the basis of the principles upon which these concepts were developed; and

4. **Subsection 1.1.4 - Incorporation of the *Gharar* and *Riba* prohibitions into the UCC** – how the g*harar* and *riba* prohibitions have been incorporated into the UCC, taking priority over man-made contract provisions as UAE legislation is derived from Islamic Sharī'a, and so compliance with the prohibitions are mandatory.

The above analysis demonstrates there is a fundamental difference between EW and UAE Law. The premise of EW Law is committed to freedom of contract and therefore the Courts are unwilling to intervene to redress the balance of obligations where the parties have agreed the terms of their transaction unless certain restrictions are satisfied. Whilst the aim of *fiqh* is to ensure ethical control of transactions to prevent such unfair or illicit gain by minimising speculation, and the control of provisions which can be applied in an opportunistic manner.

The balance of Part 1 examines the articles of the UCC, taking note of the proposed definitions by the author of the *gharar* and *riba* prohibitions, which set out the parties' rignts and obligations under the nominate contract system, and articles which apply in general terms to a construction contract, and establishes in:

Section 1.2 - The Nominate Contract System – what the parties' obligations are to allow a valid construction contract to come into existence. The primary requirement is that parties have control of their obligations. For a construction contract, this requires that the structure is fully described so the Contractor has a complete knowledge of all obligations that will be required to deliver the structure by the agreed date; and

Section 1.3 - General articles of the UCC that apply to a construction contract – what the parties' rights and obligations are to prevent *gharar* and *riba* from becoming inherent to a construction contract, and what their obligations are to prevent *gharar/riba* from manifesting in their contract. One of the primary ways that this is to be done is by making parties perform their obligations and rights, which arise from the contract, in a manner consistent with good faith, and

that ambiguities or subjective requirements be interpreted in favour of the Contractor. This obligation and the maximum mandatory period of ten (10) years where the contract is of a commercial nature and two (2) years where it is of a civil nature to make a claim, coupled to the effect of the *gharar* and *riba* prohibitions, have a profound impact in ensuring contracts are balanced so the weaker party will not be exploited.

This is followed by **Section 1.4** – **Methods applied to confirm the interpretation of the English translation of the UCC**. This section establishes that the construction and interpretation of the UCC, as drafted by Mr. Whelan who translated the United Arab Emirates (UAE) Civil Code, Federal Law #5 of 1985 in his book, UAE Civil Code and Ministry of Justice Commentary - 2010. London, UK: Thomson Reuters (Legal) Ltd are correct.

1.1.1 Primary Sources of Islamic Sharī'a

This subsection demonstrates that *fiqh* is derived from the preordained Laws of Allah through his Prophet Mohammed (pbuh). Consequently, man cannot challenge it, and so it is mandatory that any agreement entered into by the parties abide by these Laws[52].

The two primary sources from which the doctrines of *fiqh* were developed are: (a) the Qur'an, which records the commands of Allah; and (b) the Sunnah of the Prophet Mohammed (pbuh), which sets out rules/principles on which the Qur'an was silent or ambiguous, and so acts as a commentary where such circumstances arise[53].

This is illustrated by verse 64:12 of the Qur'an that commands Muslims "*Obey God and his Prophet*"[54].

Thus, the doctrines developed from these two primary sources are also immutable. The method applied to extend and develop the doctrines which make up *fiqh* is innovative reasoning (*ijtihād*), the exercising of one's own judgement by a variety of mental processes to form a legal opinion[55]. The central ingredient of *ijtihād* is analogy (*qiyās)*[56].

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[52] Coulson, *op cit.,* n. 7, pp. 9-12; Khaddura & Liebesny, *op cit.,* n. 3 pp. 85-86; Rayner, *op cit.,* n. 2, pp. 1-4 and 91-102; Abd El-Wahab Ahmed El- Hassan (1985-1986), 'Freedom of Contract, The Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law', Arab Law Quarterly (ALQ), pp. 51-59; Crone, *op cit.,* n. 2, p. 18-19; Coulson, *op cit.,* n. 3, p. 75; Fyzee, *op cit.,* n. 3, pp. 11-12; Schacht, *op cit.,* n. 2, p. 112; Vogel & Hayes, *op cit.,* n. 9, pp. 23-24.

[53] Records the normative custom/living of the Prophet as illustrated by his beliefs, what he approved tacitly or implied by his conduct and teachings which established rules/principles in respect of what the Qur'an had not revealed or was silent on, or upon which the Qur'an was ambiguous, Liebesny, *op cit.,* n. 28, pp. 13-16; Mallat, C., A.O. (2007) Introduction to Middle Eastern Law, Oxford University Press, UK, p. 33; Kamali, *op cit*., n. 3, pp. 58-63; Schacht, S., A.O. (1950, reprinted 1967), The Origins of Muhammadan Jurisprudence, Oxford University Press, Oxford, UK, pp. 58-61; Coulson, *op cit.,* n. 3, pp. 42-44; Vogel & Hayes, *op cit.,* n. 9, pp. 23-24.

[54] Kamali, *op cit.,* n. 3, pp. 16-55; Rayner, *op cit.,* n. 2, pp. 1-9; Abd El-Wahab Ahmed El- Hassan *op cit.,* n. 52; Schacht, *op cit.,* n. 2, p. 202; Hallaq, W. B., A.O. (1997 reprinted 2008) A History of Islamic Legal Theories, Cambridge University Press, New York, USA, pp. 3-7; Liebesny, *op cit.,* n. 28, p. 12; Fyzee, *op cit.,* n. 3, p. 1; Shimizu *op cit*., n. 11; Comair-Obeid, *op cit.,* n. 2, p. 11; Vogel & Hayes, *op cit.,* n. 9, pp. 101-102.

[55] Ali-Karamali & Dunne, (1994) 'The Ijtihad Controversy' ALQ, pp. 238-257; Coulson, *op cit.,* n. 3, pp. 59-61 & 77; Khaddura & Liebesny, *op cit.,* n. 3 p. 87; Fyzee states *ijtihād* literally means '*…exerting oneself to the utmost degree to attain an object…*' whilst technically it means '*…exerting oneself to form an opinion in a case or rule of law…*', Fyzee, *op cit.,* n. 3, p. 23; Liebesny, *op cit.,* n. 28, pp. 12-19; Shimizu, *op cit.,* n. 11, pp. 36-40.

[56] *Qiyās* – analogical reasoning or deduction is the main method to extend the law to deal with new situations that arise in known forms of contract and to new areas of the law or forms of contract - Kamali, *op cit.,* n. 3, pp. 264-301; Rayner, *op cit.,* n. 2, pp. 20-21; Fyzee, *op cit.,* n. 3, p. 1; Coulson, *op cit*., n. 3, p. 40; Shimizu, *op cit.,* n. 11, pp. 37-38.

In addition to these two primary sources is a third source, the consensus of the Muslim community[57]. The origin of this third source is the words of the Prophet Mohammed (pbuh), "*My community will not agree on an error*" taken to mean, 'whatever my community agrees on is the truth'[58]. The form this third source takes is personal reasoning with acceptance of the reasoning by consensus. Its application is to ensure equity when the central ingredient to *ijtihad,* analogy might otherwise lead to a result not consistent with the rulings and principles set out in the two primary sources, thereby keeping the law consistent[59].

The commands contained in the two primary sources are a combination of moral and pastoral theology, ethics, spiritual aspirations, ritualistic and formal observances, public and private hygiene, courtesy and all aspects of the Law. Thus, the term Sharī'a reflects the 'Whole Duty of Man' who follows the Islamic religion[60]. Hence, the fundamental concepts of civilised society, compassion, equity, equality, incorruptibility, justice, good faith and the prohibition of usury[61] form the doctrines of *fiqh*.

There are approximately eighty texts of the Qur'an considered to deal strictly with the law of contract[62]. An example is the command that one is to fulfil one's contracts[63]. This is on the proviso that the type of contract, the provisions that the parties agree to apply to their contract,

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[57] This basis of this source of law derives from the Prophet Mohammed (pbuh) words "*My community will not agree on an error*". Hence, what the Community agrees is right and so can be interpreted as Law - Hurgronje, C.S. (A.O. 1898) Le Droit Musulman, Leroux, France, pp. 225-227; Liebesny, *op cit.,* n. 28, pp. 16-18; Kamali, *op cit.,* n. 3, pp. 228-232; Schacht, *op cit.,* n. 2, pp. 82-97; Khaddura & Liebesny, *op cit.,* n. 3, pp. 95-96.

[58] Hurgronje, C.S. *op cit.,* n. 44, pp. 225-227; Liebesny, *op cit.,* n. 28, pp. 16-18.

[59] Kamali, *op cit.,* n. 3, pp.28-260 & 323-350; Coulson, *op cit.,* n. 3, p. 59; Khaddura & Liebesny, *op cit.,* n. 3, p. 95-96.

[60] Khaddura & Liebesny, *op cit.,* n. 3, p. 85; Rayner, *op cit*., n. 2, pp. 1-2; Schacht, *op cit.,* n. 2, p. 11; Mallat, *op cit.,* n. 48, p. 32; Comair-Obeid, *op cit.,* n. 2, p. 3 & pp. 11-12.

[61] Coulson, *op cit.,* n. 3, pp. 11-12; Schacht, *op cit.,* n. 2, pp. 11-13, 200-202; Comair-Obeid, *op cit*., n. 2, pp. 11-13 & 26 - Monetary gain by aleatory means is considered immoral in *fiqh*; Vogel & Hayes, *op cit.,* n. 9, pp. 56-69.

[62] Khaddura & Liebesny, *op cit.,* n. 3, p. 87; Coulson, *op cit*., n. 3, p. 12; Kamali states that only seventy texts can be considered as being in respect of commercial transactions, with 30 being in respect of justice, equality, evidence, rights and obligations, Kamali, *op cit.,* n. 3, p. 27.

[63] Verse no. 5:1 of the Qur'an '...*O you who believe! Fulfill your undertakings*...'; verse no. 17:34 of Qur'an '*…and fulfil (every) pledge, for (every) agreement will be enquired into on the day of reckoning…*'

and so the obligations and rights that arise from the contract do not contravene the doctrines of *fiqh*[64].

Coupled to this are non-legal texts used to deduce laws such as the commands to arbitrate with justice, to give true evidence, not to offer bribes, and to give full weight and measure[65]. These texts illustrate the moral attitude of the Qur'an towards legal matters as demonstrated by the verses:

> '...*Surely they say, usury is like sale. But God has made sale lawful and usury unlawful*...' (Verses 2:276-277); and '...*They will ask thee concerning wine and gambling. Say, in both is great sin and advantage to men. But the sin of them is greater than the advantage*...' (Verse 2:219)[66].

In the eyes of Allah all men are equal as they believe in a common faith and goal to realise the will of Allah. Consequently, they shall act as 'brothers', with property[67] being seen as a form of usufruct[68] which is to be circulated in order to benefit the community[69].

The 'Sunnah[70] of the Prophet Mohammed (pbuh)[71]' records the normative custom/living tradition of the Prophet. These records illustrate what the Prophet Mohammed's (pbuh) beliefs were, and what he approved tacitly or implied by his conduct and teachings. Thus, as stated, the Sunnah of the Prophet became an explanatory commentary on interpreting the meaning and effect of the verses in the Qur'an.

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64 Vogel & Hayes, *op cit.,* n. 9, pp. 100-102; Coulson, *op cit.,* n. 7, pp. 50-55; Comair-Obeid, *op cit.,* n. 2, pp. 31-40; Abd El-Wahab Ahmed El- Hassan *op cit.,* n. 52.

65 Schacht, *op cit.,* n. 2 pp. 11-12; Verses 4:135, 5:41-42, 6:152 and 16:90-91 of the Qur'an.

66 Khaddura & Liebesny, *op cit.,* n. 6, p. 88; Shimizu *op cit.,* n. 11.

67 Whelan *op cit.,* n. 6, art. 101 - Property being defined into two categories: real property, property which is not movable whilst all other property is moveable property.

68 The right of use and to take the profits derived from such use.

69 Shimizu *op cit.,* n. 11; Schacht, *op cit.,* n. 2, pp; Comair-Obeid, *op cit.,* n. 2, pp. 2-3.

70 Schacht, *op cit.,* n. 2, pp. 8-9 & 17-18 The term 'Sunnah' means normative custom, a record of tradition and precedents which bound each of the Arab tribes in what was customary rights which included matters such as inheritance, marriage, divorce, sale, hire, loan, guarantee etc; A Sunnah can be localised in its use and can be introduced to a community through that community submitting to the practices (and theories) of a person or a group of persons who have become that community's leader (Imam) i.e. the Propjet Mohammed (pbuh); Liebesny, *op cit.,* n. 289, p. 13; Kamali, *op cit.,* n. 3. p. 58; Fyzee, *op cit.,* n. 3, p. 18.

71 The Prophet's own ad-hoc legal decisions, deeds, utterances and unspoken approval - Rayner, *op cit.,* n. 2, p. 1; Saleh *op cit.,* n. 2, p. 1; Schacht, *op cit.,* n. 2, p. 17; Kamali, *op cit.,* n. 3. p. 58; Mallat, *op cit.,* n. 53, p. 33.

An example of his teaching when asked, "*What form of gain is best?*" the Prophet replied, "*A man's work with his hands, and every* ***legitimate sale"***[72]. Such expression further reinforces the prohibition against unfair contractual relationships.

In order to deduce, elaborate and extend on the Laws set out in the two primary sources, the process of innovative reasoning is applied. As previously stated, analogy is the primary method. Where analogy leads to a result not consistent with the principles set out in these two primary sources of law, then personal reasoning is applied. Such reasoning takes the form of discretionary opinions to exercise equity by juristic preference (*istihsān*[73]). Such preference takes two forms: 1) presumption of continuity *(istishāb*[61]), the aim of which is to keep the *status quo* where the present circumstance is fair; and 2) having regard or consideration for public interest *(istiṣlāh*[74]) to find a satisfactory solution[75]. In order to validate laws derived from juristic preference, the third source of consensus of the Muslim community is applied.

The above exemplifies the belief that Islamic Sharī'a is divine in nature and cannot be challenged by man. The concepts of this Holy Law enforce equity, equality, incorruptibility, justice, good faith and prohibits usury. Usury in *fiqh* has a wide meaning as its aim is to prevent any form of exploitation. A fundamental concept is the circulation of wealth for the benefit of the community. Thus, any form of excess gain goes against this concept.

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[72] Vogel & Hayes, *op cit.,* n. 9, p. 60, this teaching is to be considered with verses 4:160 of the Qur'an '*…because of their turning away from the path of God and their taking of usury when they were forbidden it, and of their devouring people's wealth by false pretences…*' Thus, gain from a transaction shall be honest and not from an unfair advantage, allowing gain for which nothing was done in return.

[73] A doctrine of the Hanifa School - Coulson, *op cit.,* n. 3, p. 91-93; Schacht, *op cit,* n. 6, pp. 60-62; Kamali, *op cit.,* n. 3. - Kamali refers to *istihsān* as equity in Islamic law pp. 323-350 - and *istishāb* as presumption of continuity, Kamali, pp. 384-396; Shimizu *op cit.,* n. 11, pp. 29-42.

[74] A doctrine of the Māliki School - Schacht, *op. cit*. n. 6, pp. 60-61; Coulson, *op. cit*., n. 3, p. 60; Kamali, *op cit.,* n. 3 pp. 351-367; Shimizu *op cit.,* n. 11, pp. 29-42.

[75] These terms signified a breach of strict analogy on the grounds of public interest, convenience or similar consideration - Schacht, *op cit.,* n. 2, pp. 37 & 61; Coulson, *op cit.,* n. 3, pp. 91-93.

1.1.2 *Gharar* and *Riba*

This subsection analyses the definition of the *gharar* and *riba* prohibitions as determined by Jurists. It provides the basis for the author's proposed definitions for these prohibitions and their application in the present day construction environment and demonstrates that:

1. Jurists consider *gharar* as the root cause for a dispute to arise in a contract. The reason is that lack of control of an obligation leads to the anticipated profit not materialising for one of the party's[76], i.e. the countervalue paid does not correspond to the value of the work done, thereby allowing unfair gain. This in turn leads to one party's regret that he entered into the contract and therefore claims for the losses suffered[77]. Hence, the method to determine if *gharar* is present in a contract is to see whether a dispute arises[78];
2. The criteria applied by Jurists to determine if *gharar* is intrinsic to a construction contract, and the ways it can manifest itself;
3. *Riba* is a result of the inequality of a contract. The form of the inequality is that the first party to a contract has an advantage over the second party. This allows the first party to exploit the second party in order that the first party can increase its profitability in an unfair/immoral way, in that the second party receives an inadequate return for providing a service/goods;
4. In order to minimise or prevent *gharar,* and to prevent *riba* being intrinsic to a construction contract, a complete design is required in the form of a full description, design drawings (structurally, environmentally and aesthetically), specifications and quantities of work, as these attributes allow the mode of performance to be identified, the period of delivery and countervalue;
5. The proposed definitions provided by the author in the preamble are accurate, in that the aim of the prohibitions are to ensure that

[76] Whelan *op cit.*, n. 6 Art. 203 – commentary; Ibn Rushd *op cit.*, n. 5, p.179.
[77] Imam Maliki, *op cit.*, n. 6, Book 31; Comair-Obeid, *op cit.,* n. 2, p. 24.
[78] Whelan *op cit.*, n. 6, art. 203 – commentary.

the Contractor has control of his obligations to allow the structure to come into existence in the future by the agreed delivery date, and that the Contractor achieves the anticipated benefit (profit);

6. By applying the proposed definitions of the *gharar* and *riba* prohibitions to the obligations and rights that arise from a construction contract, the parties can properly assess what their obligations are to avoid contravening these prohibitions. This ensures a primary obligation of *fiqh,* the circulation of wealth as per the obligation placed on the contracting parties by article 3, UCC.

Pious Jurists who formed the schools of Islamic Jurisprudence[79] during the sixth and seventh centuries AD developed the doctrines of *fiqh* from the Qur'an and the Sunnah of the Prophet. A consequence of the rigour of the pious Jurists is that *fiqh* applies strict ethical and moral norms in the formation and performance of both civil and commercial transactions[80]. The consequence of this is the *gharar* and *riba* prohibitions.

Gharar

Imam Maliki[81] and Ibn Taymiyyah's[82]characterisation of a *gharar* sale is a sale where one party obtains something while the other is at 'risk', causing regret[83]. For this reason, Jurists consider *gharar* as the root cause for a dispute to arise in a contract, and so why a transaction in which *gharar* is present is prohibited[84].

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[79] Khadduri & Liebesny, *op cit.,* n. 3, pp. 58-84; Schacht, *op cit., n. 2*, pp. 57-68; Liebesny, *op cit.,* n. 28, pp. 21-22; Coulson, *op cit*., n. 3, pp. 36-52 & 62-71; Shimizu *op cit*., n. 11, p. 28.

[80] Ibn Rushd, *op cit.,* n. 5, The Distinguished Jurist's Primer Vol I & II, *Bidāyat al-Mujitahid wa Nihāyat al-Muqtasid* being an example of the body of law which resulted from such theory; Imam Malik *Al-Muwatta* being another; Mallat, *op cit.,* n. 53, pp. 40-61.

[81] Mālik ibn Anas ibn Mālik ibn Abī 'Āmir al-Asbahī (711 – 795 CE) also known as "Imam Malik," the "Sheikh of Islam", the "Proof of the Community," and author of *Al-Muwatta*, "The Approved," which was said to have been regarded by Shafi'i to be the soundest book on Earth after the Qur'an.

[82]1263–1328, full name, Taqī ad-Dīn Abū l-ʿAbbās Aḥmad ibn ʿAbd al-Ḥalīm ibn ʿAbd as-Salām Ibn Taymiyyah al-Ḥarrānī, renowned scholar of the Ḥanbalī School.

[83] Sami al-Suwailem, "Towards an objective measure of *gharar* in exchange", (Oct 1999 & Apr 2000), Islamic Economic Studies, Vol. 7(1 & 2), pp. 64-66; Imam Maliki, *op cit*., n. 6, Book 31; Comair-Obeid, *op cit.,* n. 2, p. 24.

[84] Ibn Rushd, *op cit.,* n. 5, p. 179; Sami al-Suwailem, *op. cit.,* n. 83, pp. 65-66; Imam Maliki, *op cit*., n. 6, Book 31.

Thus, based on this characterisation, the criteria used by Jurists to determine if *gharar* is intrinsic to a contract is whether a dispute arises. If it does, then *gharar* is present[85].

Jurists determined that *gharar* was intrinsic to a contract where the contracting parties failed to identify fully the:

1) Subject matter of the contract;
2) Characteristics as to the price, i.e. quantity, quality or the period for delivery;
3) Possible causes for the subject matter not coming into existence, including obstacles to delivery;
4) Certainty to the continued existence of the subject matter – (the modernised interpretation is, will the structure perform as expected); and
5) A combination of any of these attributes[86].

Where there is failure to determine fully any of the elements described in 1) to 3) above, then there is a lack of control of the obligations as to how the subject matter will come into existence by the agreed delivery date[87].

Consequently, the basis upon which the legal relationship was created between the parties was that of speculation/uncertainty. Such circumstance in the eyes of the Jurist is analogous to *maysir* (Arabic for gambling)[88].

This allows an unfair gain to manifest in two ways. Either the Contractor has to provide:

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[85] Whelan *op cit*., n. 6 art. 203 commentary; Imam Malik *op cit*., n. 6 Book 31; Sami al-Suwailem, *op. cit.,* n. 83, pp. 65-66.

[86] Ibn Rushd, *op cit.,* n. 5, p. 179; Comair-Obeid, *op cit.*, n. 2, p. 58; Dr. Sanhory, 'Abd al-Razzaq the author of the Egyptian Civil Code promulgated in 1947, author of the Masadir al-haqq, Vol. III, pp. 31-42 - Saleh, *op cit.*, n. 2, pp. 52 & 54; Ibn Taymiyyah, *Al-Qiyās fī ash-Shar' al-Islāmī*, pp. 26–27; Translation from Mahdi Zahraa & S.M. Mahmor (eds.), "*Validity of Contracts when the Goods are not yet in Existence in the Islamic Law of Sale of Goods*", (2002) Arab Law Quarterly (ALQ), p. 388; Mahmoud A. El-Gamal (2001), An Economic Explication of the Prohibition in Classical Islamic Jurisprudence, 4th International Conference on Islamic Economics, Leicester, UK, pp. 1-5.

[87] Coulson, *op. cit*., n. 7, pp. 20 & 44.

[88] Rayner states there is an immoral inducement provided by false hopes in the parties' minds that they will profit unduly from the contract, Rayner, *op cit.*, n. 2, p. 291; Vogel & Hayes, *op cit.,* n. 9, p. 89; Saleh *op cit.,* n. 2, p. 49.

1) Additional services and/or goods necessary for the subject matter to come into existence over and above that priced; and

2) Goods and/or services for the subject matter to come into existence are a higher quality than that allowed for in the price.

This is why the *gharar* prohibition is repugnant to *fiqh* as the Jurists considered this unfair gain as unethical/immoral[89].

Hence, for a valid construction contract to come into existence in UAE Law, the services/goods provided must be equivalent to the countervalue paid.

Although the unfair gain can take two (2) forms, *gharar* can manifest in a construction contract in the following ways.

The first is where the Employer's design data is deficient. The second is the Employer delaying performance of the Contractor. The third is an intervening contingency beyond the control of both the Employer and the Contractor.

Since the time for delivery establishes the Contractor's monthly site administrative and head office costs, any delay in delivery will cause the Contractor additional costs. If the loss suffered is significant the Contractor will claim for the additional cost and time. If unrecoverable, these losses translate into an unfair gain for the Employer.

Modern examples of the application of these principles are as follows:

A contract made the Contractor responsible for any additional expense that might arise from ground conditions not being as anticipated. The ground conditions were different, causing the Contractor to suffer additional expense. The decision reached by the Diwan al-Mazalim Court[90] was that the Contractor was entitled to total compensation for the financial harm suffered, due to the lack of knowledge as to the ground conditions.

[89] Ballantyne *op cit.*, 49 - see page 325; Comair-Obeid, *op cit.,* n. 2, p. 58.

[90] Kingdom of Saudi Arabia, Decision of 6/2/1398 AH (17th January 1978), MAFQ 11, 1992.

Similar circumstance was put into context in EW Law in the case of Mitsui Construction Co Ltd v Attorney General of Hong Kong (1986) 33 BLR, 1 by the Privy Council:

> "*…Against this background of facts, if the contract documents were understood in the sense contended for by the Government, engineering contractors tendering for the work would have two options. They could gamble on encountering more or less favourable ground conditions or they could anticipate the worst case and price their tenders accordingly. It is clear from what happened here that the worst case might double or more than double the time required to do the work with consequent increase in time related costs. On this basis tenderers gambling on favourable ground conditions would risk a large loss, while conversely, if all tenderers anticipated the worst case, but in the event reasonable conditions were encountered, the Government would be the losers. It follows that, if the Government are right, there is a large element of wagering inherent in this contract. It seems to their Lordships somewhat improbable that a responsible public authority on one hand and responsible engineering contractors on the other, contracting for the execution of public works worth many millions of dollars, should deliberately embark on a substantial gamble…*"

Thus, even in EW Law a contract should not involve gambling if a dispute is to be avoided.

In another example before an ICC arbitration in Saudi Arabia, a Subcontractor made a claim for losses because of *gharar* in the design. The Subcontractor, to address the *gharar,* had to do more work to discharge its obligations under the subcontract. Thus, the Subcontractor suffered financial harm due to the contract being unbalanced[91].

[91] Comair-Obeid *op cit*., n.2 p. 202.

Riba

Riba (literal meaning 'excess' or 'increase')[92] is associated with usury but has a wider definition. Such definitions include: 1) any unjustified increase of capital for which no compensation is given, with such gain materialising in a usurious manner due to a right one party has over the other in the contract[93]; 2) enrichment without justification[94]; 3) receiving monetary advantage without giving a countervalue[95]; and 4) profiteering of all kinds[96] .

The point of these definitions is that party A, can by whatever means, gain an unjustified increase or enrichment without compensating party B for such increase. For party A to do this it must have some advantage over party B which allows party A to exploit party B in order to gain something for nothing[97], thereby increasing the profitability of the transaction in favour of party A.

The aim of the *riba* prohibition is to control the illegality of all forms of gain (profit) resulting from an unbalanced contract[98]. In a contract of mutual obligations this occurs when a party's position can be exploited because it does not have control of its own rights and obligations.

Such circumstance arises where party A can: 1) release itself from liability towards the other party; and/or 2) where party A can control party B's rights where party A itself is in breach of contract; or 3) decide the quality and quantity of work to be done. In either

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[92] Schacht, *op cit*, n. 2, p. 145; Saleh, *op cit.*, n. 2, p. 13; Vogel & Hayes, *op cit.*, n. 9, p. 82; Hammond *op cit.,* n. 2 p. 263; Comair-Obeid, *op cit.*, n. 2, pp. 43-44; Rayner, *op cit.*, n. 2, pp. 267-289 & pp. 255-256 illustrates the difference between unfair exploitation and *riba,* the former being the countervalue received is grossly inadequate, whilst the latter countervalue is inadequate as a result of lack of equality in quantity, quality, delivery, mode of performance.

[93] Rayner *op cit.*, n. 2, p. 268; Comair-Obeid *op cit*., n.2 pp. 44-45.

[94] Vogel & Samuel, *op cit.,* n. 9, p. 45, p. 58 & pp. 62-62; Ibn Rushd, *op cit.*, n. 5, p. 230; Comair-Obeid, *op cit.,* n. 2, p. 12 & pp. 15-18.

[95] Schacht, *op cit.,* n. 2, pp. 145-146.

[96] Rayner *op cit.*, n. 2, p. 278 - has defined *riba* as profiteering of all kinds.

[97] Coulson, *op cit.*, n. 3, p. 87; Comair-Obeid, *op cit.*, n. 2, p. 58; Saleh, *op cit.*, n. 2, p. 13; Islamic Jurists, by analogy, have applied the *riba* rules to equality in quantity, quality and delivery so an 'increase' in these attributes for which no payment is received is undue profit made by illegitimate trade as the Contractor has to discharge its obligations under the Contract to avoid damages being deducted by an Employer, which if the Employer does apply damages results in commercial exploitation; Rayner, *op cit.,* n. 2, p. 278; Vogel & Hayes, *op cit.,* n. 9, pp. 77-83.

[98] Schacht, *op cit.,* n. 2, pp. 144-146; Comair-Obeid, *op cit.,* n. 2, pp. 17-18 & pp. 53-54 & p. 64; Coulson, *op cit.,* n. 7, pp. 20 & 44-45; Vogel & Hayes, *op cit.,* n. 9, pp. 97-100; Saleh, *op cit.,* n. 2, pp. 61-65.

circumstance, party B has lost control as to how an obligation or right applies. This allows party A to be able to exploit party B's position, causing the countervalue to be unbalanced. Moreover, in the second and third instance it allows *gharar* to infect the legality of the contract as it causes speculation as to how party A will exercise its discretion to decide party B's rights.

In order not to contravene the *riba* prohibition there is a strict obligation that, where possible, every obligation/right must be precisely determined or measured[99].

Consequences of these prohibitions

A consequence of these prohibitions is that there is a presumption in *fiqh* that each party to a contract will gain an equivalent benefit, i.e. the price paid corresponds to the true value of the thing bought and so the anticipated profit from a transaction will be made[100]. Put simply, one party will not gain an excessive profit at the expense of the other party. To ensure this equal profit, obligations and rights have to be fairly balanced to ensure that neither party can exploit the other. This is achieved through certainty of the obligations that derive from the contract.

Any increase in profit gained through speculation is considered unfair in *fiqh,* whilst profit gained in an opportunistic manner is illicit and considered as *riba*[101]. Thus, any transaction that results in unfair gain can be declared void in UAE Law[102].

In order to enforce this ethical control, Jurists implemented a nominate contract system[103] to control rights and obligations which arise from a

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[99] Schacht, *op cit.,* n. 2, pp. 144-146; Hammond *op cit.,* n. 2 p. 263; Coulson, *op cit.,* n. 7, pp. 20 & 44-45; Vogel & Hayes, *op cit.,* n. 9, pp. 77-79; Comair-Obeid, *op cit.,* n. 2, pp. 17-18 & pp. 53-54; Saleh, *op cit.,* n. 2, p. 61-65.

[100] Saleh, *op cit.,* n. 2, p. 61-65; Comair-Obeid, *op cit.,* n. 2, pp. 17-18 & pp. 53-54 & p. 64; Hammond *op cit.,* n. 2 p. 263.

[101] This requirement has been traced to the Quranic verses 2:275 '...*God has permitted selling and forbidden usury*...', 30:39 '...*That which ye lay out for increase through property of [other] people will have no increase with God*....' and 4:161 '...*That they [the Jews] took usury though they are forbidden; and they devoured men's substance wrongfully*.

[102] Comair-Obeid, *op cit.,* n. 2, pp. 43-45 & 58; Schacht, *op cit.,* n. 2, p. 146; Hammond, *op cit.,* n. 2, p. 263.

[103] Vogel & Hayes *op cit.*, n. 9, p. 97; Rayner *op cit.*, n. 2, p. 86.

contract. Where the contract is for a thing that comes into existence in the future, this obligates the parties to satisfy specific requirements at contract formation otherwise the contract will be void[104]. The parties to the contract are required to determine precisely the obligations that arise from the contract to prevent the presence of *gharar* and *riba*.

These are:

1) The subject matter must be precisely described; and
2) Goods and services required are to be measured precisely, and quality punctiliously described.

This in turn allows precision in the mode of performance and so the period for delivery to be accurately determined, along with a true countervalue.

Compliance with 1) and 2) ensures that the subject matter will come into existence, and its existence will continue as there should be no latent defects.

In a construction contract it is clear that for a Contractor to assess properly his obligations for performance and to be able to control them, the technical requirements need to be clearly determined, whilst legal requirements of the contract have to operate to remove *gharar*.

The technical requirements of a construction contract which need to be satisfied are that the data consists of a comprehensive design (structurally, environmentally and aesthetically), inclusive of quality (specifications, details of quality of goods and standards of workmanship), and quantity of work to be executed. This in turn allows the Contractor to identify the resources and mode of performance to build the structure within the agreed period for delivery, and calculate an accurate countervalue.

The problem that manifests here is if *gharar* is intrinsic to the contract caused by a deficient design, an unfair gain can occur in the type of

[104] Coulson, *op cit.,* n. 7, pp. 20 & 44-45; Saleh, *op cit.,* n. 2, p. 61-65; Comair-Obeid, *op cit.,* n. 2, pp. 17-18 & pp. 53-54 & p. 64; Hammond *op cit.,* n. 2 p. 263.

additional work of whatever form, along with delays to delivery. This results in the Contractor not making the anticipated profit.

This imposes a legal requirement, that the interpretation and application of the contract provisions be consistent with the aim of the *gharar* prohibition, by correcting any data deficiencies in order to create certainty as to design, quality, quantity, mode of performance and delivery. This in turn ensures the circulation of wealth, a primary aim of *fiqh* as illustrated by the requirements of article 3, UCC, otherwise *riba* will be present.

Consequently, no provision can interfere with the balance of the contract. Therefore, party agreed contract provisions should not include, for example, a clause that releases a party from liability towards the other, or gives one party discretionary powers over the other, as such a clause can be applied in an opportunistic manner. Such clauses in *fiqh* are aleatory - as profitability depends on how the Employer operates the clause. Examples of these provisions in a construction contract are where the clause:

1) Obligates the Contractor to notify the Employer of an Employer's act that caused *gharar* to infect the contract, but which also operates as an exemption of liability clause where the Contractor fails to issue the notice in the specified timeframe[105];

2) Limits the grounds that a Contractor can require additional time to deliver, e.g. the Contractor can only ask for additional time to deliver where more work is ordered. A clause of this type operates as an exclusion or exemption of liability clause, as the Employer can argue that the Contractor agreed to be responsible for any other event that caused a delay to delivery[106]; and

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[105] Sub-Clause 20.1 FIDIC99 - obligates the Contractor to notify the Employer of an Employer's act which delays delivery, within a strict timeframe, say 28 days; Lord Wilberforce gave the following description to a provision which he considered a time bar clause which was in fact an excluded liability clause "*…I treat the words 'exceptions clause' as covering broadly such clauses as profess to exclude or limit, either quantitatively or as to the time within which action must be taken, the right of the injured party to bring an action for damages…*" Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361.

[106] See Holmes v Guppy (1838) 3 M. & W. 387; Peak Construction (Liverpool) v McKinney Foundations Ltd (1970) 1 B.L.R. 114 Salman L.J. stated "*…the liquidated damages and extension of time clauses in printed*

3) Grants the Employer discretionary powers that can be operated in an opportunistic manner by deciding the: 1) compensation due where the Employer has delayed the Contractor's performance allowing *riba* to infect the contract[107]; and 2) quality and quantity of work. These two points in turn allows *gharar* to infect the legality of the provision as the Contractor can only speculate as to how the Employer will operate these provisions.

These provisions violate the ethical control of a legal transaction as determined by the *gharar* and *riba* prohibitions[108].

The author's proposed definitions of *gharar* and *riba* for construction contracts provides parties with purposeful and objective criteria to evaluate whether *gharar* and/or *riba* will become intrinsic to the contract during the formation and the administration of the contract. This in turn should assist in preventing a dispute arising. If the parties, through their contract negotiations fail to prevent *gharar* and/or *riba* becoming intrinsic to their contract, the contract will be classified as void. If the contract provisions provide a mechanism to remove *gharar* then the contract will be or defective provided *gharar* is removed[109].

For clarification a contract is:

1) Valid when all the essential elements for an enforceable contract to come into existence has been satisfied[110];

2) Void when none or only part of the essential elements required for a contract to come into existence have been satisfied[111]; and

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forms of contract must be considered strictly contra proferentem. If the employer wishes to recover liquidated damages for failure by the contractor to complete on time, in spite pf the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference for an extension on account of such fault or breach on the part of the employer..."

[107] An example is Sub-Clause 3.5 FIDIC99.

[108] Schacht, *op cit.,* n. 2, p. 144; Comair-Obeid, *op cit.,* n. 2, pp. 31-31, 37-40; Coulson, *op cit.,* n. 3, pp. 37-39; Rayner, *op cit.,* n. 2, pp. 91-95; Vogel & Hayes, *op cit.,* n. 9, pp. 98-102. Nabil, S. "*Definition and formation of contract under Islamic and Arab Laws*" ALQ (1990) pp. 101-116.

[109] Schacht, *op cit.,* n. 2, p. 12; Comair-Obeid, *op cit.,* n. 2, pp. 17-31; Shimizu *op cit.,* n. 11; Coulson, *op cit.,* n. 7, pp. 20 & 42-45; Vogel & Hayes, *op cit.,* n. 9, pp. 68-69; Abd El-Wahab Ahmed El- Hassan, *op cit.,* n. 52; Rayner, *op cit.,* n. 2, pp. 91-100 & p. 287.

[110] Coulson, *op cit.,* n. 7, pp. 20 & 42-45.

[111] Coulson, *op cit.,* n. 7, pp. 20 & 42-45.

3) Defective when, although *prima facie* all such essential elements have been satisfied, there is a defect which becomes apparent during the contract execution, in that one or a combination of the essential elements are wanting and needs to be corrected to allow the contract to be enforceable[112]. If the defect(s) cannot be removed then the contract becomes void.

In order for parties to a construction contract to avoid the contract being void or defective, the modernised definitions proposed above could be applied at each of the following stages when interpreting the relevant articles of the UCC:

1) During the formation of their contract;
2) During the life cycle of the contract; and
3) When parties interpret and apply the provisions they have agreed in the contract.

[112] Whelan, *op cit.,* n. 6, Art. 210; Coulson *op cit.,* n. 7, pp. 42-43; Rayner, *op cit.,* n. 2, pp. 147-159; Vogel & Hayes, *op cit.,* n. 9, p. 42.

1.1.3 *Gharar, riba* and the morals they enforce put into context with EW Law

As demonstrated in the above subsection, the objective of the *gharar* and *riba* prohibitions, even when applying the modernised definitions as proposed by the author, is to ensure parties to a contract act in a moral and ethical manner when forming their contract and during the performance of the contract. This, as illustrated, is particularly important where one party has a discretion that controls the other party's rights.

This subsection demonstrates there are similarities in UAE Law between the effect of these prohibitions and the concepts in EW Law of: 1) An unconscionable bargain; and 2) unjust enrichment.

Unconscionable bargain

An unconscionable bargain arises in EW Law where a party enters into a contract without independent advice, and the terms of the contract are very unfair or there is a transfer of property for a consideration that is grossly inadequate. This arises where a party's bargaining power is grievously impaired by reason of his own needs, desires, or by ignorance, with undue influence brought to bear on him, by, or for the benefit of the other party[113]. Consequently, one party has an unfair advantage that can be exploited in an opportunistic or morally culpable manner causing the transaction to be oppressive[114].

The factors that result in an unconscionable bargain[115] arising in EW Law have been defined as: 1) where a party is seriously disadvantaged through poverty/ignorance or lack of independent advice, allowing an unfair advantage to be taken[116]; 2) the weaker party has been

[113] Lloyds Bank Ltd v Bundy [1975] Q.B. 326.

[114] Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd, [1983] 1 W.L.R. 87.

[115] McKendrick , *op cit.,* n. 23, pp. 816 – 819; Peel, *op cit.,* n. 18, pp. 463-468; Capper, D., (1998) Undue influence and unconscionability: a rationalisation L.Q.R.

[116] *Op cit.*, n. 110, Alec Lobb (Garages) Ltd; Creswell v Potter [1978] 1 WLR 255; Lloyds Bank Ltd v Bundy [1975] Q.B. 326.

exploited in a morally culpable manner[117]; and 3) the transaction has become overreaching and oppressive[118].

It has also been stated that: 1) a bargain cannot be unconscionable unless one party imposes the objectionable terms in a morally reprehensible manner that effects the conscience of such party[119]; and 2) it is against justice and good conscience for the stronger party to retain the benefit of the transaction[120]. Such morally culpable and reprehensive manner includes usury[121].

The doctrine of an unconscionable bargain is subject to certain restrictions in EW Law. 'Ignorance' or lack of knowledge should be taken in the context as to the party's experience in the type of transaction entered into[122]. The stronger party must be characterised by some moral culpability or impropriety such as actual or constructive fraud[123]. The terms imposed by a party are objectionable in a morally reprehensible manner in a way that affects that party's conscience[124]. Whilst inequality of bargaining power does not of itself make the transaction unconscionable[125].

The *gharar* prohibition in UAE Law is to prevent an unfair gain due to speculation that can become oppressive if there is no corresponding benefit, i.e. the Contractor contributes from his anticipated profit to the cost of building the structure. However, since the *gharar* prohibition is developed from laws preordained by Allah, there are no restrictions attached to its operation. For the prohibition to be enforced all that has to be demonstrated is that the basis upon which the legal relationship was created between the parties was speculative and so aleatory, allowing an unfair gain in whatever form.

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117 *Op cit.*, n. 114, Alec Lobb (Garages) Ltd.

118 *Op cit.*, n. 114, Alec Lobb (Garages) Ltd.

119 Multiservice Bookbinding Ltd v Marden [1979] Ch.84.

120 *Op cit.*, n. 114, Alec Lobb (Garages) Ltd.

121 Fry v Lane (1888) 40 CH D 312.

122 Creswell v Potter unreported 1968, see Ross-Martyn [1972] 121 N.L.J. 1159 to 1160.

123 Boustany v Pigott [1993] N.P.C. 75. It is not enough to prove that a bargain is harsh, unreasonable or foolish.

124 *Op cit.*, n. 114, Alec Lobb (Garages) Ltd.

125 Horry v Tate & Lyle Refineries Ltd [1982] 2 Lloyds Rep. 417; Lloyds Bank Ltd v Bundy [1975] Q.B. 326; CNT Cash and Carry Ltd v Gallagher Ltd [1994] 4 All ER714.

Both the principles of an unconscionable bargain and *gharar* illustrate the similar moral objectives of preventing an unfair gain from a contract due to ignorance, or a lack of knowledge as to the obligations required to perform the contract.

Unjust enrichment

Unjust enrichment[126] arises in EW Law where party A gains a benefit from party B, where party B did something for the benefit of party A in anticipation of entering into a contract with party A. The contract does not materialise so party B is out of pocket. Such circumstance is *riba* in UAE Law.

EW Law has acknowledged that in a construction contract there is scope for an Employer to allow a Contractor to do work without a written instruction and then insist that such work was part of the contract[127]. Although this can be argued to be fraud, the behaviour is unconscionable, making the gain obtained by the Employer a form of unjust enrichment[128].

UAE Law recognises *riba* can manifest where a contract exists between the parties[129]. This arises where party B cedes certain rights to party A thereby losing control over an obligation/right. Thus, party A has the ability to exploit party B to gain an unfair/illicit monetary advantage as party B receives nothing in exchange, i.e. party A increases its profit at the expense of party B, despite party A having no right to do so.

The way this occurs where a contract exists is:

1. Party A commits a breach causing financial harm to party B. However, party A has the right to release himself from liability towards party B by operation of an exclusion/exemption of liability clause;

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[126] Lipman Gorman v Karpnale [1991] 2 AC 548; McDonald v Coys of Kensington (Sales) Ltd [2004] EWCA Civ 47; Craven-Ellis v Cannons Ltd [1936] 2 KB 403.

[127] Molloy v Liebe (1910) 110 LT 616; Hill v South Staffordshire Railway co (1865) 12 L.T. 63.

[128] Atkins Chambers Ltd *op cit.,* n. 19, pp. 831-832.

[129] Imam Maliki, *op cit.,* n. 6, Book 31; Ibn Rushd *op cit.*, n. 5, pp. 230-231.

2. Party A commits a breach causing financial harm to party B. However, party A has the right to either limit or release himself from liability towards party B by operation of a discretion. This allows party A to decide the level of compensation party B has a right to be paid for party A's breach. This is despite party B anticipating that party A will operate such provision in an even-handed manner towards party B by compensating party B fairly; and/or

3. Party A can control the quantity and quality of work to be done by party B.

As these provisions give party A the right to decide what party B's rights and obligations are, party B has no control over its rights for compensation where such right exists. This in turn allows party A to act in an opportunistic or unconscionable manner by exploiting party B's position. Hence, party A can increase its profitability unfairly, as there is inequality in the operation of the contract. This results in a morally reprehensible outcome, as the amount paid by party A for the goods/services provided is grossly inadequate, to the extent that party B is subsidizing the cost of providing such goods/services.

To put this into the context of a construction contract, the Employer knowingly pressurises the Contractor into an agreement that allows the Employer to be released from compensating the Contractor[130]. This is often found in two provisions in such contracts that allows the Employer to act in such an opportunistic manner[131]:

1) A notice provision which acts as an exclusion of liability clause through time barring; and

2) Provisions that give the right to the Employer to decide the Contractor's level of compensation for a breach committed by the Employer, or whether additional/extra work has been done of any form or kind.

[130] *Op cit*., n 127 - Molloy v Liebe (1910) 110 LT 616; Hill v South Staffordshire Railway co (1865) 12 L.T. 63.
[131] McKendrick, *op cit*., n. 23, pp. 816 – 819.

Again, as the *riba* prohibition is developed from laws preordained by Allah there are no restrictions attached to its operation. All that is needed for this prohibition to be enforced is that it can be demonstrated that the principles which form the basis of the *riba* prohibition have been violated, i.e. party A has acted in an opportunistic manner to exploit party B, the weaker party, thereby allowing party A to increase its profitability unfairly.

EW Law is committed to freedom of contract limiting its ability to intervene to redress the balance of obligations where the parties have agreed the terms of their transaction[132].

Thus, unless some principle as determined by the EW Courts, such as operating a provision in an unconscionable manner or the rules against penalties/forfeiture or the mandatory requirements of the UCTA 1977 have been contravened, then there is unlikely to be any redress for the disadvantaged party.

This illustrates that EW Law is created by the Courts from the provisions the parties agree to apply to their contract. The aim of *fiqh* is to ensure ethical control of transactions, to prevent such illicit gain by minimising speculation and the control of discretionary clauses which can be applied in an opportunistic manner.

[132] McKendrick, *op cit*., n. 24, p. 793.

1.1.4 Incorporation of the *Gharar* and *Riba* prohibitions into the UCC

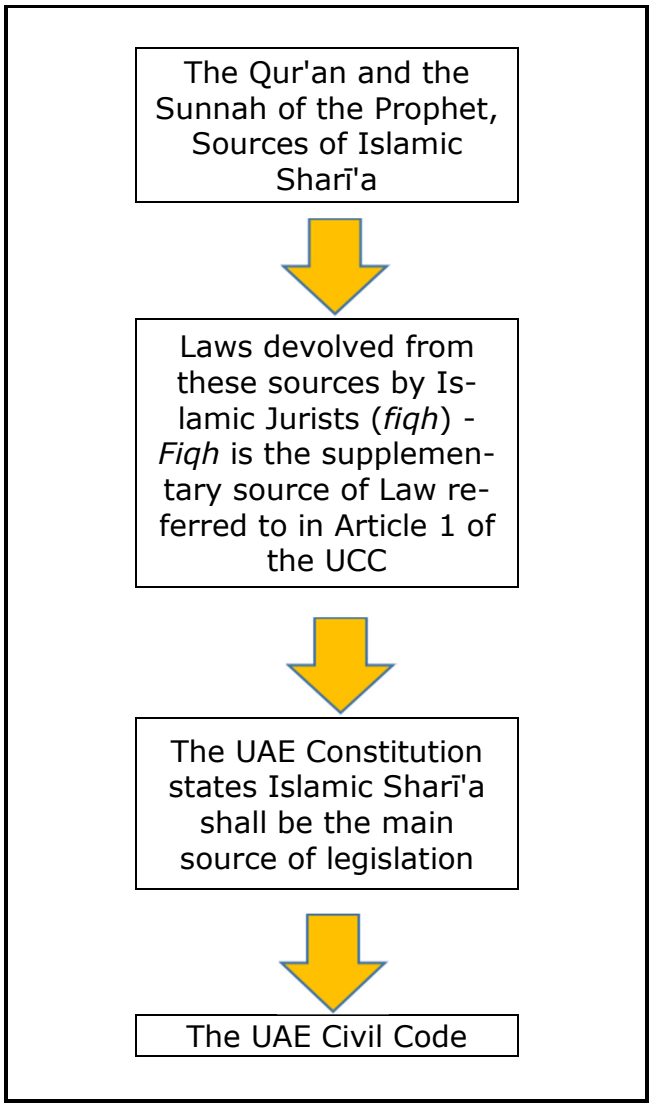
This subsection demonstrates that:

1) The *gharar* and *riba* prohibitions have been incorporated into the UCC;
2) A nominate contract system has been incorporated into the UCC through the specific articles that apply to a construction contract;
3) The aim of incorporating these prohibitions and the nominate contract system is to prevent speculation and unbalanced contracts; and
4) There is a fundamental difference between EW and UAE Law in that, as the *gharar* and *riba* prohibitions have been incorporated into the UCC, autonomy of contract is restricted to ensure equity in commercial transactions to ensure circulation of wealth.

The starting point for this is the UAE Constitution. Article 7 of the UAE Constitution states that Islamic Sharī'a will be the main source of legislation.

Figure 5 below illustrates how *fiqh* is incorporated into the UAE legislation.

Figure 5 – Hierarchy of Legislation in the UAE



As recorded, the primary legislation that regulates construction contracts in the UAE is the UCC. The reason is that this legislation deals with offer and acceptance; validity and effect of the contract; essence and circumstance for a valid contract; the subject matter of a valid contract, the type of contractual provisions which may be agreed; the effect of fraud and mistake; interpretation of agreements; the right to withdraw; remedies for breach and general questions of contract law[133].

[133] Whelan, *op cit.,* n. 6, Preface p. 6.

The Law of Commercial Transactions[134] (LCT) applies where the construction contract is of a commercial nature. However, its application is limited as there are no articles that are specific to a construction contract[135] other than obligating the parties to abide by their agreements[136]. This is on the proviso that the agreement does not conflict with public order or morals[137] of the UAE, i.e. *fiqh*.

To understand how the *gharar*/*riba* prohibitions are incorporated into the UCC, an examination of articles 1 and 2 of the UCC is required.

Article 1 of the UCC provides that:

> '…*The legislative provisions shall apply to all matters dealt with by those provisions in the letter and in the spirit. There shall be no scope for innovative reasoning (ijtihād) in the case of provisions of definitive import. If the judge finds no provision in this Law, he must pass judgement according to Islamic Sharī'a. Provided that he must have regard to the choice of the most appropriate solution from the schools of Imam Malik[138] or Imam Ahmad bin Hanbal[139], and if none are found there, then from the schools of Imam al-Shafiᶜi[140] and Imam Abu Hanifa[141] as dictated by expediency*…'

Whilst article 2 provides:

> '...*The rules and principles of Islamic jurisprudence shall be the point of reference in the understanding, construction and interpretation of these provisions*...' [the articles of the Law as set out in the UCC].

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134 Whelan, *op cit.,* n. 6, Preface, p. 6.

135 Grose. M., A.O. (2002), Construction Contracts and Disputes in the United Arab Emirates; Michael Grose, Dubai, UAE, pp. 12-13; LCT.

136 LCT, Art. 2(1).

137 LCT, Art. 2(3).

138 *Op cit.,* n. 81.

139 Ahmad bin Muhammad bin Hanbal Abu `Abd Allah al-Shaybani (780–855 CE) also referred to as "Sheikh ul-Islam founder of the Hanbali school of Islamic Jurisprudence.

140 Abū ʿAbdullāh Muhammad Ibn Idrīs al-Shafiʿī (767-820 CE) a student of Imam Māliki and founder of the Shafi'i school of Islamic Jurisprudence and is considered the founder of Islamic Jurisprudence.

141 Actual name Nuʿmān ibn Thābit ibn Zūṭā ibn Marzubān better known as Imām Abū Ḥanīfah, (699 — 767 CE) founder of the Hanafi school of Islamic Jurisprudence.

Article 1 requires, where the articles of the law are of definitive import [express is the word herein used when describing if an article is of definitive import] in their requirement, then they will be applied without deviation. Conversely, where an article can be interpreted in more than one-way, dependent on the circumstances, then the spirit or essence of the aim of the article has to be complied with. When there is no article that addresses a matter, then reference is made to the doctrines of *fiqh* to find a solution. Article 2 provides that the rules and principles of *fiqh* are the point of reference in the understanding, construction and interpretation of the articles of the UCC.

These articles demonstrate that there are two sources of Law to be found in the UCC, 'Official' and 'Supplementary'[142]. 'Official' is the articles of the UCC. 'Supplementary', as illustrated by article 2, are the historical laws and the principles of Islamic jurisprudence, i.e. the doctrines of *fiqh* that provide guidance as to how the text of the 'Official' articles are to be construed and interpreted[143].

The 'Official' articles of the UCC are divided into two: 1) articles of the UCC that are express in their requirements[144] and so are not subject to *ijtihad*[145]; and 2) articles that are subject to *ijtihad* as these articles are those that are of a general nature and so can be applied to any type of transaction[146].

The 'Official' articles are where the requirement of the Law is concise in its content as to the rule or doctrine to be applied expressly. By application of article 2, *fiqh* is the supplementary Law that is to be the point of reference in understanding the construction and interpretation of such article(s); and where the text of the law is open to *ijtihad*, again by application of article 2, *fiqh* will be the point of reference. Where there is no article, then the most suitable interpretation/doctrine will be

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[142] Al-Muhairi Butti Sultan Butti Ali (1996), 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Sharī'a', Arab Law Quarterly (ALQ), pp. 219-244.

[143] This is contrary to the Qur'an, verse 64:12 '*Obey God and His Prophet'*.

[144] Note to understand the express requirements an understanding of the supplementary law is still required as the basis of the law is derived from *fiqh.*

[145]Coulson, *op cit.,* n. 3, p. 76; Kamali, *op cit.,* n. 3, p. 468; Hallaq, *op cit.,* n. 54, p. 19.

[146] It is permissible for Muslims to do what they wish provided such action does not in contravention of an injunction.

applied as developed by the four Sunni schools of *fiqh* stated in article 1, UCC[147].

Consequently, a detailed knowledge of *fiqh* is necessary to understand and interpret the aim of these articles. The primary reason, as recorded, is that the doctrines of *fiqh* were devolved from laws as preordained by Allah and his Prophet and so are mandatory.

To demonstrate this the following articles of the UCC are examined in the following order - 202(1), 203(1), 106(2)(b) and 3.

Article 202(1) provides:

> '…*a future thing may properly be the subject matter of a commutative contract[148], involving property in the absence of gharar…'* whilst

Article 203(1) provides:

> '…*In commutative contracts involving property the subject matter must be specified in such a way as to avoid gross uncertainty…by a statement of its distinguishing characteristics, and the amount thereof must be stated if it is measurable property or the like, in such a manner as avoids gross uncertainty*…'; and article 203(3) provides '…*If the subject matter is not specified as aforesaid, the contract shall be void*…'

Article 202(1) demonstrates that a contract for a future thing must not contain any form of speculation, as if *gharar* is present there is potential for an unfair gain. To prevent such unfair gain article 203(1) obligates the parties to ensure there is no gross uncertainty concerning the subject matter or thing. The method by which the gross uncertainty is to be removed is by a statement of distinguishing characteristics, i.e.

[147] These being the doctrines of the classical Islamic theory of law as developed by the four schools Sunni Schools of *fiqh* as set out in article 1 and not the roots of such doctrines, i.e. the Qur'an, the Sunnah of the Prophet or Consensus.

[148] A contract where the parties give and receive the equivalent, i.e. the price paid corresponds to the actual value of the thing bought.

a precise and punctilious description of the thing is required, and the material elements of the thing are to be quantified where applicable[149].

This illustrates that the aim of the article is to ensure that the parties have full control over their obligations, which in turn allows each to achieve its anticipated profit from the transaction. This is confirmed by the term 'commutative or bilateral contracts', a contract where the parties give and receive the equivalent, i.e. the price paid corresponds to the actual value of the thing bought. The regulator for this is market forces at the time the bargain is entered into and so the price paid includes profit, with the medium of money being the method for ensuring the price paid is the equivalent value for the goods received.

To reinforce this article 203(3) provides that, where the subject matter is not specified (as required by article 203(1)), then the contract is void.

These articles demonstrate that the doctrine or supplementary law expounded by Jurists, to prevent *gharar* in a contract where the subject matter is a thing that comes into existence in the future, has been incorporated into the UCC. This is supported by article 2, which requires that *fiqh* is the point of reference for the understanding, construction and interpretation of the articles of the UCC.

In another example article 106(2)(b) provides:

> '…*The exercise of a right shall be unlawful if the interests which such exercise of right is designed to bring about are contrary to the rules of the Islamic Sharī'a, the law, public order or morals*…'

As recorded in the Preamble, both the *riba* and *gharar* prohibitions are repugnant to *fiqh* and so are contrary to Islamic Sharī'a and the morals of the UAE. Hence, a provision of a contract as those described in section 5, Preamble which confer a right that results in a conflict with

[149] Ibn Rushd *op cit.*, n. 5, p.179; Saleh, *op cit.,* n. 2, pp. 61-65; Vogel & Hayes, *op cit.,* n. 9, pp. 78-79; Ibn Taymiyyah *op cit.*, n. 86, pp. 26-27; Schacht, *op cit.,* n. 2, pp. 146-147; Rayner, *op cit.*, n. 2, pp. 267-289 & pp. 255-256; Coulson, *op cit.,* n. 7, pp. 20 & 44-45.

either or both of these prohibitions, will be contrary to the UAE Law and therefore be unlawful.

Moreover, a provision which operates as a time bar from preventing a party from making a claim where the Law states a longer maximum time in which a party can make a claim will have no force.

Again, article 3 provides:

> '…*Public Order shall be deemed to include matters relating to... freedom of trade, the circulation of wealth, rules of individual ownership and the other rules and foundation upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharī'a...*[150]'.

The effect of this article is that freedom of trade is allowed, provided it does not conflict with the express provisions [articles] and fundamental principles of *fiqh.* This requirement places an overriding obligation on the parties to a transaction not to disobey the *gharar* and *riba* prohibitions. This in turn ensures circulation of wealth amongst the community.

The UCC has incorporated by article 128, a nominate contract system. This article provides:

> *(1) '…The general provisions contained in this part shall apply to nominate and innominate contracts;*
>
> *(2) So far as concerns the rules specific to particular types of contract, the special provisions governing the same shall be laid down in this Law or in other laws…'*

The specific articles which set out the parties' rights and obligations in respect of a particular nominate contract are over and above those that the general articles of the Law place on the parties.

[150] In Islam all men are equal with a common goal to serve Allah. This philosophy results in all Muslims being brothers, and as brothers they are to circulate property as it is considered a form of usufruct in order to benefit each other. Thus, exploitation in any form i.e. the benefits gained from a contract which are not equivalent is considered *Riba* -usury, Shimizu *op cit.,* n. 11.

A construction contract is a nominate contract with specific articles set out in Chapter III, Part 1, UCC, and so is subject to the ethical control as determined by Jurists to prevent *gharar* being present in this particular type of contract. The primary article which demonstrates this is article 874 which states the specific requirements which have to be in place at contract formation for a valid construction contract is:

1) A description of the structure;
2) A statement of the type and extent of the structure, along with the mode of performance;
3) The period over which the structure is to be built, the anticipated date when delivery will be achieved; and
4) The countervalue[151].

Thus, to correctly interpret the requirements of each article of the UCC, both those that apply in general and those which apply to a specific type, i.e. a 'nominate contract', a knowledge of the supplementary source of law, i.e. *fiqh,* is requisite.

By applying the authors proposed definition of *gharar* to article 874, it requires that, as a structure is a thing which comes into existence in the future it has to be precisely and punctiliously described to ensure that:

1) The Purchaser's expectations are met;
2) Both the Employer and the Contractor have concise knowledge of all their obligations in building the structure;
3) The anticipated profit will be achieved; and
4) There is no methodology by which either party can make an unfair profit to ensure the benefits gained are equivalent.

[151] These elements being the essential pillars of a construction contract relating to the consideration (countervalue), which by failing to define them results in inherent uncertainty causing speculation as to what has to be done, the characteristics of which is the same as gambling (*maysir*), Rayner, *op cit.,* n. 2, pp. 137-143, pp. 147-153 & pp. 289-299. By satisfying these requirements *gharar,* as qualified by Ibn Rushd, Ibn Juzayy, Sanhory and Saleh will be removed, *op cit*., n. 2, pp. 49-56; Tyser, C.R., Demetriades, D.G., and Effendi, I.H., A.O.(2001, 2nd, reprint 2007) The Mejelle Being an English Translation of the Majallah El-Ahkam-I-Adliya and a Complete Code on Islamic Civil Law, the Other Press, Kuala Lumpar, Malaysia – art. 388 which illustrates that a detailed evaluation of the work to be done is required to allow the manufacturer has a comprehensive knowledge as to what is needed to make the product being ordered by the buyer - References are found throughout Whelan's translation.

This is supported by article 2 which requires that *fiqh,* the supplementary law as expounded by Jurists, shall be the point of reference for the understanding, construction and interpretation of the articles of the UCC. The effect of article 2 is that the *riba* prohibition has been incorporated into the UCC, through the definition of what an unlawful use of a right is, refer article 106. Consequently, autonomy of contract is restricted in UAE Law unlike EW Law.

1.2 The Nominate Contract System

This section examines how article 2, UCC applies to the article(s) of the nominate contract system which determines how a valid construction contract comes into existence. The author proposes the "prohibition test" for this examination which is derived from the EW Law business efficacy test. This test is used by EW Courts to identify what terms are to be implied where it is necessary to give the transaction business efficacy. The starting point for identifying an implied term is the provisions of the parties' contract that for some reason is ambiguous as to how something is to be done so the objective of the contract, can be achieved[152].

This test is amended, for use in the UCC so that it must be the parties' intention not to contravene either the *gharar* or *riba* prohibitions as proposed by the author.

Subsection 1.2.1 - Methodology applied to identify how Article 2, UCC operates sets out the particulars of how the "prohibition test" was developed.

This test was applied to the primary articles of the UCC which the author considers applies to a construction contract under the nominate contract system, and general articles of the UCC as examined in section 1.3.

The aim of the 'prohibition test' is to determine what the parties' obligations are when interpreting the articles of the UCC that apply to the type of contract they are entering into, by preventing *gharar* and *riba* being intrinsic to the contract in order to comply with the requirements of article 2, UCC.

This in turn identifies the types of construction contract permitted by the UCC as they limit the level of *gharar* intrinsic to a contract.

[152] Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10.

Consequently, the 'prohibition test' plays a fundamental role in a modernised understanding of how the *gharar* and *riba* prohibitions apply to a construction contract.

Subsection 1.2.2 - Examining articles 872 – 874, UCC in light of the 'prohibition test' establishes:

1) There are specific obligations which have to be adhered to by the parties when their contract is formed, and when they exercise rights or perform obligations during the performance of the contract;

2) The aim of the nominate contract system, where the subject matter is a structure which is to come into existence in the future, is to ensure that there is only nominal *gharar* (speculation) or risk as to what parties' obligations entail[153];

3) To satisfy this requirement there must be a comprehensive design prepared. All attributes necessary for the structure to come into existence must be fully determined. This includes measuring all work to the precision expounded by Jurists, and determining accurately the mode of performance and the period for delivery; and

4) The obligation to provide a comprehensive design is the Employer's as it is his expectations that are to be satisfied.

Subsection 1.2.3 - Examining articles 875, 876 and 877, UCC , in light of the 'prohibition test' establishes:

1) That the level of design is detailed enough to allow the Contractor to understand all incidental works associated with the work items to prevent *gharar,* so the countervalue reflects the equivalent value of the work done. Thus, it can be said to mirror the inclusive price principle in EW Law.

[153] Commercial law in the Gulf states Chapter 2.

Subsection 1.2.4 - Examining articles 886 and 887, UCC – Types of Contract, taking account of the examinations in subsections 1.2.2 and 1.2.3 demonstrates:

1) The two types of construction contract permitted by the UCC are M&V and LS. This can be deduced because both M&V and LS contracts minimise the level of *gharar* intrinsic to a contract by converting the design into quantifiable items of work. A M&V contract achieves this via the Employer's right in UAE Law to terminate the Contractor's employment where the countervalue significantly increases. Whilst in a LS contract the design must be fully determined to prevent *gharar*. Hence, any change will constitute a variation to the contract, which the Employer in UAE Law is obligated to pay for. For these reasons these forms of procurement can be considered Islamic compliant; and
2) That the design and build method of procurement is not Islamic compliant. The reason is that Contractors interpretations as to how to satisfy the Employer's design requirements can vary significantly.

1.2.1 Methodology applied to identify how Article 2, UCC operates

The author, to develop the 'prohibition test' applied the principles of the business efficacy test substituting the objectives of the test so it operates to identify whether the *gharar*/*riba* prohibitions come into play, and if they do how the article is to be interpreted and applied so that these prohibitions are not disobeyed.

The basis of the business efficacy test is that:

> "…*a term will be implied only where it is necessary in a business sense to give efficacy to a contract of one which the parties must obviously intended*…"[154].

The House of Lords further defined this by its reasoning:

> '…*the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship…*'[155].

As illustrated, the objective of this test is to determine what the parties will regard as an obvious term which is implicated as a "…*necessary incidental to give the effect to the intentions of the parties, and would be fair and reasonable for the type or category of contract they have entered into to make the contract workable*[156]…"

By adjusting the objective of this test based on the author's proposed definitions of *gharar* and *riba* in respect of a construction contract, it is possible to provide a suitable approach to determine how the requirements of article 2 can be met. This is summarised as follows and defines what the prohibition test is:

> "…*What is necessary incidental based on the proposed definitions of* ***gharar*** *and* ***riba*** *for the parties to a contract of mutual obligations to avoid disobeying these prohibitions by ensuring that the*

[154] The Manifest Lipkowy [1989] 2 Lloyd's Rep.138.

[155] Scally v Southern Health and Social Services Board [1992] 1 A.C. 294.

[156] Lewison, K., A.O. (2007) The Interpretation of Contracts 4th Ed., Sweet and Maxwell Ltd London, UK, pp. 204 - 220.

countervalue paid is equivalent to the goods and services provided..."

To demonstrate the obligations that the '**prohibition test'** places on the parties to a construction contract are correct, reference is made to article 203, UCC. This article obligates the parties to ensure that their contracts are equitable. The term 'bilateral contract'[157] and the Arab word '*Badal*' translates to countervalue. Thus, the contracting parties are to give and receive an equivalent, the thing sold is equivalent to the countervalue paid, inclusive of profit. This is particularly important to avoid contravening *the riba* prohibition[158], with money being the medium used to achieve this as it provides a 'neutral measure of respective values'[159].

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[157] The seller gives the thing sold and receives the price, which is the equivalent; the buyer gives the price and receives the thing sold, which is equivalent.
[158] Vogel & Samuel, *op cit.,* n. 9, pp. 74-79.
[159] Saleh *op cit.,* n. 2, p. 62; Vogel & Samuel, *op cit.,* n. 9, pp. 78-79.

1.2.2 Examining articles 872 – 874, UCC

An examination of articles 872 and 874, UCC is essential as these determine what establishes a contract and what prerequisites in Law are required for a valid contract to come into existence.

Article 872

Article 872 UCC defines what constitutes a contract of work. This is where one party (a Contractor) undertakes to make a thing (a structure in this instance) against a countervalue to be paid by the other party (the Employer).

Thus, as in EW Law, there has to be offer and acceptance between the parties. However, as illustrated by the analysis of article 874, for the offer and acceptance to be valid in UAE Law there are specific requirements that have to be satisfied to ensure the contract is valid. Moreover, the use of the term countervalue when applying the prohibition test, illustrates that the potential for unfair gain caused by speculation must be prevented so no undue profit can be made from the transaction. Put simply, the amount paid must be equivalent for the structure supplied.

Article 874

Article 874 sets out the prerequisites which have to be satisfied at contract formation (the documentation which forms the contract), for a valid contract to come into existence. Consequently, this article is the primary article for minimising *gharar* from being intrinsic to a construction contract[160]. As it is the Employer's expectations that have to be satisfied, the requirement of this article becomes the sole responsibility of the Employer[161]. This is confirmed by FIDIC4[162] being the most common type of contract provisions selected in the Emirate of Dubai.

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[160] Comair-Obeid, *op cit.,* n. 2, pp. 4-5; Saleh, *op cit.,* n. 2, pp. 54-55.

[161] Saleh, *op cit.,* n. 2, pp. 54-55; Tyser, Demetriades and Effendi, *op cit*., n. 151, art. 388 which illustrates that a detailed evaluation of the work to be done is required to allow the manufacturer has a comprehensive knowledge as to what is needed to make the product being ordered by the buyer.

[162] Sub-Clause 8.1; Corbett, E. C., A.O. (1991 reprinted 2000) FIDIC 4th A Practical Legal Guide, Sweet & Maxwell, London, UK, p. 100.

Hence, the Employer, by application of the prohibition test is under a strict obligation to determine precisely all attributes of the structure to a level of precision so the Contractor has a complete knowledge of all obligations associated with the making of the structure; and which achieves the Employer's required design.

Thus, the Employer's obligation is to define punctiliously the functional and quality requirements to satisfy these prerequisites to the level necessary so that the amount paid corresponds to the value of the structure supplied. This allows a comprehensive design to be prepared in the form of:

1) A complete set of dimensional drawings for all levels of design (which through the latest technology for preparing a design, "Building Information Modelling"[163] (BIM) can more-or-less eliminate *gharar* in the design and quantities of work to be done), and all elements of the structure (structural, architectural, mechanical, electrical and environmental services (MEP)) shall be prepared and provided to the Contractor[164];
2) A complete specification which sets out all quality requirements for goods, materials, MEP services and workmanship to be satisfied, properties of the substrata of the Site and the selection and approval process associated with all elements the Employer wishes to control; and
3) A meticulous description setting out all the attributes the Employer requires from the completed structure to ensure his expectations are satisfied, and specifics as to the location of the Site and its boundaries and access to the Site.

This in turn allows a statement of the type and extent of the structure to be prepared. Again, by applying the prohibition test to ensure that the amount paid corresponds to the value of the structure supplied, the

[163] The United States National Building Information Model Standard Project Committee defines BIM as "*a digital representation of physical and functional characteristics of a facility*".

[164] This is a clause of the FIDIC99 see Baker, Mellors, Chalmers, Lavers, *op cit.*, n. 42, p. 93; A Designer will fail in his duty if the design provides requires variation to compete the structure to the satisfaction of the Employer – Atkins Chambers, *op cit.*, n. 19, p. 307; Glover & Hughes, *op cit.,* n. 43, p. 74; Totterdill, *op cit.,* n. 43, p. 100.

statement should fully quantify all goods/materials and work activities for two reasons: 1) It allows the physical resources necessary to build the structure to be determined; and 2) It satisfies the precision expounded by Jurists to minimise *gharar*[165].

All of this data allows the Contractor to assess the optimum duration over which the structure will materialise and so the most economical price for the structure.

These interpretations are reinforced by the annotations of the Lebanese Jurist, Dr. Sobhi Mahmassani[166], that where the subject matter of a contract is work which materialises over a period of time, that a punctilious knowledge of the subject matter be provided in order to forecast an accurate time for delivery[167].

The method applied to assess the optimum duration is critical path methodology[168] (CPM), a spin-off from the US Navy Programme Evaluation and Review Technique[169]. This methodology, by use of suitable software, allows the Contractor to ascertain the most logical process for building the different elements of the structure[170]. The durations for work items which make up the different elements are derived from historical or standard productivity rates for the physical resources as determined by the Contractor to build the structure. An important aspect of the CPM is that it identifies what is termed the critical path for building the structure[171]. Put simply, it establishes what

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165 Ibn Rushd requirement for avoiding contravening the *riba* injunction was mathematical exactitude, Vogel & Hayes, *op cit.,* n. 9, p. 78; Tyser, Demetriades and Effendi, *op cit*., n. 151, Art. 388; Rayner, *op cit.,* n. 2, pp. 137-143, pp. 147-153 & pp. 289-299; Ibn Rushd, *op cit*., n. 5, p. 179; Saleh *op cit*., n. 2 pp. 50-52.

166 Born 29.01.09, Beirut, Lebanon, legal scholar, lawyer, judge, and political figure whose writings on Islamic jurisprudence remain authoritative works on this topic for legal scholars and researchers.

167 Saleh, *op cit.*, n. 2, p. 55.

168 Critical path is the term used which defines the sequence of activities through a project network from start to finish, the sum of whose duration determines the overall project duration. Put simply the optimum time in which the structure can be built – Mirant Asia-Pacific Construction (Hong Kong) Ltd v (1) Ove Arup and Partners International Ltd (2) Ove Arup and Partners Hong Kong Ltd [2007] EWHC 918 (TCC); Lowsley, S. and Linnett, C., A.O. (2006) About Time Delay Analysis in Construction, RICS Business Services Limited, Coventry, UK. p. 23.

169 Gibson, R., A.O. (2008) Construction Delays Extensions of Time and Prolongation Claims, Routledge Taylor & Francis Group, London & New York, UK & USA, pp. 22-24; Lowsley and Linnett, *op cit*., n. 170, pp. 23-24.

170 Gibson, *op cit*., n. 169, p. 27; Lowsley and Linnett, *op cit*., n. 168, pp. 40-44.

171 *Gibson, op cit*., n. 169; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, p. 226.

work items or elements cannot be delayed if the agreed completion date is to be met[172].

By using CPM a very accurate period for completion can be determined in days. However, such accuracy is dependent on the attributes, as stated above, being determined to the precision required by the Jurists. Thus, as the level of precision diminishes then the accuracy in the duration to complete will also diminish.

The duration required is fundamental to calculating the countervalue that is equivalent to the goods and services provided, as it determines the time/cost of all resources necessary to build the structure within the identified optimum duration[173]. Consequently, it is fair to say the CPM identifies the most economical or cost efficient period in calendar days over which the structure will come into existence[174], thereby satisfying the Jurists requirement for precision.

Thus, an Employer's act of prevention causing *gharar* to infect the contract as it interferes with the Contractor's mode of performance and prevents the agreed completion date from being achieved goes to the root of the contract, as time to complete is an essential element of the contract[175]. This is demonstrated by the fact that the planned date for delivery is a specific requirement for a valid contract to come into existence.

The method for presenting the mode of performance and its interrelationship with the time in which the structure will come into existence is analogous to a Gantt chart and is referred to as the Programme or Works[176]. The chart lists work activities to the left. Opposite the work activities are the durations for performing the same, with months and dates provided along the top of the chart so the durations can be assessed.

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[172] Lowsley and Linnett, *op cit*., n. 169, pp. 24-25.

[173] Gibson, *op cit*., n. 169, p. 27; Lowsley and Linnett, *op cit*., n. 168, pp. 40-44.

[174] Gibson, *op cit*., n. 169, p. 27-28.

[175] Vaughan Williams L.J. demonstrates this, in Wells v Army & Navy Co-operative Society (1902) 86 LT 764 when he stated "*… If in the contract one finds the time limited within which the builder is to do the work, that means, not only that he is to do it within that time, but it means also that he is to have that time in which to do it…*".

[176] FIDIC99 Sub-Clause 8.4; Lowsley and Linnett, *op cit*., n. 168, pp. 21-23.

Since this document presents the Contractor's precise mode of performance for delivery of the structure by the planned date for delivery, it establishes an essential element for a valid construction contract to come into existence, the period to build the structure[177]. Consequently, the Programme of Works is a contract document in UAE Law.

This is supported by the requirements of the prohibition test in that:

1) The Programme of Works is a fundamental document, as the CPM used to compile it determines an accurate date when the structure will be delivered[178]; and

2) Where an Employer's act causes *gharar* to become intrinsic to the contract delaying delivery, the Programme of Work, due to the CPM, can establish a new date for delivery by assessing the effect *gharar* that has delayed delivery[179].

This enables the countervalue to be adjusted so that it corresponds to the time related services/goods provided by adjustment to the Programme of Works whether due to:

1) The Employer, by some act, delayed the Contractor's performance;

2) It was a circumstance that neither party was responsible, for which the parties have a pre-agreement as to how this is to be addressed; or

3) It is through some default of the Contractor.

[177] Dodd v Churton [1897] 1 Q.B. 562; Holme v Guppy (1838) 3 M. & W 387; Perini Pacific Ltd v Greater Vancouver Sewerage (1966) 57 D.L.R.: Peak Construction (Liverpool) Ltd. V Mckinney Foundations Ltd. (1970) 69 L.G.R. 1; Wells v Army & Navy Co-operative Society (1902) 86 LT 764.

[178] Lowsley and Linnett, *op cit*., n. 168.

[179] Lowsley and Linnett, *op cit*., n. 168, p. 4.

1.2.3 Examining articles 875, 876 and 877, UCC

As illustrated in the previous subsection, there has to be precision in determining goods and services that the Contractor is to provide to ensure the work done meets the Employer's expectations. This subsection demonstrates the extent of detail required in the Employer's design to prevent *gharar* infecting a contract, and mirrors the inclusive price principle in EW Law.

Articles 875, 876, 877 and article 246, see commentary below, place an obligation on the Contractor to determine the necessary supplementary materials to be procured, and tools and equipment needed to decide the mode of performance and productivity that determines the period for delivery and so countervalue.

Article 875

Article 875 is relevant where the Contractor supplies materials for inclusion in the structure. Hence, the Contractor is responsible to ensure that the quality meets the standard specified in the contract. Article 876 obligates the Contractor to provide all additional equipment and tools to complete the work; and article 877 provides that the Contractor will complete the work in accordance with the contract provisions, and that he shall correct any faulty work.

To give effect to the obligations placed on the Contractor the prohibition test is applied. The necessary incidentals to be derived from these obligations to prevent *gharar,* are, the Contractor is not only responsible for the quality of materials but also the quality of workmanship required to install such materials. This includes incidental materials and tools to carry out the installation. This obligation is termed the inclusive price principle in EW Law[180].

[180] Where a BoQ has been prepared in accordance with an SMM to price the work to be done, the inclusive price principle in this context in EW Law means all work necessary incidental to completing the work described and measured in the BoQ where the contract is LS and M&V – Atkin Chamber, *op cit.*, n. 19, p. 762.

Moreover, the Contractor is obliged to ensure that accessory materials are compatible with goods specified in the design[181]. If the design information is in the form of a specification setting out a 'general description' of accessory materials, then the Contractor is to ensure that such accessories are of the required quality. In terms of installation, the tools used should be suitable for the installation process in order to avoid damaging materials when they are installed; and to ensure that such materials are installed correctly, with the labour being skilled in the required installation process, again, to avoid damaging materials during installation[182].

However, for the Contractor to be able to discharge these obligations, by application of the prohibition test, the design must be specific as to the materials supplied. Thus, where the design specifies a specific type of aluminium roofing system but accessory materials are not described or quantified but are necessary for the installation, the Contractor can readily identify what these accessory materials are and the specialist tools needed for the installation.

An example of the above circumstance is a specification makes a general statement that the roof sheeting is to be aluminium with no further particulars. By application of the prohibition test it is clear that the Contractor is to install a roof consisting of aluminium sheets. However, there is uncertainty as to what accessory materials are required for the roofing works and tools needed. The reason for this is that there are many roofing systems manufactured by different companies with design and installation variances. Consequently, the Contractor will have to speculate as to what is required to discharge this obligation. This allows *gharar* to infect the countervalue and delivery period.

[181] Furst & Ramsey *op cit.,* n. 42, pp. 77-80; Atkins Chambers Ltd *op cit.,* n. 19, pp. 461-474; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, p. 102.
[182] Vogel & Samuel, *op cit.,* n. 9, pp. 74-79..

Article 876

Article 876 obliges the Contractor to provide, at his own expense, such additional equipment and tools necessary to complete the structure. By application of the prohibition test this article requires the Contractor to provide everything necessary to achieve the mode of performance.

This includes all spares, consumables and incidentals to ensure the efficient performance of the equipment needed to build the structure, inclusive of all tools needed to install materials which form a permanent part of the structure[183]. Consequently, all requirements as set out in subsection Examining articles 872 – 874, UCC 1.2.2 have to be satisfied so an accurate mode of performance is determined.

Article 877

To allow the Contractor to discharge the obligation placed on him by article 877, all requirements of subsection 1.2.2 and that of articles 875 and 876 have to be satisfied. This minimises the potential for latent defects, which if one should appear, then the Contractor has an obligation to repair. This in turn satisfies the fourth point as determined by Jurists to prevent *gharar* being intrinsic to the contract provided the defect was not a design fault, then the obligation falls to the Employer.

There are two key documents that allow the Contractor to perform the obligations placed on him by these articles, they are the Specification and the BoQ. Consequently, any ambiguities or lack of detailed quantification will cause *gharar* to be intrinsic to the contract. These two documents are also key in allowing the Contractor comply with the inclusive price principle in EW Law[184].

[183] Vogel & Samuel, *op cit.,* n. 9, pp. 74-79..

[184] Atkins Chambers Ltd *op cit.,* n. 19, p. 762.

1.2.4 Examining articles 886 and 887, UCC – Types of Contract

Taking account of the obligations placed on parties by articles 874 to 877 and applying the prohibition test, a review of articles 886 and 887 demonstrate that there are two forms of contract permitted for the procurement of a thing, i.e. a structure that comes into existence in the future, these being M&V and LS as they ensure equivalence.

Article 886 - Measure & Value Contract

Article 886 provides, that where it appears during the course of work the quantity of work required to achieve the agreed plan increases substantially, based on the contract being an itemised list (of quantities of work to be done) and unit rates, then the Contractor must notify the Employer of the increase immediately otherwise the Contractor loses his right to recover the extra cost. In such circumstance the Employer can cancel the contract. If he decides to cancel the contract, he must do so immediately. If he delays in cancelling the contract he is responsible for all work until he does. Where he does cancel the contract then work will be valued up to that date. In both circumstances, work done is assessed in accordance with the contract.

As illustrated by article 886, the quantity of work needed to achieve the design is an estimate[185]. The method of calculating the countervalue due to the Contractor is by physically measuring the quantity for each work item completed and multiplying it by the rate/price inserted next to each item of work[186]. This demonstrates that the process adopted to calculate the countervalue for the work done is measure and value (M&V).

Importance of the BoQ

Reference to an itemised list and unit rates demonstrates that a BoQ is a fundamental document for valuing work to be done. The reason for this is stated in subsection 1.2.2. It also reiterates the importance of

[185] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, pp. 161-162; Glover & Hughes, *op cit.,* n. 43, pp. 255-256; Atkins Chambers Ltd *op cit.,* n. 19, pp. 764-765; Furst & Ramsey *op cit.,* n. 42, pp. 119-121.
[186] Sub-Clause 8.1; Corbett, E. C., A.O. (1991 reprinted 2000) FIDIC 4th A Practical Legal Guide, Sweet & Maxwell, London, UK, p. 100..

accuracy expounded by the Jurists and demonstrates that the countervalue to be paid corresponds to the value of the goods and services provided, thereby satisfying the prohibition test. This is supported when article 886 UCC is construed with the obligations placed on the parties by articles 202, 203 and 874, UCC.

The examination in subsection 1.2.2 demonstrates the importance that Jurists place on accuracy to prevent *gharar* and *riba* being intrinsic to a contract.

However, as illustrated in subsection 1.2.2, such equivalence can only be guaranteed where there is certainty in the design and quality. Any inadequacies in these two attributes will affect the accuracy of the description of the work items, but more importantly the mode of performance and so the period for delivery.

The form that *gharar* can be manifested in these circumstances is that there are inaccuracies in the description of work items such as materials to be supplied, associated sundry items which are necessary to complete the main items of work, quantities of work to be done, or the use of an inappropriate unit of measurement[187]. This is demonstrated in subsection 1.2.3 as these attributes allow the Contractor to evaluate productivity requirements, and tools and plant needed to perform all work items. Any inaccuracies can have a detrimental effect on the mode of performance and so delivery.

This is of particular importance in respect of goods that are termed long lead items, i.e. goods which require a long period for delivery.

By application of the prohibition test, the obligation placed on the Contractor to notify the Employer immediately of a substantial increase in quantity is to ensure equivalence. This obligation also includes where the Contractor discovers a deficiency in any elements that determine the accuracy of the rates/price and/or the work items presented in the BoQ, or a combination of these elements, along with an increase in quantity of work.

[187] Glover & Hughes, *op cit.,* n. 43, pp. 255-256; Atkins Chambers, *op cit.*, n. 19, p. 772.

The increases in quantity are addressed through the measurement and value process, which would, by application of the prohibition test, include extensions to the period of delivery and other circumstances that caused an increase to the countervalue, otherwise there will be an unfair gain in the form of goods/services. For these reasons it is imperative that the contract provisions that the parties apply to their contract address these circumstances. This is on the proviso that such provisions are operated in a manner that ensures the equivalence of the contract.

The obligation placed on the Employer by article 886 UCC not to delay in cancelling the contract otherwise the Contractor is entitled to payment, demonstrates that the Employer accepts: (a) liability as to the precision of his design; and (b) that the design can be achieved by the agreed delivery date. It also demonstrates that the Employer has control over the Contractor's obligation to deliver.

This obligation not to delay in cancelling the contract, when put in context with the requirements of the prohibition test, ensures equivalence of the contract as it is only the Employer who knows whether he can afford the increase in countervalue.

Conversely, the loss of the right to claim for additional payment by the Contractor is fair, otherwise unnecessary financial harm would result and the Employer's circumstance could be open to exploitation.

Therefore M&V contracts, properly interpreted are considered to be Islamic compliant.

Article 887 - Lump Sum Contract

Article 887, UCC provides that where the contract is based on an agreed plan, and payment is on a LS basis, the Contractor cannot demand any further payment. Where the Employer consents to a variation then the agreement will be observed in connection with such variation.

By application of the prohibition test, to ensure equivalence of the contract the "agreed plan" means that all requirements of article 874

have to be complied with. This also means that the design has to be complete and firm in all aspects as this certainty of the design provides certainty as to the mode of performance, quality, quantity and period for delivery. Without this precision, the contract cannot come into existence. This is confirmed by article 887 that the Contractor cannot claim for any further payment.

The need for a BoQ in this type of contract is of particular importance as the term 'Lump Sum' illustrates that price is the factor upon which an Employer will decide to proceed or not. Thus, again this type of contract can be said to be Islamic compliant.

Where any of the inaccuracies described above occur, the Contractor will need to seek the Employer's agreement to increase the time for delivery or countervalue, with such increase being granted through a variation clause agreed with the Employer. Often there will be one provision for an increase to countervalue and one provision for an increase in time to complete. These provisions can operate independently or together[188]. These are examined in subsection 4.2.4. However, their operation must not contravene the *gharar* and *riba* prohibitions otherwise the validity of the contract is compromised.

Article 888 - Valuing of extra work

Article 888 provides that where payment for work done is not specified in the contract then such payment will be fair and include the value of materials required for the work. The customary approach is that rates in the BoQ will apply where work is of a similar nature, with adjustment to take account of any change in condition under which the work is executed. Where there is no similar work then a new rate will be calculated.

By application of the prohibition test the use of existing rates ensures fairness as it reflects what the Contractor would have priced the work at the time when the contract came into existence. Thus, there is no potential for unfair gain to be made. Where a new rate is calculated it

[188] Refer Sub-Clauses 13 and 8.4; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, pp. 58-60; Glover & Hughes, *op cit.,* n. 43, p.74.

will be at market rates, so again it will be fair as the true price is paid at the time the work was done and there is no unfair gain. In both instances the equivalence of the contract is maintained.

M&V and LS Contracts - the traditional method of procurement in EW Law

As recorded, in EW Law these two types of contract are termed the traditional methods of procurement. Below is a brief explanation as to how these two forms of contract operate in EW Law, from which illustrates a similarity to UAE Law in concept and in documentation requirements at the formation of contract.

Construction contracts in EW Law are considered entire contracts[189]. Under this doctrine the Contractor's right to payment is dependent on completing the structure[190]. A further aspect is that M&V and LS forms of contract are subject to the inclusive price principle[191]. This principle is that any work, which is necessary incidental to complete the structure, is included in the contract price. Hence, the rates/prices in the BoQ are all inclusive of the work which has to be done for that measured item of work.

For both M&V and LS contracts the design is a detailed set of design drawings, a comprehensive specification, a description of the Works and a BoQ. These documents all form part of the Contract[192]. The BoQ translates the design into an accurate measurement of work to be done. This is achieved as the BoQ is measured in accordance with a SMM[193]. As previously mentioned, this document sets out the rules of measurement for each item of work and describes what each item of work covers. This description therefore identifies incidental work which

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189 Atkins Chambers, *op cit.*, n. 19, pp. 760-762; Furst & Ramsey, *op cit*., 42, pp. 100-101 & 109.

190 *Op cit.*, n. 192 - For economic grounds the Contractor can claim for payment on account as the work proceeds subject to certain monies being retained by the Employer to ensure entire performance.

191 Where a BoQ has been prepared in accordance with an SMM to price the work to be done, the inclusive price principle in this context in EW Law means all work necessary incidental to completing the work described and measured in the BoQ where the contract is LS and M&V – Atkin Chamber, *op cit.*, n. 19, p. 762.

192 Atkins Chamber's, *op cit.*, n. 19, pp. 385-390; Furst & Ramsey *op cit.,* n. 42, pp. 4-5 & 119-121- the incorporation of the BoQ is through the express terms of the conditions of contract which refers to the same; Glover & Hughes, *op cit.,* n. 43, p. 14 – Sub-Clause 1.1.1.9 illustrates that BoQ in FIDIC99 demonstrates this.

193 Atkins Chambers, *op cit.*, n. 19, p. 387; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, pp. 167-170.

the Contractor has to allow for which is necessary incidental for the structure to be completed.

Put simply, work items which form the BoQ allow the design to be measured to a high level of precision. Consequently, any changes in the quantity of work, type of work or condition under which the work is done constitutes a variation[194], subject to the inclusive price principle. Hence, the contract price calculated is more-or-less risk (*gharar*) free.

For a M&V contract the BoQ is an estimate of the quantity of work to be done. Hence, the contract sum (countervalue) is an estimate. The final contract sum is determined on actual work done multiplied by rates in the BoQ[195]. It is used where the quantity of work may vary to achieve the design. Such change in quantity is classified as an automatic variation[196]. This form of contract is aimed more towards civil engineering works where ground conditions can only be determined once work commences[197].

LS contracts are where a Contractor agrees to build a structure for an agreed sum. The form of design is the same. However, the design will be completely developed so an accurate measure of work to be done can be prepared[198] prior to tender. Thus, the quantities included in the BoQ are not subject to re-measurement. In saying this, in some instances the foundation works only maybe re-measured where there is some uncertainty concerning ground conditions[199].

As illustrated, with these two forms of contracts any change in design or method of working caused by changes in condition or design constitute a variation for which the Employer is liable[200]. As time to

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194 Atkins Chambers, *op cit.*, n. 19, pp. 783-786; Furst & Ramsey *op cit.,* n. 42, pp. 119-121.

195 Atkins Chambers, *op cit.*, n. 19, p. 761.

196 Atkins Chambers, *op cit.*, n. 19, p. 786; Furst & Ramsey *op cit.,* n. 42, p. 121; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, pp. 167-170.

197 Gibson, *op cit*., n. 170, p. 27; Lowsley and Linnett, *op cit*., n. 168, pp. 40-44.

198 Atkins Chambers, *op cit.*, n. 19, pp. 765-766.

199 Atkins Chambers, *op cit.*, n. 19, pp. 765-766.

200 Critical path is the term used which defines the sequence of activities through a project network from start to finish, the sum of whose duration determines the overall project duration. Put simply the optimum time in which the structure can be built – Mirant Asia-Pacific Construction (Hong Kong) Ltd v (1) Ove Arup and Partners International Ltd (2) Ove Arup and Partners Hong Kong Ltd [2007] EWHC 918 (TCC); Lowsley and Linnett, *op cit*., n. 168 p. 23.

complete is a fundamental ingredient for calculating delivery and price, any circumstance that impedes the Contractor goes to the root of the contract. Hence, any variation that delays the Contractor's performance entitles the Contractor to additional time to complete[201].

The precision of these traditional methods of procurement satisfy the strict requirement in *fiqh,* that all work, including incidental work necessary to complete the measured work items, be quantified and readily identifiable, i.e. accessory materials without which the main element cannot be installed.

Accepted forms of the traditional method

The requirements of articles 874, 886 and 887 limits contractual freedom[202], the objective of which is to ensure profits are equivalent to those anticipated in order to avoid a dispute[203]. This results in a very strict criterion for the legality of contracts[204], in that where *gharar* infects the contract it will be defective until the parties agree changes to countervalue and time to deliver, which if they fail to do the contract will be declared void.

Other forms of construction procurement that can fall within M&V and LS contracts are Management Contracting[205] where the work is all subcontracted. Construction Management[206] is where the Employer directly engages different Contractors to execute different elements of the project and uses a Construction Management Contractor to manage these Contractors and Cost Reimbursement Contracts.

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[201] It is permissible for Muslims to do what they wish provided such action does not in contravention of an injunction.

[202] Schacht, *op. cit.*, n. 2, p. 144; Comair-Obeid, *op. cit.*, n. 2, p. 17.

[203] Coulson, *op. cit.*, n. 3, pp. 50-55; Comair-Obeid, *op. cit.*, n. 2, p. 15; Rayner, *op. cit.,* n. 2, pp. 148-153.

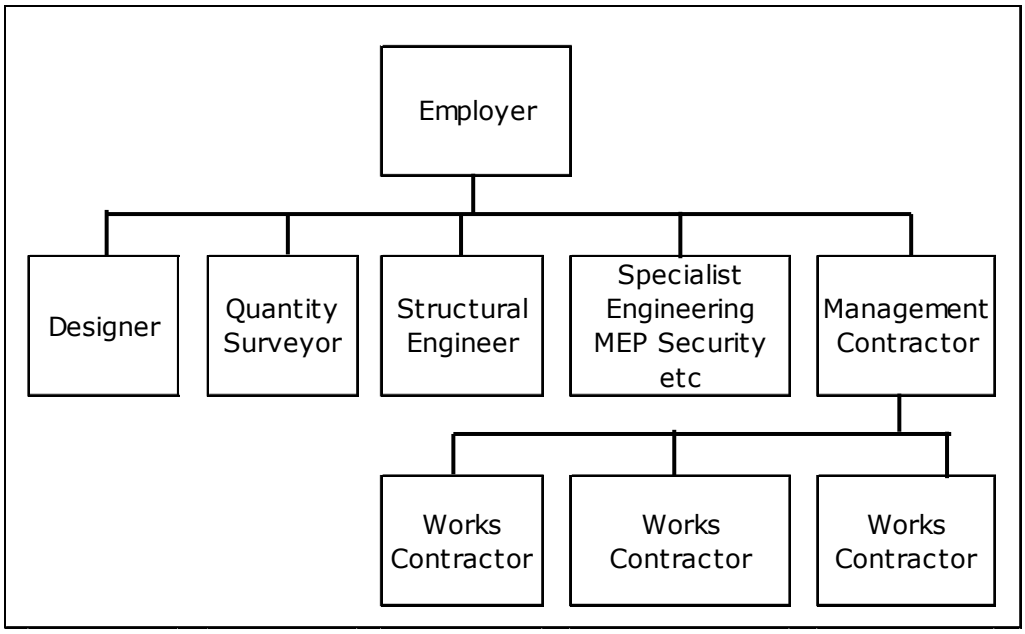
[204] Comair-Obeid, *op. cit.*, n. 2, pp. 16-22; Rayner, *op cit.*, n. 2 pp. 147-153 & 159-161.

[205] Murdoch, J., & Hughes, W., A.O. (1992 Reprinted 1999) Construction Contracts Law and Management, Spons Press Taylor Francis Group London & New York, pp. 57-59; Chappell, D., Cowlin, M., & Dunn, M., A.O. (2009) Building Law Encyclopedia, John Wiley & Sons Ltd, Chichester , UK, pp. 338-339; Pickavance K., (A.O. 2005) Delay and Disruption in Construction Contracts, Informa Professional London UK, pp. 61-66; Davis, P., (June 2008) Report on Building Procurement Methods, Cooperative Research Centre for Construction Innovation, Brisbane, Australia.

[206] Chappell, Cowlin & Dunn*, op cit.*, n. 205, P.113; Murdoch & Hughes, *op cit.*, n. 205. pp. 71-72.

Management Contracting: Figure 6 below represents the contractual relationship for Management Contracting.

Figure 6 – Management Contracting – Contractual Relationship



As illustrated in Figure 6 the "Management Contractor" (the Contractor) becomes part of the Employer's consultant's team. The Contractor's role is to appoint and enter into contracts with work/package contractors and manage them for each stage of the construction process. Thus, work contractors are essentially subcontractors for a specific element of the construction process. However, this does not release the Contractor from all responsibility for any defects[207]. The early involvement of the Contractor allows the Employer's team to benefit from the Contractor's construction experience, such as the Employer's Designer's understanding of the need for buildability, whilst allowing the Employer to remain in control of the design, thereby ensuring certainty as to the Employer's requirements/expectations. The appointment of work contractors is by competitive bidding, ensuring the structure is procured on an economic basis[208].

[207] Copthorne Hotel (Newcastle) Ltd v. Arup Associates (1997) CILL 1318.

[208] Murdoch & Hughes, *op cit*., n. 205, pp. 59-62; Chappell, Cowlin & Dunn *op cit*., n. 205, pp. 340-341; Davis *op cit*., n. 205; Pickavance, *op cit*., n. 205 pp. 61-66.

A primary benefit of this form of procurement is the reduced overall procurement time, as the design does not have to be completed before construction starts as is the case with traditional procurement. Hence, the design is developed in logical sequential stages whilst construction takes place, thereby allowing an overlap in the design and construction processes. This has resulted in this form of procurement being referred to as 'fast-track construction'[209].

A consequence of this overlap is that the Contractor has to maintain a high level of supervisory staff, both in numbers and experience, to be able to effectively engage and administer Works Contractors, particularly as to quality control, co-ordination, programming and interfacing[210]. Coupled with this, there is potential for variations resulting from changes to the Employer's requirements, or abortive work caused by the design and construct overlap[211].

However, as each element of the structure which makes up a works package is designed and quantified, taking account of the extent of work done in the previous/present work package, such variation can be readily accommodated[212]. As the design for each element of the work is fully known as well as being fully quantified, the work contractors have certainty as to their obligations which arise from the contract, thereby satisfying the precision required by Jurists to ensure the *gharar* and *riba* prohibitions are not contravened. Coupled with this, because of the Contractor's own experiences, the Contractor can control the interface and programme requirements to ensure a smooth transition between each of the Work Contractors, and readily identify variations necessary to maintain progress, keeping the Employer and his team aware of such matters.

Certainty of price within this method of procurement is achieved by "Cost Reimbursement"**.** The process applied is that the Employer's Cost Consultant will prepare an estimate in the form of a cost plan, which includes not only the cost of construction but all costs associated with the design and management

[209] Murdoch & Hughes, *op cit*., n. 205, pp. 59-62; Chappell, Cowlin & Dunn *op cit*., n. 205, pp. 340-341; Davis *op cit*., n. 205; Pickavance, *op cit*., n. 205 pp. 61-66.
[210] Pickavance emphasises that work sequencing and coordination of works contractors to maintain programme must remain with the Contractor, Pickavance, *op cit*., n. 205, pp. 61-66.
[211] Murdoch & Hughes, *op cit*., n. 205, pp. 59-62; Pickavance, *op cit*., n. 205 pp. 61-66.
[212] Pickavance, *op cit*., n. 205 pp. 61-66.

by the Employer's team[213]. Cost plans are compiled based on historical data, taking account of the site location and type of structure to be built. The cost plans should be prepared in the following stages: stage 1 - concept design; stage 2 - design development and technical design; and stage 3 - pre-tender estimate. This third stage will be updated both post tender and during construction to reflect current costs to the Employer[214]. The basis of the cost plan can be divided into two main forms, cost estimates and elemental cost models.

Structures such as tunnels, bridges etc. are prepared using a comparative method. Taking a tunnel as an example, previous projects which have similar characteristics would be examined to identify similarities in tunnels such as length, cross sectional area and ground conditions in which the tunnel was built all of which dictate the methods of construction etc.

Cost estimates are calculated from cost per functional unit, i.e. a hotel cost per unit multiplied by the number of beds, or cost per m^2 of internal gross floor area (GIFA), i.e. GIFA m^2 multiplied by the cost per m^2 of a specific element for that particular type of structure to be built, i.e. the concrete frame[215]. Note, such costs can be inclusive or exclusive of all other "on costs", i.e. the Contractors overheads, profit and other consultant's fees, but if exclusive these sums are added as a lump sum estimate.

The other method is the element unit quantity (EUQ) – a unit of measurement that relates solely to the quantity (m^2) of the element or sub-element, e.g. the area of external cladding, windows or roofing, excluding the support structure which would form a separate sub-element. This area is then multiplied by the element unit (m^2) rate (inclusive of all labour, material, plant and other such production costs, as well as all "on-costs") (EUR))[216].

As the cost plan provides detailed costs for the work to be done, the Cost Consultant can monitor and continually update the cost plan into firm costs and forecast costs to completion, thereby allowing the Employer to be able to

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[213] Royal Institute of Chartered Surveyors (A.O. 2012), The RICS New Rules of Measurement (NRM) NRM 1: Order of cost estimating and cost planning for capital building works 2nd Ed, Coventry, UK, p. 2; Murdoch & Hughes, *op cit*., n. 205, pp. 65-66.

[214] RICS, *op cit*., n. 213 p. 8.

[215] RICS, *op cit*., n. 213, p. 12.

[216] RICS, *op cit*., n. 213, p. 12.

control costs as the construction work progresses. Thus, this method of procurement falls within the M&V form of procurement as the Employer has accepted how *gharar* is to be controlled. This is further demonstrated as the work contractors are appointed as the construction work proceeds.

There are three primary forms that payment of the Contractor takes. These are:

Cost plus percentage: The Contractor is paid the actual cost of the work done by the Works Contractors, along with a percentage fee which includes the Contractor's overheads and profit. The basis upon which the Contractor calculates the percentage fee is based on the amount reflected in the cost plan for the physical construction works[217]. The percentage to be added can be negotiated or tenders can be invited from Contractors, the same way as design consultants' bids for work are evaluated. The payment of a percentage fee on all costs has been criticised as there is no incentive for the Contractor to control costs. This is countered on the basis that tenders for Works Contractors will be on a competitive basis. This then obligates the Contractor to carefully and fully evaluate the Works Contractors offers.

Cost plus fixed fee: The same approach as above but the fee for the Contractor is fixed[218]. Consequently, this approach requires a clear definition as to what work forms part of the original contract and which is a variation, otherwise there is potential for *gharar*, and so *riba,* to infect the contract.

Cost plus Fluctuating Fee: This approach is that the Contractor gives an offer based on the amount reflected in the cost plan for the physical construction works. However, the amount of the fee due increases where the contractor reduces costs and reduces where costs increase[219]. Again, this approach requires a clear definition as to what work forms part of the original contract and which is a variation, otherwise there is, once again, potential for *gharar* and so *riba* to infect the contract.

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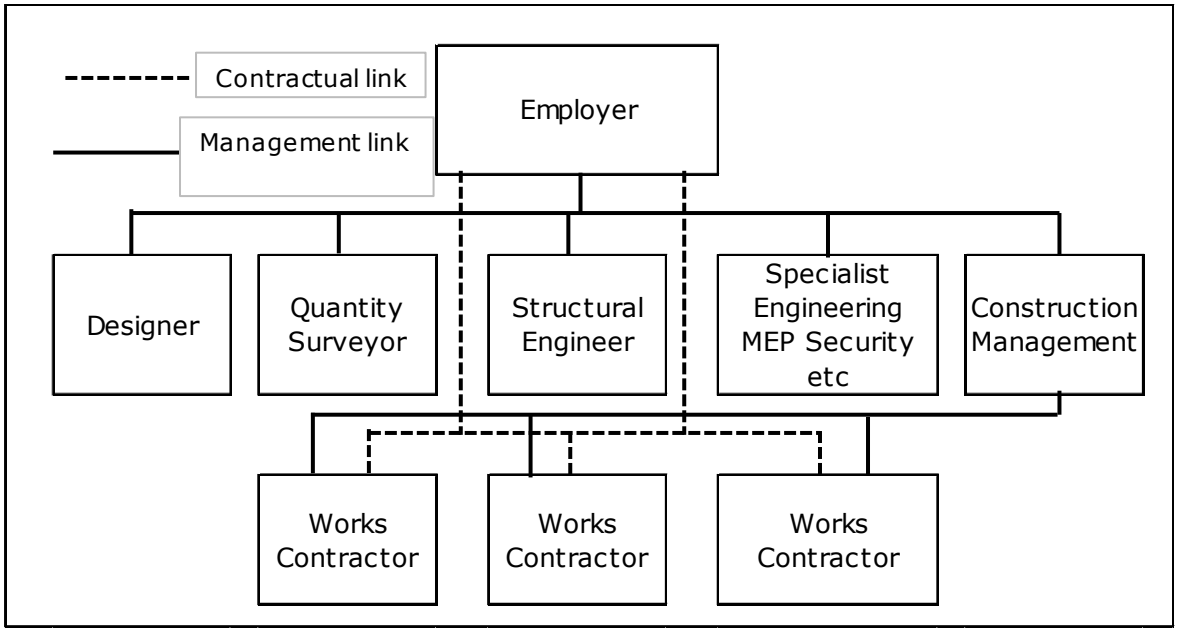
[217] Chappell, Cowlin & Dunn *op cit*., n. 205, pp. 131-132; Murdoch & Hughes, *op cit*., n. 205, pp. 65-66; Chappell, Marshall, Powell-Smith, Cavender *op cit*., n. 51, pp. 106-107.
[218] Chappell, Cowlin & Dunn *op cit*., n. 205, pp. 131-132; Murdoch & Hughes, *op cit*., n. 205, pp. 65-66; Chappell, Marshall, Powell-Smith, Cavender *op cit*., n. 51, pp. 106-107.
[219] Chappell, Cowlin & Dunn *op cit*., n. 205, pp. 131-132; Murdoch & Hughes, *op cit*., n. 205, pp. 65-66; Chappell, Marshall, Powell-Smith, Cavender *op cit*., n. 51, pp. 106-107.

An important feature of this procurement process is that the Employer controls the design, and work packages are quantified for each element of the structure, thereby providing the precision required by Jurists, with certainty of price being provided through the cost plan. Where there is potential for the cost plan to be exceeded, then the Employer has the ability to control costs through design amendments. As this procurement method allows for an early start for construction work whilst the design is still being developed, it achieves a primary aim of the design and build form of procurement, namely shortening the overall procurement period.

Construction Management: Figure 7 below presents the contractual relationship for Construction Management.

Figure 7 – Construction Management – Contractual Relationship



This method of procurement mirrors that of Management Contracting, the difference being the contractual and management links. Unlike Management Contracting, the contractual link is between the Employer and Works Contractors, whilst the management/administrative link is between the Construction Management Contractor and the Works Contractors[220]. There are two advantages to the Employer if this method of procurement is selected. The first is that the Employer has greater control over the bidding process and selec-

[220] Murdoch & Hughes, *op cit*., n. 205, pp. 71-80; Davis *op cit*., n. 205; Pickavance, *op cit*., n. 205 pp. 61-66.

tion of works contractors. The second is he has control over payment, so when a disagreement arises he has the ability to negotiate with the works contractor, taking account of his commercial needs[221].

Again, this form of procurement, for the reasons presented above, is a method which satisfies the Jurists' requirements for certainty, allowing the design to be developed while physical construction proceeds at Site.

The three methods for calculating the Contractor's fee for Management Contracting and Construction Management (described above), can also be applied as a separate contractual arrangement where the Contractor is engaged by the Employer to build the structure. This form of procurement is referred to as a Cost Reimbursement Contract.

To control the Employer's Costs, the Consultant prepares a cost plan which is the basis for the Contractor to offer his fee. The cost plan is again closely monitored and updated throughout the procurement process. However, with this form of procurement, the Contractor will actually construct certain elements of the structure, e.g. the sub-structure, the structural frame, with specialist elements being subcontracted.

This process requires an open book approach so the Employer's Cost Consultant has access to the Contractor's accounts and any subcontractors' accounts. An alternative approach is that the Contractor can price a schedule of rates based on the known scope of work for the elements of work he will perform. The same approach can also be applied to elements of the work to be performed by subcontractors.

There is one difference in respect of cost plus fixed fee in that the Contractor has the incentive to complete the Works as quickly as possible, as by doing so he reduces his overheads and so increases his profit. Consequently, it could be argued that there is an element of *riba* present in this form of contracting.

As the Employer retains control of the design with costs being true costs plus the Contractor's agreed fee, or the work is quantified and rates in the schedule of rates are applied to give a firm price, then these methods of Cost Reimbursement Contracts provide the precision required by Jurists. Again, this

[221] Murdoch & Hughes, *op cit.*, n. 205, p. 80.

method of procurement achieves the primary aim of the design and build form of procurement, namely shortening the overall procurement process.

In addition for structures where the Contractor has a standard design that only requires alterations to substructure works to accommodate prevailing ground conditions, this would be Islamic compliant provided the prerequisites set out under articles 203 and 874, UCC are satisfied. Structures which fall within this method of procurement are generally of an industrial nature such as a power station, treatment plant, a warehouse or a prefabricated structure, although housing and schools and possibly administrative buildings such as hospitals could also be procured this way. This form of contract is termed Engineer, Procure and Construct (EPC).

For Design and Build contracts - the Contractor is to prepare the design from the Employer's requirements. *Prima facie* this form of procurement would not be construed as satisfying the prerequisites for a valid construction contract to come into existence under UAE Law. The reason is that the Contractor's interpretations as to how to satisfy the Employer's expectation can vary significantly, particularly where the Employer requires that the Contractor interpret third party or stakeholder design requirements. This prevents certainty/precision in respect of quality, aesthetics, spatial and functional needs and so quantity of work to be done, causing *gharar* and *riba* to infect the contract. Consequently, the basis of the legal relationship created between the parties is speculative in nature, allowing for an undue or excessive benefit to be derived from the contract[222]. This was confirmed by decision number 182(19/8) of the International Council of the Fiqh Academy, an offshoot of the Organisation of Islamic Conference (OIC) held 26-30 April 2009 in the Emirate of Sharjah, UAE concerning Build Operate and Transfer, a form of Design and Build for Public Sector projects.

Consequently, research as to how such a form of contract can comply with the requirements of articles 202, 203, 874, 886 and 887, UCC is required.

1.2.5 A summary of the nominate contract system

The examination above demonstrates, that as a result of the specific requirements of articles 874, 875, 876, 877, 886 and 887 there are only two forms of construction contract in the UAE, M&V and LS which satisfy the requirements of equivalence and are therefore Islamic compliant. Where deficiencies in the contract documentation, whether design, BoQ, Programme of Works or other are discovered, then *gharar* becomes intrinsic to the contract. To remove *gharar,* certainty as to the delivery and countervalue has to be re-established, otherwise the contract is classified as void[223].

Although articles 886 and 887 provide a process for establishing countervalue and delivery in such situation, it is not determined in a precise manner. Thus, the parties to the transaction need to agree a set of contract provisions to address such circumstances so that *gharar* can be removed. The application of these provisions is subject to them not contravening the *gharar* and *riba* prohibitions as determined by the prohibition test, i.e. they must be applied so they ensure equivalence in that the countervalue paid is equal to the goods and services provided. This will be further examined in Part 4.

[223] Comair-Obeid, *op. cit*., n. 2, pp. 15-18; Rayner, *op cit*., n. 2 pp. 148-153; Schacht, *op. cit*., n. 2, pp. 120-121.

1.3 General articles of the UCC that apply to a construction contract

This section examines how the relevant articles of the UCC that are of a general nature apply to a construction contract, and so how they operate to prevent *gharar* becoming inherent to the contract and prevent a dispute arising.

The analysis presented, taking cognizance of the prohibition test as proposed by the author, establishes that in:

Subsection - 1.3.1 - Legal Maxims – operate to limit a party's ability to enforce an unbalanced contract by obligating parties to comply with the requirements of the articles of the law that regulate their type of contract. Consequently, parties have to operate contract provisions such as discretionary power and exemption clauses in a positive way, otherwise they cause the contract to be aleatory and so invalid, requiring such provisions to be severed from the contract[224];

Subsection - 1.3.2 - The Elements, Validity and Effect of the Contract - the UCC enacts the *gharar* prohibition by requiring that a thing that comes into existence in the future be comprehensively described and quantified to minimise uncertainty as to what an obligation entails, and not to operate contract provisions in an opportunistic way to gain an unfair financial advantage. This in turn minimises the potential for a dispute arising;

Subsection - 1.3.3 - The Effects of a Contract – the UCC requires contracts to be performed in a manner consistent with good faith. Moreover, in a contract of mutual obligations where a party delays in performing its obligation the other party can refrain from performance, thereby enforcing the prevention principle. The effect of the *gharar* prohibition requires pre-contract negotiations be performed in a transparent way to ensure the equivalence of the contract. Whilst where a party's obligation becomes onerous the Courts can re-balance the contract, which includes: 1) economic impracticality caused by abnormal

[224] Whelan, *op cit.*, n. 6, UCC, art. 210; Comair-Obeid, *op cit.*, n. 2, pp. 43-55.

price increases; and 2) a failure by a party to disclose a circumstance that affects how an obligation can be discharged by the other;

Subsection - 1.3.4 - The Construction of Contracts – deficiencies in the Employer's design fall to the Employer, and so any defect found in the structure is the Employer's liability as the UCC requires parties to interpret any doubt in favour of the Obligor, the aim being to prevent *gharar* by the Obligee exploiting the Obligor. This obligation reflects that of the principle of the *contra proferentem* rule in EW Law which is seen as a rule of justice;

Subsection - 1.3.5 - **Means of Enforcement, Section 1 – Voluntary Execution** – that the Employer, where there is a deficiency in the design allowing *gharar* to become intrinsic to a contract, has to correct the design so the Contractor's ability to control his obligation of delivery is reinstated;

Subsection - 1.3.6 - **Means of Enforcement, Section 2 – Compulsory Enforcement** – by one party failing to perform an obligation allows the other to issue notice to compel such party to correct such breach. A right for compensation arises once such notice is issued where the party issuing the notice has suffered harm; and

Subsection - 1.3.7 - **Extinguishment of Rights, Section 1 - Discharge** – the period that a party has a right to claim compensation in UAE law is mandatory and cannot be altered by the parties. The period in respect of a civil contract is two (2) years and for commercial contracts is ten (10) years.

Further points demonstrated from the examinations are that:

1) The method adopted by *fiqh* and so UAE Law to determine if *gharar* is present in a contract is, if a dispute arises between the parties then *gharar* is present and the contract will be classified as void;

2) Unlike EW Law where freedom of contract allows parties to decide their own provisions, such a right is limited under UAE Law.

The effect of article 206 illustrates this as the contract provisions have to support the rights and obligations placed on the parties by Law, for which no provision can be aleatory. Whereas in EW Law a party wishing to be granted relief in an un-balanced contract is dependent on the use of implied terms, the *contra proferentem* rule, and where applicable rules against penalties/forfeiture;

3) By application of the prohibition test using the innovative definitions of the *gharar* and *riba* prohibitions as proposed by the author to ensure equivalence of the contract, obligates parties to a construction contract to act in a manner that prevents infringing these prohibitions;

4) The obligations placed on the parties by the articles of the Law, taking account of the said prohibitions, require that the parties act in a moral and ethical manner when conducting their contract; and

5) Specific articles of the UCC are aimed at preventing one party from taking advantage of the other where circumstances cause *gharar/riba* to be present in a contract. Such articles operate by application of article 2, UCC or they are express in their requirement.

As stated earlier, articles 1 and 2, UCC obligate parties to interpret and apply the articles of the Law that apply to their type of contract in a manner compliant with the *gharar* and *riba* prohibitions. This applies to articles that are: 1) express in their requirements; or 2) general in their requirement and so are open in their interpretation and application.

In both instances, when interpreting the requirements of the articles the prohibition test is applied to ensure equivalence of the contract to prevent *gharar* and *riba* being present in a transaction.

Where the article is general in its requirement the form of the examination is contemporary interpretations by use of examples, where applicable, to illustrate the following:

1) How these prohibitions can manifest in a construction contract; and

2) What parties' obligations are to avoid contravening these prohibitions, or to correct the defective elements of the contract where the said prohibitions are contravened.

To understand fully the obligations placed on parties by articles of the Law, consideration needs to be given to article 206, UCC. The reason is that this article determines how the provisions of contract that the parties agree to are to be applied in their contract. Hence, the effect of article 206 forms part of the analysis in this subsection.

Article 206

Article 206 requires that party agreed contract provisions must not contravene the Law or morals of *fiqh* otherwise they will be void and so should be severed from the contract[225]. Subsection 1.1.2 above sets out three types of provisions, and illustrates that as their operation is dependent on an uncertain event or future contingency they are aleatory as they allow *gharar* to be intrinsic to the contract. This in turn allows the Employer to acquire services and goods at the expense of the Contractor, thereby allowing the Employer to make an unfair gain.

This in turn results in speculation as to whether a party will achieve the anticipated profit from the transaction. Such provisions can also allow a *riba* to be present in a contract as they confer a right that allows a party to act in an opportunistic manner to increase unfairly its profit at the Contractor's expense.

In addition to these provisions are clauses that make the Contractor liable for matters over which he has no control. Such provisions in respect of a construction contract are those that allows the Employer to decide the Contractor's rights as to:

[225] Ibn Rushd, *op cit.,* n. 5, p. 155; Coulson, *op cit.,* n. 7, p. 44; Vogel & Hayes, *op cit.,* n. 9, pp. 100-102; Comair-Obeid, *op cit.,* n. 2, p. 37.

1) Quality and scope of work, by operation of approval, variation and future contingency provisions such as physical Site Conditions. A provision of this nature allows the Employer to decide whether the Contractor is liable for additional work needed to overcome a subsurface physical condition at Site. This is despite subsurface ground conditions varying dramatically. Thus, the Contractor has to speculate as to what the physical Site conditions may be and is therefore taking a gamble as to the mode of performance (temporary works and type of resources to do the work) [226]. This leads to *gharar* as to the quantity of work to be done, and whether the period of delivery and countervalue are accurate[227]. This includes utilities and mandatory requirements associated with the same;

2) Coordinate/cooperate with the Employer's other third party contractors who Contractor A is dependent on to discharge his obligations. Where a third party contractor is in delay, for whatever reason, then Contractor A cannot complete and the Employer can hold Contractor A responsible for the delay[228].

In the first instance the Contractor can suffer financial harm because of necessary changes in the mode of performance, i.e. temporary works, different equipment needed to perform the work, additional/extra work necessary to achieve the design, and any delay to delivery caused by the same. This situation can be further exacerbated where the Employer delays in correcting the initial (deficient) design to take account of the actual ground conditions.

Consequently, there is an unfair gain in that work done is not equivalent to the value of the structure built as the Contractor had to over-

[226] Mitsui Construction Co Ltd v Attorney General of Hong Kong (1986) 33 BLR, 1 by the Privy Council; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, p. 309.

[227] Red Line, Doha Metro the Contractor discovered that the ground was heavily contaminated with erosive chemicals requiring a completely different approach to the tunneling and underground station work.

[228] Certain conditions of contract, such as FIDIC99 see Sub-Clause 4.6 make this an express requirement, but its operation in practice due to conflicting needs of one contractor with the other contractor. Glover & Hughes, *op cit.,* n. 43, pp. 92-94 – the commentary provided in respect of this provision demonstrates there is a high degree of speculation as to what such co-operation entails.

come exceptional difficulties[229]. Their effect can cause Contractors to suffer substantial losses and consequently the potential for a dispute to arise.

In the second instance, whilst as there is no contractual obligation between the different Contractors, Contractor A, although dependent on Contractor B to coordinate or cooperate, Contractor A has no power to force Contractor B to complete and so has no control over whether he will be able to meet his delivery date.

Thus, Contractor A's agreed delivery date, mode of performance and countervalue are speculative. Consequently, a provision of the contract of this nature is aleatory as it prevents the anticipated profit from being attained. Coupled to this the Employer has the right to deduct damages where the Contractor is in delay thereby causing *riba* to infect the contract.

A further important requirement is that article 206 records, that if a provision of this nature induces the contract, then the contract will be void[230]. Thus, if any, or a combination of these type of provisions cause a party to enter into the contract, the contract would be void.

The analysis above illustrates that these provisions fail to satisfy the prohibition test. The reason is they provide an opportunity to make an unfair gain providing fertile grounds for a dispute to arise. This is the reason why the method adopted by *fiqh,* to identify if *gharar* has infected the contract, is if a dispute arises between the parties. If a dispute does arise then *gharar* is present and the contract is void[231] unless *gharar* can be removed.

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[229] A decision from the Diwan al-Mazalim, Kingdom of Saudi Arabia, Decision of 6/2/1398 AH (17th January 1978), MAFQ 11, 1992, pp. 291-297 – the contract between the KSA Government placed the risk on the Contractor in respect of ground conditions. The Court rejected the ministry's position. '...*It found in the case a typical example of imprévision: This case raises what is known in the doctrine, in case-law generally and in administrative case-law in particular, as the theory of unforeseen material difficulties. The theory can be summarised as follows: 'If the party faces at the time of performance of his obligations material difficulties that have a purely exceptional character and could not be in any way foreseen at the time the contract was concluded, it is possible for him to ask for total compensation for the harm done to him because of the difficulties...'*

[230] Whelan, *op cit.,* n. 6, UCC, Art. 206.

[231] Whelan, *op cit.*, n. 6, UCC, art. 203, commentary.

As illustrated by the above analysis, unlike EW Law where freedom of contract allows parties to decide their own provisions, such a right is limited under UAE Law. This is because parties to a contract have to abide by the articles of the Law that regulate their contract. Also, due to the effect of article 206, they have to ensure that their agreed contract provisions support the rights and obligations placed on them by Law. This obliges parties, when taking account of *fiqh*, to ensure they do not contravene the *gharar*/*riba* prohibitions and other precepts of Islam such as unjust enrichment.

1.3.1 Legal Maxims

The first articles examined are the relevant legal maxims[232]. These maxims were formulated in the first half of the second century of the *hijra*[233] *and* evolved from early systematic reasoning. They are not uniform as to origin or period and take two forms, those that:

1) Reflect the commands of the Qur'an and explained further by the Sunnah of the Prophet; and

2) Were formulated by the pious Jurists, and so the roots of such maxims are found in *fiqh*[234].

The applicable articles are examined on an article-by-article basis for ease of reference.

Article 31

The maxim of article 31 is express in its requirement that mandatory provisions of the Law take precedence over a duty created by party agreed provisions[235]. Thus, parties' autonomy to decide their rights and obligations with regard to the type of contract is restricted. By application of the prohibition test this maxim reinforces the effect of construction contracts falling within the nominate contract system, in that the parties' rights and obligations which arise from the contract are decided by the Law and not the parties[236].

As a construction contract is for a future thing, parties have a strict obligation to abide by the requirements of article 3, 106(2)(b), 202(1), 203, 874 and 875 to prevent *gharar* and *riba* being inherent in the contract.

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232 Whelan, *op cit.*, n. 6, UCC, Art. 29-70.
233 Schacht, *op cit.*, n. 2, pp. 37-40.
234 Kamali, M. H., A.O. (2008), Sharī'a Law an Introduction, Oneworld Publications, Oxford, UK, p. 142.
235 Whelan, *op cit.*, n. 6, UCC, art. 31.
236 Whelan, *op cit.*, n. 6, UCC, art. 128.

Taking account of this, the types of contract provision described under the analysis of article 206 should not be incorporated into the agreed contract as such provisions are aleatory[237].

Moreover, article 106(2)(c) will also be contravened, which provides:

> '…*The exercise of a right shall be unlawful if the interests desired are disproportionate to the harm that will be suffered by others* [i.e. the other party to the Contract]*…'*

The disproportionate harm (additional cost) suffered will be in two ways where the Contractor's performance is delayed. 1) The Contractor will have to retain resources at Site longer than expected; or 2) Alternatively, the Contractor will have to deploy more resources to increase productivity to meet the agreed delivery date, i.e. the Contractor, by losing control of its obligation to deliver is forced to change his mode of performance. Hence, *gharar* manifests as the Employer obtains the additional services provided by the Contractor for free, so the anticipated profit expected by the Contractor is not achieved.

As illustrated, any provisions that allow the Employer to exploit the Contractor by manipulating what is required to discharge an obligation are not permitted. The cause is that as cited by the Jurists, an immoral incentive induced by the rights granted through these provisions to make an unfair gain[238]. A similar situation arises where the Contractor incurs additional expense as a result of the Employer threatening to deduct damages unless the Contractor meets the stipulated delivery date.

Article 42

This maxim expressly obliges parties not to harm one another. Where one party suffers harm, then the other party is not to retaliate, and where a party does cause harm, he shall remove the harm. Harm in re-

[237] Comair-Obeid, *op ci.t*, n. 2, p. 5; Whelan, *op cit.*, n. 6, UCC, art. 206, commentary; Abd El-Wahab Ahmed El- Hassan, *op cit.*, n. 52.
[238] Rayner, *op cit.*, n. 2, p. 291.

spect of a construction contract takes the form of unplanned expenditure for which a party will not be reimbursed.

By application of the prohibition test such circumstance might arise where the Employer fails to provide a complete design, either deliberately, negligently or ignorantly[239]. This allows *gharar* to infect delivery as the requisite control needed to ensure the mode of performance cannot be established. If the situation is not corrected then a delay to delivery will occur. This in turn results in the Employer unfairly gaining additional services as the Contractor will have to remain at Site longer than planned, causing the Contractor to suffer harm.

Hence, article 42 obligates the Employer to remove the harm by promptly issuing to the Contractor additional data needed to correct the deficient design. If this is not done then the Employer is obligated to compensate[240] the Contractor by: 1) granting additional time needed to meet delivery; 2) paying the additional costs suffered by the Contractor resulting from the delay; and 3) paying for any additional/extra work needed to correct the design.

This article also, by application of the prohibition test, obliges the Employer to refrain from acts that will delay delivery. The primary form that such an act takes is the Employer exercising his right to instruct a variation (a variation clause) which the Contractor is obligated to comply with. Hence, as the attributes upon which the contract was created are of a speculative nature there is potential for an immoral incentive to be induced, allowing an undue profit by manipulating the Contractor's obligations.

This right allows the Employer to change the functional and quality requirements and so the scope and type of work to be done. This in turn causes the Contractor to lose control of the four prerequisites[241] that are necessary for a valid construction contract.

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[239] Whelan, *op cit.*, n. 6, art. 282, commentary.

[240] Whelan, *op cit.*, n. 6, arts. 42, 282 and 292; Comair-Obeid, *op cit.*, n. 2, p. 199.

[241] Whelan, *op cit.*, n. 6, UCC, art. 874, commentary.

Consequently, such provision is aleatory as the Contractor has lost control over what is needed to complete the structure. The reason is that a design variation can affect the appearance, quality, aesthetics, performance and quantity of work. This in turn affects the mode of performance, allowing *gharar* to manifest as to when delivery will be achieved and what the true countervalue is. This, for the grounds stated above, results in an unfair gain of services and goods by the Employer. The level of *gharar* is dictated by the scope of the variation and the timing when the variation is issued.

The following example puts this into context. Where a variation revises only the internal office-partitioning layout whilst the external envelope is being constructed, then *gharar* infecting delivery and countervalue is nominal, i.e. the loss of control is minimal and the contract remains valid.

Conversely, where such instruction was issued when finishing works were well advanced, then *gharar* contaminating delivery and countervalue will be significant because of reworks, resulting in a significant loss of control by the Contractor to the mode of performance. The same situation applies where the instruction, despite being issued before partition work starts to increase the number of offices, then productivity reduces as building smaller offices is more labour intensive. There will also be a loss of productivity to floor, ceiling and wall finishes, as again the work becomes more labour intensive.

As the variation clause obliges the Contractor to do the varied work, there is *gharar* as to whether the requisite increase to delivery and countervalue will materialise. This makes a variation clause aleatory despite other articles of the UCC granting the right to the Contractor to: 1) claim for the additional time needed to meet delivery[242]; and 2) be paid the additional expense resulting from the delay, the reduction to productivity and the unnecessary work done[243]. This is because:

[242] Article 886 and 887 UCC.
[243] Article 886 and 887 UCC.

1) The obligation placed on the Contractor to do the work weakens his position when negotiating his rights for additional time to meet delivery and additional payment for the expense of mitigating the delay where possible, the actual delay suffered, and the additional/extra work done;

2) The employer be will released from liability where any of the clauses act to exclude liability or allow a discretion in the form stated under the examination of article 206 where such a provision(s) forms part of the contract; and

3) Despite the Contractor satisfying the notice requirements the Employer is still in a position to exploit the Contractor by: 1) refusing to accept liability for the delay to delivery and increase in countervalue; or 2) simply ignoring the notice and threatening to apply damages for late completion, and/or refusing to accept that the additional/extra work has caused the Contractor additional expense as a result of a reduction in productivity and removal of work previously done.

Again, the effect of a variation clause is analogous to granting the right to the Employer to change, unilaterally, the time for delivery without having to pay the consequences. Such circumstances contravene the requirements of articles 106(2)(c), 106(2)(b) and 203 for the grounds previously stated; and articles 386 and 476, 886 and 887, UCC and article 95 LCT, which obliges the Employer to compensate the Contractor both time and money.

As stated at the start of this subsection, this is the central reason why party agreed provisions have to be interpreted in a manner to avoid or prevent contravening the *gharar* and *riba* injunctions, otherwise the contract will be void[244].

[244] Whelan, *op cit.*, n. 6, art. 210; Comair-Obeid, *op cit.*, n. 2, pp. 43-55.

Article 32

The maxim '*an act required to perform an obligation is in itself an obligation'*[245].This article is express in its requirement. By application of the prohibition test to ensure reciprocity of the contract, the Employer must completely satisfy all the requirements of articles 874 and 875 to prevent *gharar* manifesting in a transaction.

Moreover, if, during construction the Employer becomes aware of a deficiency in the design, the Employer has an obligation to provide the missing information to avoid contravening the *gharar* prohibition.

Conversely, this maxim also implies an obligation on Contractors to notify the Employer promptly of any design deficiencies. Using the prohibition test, the notice must demonstrate the cause of *gharar* and its effect on delivery causing delay[246] and countervalue. This in turn allows the Employer to remedy any default on his part, which allows the Contractor to regain control of his obligations thereby negating *gharar* infecting delivery and countervalue.

Article 52

The maxim '*where prohibition conflicts with an obligation, the prohibition shall take precedence',* article 52[247], is express in its requirement. Thus, where a prohibition manifests itself as an obligation then the obligation shall no longer be an obligation[248].

An example is that a party to a contract is obligated to perform what they have agreed to do[249]. Hence, a Contractor enters into a contract to build a structure for which a complete design is provided. He starts the foundation work and comes across a large physical obstruction[250].

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[245] Whelan, *op cit.*, n. 6, art. 32.

[246] Whelan, *op cit*. n., 6, art. 380 makes the claimant responsible for demonstrating the breach

[247] Whelan, *op cit.*, n. 6, UCC, art. 52; A clause which contravenes a prohibition shall be invalid. Abd El-Wahab Ahmed EL Hassan, *op cit*., n. 52; Coulson, *op cit*., n. 3, pp. 51-55; Comair-Obeid, *op cit*., n. 2, pp. 31-32.

[248] Rayner, *op cit.*, n. 2, p 158.

[249] Whelan, *op cit.*, n. 6, art. 338.

[250] The term applied to such circumstance is physical or abnormal unforeseen ground conditions.

This causes the contract to become defective as *gharar* is now present in that: 1) the design is no longer complete as characteristics of the structure are uncertain; and 2) there is a possibility that the structure may not come into existence[251]. These circumstances result in the requirements of articles 202, 203, and 874 being contravened. Consequently, by application of the prohibition test, the Contractor has the right to refrain from performance until the Employer issues the revised design.

The Contractor would be entitled to additional time to meet delivery to negate the effect of *gharar*. The parties would be obligated to remove *gharar* by agreeing a new date for delivery along with the quality, characteristics of the additional work and increase in countervalue.

If the above is not done there is potential for the *riba* prohibition to be contravened. The grounds are that the Contractor, in order to avoid paying damages for late delivery, will pursue a solution to overcome the lack of instruction. Conversely, the Employer will seek to avoid payment and deduct damages for late delivery, further compounding the harm suffered by the Contractor.

Conversely, the Employer would not have the benefit of the structure and so would consider it correct to deduct damages. These events, as construed by the Jurists, are the ingredients for a dispute to develop for which the primary cause is *gharar*. In either instance, the contract would be considered void.

[251] Whelan, *op cit.*, n. 6, this article provides that where it can be demonstrated by the Obligor that it is impossible to give specific performance through some external cause which the Obligor played no part, then he is not liable to the Obligee. This being pursuant to the Shari'a rule that God imposes upon no person more than that person can do.

1.3.2 The Elements, Validity and Effect of the Contract

The aim of articles 202 and 203, as illustrated earlier, is to prevent *gharar* from being intrinsic to a contract.

Article 210

Article 210(1) provides, that if the contract is found to be non-compliant it will be declared void, as the nature and circumstances do not comply with the Law, i.e. the structure to be built has not been exactly determined due to a lack of description, resulting in *gharar*. The effect of this article is to ensure that the obligations placed on the parties to a construction contract by articles 202, 203, 206, and those which set out the requirements of a nominate contract are complied with.

Where *gharar* is found to be present then article 212(1) applies. This article provides that where the requirements for a valid contract to come into existence were satisfied but then a certain element becomes no longer satisfactory, e.g. a necessary design change which allows *gharar* to infect delivery and countervalue, then the contract is 'defective' until the imperfection is removed, if the imperfection is not removed the contract will become void.

1.3.3 The Effects of a Contract

As illustrated, construction contracts are classed as one type of nominate contract. To ensure that parties fully grasp their obligations that arise from the effect of article 874, the requirements of article 2 have to be complied with. Coupled to this, article 243(1) provides that the contract shall govern the subject matter; and article 243(2) provides that the parties are bound by and must perform the obligations that derive from the Contract.

Their effect is that they obligate the Employer to prevent *gharar* by complying with the requirements of article 874. Conversely, the effect of these articles on the Contractor is that he is responsible for executing all work set out in the design to the quality specified in the design, thereby reinforcing the Contractor's obligation as set out in articles 875 to 877.

Article 243

The requirements of article 243 are that the contract will be governed by the subject matter of the contract; and that parties to the contract must perform that which the contract obligates them to do. Thus, parties have to ensure that the provisions of the contract they agree to, which apply to their contract, reflect the rights and obligations that arise from the type of contract they have entered into.

Hence, by applying the requirements of articles 31 and 206 no provision of the contract shall be of an aleatory nature.

Article 246

Article 246(1) requires that a construction contract be performed in accordance with its content and in a manner of good faith; and article 246(2) requires that parties accept matters that accompany the primary obligation.

EW Law *prima facie* does not recognise a general principle of good faith in terms of performance of a contract[252]. In saying this, EW Law does not accept acts of bad faith[253]. The mechanism employed to prevent this is implied terms[254]. In the case of *Director General of Fair trading v. First National Bank Plc* the concept of good faith was defined as "…*an overarching concept of fair and open dealing requiring both procedural and substantive fairness in contracting…"*[255]. It was also stated in this case that the UK's Unfair Terms in Consumer Regulations 1999 enacts the concept of good faith. The Consumer Rights Act 2015 has replaced the Unfair Terms in Consumer Regulations 1999, which as illustrated in the case of *David, Barbara Abbott & Ors v RCI Europe*[256], the Consumer Rights Act 2015 continues to recognise the concept of good faith.

Where a contract confers a discretion to one of the contracting party's, which is wider than that necessary to protect their own legitimate interests, Courts in Common Law jurisdictions such as Australia and Canada examine whether the discretion exercised is consistent with that required to fairly and reasonably protect their interest. This is demonstrated in *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* [257], that there is a general obligation in Law that a party perform the obligations placed on it by the contract, despite there being a discretion to rescind the contract because such party was unwilling or unable to comply with the obligation. The basis of the Courts decisions was that such discretion should not be exercised in a capricious or arbitrary manner. The outcome has been that the Courts will construe such contractual powers in a way that requires consideration to be given to the interest of the other party. The approach is to ensure that powers conferred operate in line with the objective of the contract. Consequently, discretionary clauses, although aimed at protecting a

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[252] Mckendrick, *op cit*., n. 23, p. 542, records "…*While English contract law is influenced by notions of good faith, it does not, as yet recognize the existence off a doctrine of good faith…*"; M. Bridge, Doubting Good Faith (2005)11 NZBLQ 430, 450 "…*There is no general duty of good faith and fair dealing in English contract law and there is no reason why there should be…*"

[253] In EW Law this is defined as to act in a dishonest manner and not in the sense which European jurisdiction does – Director of Fair Trading v. First National Bank [2000] 1 WLR – Evans-Lombe J.

[254] Collins, *op cit*., n. 19; Mckendrick, *op cit*., n. 23, pp. 379-380.

[255] [2001] UKHL 52 [2002].

[256] [2016] EWHC 2602 (Ch).

[257](1972) 128 C.L.R. 529; Hoffens v Commercial Bank of Victoria Ltd (1980) 1 NZCPR 262.

party's interest, such clause should not be operated to undermine the reasonable expectations (profit to be achieved from the transaction) of the other[258].

An example is where the Employer discovers that an element of the design is deficient, say the depths of the drainage system which prevents the system from working in accordance with the design. The Employer should issue a corrected design as promptly as possible and not wait for the Contractor to give notice requesting such correction. If, as a result of the deficient design, the Contractor suffers a delay to delivery and incurs additional expense, then agreement for a new date and countervalue should be reached to remove the *gharar* that has infected the Contract.

Conversely, where the Employer is unaware of such deficiency the Contractor should notify the Employer promptly when discovering it, act to minimise the delay by detailing where changes in depth are required, change working methods or increase resources provided it does not cause financial harm to the Contractor. Such action removes the potential for *gharar* and *riba* to contaminate the contract.

The above circumstances demonstrate that where a contract is a contract of mutual obligations, such as a construction contract, then the desired outcome will not be achieved if either of the party's delay in performing its obligation.

By application of the good faith obligation of article 246(2) to the above principle, then neither party to a contract of mutual obligations will prevent the other from discharging its obligations. This includes where one party is dependent on the other for its performance, then such party will not delay in performing that obligation upon which the other is dependent.

This concept is supported by the following implied terms found in EW Law that:

[258] A.F. Mason, 'Contracts, Good Faith and Equitable Standards in Fair Dealing (2000) 116 (Jan), LQR 66-94.

"…*Where in a written agreement it appears that both parties have agreed that something should be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect…"*[259];

"…*There is an implied contract by each party that he will not do anything to prevent the other from performing a contract or delay him in performing it. I agree that generally such a term is by law imported into every contract*…"[260]; and

as stated by Devlin J. in *Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd*[261]

"…*I can think of no term that can be properly implied other than one based on the necessity for co-operation…The law can enforce co-operation only in a limited degree…to the extent it is necessary to make the contract workable*…"

This principle has been incorporated into UAE Law by article 247. This article allows either party, where one party is dependent on the other to perform an obligation, to refrain from performing their obligation if the other party is not performing theirs[262]. Hence, an aim of this article is to prevent a party acting in an unfair way where he delays performance of the other party.

The difficulty which arises in EW Law in the application of good faith is during negotiations in the formation of a contract. Such concept has been described as 'inherently repugnant' to the adversarial positions of the parties when involved in negotiations'[263]. The rationale argued is that: 1) parties should be free from any obligations until the contract comes into existence; 2) adversarial negotiations are fundamental to

[259] Atkins Chambers, *op cit.*, n. 19, pp. 96 Lord Blackburn Mackay v. Dick (1881) 6 A.C. 251.
[260] Vaughan Williams L.J. Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274.
[261] [1949] 2 All E.R. 1014.
[262] Dubai Court of Cassation Judgement #90/95.
[263] Lord Ackner – Walford v Miles [1992] 2 AC 128.

the contract formation; and 3) it is impossible to impose an alternative system[264].

This is despite the argument that transparent negotiations would serve the parties long-term interests[265] as this guarantees that both parties to the contract will achieve their planned benefit. This concept aligns itself with article 246(2), in that a primary obligation is for a structure to come into existence in the future to the expectations of the Employer. Hence, any withholding of requisite data by the Employer will prevent the Contractor from achieving this primary obligation of the contract and so neither party will achieve the equivalent benefits expected.

Consequently, during negotiations parties hold back information as their aim is to get something as cheap as possible at the expense of the other. Such an environment clearly encourages an immoral incentive for an unfair gain. This in turn leads to uncertainty as to what an obligation entails or pressure to agree to aleatory provisions. These circumstances clearly conflict with the prohibition test.

Such circumstance goes against the aim of the *gharar* prohibition of preventing an unfair gain caused by lack of knowledge as to what the Employer's expectations are for the thing that is to come into existence in the future. The result is that the parties' expectations will not be met which, if the financial loss is excessive, then a dispute will arise.

Deliberate Silence

An important aspect of UAE Law, as illustrated by article 186, UCC is that:

> '…*Deliberate silence concerning a fact or circumstance shall be treated as a misrepresentation if it is proved that the person*

[264] Cohen, Two Freedoms and the Contract to Negotiate in Good Faith and Fault in Contract Law (1995) 12 O.J.L.S.
[265] Hoskins H., Contractual obligations to negotiate in good faith; faithfulness to agree common purpose L.Q.R 131 2014.

misled thereby would not have made the contract had he been aware of that fact or circumstance…[266].

This is because *fiqh* views misrepresentation as a serious moral wrong, having a wider definition than that in EW Law[267].

Thus, negotiations shall be conducted in an honest and open manner, and in accordance with the principles of good faith in order to avoid speculation as to what an obligation fully entails. Consequently, the Employer has an obligation, pre-contract, to disclose circumstances that will affect the performance of an obligation.

By application of the prohibition test to ensure equivalence, it is clear that to prevent contravening the *gharar* prohibition an Employer, where negotiations are aimed at concluding a contract, should disclose all information so a Contractor may draw his own conclusion about whether it will affect the way he prices the work to be done. Otherwise, article 874 will be contravened and there will be an unfair gain of services or goods. Where there is not full disclosure, then there is potential for the Employer being in a position to exploit the Contractor because of an immoral incentive to gain an undue benefit. Such exploitation results in unfair profit and so the *riba* prohibition being contravened.

As EW Law allows parties to agree the obligations which derive from a contract of mutual obligations, subject to the parties being experienced and understanding what they are agreeing to, this allows *gharar* to be a characteristic of the contract[268]. Consequently, if one of the parties suffers a financial loss, then, as a result of speculating as to what it will cost to perform the obligation, he has no redress against the other party, unless misrepresentation can be demonstrated in accordance with the EW Misrepresentation Act 1967.

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[266] Article 186 provides - Deliberate silence concerning a fact or circumstance shall be treated as a misrepresentation if it is proved that the person misled thereby would not have made the contract had he been aware of that fact or circumstance - Whelan, *op cit.*, n. 6, p. 99.

[267] Rayner, *op cit.,* n. 2, pp. 205-206.

[268] Peel, *op cit*., n. 18, pp. 361-374.

The Misrepresentation Act gives the Courts the right to allow a party claiming misrepresentation to rescind the contract or treat the misrepresentation as a breach, entitling such party to damages in lieu of rescission. Rescission is a remedy allowed under EW Law in respect of all forms of misrepresentation, the aim of which is to restore the parties, as far as possible, to the position they were in before they entered into the contract[269].

If the party claiming misrepresentation is unable to satisfy the attributes to allow it to claim misrepresentation, then the party has to accept such loss. This being despite the party feeling aggrieved that it was misled during negotiations and should be reimbursed for losses suffered. Thus, unless:

1) The Courts can imply a term in Law or fact which re-balances the risk so that the loss made as a result of the speculative decision is to be reimbursed by the other party; or

2) The party with the advantage adopts a fair and reasonable approach and agrees to reimburse the losses suffered by the other party, the party suffering such loss has to accept it

Moreover, a disclaimer in the form of an exclusion of liability clause will not have any effect under UAE Law as it is in direct contradiction of article 52, unlike in EW Law.

As illustrated in this thesis, EW Law applies a number of methods to limit the effect of exclusion of liability clauses. These are namely:

1) The *contra proferentem* doctrine, which as illustrated under the commentary of article 266, is to control the protection of the party who relies on such a clause by identifying ambiguities in the text of the clause[270];

2) Implied terms, where courts are allowed to act as an unofficial legislator where there is a lack of definition as to which party is responsible for a risk that arises from a contract which places

[269] Mckendrick, *op cit*., n. 23, pp 678-679.

[270] Lewison *op cit*., n. 156, pp. 260-268; McKendrick, *op cit*., n. 23, pp. 446-460.

such risk upon the party most suited to control such risk[271]. This is further examined in Section 2.4 below; and

3) Strict interpretation of the application of such clauses[272] so they do not offend the rules against penalties/forfeiture, see subsections 2.3.2 and 2.3.4 below.

Article 249

Article 249 invokes the concept of *Al-Qūwat Al-Qāhira*, a similar concept of force majeure[273] or intervening contingencies[274]. If such circumstance occurs, the Contractor loses control over its obligations (the mode of performance is no longer possible) and *gharar* infects the contract. Where such circumstance causes unfair loss/harm as performance is impossible or has become unreasonably burdensome[275], threatening grave financial losses (a major delay to delivery occurs allowing the Employer to deduct damages), then *riba* will contaminate the contract.

The effect of either of these circumstances cause the equilibrium of the contract to be lost. Where this occurs the Court can, upon application from the party facing the financial losses, weighing up the interests of the parties, reduce the onerous obligation to a reasonable one, reinstating the balance of benefits.

The form the reinstatement can take is to allow the Contractor to be exempt from the obligation, or the period for delivery or countervalue being adjusted[276].

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[271] McKendrick, *op cit*., n. 23, pp. 337-402.

[272] McKendrick, *op cit*., n. 23, pp. 446-460.

[273] Amkhan A, (1991) 'Force Majeure and Impossibility of Performance in Arab Contract Law', (ALQ), pp. 297-308; Rayner, *op cit.*, n. 2, pp. 259-263.

[274] Amkhan A, (1994) 'The Effect of Change in Circumstances in Arab Contract Law', (ALQ), pp. 258-275. Both of these doctrines are accepted by the Maliki School.

[275] Whelan, *op cit.*, n. 6, UCC, Art. 273(1), provides that where *Al-Qūwat Al-Qāhira* intervenes when a corresponding obligation which makes performance impossible, the contract will be automatically cancelled; Art. 273(2) releases the Obligor from performance where the impossibility of performance is of a temporary nature, although the Obligee can cancel the contract by notice to the Obligor during the period of temporary impossibility. This circumstance would correspond to partial or full suspension of the Works.

[276] Rayner, *op cit.*, n. 5, pp. 259-261.

There are two alternative responses depending on how these intervening contingencies manifest:

1) Excuse that which applies to a contract where a time period is specified for performance, where such intervening contingencies render continuing performance harmful to the Contractor, e.g. mode of performance is no longer possible as a result of unforeseen physical obstruction which did not appear in the geotechnical reports, or from a misinterpretation of the same[277]; and

2) Disastrous event such as flooding, earthquakes or an epidemic that are considered acts of God.

An Employer's act that prevents the Contractor from building the structure, such as the suspending of the Works for an excessive period, would also fall within the ambit of excuse.

For the Contractor to claim that an obligation has become unreasonably burdensome he must: 1) demonstrate that the event was wholly unforeseeable, 2) a fundamental change has occurred, 3) the contract has become exceptionally onerous on the party discharging the obligation and so there is a duty to impose a reasonable solution[278].

An example of the above is where a change is enacted to migrant labour laws limiting the number of migrant workers a company can employ which occurs after signing the contract and there was no prior warning, then the obligation to meet the agreed delivery date will become speculative. The reason is that migrant workers establish what productivity a Contractor can achieve. If he cannot secure the planned level of migrant workers, the planned durations for executing construction activities will become impossible, resulting in *gharar* infecting delivery as there will be a significant increase in time needed to achieve delivery of the structure.

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[277] Rayner S, (1991) '*A note of Force Majeure*' in Islamic Law (ALQ), pp. 86-89.

[278] Amkhan, *op cit.,* n. 273; Amkhan, *op cit.,* n. 274.

This will cause the Contractor to incur excessive Site administrative costs by having to keep equipment needed to build the structure and supervisory staff on the project longer than planned[279], and by missing the stipulated delivery date, this will permit the Employer to claim damages for late delivery, thereby causing *riba* to pollute the contract.

As the effect of this new labour law would be the same for all construction contracts, Employers will lose the benefit of the use of the structure in the short term. However, they will eventually receive the planned benefit, whilst Contractors will not be able to recover the losses suffered. This will be an unfair gain of goods/services as Contractors have to remain at Site longer than planned. Hence, the Court has a duty to take account of the *gharar* that has infected the Contractor's obligations.

This can further lead to *riba* contaminating the contract as the Employer can deduct damages for late completion thereby allowing him to gain an excessive benefit[273].

The comparable principle with this article in EW Law is the doctrine of frustration that operates by discharging parties from further performance of a contract. For it to operate the following applies:

1) A fundamental assumption upon which the parties agreed the contract can no longer apply due to some unforeseen supervening event;
2) The frustrating event must not have been brought on by either of the parties;
3) Neither of the parties accepted responsibility for an unforeseen event through the contract; and
4) The event must make further performance impossible[280].

This fundamental assumption has been assessed as going to the root of the contract, as it is essential for the performance of the contract[281].

[279] Case #14 of the Syrian Court of Cassation 17/1/1981 ruled that sharp change in economic circumstances falls within the ambit of intervening contingencies.
[280] Atkins Chamber's *op cit.*, n. 19, pp. 65-67.

Lord Radcliffe recorded:

> *"… Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because of the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract… it was not this that I promised to do..."*[282]

However, the application of this doctrine in the context of a construction contract is limited as the party agreed contract provision generally provide for when an unanticipated event occurs.

In the absence of a contract provision that addresses such an event the Contractor would be liable to complete, despite any significant increase in cost as the Employer does not guarantee the practicality of the design nor the suitability of the Site[283]. This, as illustrated above, is a fundamental difference between UAE and EW Law.

This is also the case where the cost to perform the contract significantly increases due to an abnormal increase in prices. EW Law does not recognise the economic impracticability as fulfilling the requirement that performance is impossible[284].

As illustrated above, economic impracticability is recognised in UAE Law as Force Majeure. However, as demonstrated by the examples given, such economic impracticability must affect the construction industry as a whole[285].

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[281] Krell v Henry [1903] 2 K.B. 740.

[282] Davis Contractors Ltd v Fareham UDC [1956] A.C, 696.

[283] Atkins Chamber's *op cit.*, n. 19, pp. 65-67.

[284] British Movietonews Ltd v London & District Cinemas [1952] A.C. 166; Tennants (Lancashire) Ltd v C. S. Wilson & Co Ltd [1917] A.C. 495; Gold Group Properties Ltd v BDW Trading Ltd (2010) B.L.R. 235; The Nema [1982] A.C. 724; Tsakiroglou & Co. Ltd v Noblee Thorl GmBH [1962] A.C. 93.

[285] Whelan, *op cit.,* n. 6, art. 249.

1.3.4 The Construction of Contracts

Article 263

Article 263 expressly provides that a description of an absent thing shall have effect. Applying the prohibition test this article supports article 874 in that as a structure comes into existence in the future the Contractor has the right to rely on the description given by the Employer, otherwise *gharar* would be present[286].

Consequently, any lack of such definition which results in an aesthetic requirement or lack of performance not being satisfied falls to the Employer[287]. To prevent such instance article 246(2) obligates the Employer to rectify such deficiency in order to remove speculation as to countervalue and time for delivery.

Article 266

Article 266 provides that doubt will be interpreted in favour of the Obligor. Thus, where there is any speculation in the interpretation of the wording of the contract causing *gharar,* such doubt will be interpreted in favour of the Contractor.

An example in respect of a construction contract is where there is ambiguity in the interpretation as to which utilities are to be placed in the ground first because of a poorly drafted specification. Coupled to this, each utility is to be installed by different Contractors. Applying the requirements of article 246(2) and using the prohibition test, the Employer is obligated to state which utility will be first. This removes *gharar* in the form of speculation as to the mode of performance, i.e. form and type of lateral support required to prevent collapse of an excavation, method of excavation, machine or by manual labour etc., all of which negates speculation as to delivery and countervalue.

The aim of this article is to provide certainty in respect of work to be done or goods to be supplied by favouring the Contractor, and places

[286] Whelan, *op cit.,* n. 6, art. 263, commentary.
[287] Whelan, *op cit.*, n. 6, art. 263, commentary.

an obligation on the Employer to ensure that the design is meticulously prepared to avoid *gharar* infecting the contract.

The *contra proferentem* rule is comparable with the application of article 266 in EW Law. The rule is that where there is ambiguity in respect of a document where methods of interpretation have failed to clarify, then the words creating the ambiguity should be construed against the party relying on such wording[288]. Sedley L.J. described this not only as a principle in law but also of justice, as its aim is to limit the power of a dominant party who can adopt a take it or leave it approach[289].

Such statement is supported by Lord Mustill[290] who recorded:

> '*…the basis of the 'contra proferentem' principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not…*"

And Evans L.J.[291] who stated:

> "*…It is common ground that the rule of construction known as contra [proferentem] operates against the respondent for two reasons. First they only rely upon the clause to exclude or to limit the liability alleged against them, and, secondly, they were responsible for introducing during the negotiation process the particular parts of the clause on which they now rely…*'

The above extracts illustrate that the aim of the *contra proferentem* principle is to introduce equity into the construction and interpretation of a provision of which the aim is to protect the party who relies on its operation. The reason is that the provisions objective is to protect such

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[288] Furst & Ramsey, *op cit.*, n. 42, p. 61.

[289] Lewison *op c*it., n. 156, p. 261 - Association of British Travel Agents Ltd v British Airways Plc [2000] 2 All E.R. (Comm) 204; Johnson v Edgware Railway Co. (1866) 35 Bev. 480 – Romily M.R. recorded "*…It is to be observed, that all deeds are to be construed most strongly against the grantor…*"

[290] Lewison *op cit.*, n. 156, p. 262 – Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 B.L.C. 69.

[291] Lewison *op cit.*, n. 156, p. 264 – BHP Petroleum Ltd v British Steel Plc [2000] 2 Lloyds Rep 277.

party's interests by excluding it from being liable for an act that causes the other party harm.

Hence, there is a clear analogy between EW Law and *fiqh* on the basis of the application of this rule, as the aim in both jurisdictions is to ensure justice and so fairness by ensuring a balance of obligations by favouring the party to whom the ambiguity will do the most harm.

1.3.5 Means of Enforcement, Section 1 – Voluntary Execution

Article 354

Article 354 is express in its requirement that substitute performance is only allowed with the Employer's consent. The Contractor is obliged by article 338 to complete the structure as per the design[292]. Thus, variations to the design have to be instructed by the Employer. This is comparable with the Contractor's obligation in EW Law, as any variance to the design by the Contractor results in a breach of contract by the Contractor[293].

Without the right granted to the Employer by article 354 the Employer would not be able to revise the design, quality, quantity of work and mode of performance, and so time for delivery as time is a fundamental constituent of countervalue. Moreover, there would be no mechanism to remove *gharar* infecting the contract resulting from the Employer's deficient design, and so the Contract would be void.

Note, no liability can be placed on the Contractor where he misinterprets geological surveys, as by application of the prohibition test this allows *gharar* to infect the contract. This is illustrated by the following analogy. If a man is blindfolded before he is allowed to cross the road, his ability to control when he crosses the road is removed. Thus, if a Contractor is not to dig up services buried in the ground, without data to indicate where such services are he has no control over how he is to prevent digging them up.

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[292] Whelan, *op cit.,* n. 6, art. 338 provides - A right must be satisfied when it satisfies the legal provisions rendering it due for performance, and if an obligor fails [to perform an obligation], it must be compulsorily enforced either by way of specific performance or by way of compensation in accordance with the provisions of the law - Whelan, *op cit.*, n. 6, Arts. 380-387.

[293] Atkins Chambers, *op cit.*, n. 19, p. 783.

1.3.6 Means of Enforcement, Section 2 – Compulsory Enforcement

Articles 380, 386 and 387

Article 380(1) is clear in that it gives a right to a party to give notice to the other party to compel that party to perform where it is failing to do so[294].

Article 386 obliges the defaulting party to pay compensation. However, where the defaulting party can demonstrate that it was impossible to perform an obligation, or that a delay in giving such performance was through some external cause in which they played no part[295], then the non-performing party will not be liable to the other.

Article 387 provides that an injured party may claim compensation provided a notice has been issued under article 380[296].

For a party to demonstrate that performance is impossible or delayed due to *gharar* infecting the contract through an external cause, the following criteria have to be satisfied[297]:

1) The cause was unforeseeable at the time of signing the contract. The measure to illustrate this being that a diligent man, when entering into a contract would have foreseen the impossibility/delay of performance. This obligation is not absolute[298]; and
2) The cause was unavoidable in that the party must be able to demonstrate that all steps were taken to prevent the occurrence of the event or its consequences.

An example of an external cause delaying the performance of the Contractor, in which he played no part whilst satisfying these criteria, is that the Employer's initial design was deficient at the time of contracting. The Employer failed to meet its obligations under articles

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[294] Whelan, *op cit.*, n. 6, - Commentary on the UCC in respect of this article which states that the obligee has the right to demand performance of an obligation where it is in the bounds of possibility and the obligor has the right to discharge the obligation. There is no right for substitution of performance unless the parties agree on such a substitution.

[295] The basis of this right being derived from the Shari'a doctrine that Allah imposes upon no person more than he can do, Whelan, *op cit.,* n. 6, commentary on Art. 386.

[296] Dubai Court of Cassation Judgment No. 13/99.

[297] Amkhan, *op cit.,* n. 273; Amkhan, *op cit.,* n. 274.

[298] Amkhan, *op cit.,* n. 273; Amkhan, *op cit.,* n. 274.

202, 203 and 874 to provide a complete design so as not to allow *gharar* to infect the mode of performance, period of delivery and so countervalue.

As illustrated by article 354, only the Employer has the right to vary the design. Hence, any delay in correcting the design by the Employer will in turn increase the level of *gharar* infecting the said attributes. Coupled to this, where the corrected design causes the Contractor to do additional/extra work or changes the mode of performance, again the level of *gharar* will increase these attributes.

1.3.7 Extinguishment of Rights, Section 1 - Discharge

Articles 472, 476, 487 and 95 LCT are the relevant articles that are considered to apply to a construction contract.

Article 472 - Impossibility of performance

Article 472 is clear in its requirements in that the Obligee will be released from performance of an obligation where he proves it has become impossible due to an external cause. Hence, if an Employer instructs the Contractor to suspend work whilst he revises the design and attempts to arrange additional financing, but fails to instruct the Contractor to re-start work, then delivery will be impossible.

In such a case, by application of the prohibition test, the Contractor has the right to be released from performance. The exercising of this right negates *gharar* in the form of the Contractor having to retain resources at the Site, despite not providing any benefit to the Employer caused by the uncertainty as to whether the structure will come into existence. It will also prevent contravening the *riba* prohibition as the Employer will be unable to apply damages for late delivery.

Articles 476, 482, 486 487 and 95 LCT - Compulsory period within which to make a Claim

An important aspect of UAE Law is that it sets out mandatory periods in which parties can make a claim against the other. This right is subject to the requirements of articles 380(1), 386 and 387, above.

Where the construction contract is of a civil nature, i.e., one of the party's to the contract is a private individual or a government body, then article 476, UCC gives parties the right to make a claim within two (2) years[299]. Where the contract is of a commercial nature, i.e. both parties are companies, then article 95, LCT extends the right to ten (10) years. The point from which time starts to run in respect of article 476, UCC and 95, LCT is the date from which the right became due,

[299] Whelan, *op cit.*, n. 6, Art 476.

with the period being measured in days, with the first day not being included in the calculation, but inclusive of the last day.

Article 486 provides that a right is barred once the specified time for making such claim has expired. Article 487 provides that parties are not allowed to agree a different time period for a party to make a claim other than that stated in Law.

1.4 Methods applied to confirm the interpretation of the English translation of the UCC

This section examines the accuracy of translations upon which the analysis set out in this thesis was verified. The process adopted was to compare texts of injunctions in the Qur'an quoted in the literature examined to identify consistency of the meaning of the text. It should be noted that many of the authors of the literature examined are Arab. Where differences in wording were found, the translations were carefully examined by applying different meanings to words used, taking cognizance of the context of the words being applied to identify whether there were any fundamental differences in what the text was conveying to the reader; no such differences were found.

The approach adopted to examine the text where books/articles quoted a particular Jurist's doctrine, was that consideration was given to the meaning of the words applied in the text to ensure the point(s) they were making were consistent with other author's views. For example, in the translation of Ibn Rushd's definition of a *gharar* sale as recorded at page 179 in his book *Bidāyat al-Mujiahid II*, *the Book of Sale, '24.2.5 Chapter 3: Sales Proscribed on Account of Misappropriation* the Cause of which is *Gharar*', the aim was to demonstrate that where the characteristics of the subject matter was wanting and/or the quantity, quality was lacking, and/or there was any obstacles to delivery of the subject matter, then *gharar* is present in the contract resulting in misappropriation. Nabil Saleh in his book '*Unlawful Gain and Legitimate Profit in Islamic Law*' at page 52; Nayla Comair-Obeid in her book '*The Law of Business Contracts in the Middle East*', page 58; Susan Rayner at page 289 in her book '*The Theory of Contracts in Islamic Law'*; and Noel Coulson at page 44 in his book '*Commercial Law in the Gulf States*' all describe the same circumstances as that stated in the text of Ibn Rushd's book.

This same process was applied to confirm the translation provided by Mahdi Zaraa and Shafaai M Mahmor's translation in their article '*The Validity of Contracts when the Goods are not yet in Existence in the Islamic Law of Sale of Goods*' to Ibn Juzayy's definition of a *gharar* sale.

This translation was analogous with translations given by Nayla Comair-Obeid at page 58 of her book, page 51 of Nabil Saleh's book, and again Susan Rayner's description of this text at page 289 of her book.

In respect of the UCC, Whelan first translated this Code in 1987 with the assistance of Essam Al Tamimi, a prominent lawyer in Dubai, and Dr. Hassan Alloub, a former Judge, which was published by Graham and Trotham[300]. This became the customary reference book used by legal and claims practitioners in the construction industry in the UAE up until Whelan published his new translation[301].

The problem with the first translation was that without having knowledge of the underlying doctrines, little sense could be made of the articles, this being illustrated by the text of the Preface in Whelan's new translation. This records that at the time of the first translation the Ministry of Justice Commentary on the Civil Code had not been published, with only a few judgements being available from the Federal Court of Cassation and the Dubai Court of Cassation as to how the articles of the Law applied. Thus, Whelan felt that a new translation was needed.

Despite this, to confirm the accuracy of this improved translation of the UCC, a comparison of the text was made with the text of the translation prepared by Daoud A. Abdo PhD, Professor of Linguistics which was published in Amman, Jordan in 1995[302] to ensure that the aim of the articles of the UCC were consistent.

Whelan's translation of the UCC includes a translation of the Ministry of Justice Commentary on the Civil Code, which explains how the articles of the Law are to be interpreted and applied. These explanations make reference to articles in the Majallah el-Ahkam-I-Adliya (Mejelle), the Civil Code of the Ottoman Empire, to assist in the interpreting and application of the articles of the UCC. Translations of articles cited from the Mejelle were compared with translations of the Mejelle in the Arab

[300] Under the title Business Laws of the United Arab Emirates Volume III, ISBN 0 86010 860 0.

[301] Copies of extracts from this book was provided to the author by Alqari Advocates & Legal Consultants of Dubai, Galadari Pinsent Masons, Al Tamimi & Company.

[302] National Library, Amman – Jordan 399/4/1995.

Law Quarterly (ALQ) and those prepared by Tyser, Demetriates and Effendi to ensure the meaning of these articles were consistent. This process allowed the author to verify that the intent of the articles of the UCC being examined was accurate.

An example of how this comparison was undertaken is presented below in respect of article 203(1), UCC. To identify which translations are being examined the following references have been applied: Whelan's translation (WT), Professor Abdo (AT), ALQ's translation of the Mejelle (AM) and Tyser, Demetriates and Effendi's translation (TDE).

For example, the text of the translation of article 203(1) UCC was examined. The text was typed, starting with AT's translation which provides '…*The object of a compensatory contract* (i.e. to give money or something else of value to (someone) in return for something (such as work)[303]) *shall be specifically designated in a manner beyond all doubt…by describing its main characteristics, and by showing its amount if it is assessable (*quantifiable, measureable*) or in any other manner that eliminates sheer ignorance*…' WT's translation provides '…*In commutative contracts* (the price paid is the equivalent of the goods/work provided) *involving property the subject matter must be specified in such a way as to avoid gross uncertainty…by a statement of its distinguishing characteristic, and the amount thereof must be stated if it is measurable property of the like, in such a manner as avoids gross uncertainty*…'

Although there are differences in the text of the two translations, the aim of the article is the same. In that where the subject matter of a contract is where one party pays another for goods/work, then the specific characteristics of the subject matter must be described. This includes the amount of the goods/work to be done in a manner to avoid complete ignorance or gross uncertainty of the subject matter so that the consideration paid reflects the true value of the subject matter of the exchange.

[303] Merriam-Webster Dictionary online.

WT's translation of the Ministry of Justice Commentary on the Civil Code reveals that the reason for this is in order to prevent a dispute arising from the contract caused by one of the parties feeling they have been deceived. Thus, where the subject matter is impossible to specify, or work done cannot be accurately estimated or is partly undetermined, then the contract is void. The Ministry of Justice Commentary on the Civil Code makes reference to articles 200-304 of the Mejelle.

From an examination of these articles from the translations of AM and TDE, it was seen that articles 200 to 251 and 262 to 292 are relevant to a construction contract as they specify, including examples of the prerequisites to be satisfied for the following elements that create a valid contract, the subject matter, price and delivery.

It was again found that although the wording of these translations were different, the objective of them was consistent. An example of this being in respect of a thing being sold. The parties must know the subject matter by referring to its state or qualities of its state and a description, which distinguishes it from other things. This is illustrated by the translation of article 201 which AM provides '…*The fact that the thing sold is known is ascertained by referring to its state and description which distinguish it from other things*…' whilst TDE provides '…*The thing sold becomes known by a description of its qualities and state, distinguish it from other things*…'.

Articles which require the essential elements to be described must be satisfied. The term 'Price' is selected as an example. The articles state the way the price is to be ascertained is from the description of the thing being sold. Thus, if the thing is measurable then this will be a basis of calculating the price, and the price has to be stated in the agreement. Where payment is to be by instalments the period has to be stated.

By applying the above process it was found that although texts of translations are different, the aim being conveyed is consistent. A benefit of this approach was that when applying different meanings to words used to translate a text, taking account of the context in which

such words were applied, particularly where the authors were ‘of Arabic origin’, gave a clear understanding of the depth and scope as to the objective of an injunction, the doctrines developed by Jurists from such injunctions, and so how the articles of the UCC would apply to a construction contract.

Part 2 – *Gharar,riba* and the influence of English Law

2.1 Introduction

Part 2 examines the effect EW Law has on construction contracts in the Emirate of Dubai, and the difference in the application of good faith in EW and UAE Law. It also demonstrates that notice and discretionary clauses, when applied taking account of the current approach of such provisions in EW Law, conflict with the aim of the *gharar* and *riba* prohibitions.

This section also establishes there are two contractual approaches in EW Law that operate in a manner that adheres closely to the notion of good faith, these are:

1) Parties' expectations: Parties, whilst protecting their interests, should not operate contractual provisions which favour them in a manner which is detrimental to the other; and
2) Construction contracts have been classified as relational contracts because their aim is to achieve a common goal for the successful completion of a structure. To achieve this it is a prerequisite that parties have a high level of cooperation. Such cooperation requires that notice and discretionary clauses be operated in a manner that allows each party to realise the anticipated profit they expect from the bargain.

These two forms of contractual approaches have strong similarities as to how UAE Law requires parties to perform a contract of mutual obligation.

2.2 EW Law and Construction Contracts in the Emirate of Dubai

As stated in the Preamble, the most common standard form of construction contract which Employers used for procuring a construction project when this research was carried out was FIDIC99. This contract is specifically for use with both M&V and LS Contracts.

Although FIDIC99 is available in the Arabic language, Employer's - Government, parastatal and the private sector use the English language version with the governing language being English[304]. Arabic is only used for specific elements such as the Agreement, with the applicable Law being that of the UAE[305], which in turn determines the validity and enforceability of the contract provisions[306].

This is put down to the dominance of American and British project management companies (PMC's) (AECOM, Hyder, KEO, Halcrow, PARSONS, Parsons-Brinckerhoff, Arups, Hill International, Faith and Gould etc.), in the Gulf States which administer the projects, with many of the professionals engaged by these PMC's being British who do not speak or read Arabic. There are a number of books in the English language that provide commentaries as to how the relevant clauses, contained in FIDIC99, operate in EW Law when a Contractor claims a right to be granted an extension of time to complete and additional payment, some of these are referenced in this thesis.

Consequently, parties wishing to understand their rights and obligations rely on the interpretations provided in such books. This being despite such interpretation being derived from EW case Law, i.e. Law created by man unlike that of Shari'a, Law as preordained by Allah, and the provisions of the contract stating that the Law governing the contract is that of the UAE.

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[304] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, p. 48 the purpose is to avoid difficulties translating legal and technical principles which can effect parties rights/obligations.

[305] Roads and Transport Authority of Dubai Standard Form of Construction Contract (2006); Emaar Standard Form of Construction Contract; Dubai Municipality Conditions of Contract for Works of Civil Engineering Construction: Dubai Properties PSJC Conditions of Contract.

[306] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, p. 47; Ballantyne records that there is a lamentable, if understandable, ignorance, even an aversion to the Shari'a among Western Lawyers *op cit*., n. 2.

For this reason it was concluded, as illustrated in the Preamble, that there has been a lack of interest in the West to understand *fiqh.* Consequently, there is a lack of literature in the English language which explains how the nominate contract system, used by Jurists operates. This in turn has led to a lack of understanding as to how the principles of *fiqh* apply to a contract for a thing that comes into existence in the future. The books referenced in this thesis demonstrates this.

In saying this there are a number of English translations of the Majallah el-Ahkam-I-Adliya (the Mejelle), the Islamic Civil Code of Law of the Ottoman Empire, as promulgated in 1869, which codifies the doctrines of *fiqh*. As demonstrated in section 1.4 above, this Legislation is a principal reference point for the Ministry of Justice Commentary on the UCC. This codified Law was introduced to the Gulf States by the Ottoman Empire during the nineteenth century[307]. However, from the author's experience, knowledge of the existence of this legislation and the importance it plays in the construction, understanding and interpretation of the articles of the UCC and nominate contracts as obligated by Islamic Sharī'a is virtually non-existent. It is clear when reading the Mejelle that a background knowledge of Islamic Sharī'a is required to understand this legislation. Once such understanding is gained, it is clear that the aim of this legislation is to ensure transactions entered into by Muslims are Islamic compliant.

The consequence of the above is that 'professionals' in the construction industry, and so Employers and Contractors, have an inadequate knowledge of the governing Law as derived from the Holy Law of Islam which applies to their contract.

Hence, parties are failing to understand the obligations placed on them by the UCC in the construction, interpretation and application of contract provisions when discharging their rights and obligations that arise from a construction contract.

[307] Tyser, Demetriades and Effendi, *op cit*., n. 151, Foreword to this edition pages v to vii.

This is particularly important, as illustrated in subsection 1.1.2 and section 1.3 in respect of provisions that exempts, or limits the Employer's liability for a breach that is the accepted approach, at present, under EW Law.

The method by which such provisions operate in EW Law is by limiting the time to give notice for the breach, or by allowing the defaulting party to decide the compensation due to the injured party. Section 2.3 establishes how these provisions operate and how they disobey the *gharar* and *riba* prohibitions as proposed by the author.

2.2.1 Methods adopted in the Emirate of Dubai to resolve disputes

The approach adopted is to present detailed claims demonstrating the legal entitlement, cause, effect and additional payment required.

The process that then follows is:

1) Negotiations between the parties directly or through intermediaries. This can be in the form of informal or formal mediation to find alternatives in lieu of strict contractual solutions. The outcome is generally the Employer will not deduct damages if the Contractor forgoes additional payment for the additional time required to complete but all additional work is paid. It can also involve the Employer negotiating with the Contractor for a new contract.

2) Expert determination - one of the party's, generally the Contractor as he wants to recover his losses, proposes to the Employer to agree to appoint such expert. If the Employer accepts then an expert is jointly selected and appointed by the parties. The expert will work either alone, or with the assistance of further experts to address delay analysis and quantum as well as contractual points. The difficulty is that the Employer will generally not make any pre-agreement to accept the expert's determination.

3) If the dispute is in respect of a government project, then prior to any formal dispute process being pursued the Contractor has to submit a copy of its statement of claim to the Ruler's Court for examination. This allows the Government to discuss the matter with the Government department which the Contractor has the dispute with. This can result in the Ruler's Court negotiating a settlement. Alternatively, the Ruler's Court may consent to the Contractor moving forward with the formal dispute process set out in the contract.

4) Arbitration has become the main process for formally dealing with a dispute in Dubai as illustrated in the Preamble. The primary institution used is Dubai International Arbitration Centre,

although the International Chamber of Commerce (ICC) is present. The award is subject to the Court of First Instance's approval to ensure all procedural requirements have been properly performed[308]. Once approved compensation can be recovered. If the party whom the award is against fails to pay, then the award is placed with the Court of Execution and payment is recovered through the bailiff. To keep the matter private, parties tend to honour the award to prevent the dispute becoming public knowledge.

5) The Courts - the procedure here is to refer the matter to the Court of First Instance. All submissions have to be translated into Arabic. The Judge will nearly always appoint an expert to evaluate the claim whilst the Judge considers the legal arguments. The process can take a number of hearings with all oral evidence having to be translated into Arabic. Either party can appeal to the Court of Appeal. This is limited to document submissions and is based on either party disagreeing with the Court of First Instance's Judgement. The highest Court in Dubai is the Court of Cassation and only deals with points of Law.

[308] Dubai Cassation Judgement 165/966.

2.3 Application of notice and discretionary clauses

This section examines the construction, understanding and interpretation of notice and discretionary clauses that exclude or limit the Employer's liability for a breach of contract in EW and UAE Law. This analysis demonstrates the difference in the rights associated with operating these types of clauses in the two jurisdictions.

To put this examination into context, the relevant provisions of FIDIC99 were analysed as an example. The primary clauses in FIDIC99 are Sub-Clause 20.1 and Sub-Clause 3.5. Although their aim is argued to be to protect the Employer's interest, their construction can operate in an opportunistic way towards the Contractor.

Other discretionary clauses in FIDIC99 that give the right to the Employer to decide quality, increase the Contractor's scope of work, and whether a future contingency is the responsibility of the Contractor. These are examined in section 4.4 below.

Sub-Clauses 20.1 and 3.5 operate in conjunction with each other, in that if the Contractor has suffered a delay, which the Employer is responsible for, the Contractor is obligated to give notice under Sub-Clause 20.1. If the Contractor satisfies the obligations set out in this clause and the Engineer acknowledges the same, then Sub-Clause 3.5 obligates the parties, through negotiation, to compensate the Contractor in the form of additional time to complete and/or additional payment[309].

Thus, this section examines and establishes in:

Subsection 2.3.1 - **EW Law - notice clauses and the prevention principle** – the operation of a clause limiting the time a Contractor has to notify the Engineer of an Employer's delay event in EW Law, excluding the Employer from liability, is a rule of construction;

[309] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, pp. 329-330; Glover & Hughes, *op cit.,* n. 43, pp. 378-379; Totterdill, *op cit.,* n. 43, p. 239; Bunni, *op cit.,* n. 43, p. 525.

Subsection 2.3.2 - **Notice or exclusion of liability clause** - by applying the principles of EW Law that determines if a clause that enforces a strict timeframe for the Contractor to issue notice should be classed as an exemption of liability clause;

Subsection - 2.3.3 - **EW Law and Discretionary Clauses** the Employer's right, through a discretionary clause that allows the Engineer to decide the Contractor's rights, can operate as an exemption clause in favour of the Employer;

Subsection - 2.3.4 - **Discretionary or exclusion of liability clause** – by applying the principles of EW Law that determines if a clause which gives the right to the Engineer to decide the compensation due to the Contractor should be classed as an exemption clause; and

Subsection 2.3.5 - **Conflict with *gharar* and *riba* prohibitions** – as notice and discretionary clauses operate to exclude an Employer's liability towards a Contractor, they are aleatory in nature and so contravene the author's proposed definitions for the *gharar* and *riba* prohibitions.

2.3.1 EW Law - notice clauses and the prevention principle

Where the Employer prevents the Contractor from meeting the delivery date, in EW Law the Employer cannot insist that the Contractor meet the stipulated delivery date[310]. Where this occurs, the date for completion is termed "at large". In this situation, the Contractor is obligated to deliver the structure within a reasonable time[311]. This doctrine is referred to as the prevention principle in EW Law[312].

In such circumstances the Employer loses its right to deduct damages for late delivery as there is no date from which the liquidated damages provision can operate[313]. This is a primary reason for the inclusion of an extension of time provision in construction contracts in EW Law. The rationale is twofold: 1) to allow the Contractor relief from damages for not meeting the delivery date; and 2) to create a new date for delivery to reactivate the damages provision.

For the Contractor to gain the right to have the delivery period extended, he is obligated to notify the Engineer when the Employer commits an act that delays delivery. The Contractor, to have the right to claim additional payment associated with the delay or for some other reason, must again give notice to the Engineer.

Sub-Clause 20.1[314] FIDIC99 obligates the Contractor to issue a notice to the Engineer within 28 days where the Contractor considers that an

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310 Winser, C Shutting Pandora's Box: The Prevention Principle After Multiplex v Honeywell (2007) 23 Const. L.J. 511.

311 Holmes v Guppy (1838) 3 M. & W. 387; Trollope & Colls v NW Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601 HL Lord Denning M.R. "*…it is well settled that in building contracts, when there is a stipulation for work to be done in a limited time, if one party his conduct – which may be quite legitimate conduct…renders it impossible or impracticable for the other party to do the work within the stipulated time, then the one whose conduct caused the trouble can no longer insist on strict adherence to the time stated…*"; Peak Construction (Liverpool) v McKinney Foundations Ltd (1970) 1 B.L.R. 114; Dodd v Churton [1897] 1 Q.B. 562; Atkins Chambers, *op cit.*, n. 19, pp. 893-904.

312 Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 43, pp. 415-416; Atkins Chambers, *op cit.*, n. 19, pp. 893-904.

313 Article 186 provides - Deliberate silence concerning a fact or circumstance shall be treated as a misrepresentation if it is proved that the person misled thereby would not have made the contract had he been aware of that fact or circumstance - Whelan, *op cit.*, n. 6, p. 99.

314 Sub-Clause 20.1 states "*…If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions of otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the Event or circumstance. If the Contractor fails to give notice of claim within such period of 28 days, the Time for Completion shall not*

Employer has failed to perform an obligation which impedes the Contractor's mode of performance, delaying delivery of the Works; and/or where the Contractor claims an increase to the contract price.

If the Contractor fails to issue such notice within the 28-day timeframe, then he forfeits all rights to any additional time needed for delivery and any right for additional payment[315].

Employer's delay events, or as they are termed Employer Risk Events (ERE), are set out in Sub-Clause 8.4, FIDIC99[316]. The definition of such events is very broad, with the aim to cover all future contingencies to ensure that every possible form of ERE falls within Sub-Clause 8.4, otherwise the "time at large" doctrine will apply[317]. This is demonstrated by the form that the ERE's take, these are the issuing of a variation; any cause of delay as specified in any other provisions of FIDIC99[318]; exceptional adverse climate conditions; unforeseeable shortages of personnel or goods caused by an epidemic or government actions; and any delay caused by the Employer or his agents.

The inclusion of such provisions illustrate that it is in the contemplation of the parties that some future contingency will possibly delay delivery, and/or increase the contract price. This makes *gharar* intrinsic to the contract as there is speculation in that there could be obstacles to delivery and so the characteristics of price.

The rationale for obligating the Contractor to notify the Engineer of an ERE is so the Engineer can investigate how such an event manifested.

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be extended, the Contractor shall not be entitled to additional payment, and the Employer will be discharged from all liability in connection with the claim..."

315 Atkins Chambers *op cit.*, n. 19, pp. 904-910; Baker, Mellors, Chambers, Lavers, *op cit*., n. 42, pp. 320-323; Glover & Hughes, *op cit.,* n. 43, pp. 377-378; Totterdill, *op cit.,* n. 43, p. 238.

316 Baker, Mellors, Chambers, Lavers, *op cit*., n. 43 pp. 294-300; Glover & Hughes, *op cit.,* n. 43, p.74; Totterdill, *op cit.,* n. 43 pp. 145-148;

317 Hoskins*, op cit.*, n. 265 & 313.

318 Sub-Clause 1.9 - Delayed Drawings or Instructions; Sub-Clause 2.1; Sub-Clause 4.7 – Setting Out; Sub-Clause 4.12 - Unforeseeable Physical Conditions; Sub-Clause 4.24 – Fossils; Sub-Clause 7.4 – Testing; Sub-Clause 8.5 – Delays by Statutory Authorities; Sub-Clause 8.8 – Suspension; Sub-Clause 10.3 – Interference with Tests on Completion; Sub-Clause 10.2 Taking Over Parts of the Works; Sub-Clause 13.7 – Adjustment for Changes in Legislation; Sub-Clause 16.1 – Contractor's Entitlement to Suspend Work; Exceptional adverse climatic conditions and Sub-Clauses 19.2 and 19.4 – Notice of Force Majeure - FIDIC99; Totterdill, *op cit.,* n. 43, pp. 145-148; Glover & Hughes, *op cit.,* n. 43, pp. 194-195; Baker, Mellors, Chambers, Lavers, *op cit*., n. 42, pp. 460-464.

This allows the Employer to effectively manage time, cost, and other contractual requirements associated with the ERE[319].

This can include the Employer issuing a variation which addresses the ERE[320]. The procedure for this is set out under specific Sub-Clauses of FIDIC99[321]. The Employer, by doing this avoids delaying the Contractor and protects its right to deduct damages. If the Employer fails to issue such directive and the Contractor incurs a delay, he has to complete within a reasonable time[322].

Such investigation also allows the Employer to understand the type and level of compensation claimed by the Contractor[323].

In *City Inn Ltd v. Shepherd Construction Ltd*[324] it was held that failure by the Contractor to give notice, where it was a provision precedent, barred the Contractor from its right to additional time to complete.

In the cases of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2)*[325] and *Steria v Sigma Wireless Communications Ltd*[326], the prevention principle was described as a rule of construction. The rule is that the Employer and Contractor can agree an express provision to address where an Employer's act prevents delivery and causes the Contractor to suffer additional expense. If the provision obligates the Contractor to issue notice of the Employer's preventative act to the Employer within a timeframe specified and the Contractor fails to do so, then the prevention principle will no longer have effect.

The Judge in *Steria v Sigma Wireless Communications Ltd* stated in support of the Contractor's obligation to abide by a notice that:

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319 Baker, Mellors, Chambers, Lavers, *op cit*., n. 42, p. 307; Totterdill, *op cit.,* n. 43, p. 239; Atkins Chambers *op cit.*, n. 19, p. 527.

320 Atkins Chambers *op cit.*, n. 19, p. 527; Baker, Mellors, Chambers, Lavers, *op cit.*, n. 42, p. 317.

321 Sub-Clauses 1.9, 2.1, 4.7, 4.12, 4.24, 7.4, 8.4, 8.5, 8.9, 10.3, 16.1, 13.7, and 19.4; Baker, Mellors, Chambers, Lavers, *op cit*., n. 42 pp. 294-300; Glover & Hughes, *op cit.,* n. 42, pp. 194-195; Totterdill, *op cit.,* n. 43, p. 146.

322 Hoskins**,** *op cit*., n. 265.

323 Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 294-298; Glover & Hughes, *op cit.,* n. 43, pp. 65-67; Totterdill, *op cit.,* n. 43, p. 96.

324 2003 SLT 885.

325 [2007] EWHC 447 (TCC); [2007] B.L.R. 195.

326 [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC).

> "…*one can see the commercial absurdity of an argument which would result in the contractor being better off by deliberately failing to comply with a notice condition than by complying with it*…"

Hence, a notice clause can be described in a commercial sense as an agreement between two parties to protect their interests, and to apportion risks as they see fit[327].

It was also stated in *Steria v Sigma Wireless Communications Ltd*:

> "…*The Employer's entitlement to damages, it might be said, was caused not by the delay but by the delay coupled with the contractor's failure to satisfy the condition precedent*…"

This approach for the interpretation and application of a notice condition was reflected in a number of subsequent cases[328].

The effect of this provision was that the Contractor, by failing to issue notice within the specified timeframe, loses **all** rights for compensation associated with the delay incurred[329], and an increase to the contract sum thereby allowing *riba* to be present in the contract.

Sub-Clause 20.1 can therefore be construed as a clause aimed at excluding a party's liability for a breach of specific aspects of an obligation(s). Thus, it can be argued that such provision falls within the second distinct type of protective (exemption or exclusion) clause as cited by Donaldson J. in *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd*[330].

When considered in this light Sub-Clause 20.1 is subject to the principles which EW Law applies to exemption clauses, which include

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[327] Lewison *op cit*., n. 156, p. 447 - Tradigran SA v Intertek Testing Services (ITS) Canada Ltd [2007] I C.L.C 188 ; Peel *op cit*., n. 18, pp. 238 -239.

[328] Turner Corporation Ltd v Co-ordinated Industries Ltd (1997) 13 BCT 378; Turner Corporation Ltd v Austotel (Pty) Ltd (1995) 11 B.C.L. 202; Décor Ceiling Pty Ltd v Cox Construction Pty Ltd (no.2) [2006] CILL (March) p. 2311; Group Five Building Ltd v Ministry of Community Development [1996] 3 S.A. 629; Hsin Chong Construction (Asia) Ltd v Henble Ltd [2006] HKCU 1397; see commentary in Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 320-322.

[329] Atkins Chambers, *op cit.,* n. 19, pp. 907-909; Glover, & Hughes, *op cit.,* n. 43, p. 376; Furst & Ramsey *op cit*., n. 42, p. 307.

[330] [1971] 1 W.L.R, 519.

the application of the *contra proferentem* rule and to a stricter form of interpretation. This is discussed in the next subsection 2.3.2 below.

2.3.2 Notice or exclusion of liability clause

The analysis under subsection 2.3.1 demonstrates the present status of a notice clause in its application in a construction contract under EW Law, that is, if the Contractor fails in its obligation to issue notice within the specified timeframe it will lose its right to compensation.

This subsection examines the principles in EW Law which determine if such a clause should be classed as an exclusion of liability clause in Law, or through current legislation such as the Unfair Contract Terms Act 1977 (UCTA); and the doctrines of the *gharar* and *riba* prohibitions to see if there are similarities between such EW Law principles. It also considers the construction that such a clause shall take to give effect to the party seeking exclusion from liability.

The rulings in *City Inn Ltd, of Multiplex Constructions (UK) Ltd and Steria* was that due to the Contractor failing to give timely notice to the Employer of an Employer's breach the Courts accepted, *prima facie*, that the Contractor was responsible for the Employer's act of prevention. This was despite the Contractor, under the prevention principle, having a right to compensation.

Accepting that the Contractor, as the party obligated to building the structure should be responsible for determining whether the Employer's act of prevention will delay delivery, therefore it is his decision when to issue a notice[331]. Thus, any delay in issuing could prejudice the Employer's rights. However, this argument is limited in its application for two reasons: 1) the timing of the ERE; and (2) the form and extent of the ERE makes it apparent as to whether or not a delay to delivery will be suffered.

To demonstrate this point an instruction to vary the partitioning layout issued well before work was to be carried out might not necessarily result in a delay. The reason is that the Contractor has the ability to manage (mitigate) the change but it may result in additional payment. Whereas, if such variation was issued when the partitioning works were

[331] City Inn Ltd V Shepherd Construction Ltd [2003] S.L.T. 885; East Ham Corporation v. Bernard Sunley & Sons Ltd (1965).

well advanced, then a delay to completion will be incurred. A similar situation is that of, where the Employer fails to hand-over the Site at commencement, and where the Employer fails to issue instructions in a timely manner so as to correct a deficient design.

Thus, in the circumstance where it is obvious that the ERE will delay delivery, then the Employer, through his agent, has the ability to evaluate the delay to delivery associated with the ERE. Vinelott J. demonstrates this in *Hugh Stanley Leach v London Borough of Merton*[332].

A construction contract is a contract of mutual obligations, so delivery of the structure is dependent on the parties performing their obligations in a timely manner so neither party prevents the performance of the other. Lord Blackburn[333] and Vaughan Williams L.J.[334] demonstrate this.

A provision such as Sub-Clause 20.1, FIDIC99, aimed at releasing an Employer from liability due to the Contractor failing to give timely notification to the Employer of the Employer's act of prevention for which the Contractor has a right in Law, as illustrated by the prevention principle, then such clause is in fact an exemption clause.

In the circumstance where the liability excluded is to compensate for delaying the Contractor's performance, then the liability excluded is for a breach of contract that goes to the root of the contract. This is demonstrated by *Wells v Army & Navy Co-operative Society*[335] which recorded that not only is the Contractor to do the work within the agreed time, but he is also entitled to have such time in which to do the work.

The loss by the Contractor of his right to claim additional time to delivery effectively gives the Employer a unilateral right to adjust a

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[332] (1986) 32 B.L.R. 51 Vinelott J. recorded that the Architect is not a stranger to the work and will have a detailed knowledge of the progress of the work and the Contractor's planning as to how the work will be executed; and that that although the Architect is not required to issue further instruction at a date which is unreasonably distant from when the Contractor needs such instruction he is responsible for the design so he will know when further instruction is needed to allow the Contractor to progress the works.

[333] Mackay v. Dick (1881) 6 A.C. 251.

[334] Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274.

[335] (1902) 86 LT. 764.

fundamental element of the contract, the agreed period for delivery that a Contractor undertook to perform its obligation. This clearly goes against the aim of the prevention principle and the rules of justice[336].

By giving the right to the Employer to reduce the period for delivery, in turn necessitates the Contractor to revise his mode of performance to meet the agreed delivery date.

If the Contractor fails to meet such date the Employer will have the right to deduct damages. This allows the Employer to benefit from his breach and so makes the damages provision a penalty or forfeiture clause in Law[337]. Moreover, the notice clause, by applying a strict timeframe, can be argued to be warning the Contractor to complete no matter what future contingency occurs which will delay completion. This is illustrated by Mance L.J.[338] who referred to Colman J[339] paraphrase of the concept of a penalty when Colman J. said that *Dunlop Pneumatic Tyre*[340] showed that:

> "…*whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred*…".

This was confirmed in *Makdessi v Cavendish Square Holdings BV*[341]*.* There it was stated that the true test to determine if a contractual provision is penal, is whether it is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to the

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[336] Construction Law International - December 2014 – Thomas, D., QC - Time-bars revisited http://www.ibanet.org/Article/Detail.aspx?ArticleUid=9199af06-e541-4c36-a1a7-a5ad4de00c81

[337] Atkins Chambers, *op cit.*, n. 19, p. 924; Alghussein Establishment v Eton College [1988] 1 W.L.R. 587 – held that a party cannot benefit from his own wilful default; Elliot, *op cit*., n. 21.

[338] United International Pictures v Cine Bes Filmcilk VE Yapimclik [2003] EWCA Civ 1669.

[339] Lordsvale Finance Plc v. Bank of Zambia [1996] QB 752.

[340] Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79.

[341] [2015] UKSC 67.

innocent party's legitimate interest in the enforcement of the primary obligation (in this instance the issuing a notice).

The same principle was set out in *Photo Productions Ltd v Securicor Transport Ltd*[342] as to how an exemption clause operates in respect of the party who is subject to it. This principle is that an exemption clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise by implication of Law. In this circumstance the implication is the effect of the prevention principle. Hence, although parties are at liberty to decide whatever exclusions they wish of these three types of obligations, in doing so they must not offend the rule against penalties. The rule is that failure by a party to perform a primary obligation (the issuing of the notice), must not impose on this party a secondary obligation to pay to the other a sum of money which is manifestly in excess of that which would fully compensate the other party for losses suffered.

Lord Mance further expanded on such understanding[343]:

> "…*What is necessary in each case is to consider, first whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable*…"

Lord Wilberforce in *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[344] determined that a time bar clause was an exemption clause:

> "…*I treat the words 'exceptions clause' as covering broadly such clauses as profess to exclude or limit, either quantitatively or as to the time within which action must be taken, the right of the injured party to bring an action for damages*…"

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342 [1980] A.C. 827.

343 Makdessi v Cavendish Square Holdings BV [2015] UKSC 67.

344 [1967] 1 A.C. 361.

To put these principles into the context of a construction contract, the Contractor's failure to issue notice in the specified time allows the Employer to be released from liability. Therefore, such provision does not protect a legitimate business interest of the Employer but consents to the Employer profiteering from his own breach as its operation is extravagant and unconscionable.

The reason is the Contractor has to absorb additional costs to complete within the time stated and/or to pay the Employer damages for late completion, despite the Employer being responsible for preventing the Contractor's performance. Such payment, in either circumstance, does not reflect the losses suffered by the Employer from the Contractor failing to meet the specified timeframe to issue notice[345].

Coupled to this, as determined in *Dorset County Council v Southern Felt Roofing Ltd*[346], a provision that expressly provides that one party bear the loss of certain perils/risks was held to be an exemption clause. A provision that allows the Employer to benefit from his own breach clearly is an example of this.

In *Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd*[347] Lord Denning M.R. concluded that reliance on such clauses was only permitted at common Law where it was fair and reasonable to do so[348]. Thus, a party wishing to gain relief from a breach of contract cannot do so where it can be considered that the provision was unfair and unreasonable.

Consequently, a notice clause that excludes liability by limiting the time to claim a right for compensation, particularly where it allows an Employer the right to change the time in which a Contractor has to complete a fundamental element of the contract, is clearly penalising the Contractor for the Employer's breach and so is unfair and unreasonable.

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345 Elliot, *op cit*., n. 21 cites these reasons.

346 [1989] 48 BLR. 96, CA.

347 [1983] 2 A C 803.

348 Lewison *op cit*., n. 160, p. 448.

This is supported by the first of Lord Dunedin's[349] four tests to determine if a clause is penal:

> "…*if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could be conceivably be proven to have followed from the breach*…"[350]

[i.e. the Contractor's failure to issue notice with 28 days of an Employer's delay] when considered with Mason and Deane JJ[351] dicta:

> "…*A penalty, as its name suggests, is in the nature of a punishment for a non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation*…" that of the Contractor being liable for the Employer's delay.

The principles stated in the above cases illustrate that:

1) The notice clause operates to release the Employer from liability to compensate the Contractor for delaying the Contractor's performance; and
2) The Employer is allowed to benefit from his breach.

Thus it can be said that such a provision falls within the definition of the second distinct type of protective (exemption or exclusion) clause as cited by Donaldson J. in *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd*[352], a condition aimed at excluding a party's liability for a breach of specific aspects of an obligation(s).

A reason that the above has not been advanced in the EW Courts is that the argument falls within the concept of relief from forfeiture. This concept is considered restricted to land law and so consideration has not been given as to whether it should apply to damages clauses where

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[349] Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79.

[350] This test is confirmed in Paciocco v Australia and New Zealand Banking Group Ltd [2015] FCAFC 50; Cine Bes Filmclik ve Yapimill v United International Pictures [2003] EWCA Civ 1669; Murray v Leisurelay [2005] EWCA Civ. 963.

[351] Legione v Hateley (1983) 152 CLR 406 , 445,

[352] [1971] 1 W.L.R, 519.

they can (due to the circumstances in which the damages are applied) become a penalty clause[353].

The legislation that governs the classification of exemption/exclusion of liability clauses is the UCTA. Section 3 of the Act is the one considered in this thesis as it applies where the contract is a standard form contract issued by one party for the other to sign. In *St Albans City and District Council v International Computers Ltd*[354], it was held that not all terms had to be standard as there were certain provisions that would apply to the specifics of a particular contract, such as unit prices, quality etc.

What the Act does apply to is a situation where standard terms remain unchanged, or despite negotiations are effectively unchanged. Consequently, where the term in question is an exclusion or exemption clause, then the contract entered into is on written standard terms for the purposes of the Act[355].

The reason is as stated by Lord Dunpark, in that section 3:

> *"…is designed to prevent one party to a contract from having his contractual rights, against the other party who is in breach of contract, excluded or restricted by a term or condition which is a number of fixed terms or conditions invariably incorporated in contracts…"*[356]

This circumstance arises where the contractual relationship is Contractor – Subcontractor as Contractors have their own standard forms of Subcontract. It would also apply where a large developer has the ability to adopt a "take it or leave it" approach towards a Contractor[357], then section 3 can apply[358], or where a standard form of contract provisions is recommended to an Employer by an organisation

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353 Elliot, *op cit*., n. 21.

354 [1995] F.S.R. 686.

355 Pegler Ltd v Wang (UK) Ltd (2000)) EWHC 137 TCC.

356 McCrone v Boots Farms Sales [1981] S.L.T. 103 Lord Dunpark dicta was followed in Chester Grosvenor Hotel v Alfred McAlpine Management 56 B.L.R. 115.

357 Lawson R., A.O. (2008) Exclusion Clauses and Unfair Contract terms 9th Edn., Sweet & Maxwell – Thomson Reuters (Legal) Ltd, London, UK, pp. 155-156.

358 *Op cit*., n. 343.

whose business it is to administer construction projects on behalf of an Employer.

As recorded above, there is a presumption that neither party will give up its rights in Law to claim compensation where the other commits a breach. Consequently, a clause aimed at excluding liability for a breach to be effective in its objective has to be unequivocal in its intention[359].

Lord Diplock demonstrated this in *Modern Engineering Ltd v Gilbert-Ash Ltd*[360] when he stated:

> "*…So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of Law…To rebut that presumption one must be able to find in the contract clear and unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract…*"

Similar statements as to the explicitness of the express provision, where a party wishes to rely on it to release itself from liability were made in earlier and subsequent cases[361]. The reason for this is to ensure the party accepting that it loses its right for compensation does so with it's 'eyes open'.

As recorded in subsection 2.3.1, the form of the opportunism, which results from a notice clause acting as an exclusion provision, is that the Employer can release himself from liability towards the Contractor where:

1) An Employer delays the Contractor's performance and so delivery of the Works;

2) Has breached the contract which gives the right to the Contractor to claim additional payment; and

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[359] Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 898.

[360] [1974] A.C. 689.

[361] Dodd v. Churton [1897] 1 Q.B. 562; Bremer Handelsgesellschaft Schaft M.B.H. v Vanden Avenne Izegem P.V.B.A. (1978) 2 Lloyd's Rep 109; Alghussein Establishment v Eton College [1988] 1 W.L.R. 587.

3) The Employer, despite being responsible for the delay by releasing himself from liability, still has the right to apply damages for late completion.

Moreover, the ability to change the period for delivery demonstrates exploitation.

As recorded, a clause whose aim is to exclude a party's liability has to be unequivocal in its intention. To ensure this unequivocal intention is demonstrated, EW Courts will subject the provision to the following tests:

1) The words used to construct the text of the provision must be clear, to demonstrate that the right for compensation is lost[362];

2) That the aim of the exclusion clause does not go against the natural rules of justice, particularly that of the prevention principle, which is not an implied Law but a positive rule of Law[363] to ensure fairness. The application of this test demonstrates, that although the EW Courts will ensure freedom of contract, they can act as legislator if they feel certain terms are unfair, or as illustrated earlier, when examining what constitutes an unconscionable bargain. Such action is a clear intention to ensure fair dealing[364] and prevent acts of bad faith; and

3) Be construed strictly *contra proferentem*[365], which as recorded is the principle, not just of Law but of justice, taking account of its relationship with other provisions of the Contract to ensure there are no inconsistencies with other provisions[366].

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[362] Lord Bingham - Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 898; Hollier v Ramble Motors (AMC) Ltd [1972] 2 Q.B. 71.

[363] Brooking J. SMK Cabinets v Hili Modern Electrics Pty Ltd (1984) V.R. 391.

[364] Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 A C 803; Photo Productions Ltd v Securicor Transport Ltd [1980] A.C. 827; Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen [1967] 1 A.C. 361.

[365] Atlantic Shipping & Trading Co. Ltd v Louis Dreyfus & Co [1922] A.C. 250; Dodd v. Churton [1897] 1 Q.B. 562 at p. 566; Peak Construction (Liverpool) v McKinney Foundations Ltd (1970) 1 B.L.R. 114.

[366] Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co. Ltd [1983] 1 W.L.R. 964.

This is demonstrated in the case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[367] in that Akenhead J. stated

> *"…I see no reason why this clause should be construed strictly against the Contractor and can see no reason why it should not be construed reasonably broadly, given the serious effect on what otherwise be good claims for instance for breach of contract by the Employer…"*

He further stated, when applying this provision in the context of an extension of time that regard must be had to Clause 8.4, FIDIC99. The consequence of his decision, in the operation of Sub-Clause 20.1 when taking account of the text of Sub-Clause 8.4, was that there is a clear suggestion:

> "*…that the extension of time can be claimed either when it is clear that there will be a delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay)*…" and that

> *"…The notice must be given as soon as practicable but the longstop is 28 days after the Contractor has become or should have become aware. The onus of proof is on the Employer… here to establish that the notice was given late…"*

The above decision reflects that of Lord Bingham of Cornhill[368]:

> "*…The clause must be construed in the context of the contract as a whole. The general rule should be applied that if a party, otherwise liable, is to exclude or limit liability or rely on an exemption condition, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against the party*…"

A further point for consideration in the operation of a notice clause which excludes an Employer from liability by operation of a strict timeframe, is that it has been argued that the Contractor's failure to

[367] [2014] EWHC 1028 (TCC).

[368] Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R 898.

meet the timeframe for giving notice prevents the Employer from granting a Contractor additional time to meet delivery, thereby invoking the prevention principle[369].

Consequently, such a provision in EW Law can be argued to be invalid where the Employer has delayed the Contractor, giving the right to the Contractor to be granted additional time for delivery. Although such assertion is contrary to the Judge's decision in *Steria*, the logic is arguably sound. However, this may not operate in the same way when it comes to additional payment[370].

It also raises the question, in order to ensure fairness on behalf of the Employer, why the Contractor's right for damages does not run once the notice has been issued. This, as illustrated, is the case in UAE Law.

The above analysis illustrates that the reason for restricting the effect of an exclusion of liability clause in EW Law is similar, in nature, to the aims of the *gharar* and *riba* prohibitions.

This is demonstrated by the principle set out in *Makdessi v Cavendish Square Holdings BV* and *Photo Productions v Securicor Transport Ltd*[371]*,* in that a failure to issue a notice allows the Employer to force the Contractor mitigate the Employers breach. To do this the Contractor has to engage additional resources to address the reduced time to complete that the Employer does not pay for, i.e. an unfair gain of services. Where the Contractor fails to achieve delivery by the agreed date the Employer can deduct damages leading to unfair gain, allowing *riba* to infect the contract.

[369] Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 320-322.

[370] Ellis Baker, James Bremen, Anthony Lavers, The Development of the Prevention Principle in English and Australian Jurisdictions [2005] ICLR 197; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, p. 321.

[371] [2015] UKSC 67; [1980] A.C. 827.

2.3.3 EW Law and Discretionary Clauses

Discretionary clauses are included in a contract as a mechanism to handle some future contingency as it allows for a party's obligation to be adjusted to take account of such eventuality[372]. Such contingency in a construction contract is compensation in the form of granting additional time to complete where the Employer has delayed the delivery, or additional payment associated with the same or some other breach by the Employer[373].

The principal clause for this is Sub-Clause 3.5, FIDIC99 that grants this power to the Employer's agent, the Engineer. The clause requires that the Engineer agree or determine any matter between the Employer and the Contractor[374]. As illustrated by the text of Sub-Clause 20.1, such matters include a claim for an extension of time to complete and any form of additional payment.

Where no agreement can be reached the Engineer shall make a fair determination. There is no timeframe in which the Engineer has to reach an agreement or to make a determination[375].

The Engineer's duty to agree or make a determination for an extension of time or additional payment only arises if the Contractor has complied with Sub-Clause 20.1. Where the Contractor has satisfied the requirements of this clause, the Contractor still has to convince the Engineer that the amount of additional time to complete, and additional payment that has been requested, is correct.

The fact that:

1) There is no timeframe for the Engineer to make a determination demonstrates there is potential for opportunism on the part of the Employer. This illustrates that *gharar* is intrinsic to the contract and so the potential for *riba* to manifest; and

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[372] Campbell, D., Collins H., & Wightman, J., A.O. (2003) Implicit Dimensions of Contract Discrete, Relational and Network Contracts, Hart Publishing Oxford and Portland Oregon, USA, p. 226.
[373] See Sub-Clause 8.4 FIDIC99 as an example.
[374] Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 294-298; Glover & Hughes, *op cit.,* n. 43, pp. 65-67; Totterdill, *op cit.,* n. 43, p. 96.
[375] Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, p. 329; Glover & Hughes, *op cit.,* n. 43, p. 67; Totterdill, *op cit.,* n. 43, p. 96.

2) The Engineer has to negotiate with the Employer to agree compensation due to the Contractor reinforces this. The reason is, the Engineer, as he is the Employer's agent, can be influenced by the Employer to disapprove the Contractor's claim for opportunistic grounds[376].

Coupled to this is that the Engineer's duty to approve or disapprove a claim involves different considerations, suggesting that previous determinations can be revised under the guise that the Engineer can retrospectively change his decision to reflect a fair determination[377]. This being despite the obligation of fair dealing and good faith as demonstrated by the use of implied terms in EW Law[378].

Consequently, Sub-Clause 3.5 can be described as a clause aimed at limiting the extent to which a party is bound to indemnify the other in respect of consequences of a breach of that obligation. Thus, such clause falls within the third distinct type of protective (exemption or exclusion) clause as cited by Donaldson J. in *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd*[379].

When considered in this light Sub-Clause 3.5 is subject to the principles which EW Law applies to exemption clauses, which includes the application of the *contra proferentem* rule, strict rules of interpretation and rules against penalties/forfeiture. This is discussed in subsection 2.3.4 below.

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[376] The reason is that Engineer has no power to make a determination, this can only be decided by the Employer see Engineers powers in the following contracts - Roads and Transport Authority of Dubai Standard Form of Construction Contract (2006); Emaar Standard Form of Construction Contract; Dubai Municipality Conditions of Contract for Works of Civil Engineering Construction: Dubai Properties PSJC Conditions of Contract.

[377] Baker, Mellors, Chambers, Lavers, *op cit*., n. 42, pp. 329-331.

[378] Collins, *op cit*., n .19; Campbell, Collins & Wightman, *op cit*., n. 372, p. 223; see commentary under article 246 UCC above; Lord Bingham recorded in HIH Casualty v Chase Manhattan Bank [2003] 2 Lloyd's Rep. 61 (HL) "*…Parties entering into a commercial contract…will assume the honesty and good faith of the other; absent such assumption they would not deal…*" Lord Kenyon in Mellish v Motteux (1792) Peake 156, 157 (170 ER 113, 113-14): "*…In all contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith…*"

[379] [1971] 1 W.L.R, 519.

2.3.4 Discretionary or exclusion of liability clause

As stated in subsection 2.3.3, a discretionary clause such as Sub-Clause 3.5, FIDIC99 can be considered to fall within the third distinct type of protective (exemption or exclusion) clause as cited by Donaldson J. in *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd*[380].

As recorded, this type of clause is to compensate the Contractor for an Employer's act of prevention which delays delivery and causes the Contractor to incur additional costs associated with the delay, including the ordering of additional/extra work of any form.

As the right and level of compensation to be paid is to be decided at the sole discretion of the Employer's agent, the Engineer, the clause can be operated in a biased manner in favour of the Employer, thereby allowing him to exempt himself from liability[381].

Thus, for the reasons recorded under subsection 2.3.2 there is potential for opportunism as the Employer can influence the Engineer to either release the Employer from liability as a whole, or only expose himself to a minimal level of compensation[382].

Hence, for the reasons set out in subsection 2.3.2, the principles as set out in *United International Pictures*[383], *Makdessi*[384], *Photo Productions Ltd*[385] and *Suisse Atlantique Societe d'Armement Maritime SA*[386] will apply in the application of this type of discretionary clause, in that the operation of the clause must not offend rules against penalties/forfeiture[387]. If it does then the party relying on the clause can only recover damages measured against the breach of the primary obligation, i.e. the failure to give notice[388].

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380 [1971] 1 W.L.R, 519.
381 Hoskins**,** *op cit*., n. 265.
382 This being despite the obligation of good faith and to act in an honest manner, *op cit*., n. 325.
383 [2003] EWCA Civ 1669.
384 [2015] UKSC 67.
385 [1980] A.C. 827.
386 [1967] 1 A.C. 361.
387 Elliot, *op. cit*., n. 21.
388 Makdessi v. Cavendish Square Holdings BV [2015] UKSC 67.

Again, Lord Denning M.R. dicta in *Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd*[389], see above applies.

Consequently, where the Employer prevents the Contractor's performance thereby reducing the time in which the Contractor has to deliver the structure, he has an obligation, as illustrated by the decisions in the above cases, to extend the delivery period and pay the costs associated with the same.

For the reasons stated above, Sub-Clause 3.5 would also be subject to section 3 of the UCTA, as the aim of section 3 is to prevent a party in breach from restricting the other party's rights. Thus, the construction, interpretation and application of Sub-Clause 3.5 will be subject to the same tests in EW Law as described in subsection 2.3.2. The operation of Sub-Clause 3.5 would also need to reflect the decision as in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[390]. Moreover, the construction of this Sub-Clause would be subject to the same tests as listed above, to demonstrate that it was unequivocal in its intention that the clause can limit or release the Employer from liability.

The above demonstrates that the control imposed by the EW Courts in the application of a discretionary clause, if operated as an exclusion of liability clause, again has similar aims as that of the *gharar* and *riba* prohibitions as demonstrated in the last subsection.

Such control would extend to ensuring that the Employer does not exploit the Contractor's position with regard to enforcing a short period for completion, where the time necessary to complete was reduced by an act of prevention of the Employer.

[389] [1983] 2 A C 803.
[390] [2014] EWHC 1028 (TCC).

2.3.5 Conflict with *gharar* and *riba* prohibitions

The examination in subsections 2.3.1 and 2.3.3 above illustrates that Sub-Clauses 20.1 and Sub-Clause 3.5 can exclude or limit the Employer's liability towards a Contractor where the Employer delays the Contractor's performance, thereby committing a breach of Contract. Such operation classifies such clauses as aleatory in *fiqh* for the following reasons:

1) The inclusion of an extension of time clause demonstrates that *gharar* is intrinsic to the contract. The reason is that it is an admission that parties acknowledge that delivery is subject to future contingencies which will affect their rights and obligations to allow the structure to come into existence;

2) The issuing of a variation, defined as a future contingency in FIDIC99, demonstrates that the Employer's design expectations as to quality, type and quantity of work are subject to change, thereby causing *gharar* to be intrinsic to the contract as to whether the design is complete[391];

3) Where there is *gharar* as to whether the Employer's design expectations are final, causes *gharar* as to whether the Contractor's mode of performance will allow it to complete the structure by the agreed delivery date;

4) Sub-Clause 20.1, by fixing a specific time period to issue a notice, can be construed as an exemption clause as it falls within the second distinct type of exclusion clause cited by Donaldson J., thereby allowing *riba* to be present in the contract;

5) The aim of Sub-Clause 20.1 is to prevent the Employer from liability for failing to meet its obligations that arise in UAE Law under article 874, UCC, to provide a comprehensive design. It also attempts to negate the right granted to the Contractor under article 247, UCC to suspend work when the Employer prevents the Contractor's performance, and 387, UCC, to be paid

[391] Coulson *op cit*., n. 7, p. 44.

compensation when the Employer prevents the Contractor's performance, thereby allowing *riba* to infect the contract;

6) The objective of Sub-Clauses 20.1 and 3.5 is to allocate the additional cost associated with *gharar* infecting the mode of performance, and so delivery to one of the party's, which as a result of the subjective nature of these clauses is analogous to playing roulette which allows *riba* to infect the contract;

7) The effect of Sub-Clause 3.5 is, that although it provides the mechanism for removing *gharar* it allows opportunism to be introduced into the contract as: 1) the Contractor is dependent on the Engineer acting in an equitable manner, and the Employer does not influence the Engineer to disapprove the Contractor's right to compensation; and 2) the Employer, through the Engineer, does not act in an opportunistic manner to limit the level of compensation due to the Contractor – both instances allow *riba* to infect the contract;

8) As Sub-Clause 3.5 can be operated in an opportunistic manner, such clause falls within the third distinct type of exclusion clause cited by Donaldson J., thereby allowing *riba* to be present in the contract; and

9) The operation of these clauses removes the ability of the Contractor to control obligations that go to the root of the contract, i.e. its ability to control the mode of performance and delivery, which in turn causes *gharar* as to whether the price is correct.

The above reasons illustrate there is great potential for the inducement of an unfair gain in the form of acquiring goods and services by the Employer for which he does not pay, where the Contractor's right for compensation is denied for opportunistic grounds. This in turn allows the Employer to increase its profit illicitly by being able to apply damages.

Consequently, where the Contractor does not achieve the anticipated profit, dependent on the level of losses, can lead to a dispute between the parties.

As stated, although the aim of Sub-Clauses 20.1 and 3.5 is to allocate additional costs associated with the speculation to one of the party's, the fact that:

1) These clauses remove the Contractor's ability to control its rights and obligations:

2) The Contractor has to convince the Employer that the Employer has breached the Contract; and

3) The Contractor is dependent on the Employer's agreement as to the level and type of compensation due, and is subject to the negotiating position adopted by the Employer or the determination made by the Engineer, although this can be challenged later,

puts the Contractor in a weak position and exposes him to exploitation, which again, as stated, such circumstances are analogous with gambling.

The above analysis illustrates the principle differences between the operation of Sub-Clause 20.1 and 3.5, FIDIC99 under EW and UAE Law. The difference is, these clauses can be operated to prevent the Employer from being liable for breaches of contract, in EW Law, which conflict with the rights and obligations which UAE Law, through the UCC, places/grants such rights and obligations on the parties.

These rights and obligations are to ensure that each party's expectations are achieved by preventing any incentive to gain an illicit profit caused by the speculative nature of these provisions.

From the analysis in subsections 2.3.1 and 2.3.4, it is clear there are differences in how the principles established in EW Law control the operation of exemption clauses, although their aim is very similar to that of the *gharar* and *riba* prohibitions.

EW Law allows autonomy of contract. Parties to contracts are interested in their commercial aims and so their agreement is highly influenced by this. Thus, where there is potential for a good return, then, as recorded above, there is an incentive to make an excessive profit.

This is dependent on what EW Law refers to as "risk" which attaches itself to the obligations to be performed. Where a future contingency occurs, exposing a party to losses which are greater than anticipated, the party still has to perform.

At this point, the provision that places the obligation on the party is examined to see if there is room for redress. The form of the methods to claim redress is through implied terms, application of the *contra proferentem* rule, rules against penalty/forfeiture clauses, or the UCTA to rebalance the contract to ensure the equity of the contract. This would include taking account of an obligation to issue notice where the other party accepted the risk.

The EW Courts, by the tools they have, will, as stated by Bowen LJ, place the 'perils' or cause of the monetary loss with the party which is considered as having accepted the contemplated risk.

The *gharar* and *riba* prohibitions, by not allowing speculation, achieves the same goal of an equitable contract as it minimises speculation, the primary cause of an incentive to make an excessive profit in both jurisdictions. To achieve this there must be precision in the obligations and restrictions on party autonomy by not allowing any form of opportunism.

To enforce this, UAE Law, through the UCC, takes a very strong approach through the following articles:

1) 106 (2)(b) which prevents the exercising of a right which contravenes the rules of *fiqh* and the morals of the UAE;
2) 106(2)(c) which prevents the exercising of a right which results in disproportionate harm to the other party; and
3) 206, that no provision must contravene the morals of *fiqh*.

The effect of article 106 is comparable to the doctrine of abuse of rights, where either a legal or a contractual right are used for an improper purpose. The improper use is the exercise of a power for damaging the other party's interests, not for serving the interests of the party holding the power. The difference between this principle and that of the obligations placed on the parties by article 106, is that the doctrines behind these articles are to ensure equivalence of a transaction by preventing *gharar* or *riba* being intrinsic to a contract.

The next section considers how equivalent benefits can be maintained despite provisions that can operate to exempt or limit liability, or give one party the right to decide the rights and obligations of the other party to the contract.

2.4 Fair Dealing, Good Faith, Parties' Expectations and Relational Contracts

The freedom of contract doctrine applied in EW Law can lead to a harsh or unfair financial burden being placed on one of the party's to a contract of mutual obligations where the terms of the contract are strictly enforced.

Consequently, EW Courts can assign the 'perils' or 'risk' (*gharar*) associated with a contractual obligation where it has not been expressly assigned. They do this by the use of implied terms. Coupled to this there are other approaches that parties to a contract of mutual obligations can adopt when exercising their rights to perform their obligations. These approaches are parties' expectations and relational contracts.

The use of implied terms and the effect of the approach adopted through parties' expectations and relational contracts lead to fair dealing and good faith being applied in the performance of the contract, which in turn allows the parties to achieve their anticipated profit. Thus, this section examines and establishes in:

Subsection 2.4.1 - Implied duty of fair dealing and good faith – that EW Law, despite its allegiance to the doctrine of freedom of contract, the Courts recognise an implied duty of good faith in the performance of a contract[392];

Subsection 2.4.2 - Parties' expectations – when this approach is applied to a construction contract, with particular regard to the equitable operation of notice and discretionary clauses;

Subsection - 2.4.3 - Relational contracts – that a construction contract, when classified as a relational contract is to achieve the parties' common aim, to complete by the agreed date at the correct price. This requires fair dealing and good faith in the performance of the parties' obligations, particularly the act of cooperation[393]. Consequently, it can be argued that to operate a notice or discretionary clause as an exemption

[392] Leggett J. Yam Seng v. International Trade Corporation [2013] EWHC 111 (QB).

[393] Vaughan Williams L.J. Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274; Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd [1949] 2 All E.R. 1014.

or limitation clause is contradictory to the principles of fair dealing and good faith[394]; and

Subsection - 2.4.4 - Similarities between the parties' expectations, relational contracts and UAE Law – the approaches adopted in parties' expectations and relational contracts as defined in EW Law assimilate the aim of the *gharar* and *riba* prohibitions. Thus, it can be said that UAE Law enacts these approaches into Law.

[394] Vaughan Williams L.J. Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274; Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd [1949] 2 All E.R. 1014; Good faith and fair dealing requires both parties to respect the reasonable expectations of the other provided they are not excluded by some express term, Collins, *op cit.*, n. 19; It also implies a duty on each party to do what, within reasonable powers necessary to permit the other party to enjoy the benefit of the contract, - C Mitchell, 'Leading a Life of its own? The Role of reasonable expectations in Contract Law' (2003) OJLS, Vol. 23, No. 4 2003, pp. 639-665.

2.4.1 Implied duty of fair dealing and good faith

As recorded in subsection 1.3.3, EW Law, *prima facie* does not recognise the principle of good faith[395]. In saying this, EW Law does not accept acts of bad faith. This is demonstrated by the approach developed by EW Courts to control acts of bad faith[396]. This is a fundamental difference between EW and UAE Law as the latter enacts the notion of good faith into Law. The result in reality is that EW Courts, in controlling acts of bad faith, implement fair dealing and good faith into the performance of contractual obligations. The Courts do this by implying terms to the parties' rights and obligations that arise from the type of transaction they have entered into. This allows the Courts to assign risk (*gharar*) where it has not been expressly assigned, thereby rebalancing the contract[397].

As illustrated in the case of *The Moorcock*[398] when Bowen LJ stated that the Law desired to give effect, by implication, to the business efficacy of a transaction so as:

> "…*not to impose on one side all the perils of the transaction, or to emancipate one side from all chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances*…"

In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[399] it was recorded that an implied term must:

1) Be reasonable and equitable;

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[395] Mckendrick, *op cit*., n. 23, p. 542, records "…*While English contract law is influenced by notions of good faith, it does not, as yet recognize the existence off a doctrine of good faith*…"; M. Bridge, Doubting Good Faith (2005)11 NZBLQ 430, 450 "…*There is no general duty of good faith and fair dealing in English contract law and there is no reason why there should be*…"

[396] Mckendrick, *op cit*., n. 23, pp. 379-380;

[397] Mckendrick, *op cit*., n. 23, pp. 379-380; Collins, *op cit*., n. 19; Peel, *op cit*., n. 18, pp. 223-237; Steyn. J Contract Law: Fulfilling the reasonable expectations of Honest Men Law, QR, 1997.

[398] (1889) L.R. 14 P.D.64; H.H. Edgar Faye QC in Henry Boot Construction Ltd v Central Lancashire New Town Development Corp (1980) 15 B.L.R. 1.

[399] (1977) 180 CLR 266, 283.

2) Be necessary to give business efficacy to the contract (in that without it the contract would lack commercial or practical coherence);

3) Go without saying;

4) Be capable of clear expression; and

5) Not contradict any express term.

In *Equitable Life Assurance Society v Hyman*[400] Lord Steyn recorded that a term will be implied if it is "*essential to give effect to the reasonable expectations of the parties*" which involved diluting the previous test of necessity. This statement suggests it was not a question of whether the contract would work without the implied term, but whether the contract would work in the way the parties reasonably expected it to without the implied term[401].

Lord Neuberger confirmed Lord Steyn's observation in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another*[402].

The above extracts demonstrate that there is a need for commercial and practical rationality to be implied into a contract in order to give effect to the reasonable expectations of the parties as to how the contract will achieve its aim. Whilst such commercial and practical rationality to be implied into a contract must not conflict with the express terms, the effect of such express terms can be tempered to ensure the overall aim of the transaction is achieved.

These requirements, when taking account of Bowen LJ dicta, illustrates the term business efficacy implies that to achieve parties' reasonable expectations, considering the need for practical coherence, it would be impractical and unreasonable, in order to achieve the aims of the transaction, to place all the perils/risks on one party, but instead the parties share the 'perils'/risk (*gharar*) of the transaction.

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400 [2002] 1 AC 408.

401 Lewison, *op. cit.*, n. 156, p. 210.

402 [2016] A.C. 742, 130.

Consequently, implied terms can be said to apply whether or not the parties had them in mind, or would have expressed them if they had foreseen the difficulty. The reason is that the EW Courts will imply terms to a contract for reasons of fairness or policy, or in consequence of the rules of Law[403].

This view of fairness or policy is reflected in the prevention principle, in that the Obligee cannot insist on performance of the Obligor when the Obligee has prevented the Obligor's performance. This implied term was formulated by Cockburn C.J[404].

> "…*I look on the law to be that if a party enters into an arrangement which can only take effect by reason of continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative*…"

This expression has been applied in a number of cases[405] with Vaughan Williams L.J. recording in *Barque Quilpue Ltd v Brown*[406]:

> *"…that generally such a term is by law imported into every contract…"*

The principle has also been described as a respectable principle with it's:

> *"…proposition of law and common sense is undoubted; like any other such proposition in law of contract, it needs to be read in context of the particular contract, interpreted against the factual matrix in which it was made…"* [407]

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[403] Professor Williams G., Language and the Law (1945) 61 L.Q.R. 71 at 401.

[404] Sterling v Maitland (1864) 5 B. & S. 841; Cory (Williams) & Sons Ltd v London Corp [1951] 2 K.B. 476.

[405] Ogdens Ltd v Nelson [1903] 2 K.B. 287, affirmed by the HL [1905] A.C. 109; Southern Foundries (1926) Ltd v Shirlaw [1940] A.C. 701; Schindler v Northern Raincoat Co., Ltd[1960] 1 W.L.R. 1038.

[406] [1904] 2. K.B. 264.

[407] Schindler v Northern Raincoat Co., Ltd [1960] 1 W.L.R. 1038.

Based on the above, the duty placed on each party is not to prevent the performance of the other. This is a positive rule of law of contract[408]. The reason is that the conduct of either party, which can be seen as an act to bring about the impossibility of performance [and so delayed performance] of the other party, is in itself a breach of contract[409].

The factual background in respect of a construction contract is that the subject matter of the contract is placed on land controlled by the Employer. The structure to be supplied is for the Employer's use so only he knows what his expectations are as to functional requirements, quality, quantity and aesthetics. Consequently, for the structure to be built he has to provide the necessary design information to the Contractor so he can build it.

Bowen LJ's statement and the associated analysis as presented in the dicta of the said cases above, taken in context of the said factual background of a construction contract, illustrates that:

1) For a contract to be workable there is an implied obligation to remove the peril of late completion;

2) Neither party will prevent the other from discharging its obligations[410];

3) To satisfy the implied obligation of reasonableness and fairness in the form that one party is dependent on the other for its performance, then such party will not delay in performing that obligation upon which the other is dependent[411]; and

4) The implied obligation of reasonableness and fairness, in that one party will not delay the other in performing its obligation, includes the necessity of co-operation to make the contract workable as illustrated by Devlin J[412] and Cooke J[413]. It also obligates the

[408] SMK Cabinets v Hili Modern Electrics Pty Ltd (1984) V.R. 391.

[409] Southern Foundries (1926) Ltd v Shirlaw [1940] A.C. 701 – Lord Atkin; Thompson v ASDA-MFI Plc [1988].

[410] Vaughan Williams L.J. Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274.

[411] Atkins Chambers, *op cit.*, n. 19, pp. 96 Lord Blackburn Mackay v. Dick (1881) 6 A.C. 251.

[412] Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd [1949] 2 All E.R. 1014 [1949].

[413] James E McCabe Ltd v Scottish Courage Ltd [2006] EWHC (comm).

parties to work together honestly, endeavouring to achieve the obligation of good faith and cooperation[414].

The first of these implied terms may not be apparent to the parties to a construction contract but it is clear from Leggatt J. dicta in *Yam Seng Pte Ltd v International Trade Corporation*[415] that parties need to cooperate to achieve the mutual benefit of timely completion to ensure the business efficacy of the contract. Without the requisite co-operation of the Employer to assist the Contractor in addressing the peril of late completion, the Contractor takes on the full responsibility of the contract, which is not the objective of contracts of mutual obligations as illustrated by Devlin J[416] and Cooke J[417].

Moreover, cooperation cannot be imposed on a party to compel him to do something that he cannot in fact do[418]. Thus, an obligation placed on the Contractor to co-ordinate his work with other Contractors where such other Contractors refuse to cooperate, then there is an implied term that the Contractor has the right to be granted relief.

Based on the above examination, the express terms of a construction contract which grants the right to the Contractor for an extension of time for delivery and/or additional payment, demonstrates that the reason for granting the Contractor an extension of time is a breach of contract by the Employer. Consequently, where the Employer delays the Contractor's performance, then this positive rule of law is that the Employer has to compensate the Contractor by granting additional time to complete and additional payment.

This is particularly important in respect of discretionary clauses. The reason for the inclusion of such clauses is to make provision to adjust contractual obligations where some future contingency occurs. Such events in respect of a construction contract are those as defined in the

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414 Compass group UK and Ireland Ltd v Mid Essex Hospital Services HNS Trust [2013] EWCA Civ 2000; [2013] B.L.R. 265.

415 [2013] EWHC 111.

416 Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd[1949] 2 All E.R. 1014 [1949].

417 James E McCabe Ltd v Scottish Courage Ltd [2006] EWHC (comm).

418 North Sea Energy Holdings NV v Petroleum Authority of Thailand [1999] 1 Lloyd's Rep 483, CA.

contract provisions[419]. Consequently, EW Courts have the ability to exercise judicial discretion, through business efficacy, to take account of obligations of cooperation, fairness and unconscionability[420] where a discretionary clause is operated in an opportunistic manner.

This is demonstrated by *Wells v Army & Navy Co-operative Society*[421], in that if the time in which a Contractor is to do the work is limited, then not only is the Contractor to do the work within that time, but he is also entitled to have such time in which to do the work.

Hence, EW Courts can act as a legislator under the guise of identifying terms of the contract to which the parties have not expressly agreed, but must apply to make the contract workable, taking account of the perils/risks of the transaction while considering the questions of reasonableness and fairness[422]. This prevents exploitation and opportunism[423] such as the Employer applying damages for late completion for which the cause is an Employer's act, and by implication can satisfy the reasonable expectations of the contracting parties[424].

These implied obligations mirror the strong ethical and moral stance that influences obligations in *fiqh*, by making sure the parties adhere to the principles of good faith and fair dealing so the parties' benefits or profits to be derived from the contract can be met.

There are similarities concerning these two prohibitions and the parties' expectations in contract law in EW Law[425] as illustrated in the next subsection.

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419 Clause 8 of FIDIC99.

420 Campbell, Collins & Wightman, *op cit*., n. 372, p. 223, pp. 187 to 192; Collins, *op cit.,* n. 19; Peel, *op cit*., n. 18 pp. 224-237; Lawson, *op cit*., n. 357, pp. 106-110.

421 (1902) 86 LT. 764.

422 *Op cit*., n. 337.

423 Campbell, Collins & Wightman, *op cit*., n. 372pp. 219 to 254; Collins, *op cit*., n. 19.

424 McKendrick, *op cit.*, n. 23, pp. 401-402.

425 Mitchell, *op cit*., n. 394; Steyn, *op cit*., n. 397.

2.4.2 Parties' expectations

The aim of parties' expectations is to apply fairness and justice as to how rights and obligations are to apply to a transaction in lieu of a strict application of the rules of contract law, taking account of the contextual scene of the particular contract such as the fundamental need to cooperate, or what is termed necessary to allow business efficacy[426]. When examining parties' expectations, consideration should be given to the concept of implicit understandings as to the legal relationship, and so how rights and obligations that arise in a construction contract are to be exercised and or performed[427].

The aim of the investigation is not to modify the rights and obligations as set out in the express terms of the contract[428], but to understand what a party's implicit understanding is as to how terms would operate. The grounds for this is that the express terms may not accurately record the party's intention/understanding[429]. Then, based on this understanding, determine whether such party's expectations (profit) were in fact fair and reasonable. This ensures good faith and fair dealing where a discretionary clause allows party A to decide the rights of party B[430] because of a future contingency.

To put this into context of a construction contract, Contractors price subsurface work based on a geotechnical report provided by an Employer. Such report is limited in its scope, as to prepare a detailed report takes time and requires extensive equipment. Coupled to this is that the aim of the contract clause that gives a Contractor the right to claim where subsurface conditions are different from that expected, is to place the *gharar* associated with additional work with the Employer to encourage Contractors to offer competitive prices for the structure.

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[426] Mitchell, *op cit.*, n. 394; Steyn, *op cit.*, n. 397.

[427] Campbell, Collins & Wightman, *op cit*., n. 372, pp. 25-49;

[428] Collins, *op cit.,* n. 19; Campbell, Collins & Wightman, *op cit*., n. 372, pp. 25-49.

[429] Lord Hoffmann recorded in Mannai Investments Co Ltd v Eagle Star Life Assurance Co. [1997] AC 749, 779 "*… The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say they used the wrong words…*".

[430] Collins, *op cit*., n. 19; Campbell, Collins & Wightman, *op cit*., n. 372, pp. 25-49.

The Contractor commences foundation works and discovers the ground conditions are not what was expected. Consequently, the Contractor has to do more work, i.e. he loses control of his obligation to build the foundation element of the structure. This results in the anticipated profit to be made from the contract being reduced. The Contractor believes that a certain contract provision takes account of this future contingency. Thus, investigation is needed to ascertain whether the Contractor's implicit understanding of the provision(s) that the Contractor believes allows it to maintain its anticipated profit in such circumstance was fair and reasonable[431].

To determine this, the questions to be answered are[432]:

1) Whether it would be fair and reasonable to operate such provision(s) in accordance with the implicit understanding that the reasonable expectations of the Contractor are to be achieved;

2) If such implicit understanding is fair and reasonable, would it be fair and reasonable to operate such provision(s) in the manner understood by the Contractor; and

3) Whether, based on the operation of such provision(s), the anticipated profit was justified.

Where the answer to all three questions is yes then the anticipated profit level should be maintained[433]. Where the answers are a combination of yes and no then the anticipated profit should be adjusted accordingly, with the Contractor having to accept some of the loss[434]. Such an approach will keep the level of *gharar* to that which was accepted at the time of contract formation and so prevent *riba*.

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[431] Steyn, *op cit.*, n. 397 this would align with the requirement of business efficacy to operate the discretionary power which the Employer has to grant the Contractor the requisite relief in such circumstances. It would also satisfy the good faith requirement of honesty and satisfy the primary objective of the contract to build the structure – Mason, *op cit*., n. 258.

[432] Mitchell, *op cit.,* n. 394; Steyn J, *op cit.,* n. 397.

[433] Mitchell, *op cit.,* n. 394; Steyn J, *op cit.,* n. 397.

[434] Such a situation is where, although there is an limitation clause in the written contract it is not necessary applied – Campbell, Collins & Wightman, *op cit*., n. 372, pp. 38-40 – Mitchell (George) (Chesterhall) Ltd v Finney Lock Seed Ltd [1983] 2 AC 803.

As stated, parties' expectations require the parties to a transaction to perform their rights and obligations in a manner of fairness and justice, which in turn requires the parties to discharge their rights and obligations in a manner consistent with fair dealing and good faith. This includes:

1) Allowing the other party to achieve a fair level of profit where such party has genuinely under-assessed its obligations, particularly where an implied term allows for the re-apportionment of risk;

2) Exercising discretionary clauses in a manner that avoids preventing the other party achieving its anticipated profit. This being despite this party failing to meet a precondition so it can be granted relief where the prevailing circumstances would make him liable for some matter beyond his control; and

3) Not to operate discretionary clauses in an unconscientious manner that exploits the position of the party who is subject to the operation of such clauses.

An example of these three points in respect of a construction contract is that there is speculation as to whether or not a future contingency will occur delaying the Contractor's performance. This is demonstrated by the inclusion of an extension of time clause in the contract provisions. A Contractor, based on the implied term that the Employer will not delay the Contractor's performance will have an implicit understanding that such an occurrence will not materialise. Despite this, the Employer does commit an act that delays the Contractor's performance, causing the Contractor's profit to be adversely affected.

The reasonable expectation of the Contractor is that the Employer, despite any notice clauses that can exclude it from liability, has an obligation, through the requirement of fair dealing and good faith, to work with the Contractor to assess the compensation due.

Such expectation reflects the implicit understanding[435] of the Contractor, that such an approach by the Employer is necessary to avoid a dispute arising and satisfies the need for justice which is a core aim of parties' expectations[436].

Parties' expectations reflect the aim of the *gharar* and *riba* prohibitions in that parties, when discharging their rights and obligations, accept their responsibilities and act in a manner consistent with fair dealing and good faith. This includes where the Contractor has failed to fully appreciate its obligations, and so it has to accept the losses where it is demonstrated that his reasonable expectations where incorrect.

To determine this, the questions to be asked[437] by the Employer to understand the Contractor's reasoning are:

1) Whether the data provided to the Contractor was detailed enough to give certainty as to what the obligation entailed. The Contractor, to comply with the requirement of good faith, has to accept the loss which results from his error;

2) Taking account of 1) above, if the Contractor was not compensated for the additional services/goods provided, would this result in an unfair gain for the Employer. To do this consideration should be given as to whether additional cost incurred by the Contractor is a direct result of the Contractor's error, or whether the Employer contributed to such loss by delaying the Contractor. If the latter, then the Employer needs to reimburse the Contractor accordingly.

Conversely, where the Contractor can demonstrate to the Employer that the cause was a genuine misunderstanding which led to his reasonable expectation not being achieved, the Employer should accept some of the losses in order to prevent an unfair gain. This will allow the Contractor to make some of the anticipated profit. Furthermore, the

[435] Campbell, Collins & Wightman, *op cit.*, n. 372, pp. 38-40; Steyn, *op cit.*, n. 379.
[436] Campbell, Collins & Wightman, *op cit.*, n. 372, pp. 38-40. Steyn, *op cit.*, n. 379.
[437] Mitchell, *op cit.,* n. 374; Steyn J, *op cit.,* n. 379.

Employer shall not exclude itself from liability where he delays the Contractor's performance. Moreover, the Employer, to avoid making an unfair profit from the transaction, should not operate a discretionary clause in an opportunistic manner. This requires the Employer to make a conscious decision as to whether or not it is fair and reasonable to operate such a clause, as it will adversely affect the Contractor's interests.

These requirements reflect a core aim of *fiqh* to ensure that the circulation of usufruct is for the benefit of the community, and demonstrates why opportunism and exploitation are considered as *riba*[438].

If parties agree to follow parties' expectations then they have to conduct contract negotiations in a manner consistent with good faith, regardless of such concept being described as 'inherently repugnant' to the adversarial positions of the parties when involved in negotiations'[439].

This, also being despite the rationale that parties should be free from any obligations until the contract comes into existence, and that adversarial negotiations are fundamental to contract formation in that it is impossible to impose an alternative system. As recorded above, it has been argued that transparent negotiations would serve the party's long term interests[440]. As construction contracts are dependent on a thorough knowledge, where such knowledge is lacking then *gharar* can manifest leading to a dispute as one of the party's will feel cheated if it suffers substantial financial losses.

Hence, to prevent *gharar* that leads to the unfair apportionment of the perils/risks that arise in a contract, a clear and comprehensive understanding of what the Employer's expectations are is necessary. If the Employer has still to finalise a certain aspect, then it is requisite that the Contractor be fully informed of the same during negotiations.

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[438] Comair-Obeid, *op cit.,* n. 2, p. 40; Shalabi, al-Iqtisad fil-fikr al-islami, 2nd ed., an Nahda al-islamiya, Cairo, 1990, p. 21.

[439] Lord Ackner – Walford v Miles [1992] 2 AC 128.

[440] Hoskins, *op cit.*, n. 265.

Moreover, to minimise *gharar* which can manifest in the contract, the parties should agree a mechanism which is to be included within the contract as to how such aspect or future contingency is to be dealt with.

For grounds of fairness and reasonableness, this mechanism should be over and above the provisions that standard forms of construction contracts have to address contingencies, which fall within the classification of Employer's acts of prevention to remove the possibility of the *gharar* and *riba* prohibitions being contravened. This will allow the necessary flexibility to adjust parties' rights and obligations (time for completion and countervalue) which are affected by perils/risks which arise from the uncertainty of an aspect or future contingency which the Employer is still to finalise.

Such an approach is necessary to satisfy the obligations of fair dealing, reasonableness and justice that parties' expectations require.

2.4.3 Relational contracts

Construction contracts have been referred to as 'Relational Contracts' due to the integral nature they now take in that:

1) Projects have become more complex technically, such as fully automated building management systems, security, energy saving requirements, fire life-saving systems etc.; and

2) The location of the project demands a complex structure design or innovative methods of construction; or

3) Due to the size of the project the Employer engages a number of contractors to perform different elements of the project to achieve his time for completion.

Consequently, there is greater reliance on each party performing his obligation in the manner expected by the other, inclusive of time constraints which includes the input of other stakeholders necessary to achieve the Employer's expectations. This requires extensive cooperation between the Employer, his Engineer, different tiers of the Employer's design and management staff and his selected contractors/suppliers.

All of these factors generally make the time to achieve completion considerable[441].

This results in a need to accommodate future contingences to be addressed such as changes to the Employer's requirements, unforeseen events, design changes caused by the complex nature of the project, or changes to statutory requirements governing the type of structure to be built, in that what should have been a straightforward exercise of building the structure is not so straightforward. Hence, there is a high

[441] Chan, Chan, Yeung, *op cit.*, n. 23, pp. 10-15, the form that relational contracts take has been described as strategic partnering, project alliance, strategic alliancing, Build Own Operate and Transfer (BOOT) and Joint venture. Despite all these terms the main the main aim of relational contracts is that the parties co-operation. This creates trust and an understanding by each of the parties what the other party's interests are. The interests of the Employer is that he wants the structure to meet his expectations, that it is delivered by the agreed date for a fair price. The Contractor's interest is that his anticipated profit materialises.

level of personal interaction between the individuals who are charged with building the structure[442].

This was confirmed in *Yam Seng Pte Ltd v International Trade Corporation*[443] in which it was stated that contracts which involve long-term relationships:

> "…*may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty* [this word with regard to a construction contract should be interpreted as reliability] *which are not legislated for in express terms of the contract but are implicit in the parties understanding and necessary to give business efficacy to the arrangements*…"

These aspects, when in the context of a construction contract, requires that parties must readily offer data or knowledge to each other to assist them achieve their obligations under the contract[444]. This also requires the placing of the other party's interests, i.e. the Contractor, before a party's own interests, i.e. the Employer, or as Leggatt. J stated, "…*the essence of contracting is that parties bind themselves in order to co-operate to their mutual benefit*…"[445]

Long-term contracts often create supplementary duties for the parties involved in them in order to ensure the business efficacy necessary for such contracts to operate[446]. As illustrated, by extension of time and discretionary clauses to decide the Contractor's scope of work, standard contract provisions, such as FIDIC99, have to make allowance for future contingencies.

Although Employer acts of prevention such as the issuing of a variation or late issuing of instructions can be argued to be unforeseen at the

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[442] Rowlinson. S., & Cheung, F., A review of Concepts and Definitions of Various forms of Relational Contracting, pp. Preface, Executive summary and pages 1-22; Campbell D., and Harris D., "Flexibility in Long-term Contractual Relationships" (1993) 20 J Law Soc, pp. 166-191.

[443] [2013] EWHC 111.

[444] Bakri, Ingirige, Amaratunga, *op cit*., n. 23; Campbell and Harris, *op cit*., n. 442.

[445] Whittaker. S., Case Comment - Good, faith implied terms and commercial contracts, L.Q.R. (2013) 129 (Oct), 463-469.

[446] Collins, *op cit*., n. 19; Rowlinson & Cheung, *op cit*., n. 442.

time of contract formation, an Employer and his agent will have knowledge of the potential for such acts to manifest before the Contractor will have such knowledge[447]. This is illustrated in section 3.2 below, which demonstrates that a cause of dispute in construction contracts in Dubai is the late issuing of instructions, such as detailed drawings required for the construction of the structure.

Thus, it is clear that these supplementary duties in a construction contract includes the prompt issuing of design data required for the construction, or to correct deficiencies to the design. Where the issuance of the same delays the Contractor's performance, the contract provisions may prove to be too crude to appropriately deal with adjustments to the Contractor's rights and obligations caused by such delays as illustrated by Sub-Clause 20.1 of FIDIC99. Flexibility is then necessary as to how terms of a contract are operated to avoid a dispute[448].

As illustrated in section 2.3, provisions which act to exempt an Employer from liability where he prevents the performance of the Contractor by operation of a strict timeframe, and which *inter alia* makes the Contractor liable for the Employer's breach, clearly goes against the principles set out in *Yam Seng Pte Ltd v International Trade Corporation*[449].

The fundamental principles set out in this case are extremely important where a contract is for building a structure, as without them the whole concept of teamwork is lost. Teamwork is a prerequisite for establishing efficient relations necessary to avoid delays in the production of a structure[450]. Without such atmosphere there is no trust, a fundamental requirement to removing barriers which in turn encourages maximum

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[447] Vinelott., J. - Hugh Stanley Leach v London Borough of Merton(1986) 32 B.L.R. 51.

[448] Rowlinson & Cheung, *op cit*., n. 442; Campbell and Harris, *op cit*., n. 442; Collins, *op cit*., n. 19 – this is particularly important as the role the Employer, through his Engineer is that of a fiduciary, and any failure to act in a fair, reasonable and just manner is an act of bad faith; Also see Whittaker, *op cit*., n. 445.

[449] [2013] EWHC 111; Campbell and Harris, *op cit*., n. 442.

[450] Collins, *op cit*., n. 19.

contribution to allow the parties to achieve success[451], i.e. achieve their anticipated profits referred to as a win-win scenario.

This is demonstrated in the case of *Shell UK Ltd v Lostock Garage Ltd*[452] where Shell, the franchiser of a tied petrol station discriminated against Lostock as to rebates offered to other garages in the area forcing Lostock to run its business at a loss. This lack of predictable performance, cooperation and reliability denied the teamwork that Lostock expected, to the extent that it could drive Lostock out of business. The decision in this case was that there was an implied term in that there were constraints on Shell's power to discriminate which imposed a duty of loyalty (reliability).

Laggett J. in *Yam Seng Pte Ltd v International Trade Corporation* highlighted an important point to be considered in contracts that created a greater duty of cooperation and other principles that were considered to fall within the ambit of good faith. The principle, put into context of a construction contract is, where an Employer is heavily investing in a capital project for his own use or public service, and a Contractor is investing heavily in production resources to ensure delivery, then the greater the cooperation or teamwork that takes place, the greater potential for expected returns to be achieved. This demonstrates that parties to a construction contract owe a duty to the project, the subject matter of the contract, to prevent unnecessary costs from delays and so the claims they generate[453].

Consequently, it can be said that there are three aspects which parties have an obligation to do: 1) assist the other party in its performance of the contract so benefits which are derived from the contract are maximised, i.e. the Employer has early or on time delivery and the Contractor is not delayed. This requires prompt sharing of data, or in the circumstance of the Contractor, keeping the Employer informed of problems; 2) avoid harming the interests of the other party unless there is a compensating benefit to oneself; 3) act reliably to protect the

[451] Campbell, Collins & Wightman, *op cit.*, n. 372, pp. 26-49.
[452] [1976] 1 WLR 1187 (CA); Whittaker, *op cit.*, n. 445.
[453] Collins *op cit.*, n .19; Campbell and Harris, *op cit.*, n. 442.

system of production and so the joint interest of the parties, as stated above, against adverse interference[454].

These factors are akin to the objectives of parties' expectations. Such factors are that parties, in order to avoid a party failing to meet its obligations, have to act in a fair and reasonable manner. This means they must cooperate with each other over and above the implied obligation of not doing anything to prevent the other party from discharging its obligations under the contract.

In a construction contract this translates into each party assisting the other party in achieving its obligations by transferring relevant data without having to be asked. It also requires the Employer to compensate the Contractor, despite having the option to limit or release himself from liability under the contract, where he delays the Contractor's performance. By doing this the joint interests are achieved, i.e. delivery of the structure on the agreed date to the expectations of the Employer. This ensures that the profits achieved are those anticipated and ensures circulation of wealth, thereby satisfying a primary requirement of *fiqh* and article 3, UCC.

Thus, in the scenario under article 246 above concerning a deficient drainage design, an Employer, to satisfy the fair and open dealing requirement as defined in EW Law, and that parties must readily transfer data when considering the aim of relational contracts, should promptly issue the corrected design without waiting for the Contractor to issue a notice.

Moreover, when it comes to the use of exemption of liability clauses there has to be fairness in the application of such clauses in order not to take advantage of the Contractor's weaker bargaining position, thereby exploiting the Contractor into agreeing to forego his right to compensation where the Employer has committed a breach of contract.

As discussed in subsections 1.3.3 and 2.4.2, major differences between the concept of good faith in EW and UAE Law arises during the

[454] Collins *op cit*., n .19; Whittaker, *op cit*., n. 445; Campbell and Harris, *op cit*., n. 442.

formation of the contract when negotiations are carried out. For the same reasons as set out in the said subsections, the approach adopted in EW Law for such is contrary to the requirements of relational contracts as demonstrated by the fundamental aims of such contracts. Consequently, during negotiations parties hold back information as their aim is to get something as cheap as possible at the expense of the other. This in turn leads to uncertainty as to what an obligation entails, or pressure to agree aleatory provisions, i.e. notice and discretionary clauses.

2.4.4 Similarities between the parties' expectations, relational contracts and UAE Law

As recorded, EW Law applies the doctrine of freedom of contract. The provisions that the parties have agreed to apply to their bargain are sacrosanct. Rights and obligations that arise from these provisions can only be challenged where they fall foul of a statutory obligation(s), where the bargain can be demonstrated to be unconscionable or where the Courts can re-balance the risk through implied terms. Hence, achieving the objectives of parties' expectations and relational contracts is only possible where the parties discharge their rights and obligations in a manner consistent with good faith, fair dealing and justice.

The above analysis demonstrates that the objectives of parties' expectations and relational contracts, when applied to a contract of mutual obligations such as a construction contract, comes close to that of what UAE Law obligates parties to do in Law.

The effect ensures precision in parties' rights and obligations, so when a future contingency intervenes it obligates the parties to act in a manner that serves the best interest of both parties. The form that the obligation takes is that of legislation which can be split into two forms.

The first is that parties conduct their transaction in a manner consistent with good faith as to the type of contract which the parties have entered into. The definition of good faith, in a construction contract in UAE Law, is as determined in the above analysis for parties' expectations and relational contracts.

The second is articles of the UCC that are express in their requirements by giving effect to the *gharar* and *riba* prohibitions, or that the article is specific in the obligations or rights.

This is a major difference between EW and UAE Law, in that where these rights and obligations are not abided by and *gharar* and/or *riba* manifests, if the parties do not take steps to negate the effect then the contract will be void in UAE Law. Consequently, it can be said that UAE

Law enacts parties' expectations and relational contracts as defined in EW Law.

Part 3 – How *gharar* and *riba* are being neglected in UAE construction contracts

3.1 Introduction

Part 3 examines how the *gharar* and *riba* prohibitions are neglected in the formation and administration of construction contracts in the Emirate of Dubai and the consequences thereof, and establishes in:

Subsection 3.2 – ***Gharar*, *riba* and construction contracts** - that *gharar* becomes intrinsic to a construction contract due to an incomplete design, ambiguities in the Employer's requirements, late instructions/variations proving the design was deficient, and Employer's acts which impede the Contractor's mode of performance thereby causing disputes to arise in a construction contract; and

Subsection 3.3 – **Articles of the UCC that are not being complied with** – and the effect the non-compliance has on the contract. The examination takes cognizance of the definitions for the *gharar* prohibition as proposed by the author, and sets out:

1) The obligations that the Employer is failing to perform, and how this allows *gharar* to manifest in the contract;
2) What rights and obligations the Employer and the Contractor have; and
3) Illustrates that a more practical and cooperative approach such as parties' expectations or relational contracts, as defined in EW Law, need to be adopted to manage the inherent uncertainty of what the Employer requires.

3.2 *Gharar, riba* and construction contracts

As recorded in the Preamble and further expanded upon here, the main causes of disputes in construction contracts in the Emirate of Dubai are:

1) Poor 'front-end' engineering design in the form of incomplete drawings and contract documentation to execute the project;
2) Unclear Employer's objectives resulting in Employer's interfering in the detailed design;
3) Late instructions or approvals in respect of: (i) design corrections; (ii) method statements; and (iii) goods/material;
4) Variations in respect of: (i) extra/additional work; (ii) quality; (iii) layout; (iv) aesthetics; and
5) Employer acts of prevention: late payment, late access, design migration causing the quantity/quality of work to be done to be greater than specified, and late appointment of nominated subcontractors/suppliers[455].

Points one to four above illustrates that *gharar* was present in the design causing a lack of control as to quantity, quality, form and type of work to be done and therefore mode of performance, the period for delivery and countervalue.

The fifth point demonstrates that *gharar* manifested because of the Employer's delayed performance of an obligation. This includes corrections to the design as demonstrated by design migration and the increase of quantity/quality because of the Employer's unclear objectives. The term "design migration" is used to describe where the design, provided by the Employer is improved upon/further developed by informal directives by the Employer, when he comments on the Contractor's submittals for working drawings for finishes, specialised

[455] Zaneldin, *op cit.,* n. 38; Ren, Atout & Jones J., *op cit.,* n. 38; Shaikh Asif Abdus Saeed, Delays to Projects – cause, Effect and Measures to Reduce /Eliminate Delay by Mitigation /Acceleration, Institute of Business, The British University, Dubai (2009).

installations such as MEP, security systems (all of which are referred to as shop drawings), and material approvals.

The main reasons for this is that it has become customary (influenced by practices used in the UK), that elements of the design necessary to create certainty as to the Contractor's technical obligations are provided during the building of the structure[456]. An example in respect of structural requirements is the steel reinforcement design for columns from the ground floor up. These are only required once the Contractor is due to finish the sub-structure, whilst for joinery the final detailed design for moulds or fire doors are only required as the structural works come to an end.

As demonstrated under section 1.2 above, a construction contract is classed as a nominate contract. Consequently, both the general obligations of articles 202, 203 and those that apply specifically as set out in article 874, UCC have to be complied with for a valid construction contract to come into existence. The aim of these articles is to prevent contravening the *gharar*/*riba* prohibitions so that the anticipated profits are achieved.

Hence, based on the reasons cited above, it is clear that there are two primary reasons as to why disputes arise in a construction contract. These are:

1) The Employer is not complying with the obligations placed on him by articles 202, 203, 874, 886 or 887 UCC to provide a comprehensive design in the form of drawings, specifications, and quantity of work to be performed in the form of a BoQ to a level to allow the Contractor to decide its mode of performance, and so build the structure within the agreed period; and

[456] Hugh Stanley Leach v London Borough of Merton (1986) 32 B.L.R. 51. – The commentary on the use of a Programme of Works illustrates that date reflected in by which the Architect was to provide data to the Contractor shall not be neither unreasonably close to nor unreasonably distant from the dates when such was in fact required. The reasonableness being determined by actual circumstance of the work to be done – Powell-Smith, V., & Sims, J., A.O. (1983) Building Contract Claims 2nd Ed., Blackwell Scientific Publications Oxford UK, p. 72.

2) The relevant articles of the UCC that regulate a construction contract during its performance as set out in section 1.3 above are not being adhered to.

This in turn leads to a dispute as to[457]:

1) Whether the Employer or the Contractor was responsible for the delay;

2) Where the Employer caused the delay, what additional time the Contractor has a right to deliver the structure; and

3) What increase in countervalue the Contractor has a right to for the delay suffered, and any additional/extra work done.

The result is that *gharar* is intrinsic to the contract in the form of speculation as to[458]:

1) When delivery will be achieved because of an Employer's act that delayed the performance of the Contractor; and

2) Whether the countervalue takes account of costs incurred by the Contractor caused by changes in condition, Employer's changes to the scope of work and so it is equivalent to the work done.

The way a dispute manifests is, that although the Contractor has the right to have the time for delivery adjusted through the contract provisions, there is, from the author's experience, disagreement as to:

1) Whether or not the Contractor has met the obligations of the notice clause; and

2) The operation of the discretionary clause that gives the right to the Employer to decide the compensation due to the Contractor.

[457] Atkins Chambers *op cit.*, n. 19, pp. 893-904; Holme v Guppy (1838) 3 M. & W 387.; Wells v Army & Navy Co-operative Society (1902) 86 LT 764; Peak Construction (Liverpool) Ltd. V Mckinney Foundations Ltd. (1970) 69 L.G.R; Trollope & Colls v NW Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601 HL.

[458] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, pp. 320-323; Atkins Chambers, *op cit.*, n. 19, pp. 904-910; City Inn Ltd v. Shepherd Construction Ltd 2003 SLT 885; Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2) [2007] EWHC 447 (TCC); B.L.R. 195.; Steria Limited v. Sigma Wireless Communications Limited [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC).

In this second instance there is uncertainty as to: 1) whether or not any compensation will be agreed to by the Employer; and 2) whether the compensation agreed to by the Employer will be fair.

Consequently, there is potential as to whether or not the Employer will deduct damages for late delivery of the structure, which if the Contractor fails to give timely notice and/or the Employer acts in an opportunistic manner when deciding the time element of the compensation due, then *riba* can infect the contract.

The next section analyses how the relevant articles of the UCC are not being complied with.

3.3 Articles of the UCC that are not being complied with

This section examines, by considering the causes of a dispute as set out in the previous section, what articles of the UCC are not being complied with, along with the consequences of non-compliance.

All of the causes of a dispute as set out in section 3.2 demonstrate that the Employer has failed to meet the obligations placed on him by articles 202, 203 and 874 UCC. This in turn prevents the precision as required by articles 886 and 887, UCC as to what the Contractor's obligations are to perform the physical work not being achieved through the BoQ.

This allows *gharar* to be present in the mode of performance and so the period for delivery, an essential element of a construction contract which goes to the root of the contract. Hence, the period agreed for delivery lacks the precision necessary to minimise *gharar*.

Thus, where the delivery is too short then an Employer's unfair gain is in two forms, in that he does not pay for:

1) Work which was not measured, services associated with design migration and changes in quality and type of goods; and

2) Administrative costs required to manage the mode of performance, in that such costs will be incurred for a longer period than the planned duration, or will not be sufficient to cover the selected mode of performance.

Where the period is too long there will be no unfair gain as Contractors will reduce the resources required to optimise their administration costs. In the circumstance of the delivery period being too short, then Contractors will not meet the agreed delivery date and Employers will deduct damages, thereby contravening the *riba* prohibition. These circumstances also contravene the obligations placed on Employer's by article 42 UCC, in that neither party will cause harm to the other.

The effect of the non-compliance with articles 202, 203, 874, 886 or 887 UCC (the 'design articles'), is further compounded where an

Employer corrects the design deficiency which delays the Contractor's performance, and then relies on the exclusion of liability (notice) clause to avoid compensating the Contractor. This being despite his failure to obey the requirements of the 'design articles'. The reason, as demonstrated, is that a provision of this nature is aleatory as the Employer now decides the Contractor's rights and so furthers enhances the effect of *gharar* that has infected the mode of performance, delivery and countervalue, and allows *riba* to infect the contract. For this reason it is contrary to the requirements of article 206, UCC.

In both instances the provisions of articles 3, 31, 32, 42, 52, 106(2)(b) and (c), UCC will be contravened, as the Employer is causing the Contractor to suffer financial harm for the reasons stated. This allows the Employer to increase his profit unfairly, which as stated is repugnant to the morals of *fiqh* and so the morals of the UAE. Consequently, as provided for under article 210, UCC the contract is in effect void or defective.

For the above reasons the five (5) causes for a dispute stated in section 3.2 demonstrate that the contract entered into did not comply with article 243, UCC. This article provides that the rights and obligations that arise from that type of contract must be performed. Put simply, the Employer must comply with the obligations placed on him by the design provisions; and no clause of the contract can be aleatory as it contravenes article 206, UCC and the morals of the UAE. The overall effect is the contravention of article 3, UCC as the circulation of wealth is impeded.

These five (5) causes also illustrate that the requirements of articles 246(2) and 263, UCC are being disobeyed. These articles, when construed together, obligates the Employer, where the description (the design) of a thing is incomplete, to correct the deficiency in the design.

As recorded above, an Employer's reliance on an exclusion of liability clause furthers the effect of *gharar* that is intrinsic to a contract. An Employer, by relying on such provision and exercising the right granted, contravenes the obligation placed on the parties by articles

106(2)(b) and (c), UCC not to exploit the Contractor, and 246(1), UCC to act in a fair and open manner, both procedurally and with substantive fairness.

Such action by the Employer is contrary to article 386, UCC that makes the defaulting party responsible for compensating the other party, and article 387, UCC, that the injured party can make a claim against the defaulting party. This obligation to compensate the Contractor for a breach of contract only arises once the Contractor has issued notice as obligated by article 380, UCC. Moreover, such provision(s) is in direct conflict with article 476, UCC and article 95 LCT, both of which are mandatory.

The five (5) causes of a dispute stated in section 3.2 demonstrate that parties are not complying with the broader effect of obligations placed on them by article 246(1), UCC.

The obligations placed on the Employer by the above articles require that he take responsibility for his breaches of contract. Thus, no exclusion of liability clause should be incorporated in the provisions of contract as they detract from these obligations. Where an exclusion of liability clause is included in the contract provisions, although an Employer will consider it a right to apply the provision, it should only be used to protect his interests. It should not be used in a manner to undermine the reasonable expectations of the Contractor.

Put in the words of Bowen LJ[459], the perils/risk which result in a loss should not be the burden of one party to the contract, nor should a party be 'emancipated' from all chances of failure. This is because EW Courts view of fairness is a rule of Law.

As illustrated, article 247, UCC gives the right to the Contractor to refrain from performance where the Employer fails or delays in performing an obligation that the Contractor is reliant on to perform his obligation. Thus, as stated, the prevention principle is enacted in UAE Law.

[459] The Moorcock (1889) L.R. 14 P.D.64; This is supported by H.H. Edgar Faye QC in Henry Boot Construction Ltd v Central Lancashire New Town Development Corp (1980) 15 B.L.R. 1.

The obligations that an Employer will not delay in performing with regard to a construction contract in EW and UAE Law are the same. These are[460]:

1) That he promptly performs all administrative obligations he has under the contract;
2) To appoint all parties which the provisions of the contract oblige him to do;
3) Pay the Contractor in accordance with the provisions of the contract; not to interfere with any certificate;
4) Not to misrepresent the physical state of the Site;
5) Give adequate undisturbed possession of the Site against other parties engaged by the Employer;
6) That such possession shall be of good title against third party's; and
7) That the Employer shall promptly issue all necessary instructions in respect of deficiencies in the design, and issue all variations in a timely manner.

The five (5) causes cited in section 3.2 demonstrates that the Employer is failing to perform these obligations and so is disobeying the requirements of article 246, UCC. Moreover, these five (5) causes illustrate that the parties are failing to take cognizance of the right granted under article 247, UCC to the Contractor.

Such circumstance demonstrates again non-compliance with the 'design articles', article 243, UCC and the requirements of 246 (2), UCC that requires parties to embrace matters that accompany the primary obligation; and that all other articles previously stated are being contravened.

The first and second causes of a dispute in section 3.2 demonstrates that the Employer was failing in his obligation of cooperation, placed on

[460] Atkins Chamber's, *op cit.*, n. 19, p. 532.

him by article 246(2), UCC, to ensure his agent, the Engineer, performs his duty to issue instructions promptly to the Contractor.

The second cause for a dispute to arise, "unclear Employer objectives resulting in the Employer's interference", demonstrates that *gharar* was present during pre-contract negotiations. The reason is that the Employer's uncertainty as to what his expectations are results in the Employer adopting a defensive approach during such negotiations[461]. Such approach is analogous to the adversarial position that EW Law considers the only way parties can negotiate and conclude a contract. This leads to the same outcome of that in EW Law, to get something as cheap as possible. Such circumstance contravenes all articles as referenced above for the reasons previously stated. However, it seriously undermines the obligation placed on the parties by article 246, UCC, as the seed for not dealing in a fair manner has already been planted.

As recorded in subsection 1.3.3, such instance contravenes the obligation placed on the Employer by article 186, UCC. Unlike EW Law which has adopted the principle that it is fundamental at contract formation that parties during pre-contract negotiations take adversarial positions, UAE Law requires full disclosure. The reason for this, as recorded throughout this thesis, is to avoid an unfair gain (*gharar*) and so exploitation (*riba*) of a party, as such circumstances lead to the illicit gain from a transaction. This concept is understood in EW Law as demonstrated by the words of Bowen LJ, "…*not to impose on one side all the perils of the transaction*…" and reflected by Lord Steyn in his dicta in *Equitable Life Assurance Society v Hyman*[462]*.*

All of the causes cited in section 3.2 demonstrate that the parties, when attempting to resolve a controversy between them, were failing to comply with article 266, UCC. This article, as recorded in subsection 1.3.4, enacts what is comparable to the *contra proferentem* rule in EW

[461] Zaneldin, *op cit.,* n. 38; Ren, Atout & Jones J., *op cit.,* n. 38.
[462] [2002] 1 AC 408.

Law, which is a principle of justice in EW Law and so clearly aligns itself with the precepts of *fiqh*.

Incomplete drawings and contract documentation illustrate that the design is not fully developed, demonstrating that there are ambiguities in the same. Employer's uncertainties as to his expectations support this, which, as illustrated above, will prejudice the Employer to comply with his obligation of fair and open dealing. This obliges him to accept that his failure to provide a design, to the precision of that required by the 'design articles', has allowed *gharar* to be intrinsic to the contract as to the attributes of mode of performance, delivery and countervalue. This demonstrates that the requirements of the 'design articles', and articles 243, 246(2), UCC and all other articles previously stated are contravened.

This is supported by the third and fourth causes of a dispute arising, and the fifth with regard to design migration that results in the quantity/quality of work to be done to be greater than that specified.

The above circumstances also demonstrate the parties have failed to comply with article 249, UCC where some intervening contingency has occurred, causing the Contractor to lose control over its mode of performance, resulting in the Contractor facing grave financial losses. Such losses include economic impracticability as illustrated by the commentary under subsection 1.3.3.

The third and fourth causes for a dispute to arise illustrates that the Employer was not abiding by this obligation placed on him by article 354, UCC to consent to a change in design where he failed to comply with the obligations placed on him by the 'design articles'. This failure contravenes article 52, UCC, as any delay in consenting to a necessary design change increases the effect of *gharar* caused by an incomplete design. This increases the level of unfair gain and allows *riba* to be present.

An example would be the Employer failing to revise the design when unsuitable grounds are discovered, and makes the Contractor

responsible for changes to his mode of performance[463] by operation of a provision that allows him to decide the rights of the Contractor.

If the Employer is released from being liable to compensate the Contractor for the delay suffered and the change in the mode of performance, the Employer will gain an excessive benefit by exploiting the Contractor's contractual position. The right of the Employer to deduct damages for late delivery will further exasperate this.

The requirements of article 886, UCC, where the contract is M&V support this argument as the Employer has the right to cancel the contract where there is a significant increase in countervalue. Whereas, article 887 obligates the Employer to initiate a variation where there is any change in the 'agreed plan'.

Thus, where the ground conditions are not as expected, the Employer, to avoid contravening articles 52, 106 (b) and (c), UCC, should promptly issue a revised design. Such action is in line with the broader obligations placed on the Employer by article 246, not to operate a condition to undermine the reasonable expectations of the other party.

As discussed above, article 386, UCC obliges a defaulting party to pay compensation to the other party. This obligation only arises where: 1) the injured party issues a notice as required by article 380, UCC; and 2) upon the injured party making such a claim, refer article 387, UCC. Article 386, UCC obligates the Employer to compensate the Contractor where the Employer prevents or delays the Contractor's performance. Thus, all five (5) of the causes of a dispute stated in section 3.2 give the right to the Contractor to be compensated for both time and money. Hence, any exclusion of liability clause will have no effect unless the Contractor has failed to give notice.

As illustrated above, when considering the broader obligations that arise under article 246, UCC, the Employer, where the Contractor has failed to give notice can rely on the exclusion of liability clause. However, once notice is issued then such exclusion clause shall no

[463] Rayner S, (1991) '*A note of Force Majeure*' in Islamic Law (ALQ), pp. 86-89.

longer apply as it detracts from the Employer's obligations, namely those that are set out by the 'design articles'; and that such provision should not be operated to undermine that of the Contractor.

The above demonstrates there is a serious lack of understanding of how the UCC regulates parties' rights and obligations that arise from a construction contract. The primary reason is that parties see the contract provisions as the key source as to what rights and obligations arise from a construction contract. Parties relying on EW Law to interpret and understand such rights and obligations as illustrated in section 2.2 compound this allowing *gharar* and *riba* to be inherent to the contract. This in turn causes the countervalue not to be equivalent to the work done, leading to a dispute between the Employer and the Contractor.

This is particularly obvious at the formation stage of the contract as the design and precision expressed by Jurists has not been complied with. The five (5) causes for a dispute to arise stated in section 3.2 illustrate this. There is also a complete lack of cooperation that is necessary as obligated by article 246, UCC, to ensure that the structure built is to the Employer's expectations and delivered by the agreed date for the corresponding value. The reason is that the Employer has not defined his objectives, leading to a defensive approach adopted in negotiations.

The result is negotiations not being conducted in a transparent manner. This lack of the Employer's objectives leads to uncertainty as to what the Employer's expectations are, and so a desire on the part of the Employer to minimise the amount to be invested. Thus, there is potential for an immoral incentive to gain an undue benefit from the transaction, e.g. get a Rolls Royce whilst paying the price for a Ford Mondeo.

Consequently, parties to a construction contract need to adopt a more practical and cooperative spirit to correct the inherent flaws at contract formation and the delivery phase of the structure. The aim of the *gharar* and *riba* prohibitions, as demonstrated by the contemporary definitions determined by the author, is to remove the cause of a

dispute at contract formation. This in turn allows parties to the contract to make the anticipated profit from the contract, thereby satisfying their commercial aims.

Approaches which can allow such a practical and cooperative spirit to be adopted are parties' expectations and relational contracts. A more formal approach is that of Alliance Contracting. Again, this approach is aimed at promoting a collaborative working environment using techniques aimed at encouraging cooperation between the parties. The contractual relationship can vary widely, in that the agreement can be nothing more than a statement of the commons gaols the parties wish to mutually meet, or can be a fully integration of management systems, including open book keeping and sharing of all data including access to all stakeholders, the design team and supply chain. The objective is to create a spirit of mutual trust and cooperation. This includes the sharing of cost overruns and savings regardless of how the overruns or savings occur[464].

The basic principles which Alliance Contracting wish to create is the elimination of 'blame culture' by creating an atmosphere of teamwork, cooperation and mutual trust, and that the parties understanding of each other interests so they can identify and minimise areas which can lead to a dispute[465].

Such approach will allow parties to comply with a primary objective of *fiqh,* which, as recorded in this thesis, is to allow the circulation of wealth.

Applying the proposed definitions of the *gharar* and *riba* prohibitions, taking account of the obligation placed on the parties by article 2, UCC when interpreting the relevant articles of the UCC that regulate a construction contract, there are clear analogies in the principles and aims of the parties' expectations, particularly that of a win-win scenario

[464] Bailey, J. A.O. (2016) Construction Law (Construction Practice Series), Informa law from Routledge, Abingdon, Oxon, UK pp. 37-39; Chappell, Marshall, Powell-Smith, Cavender, *op. cit*., n. 51,pp. 388-389.
[465] Chappell, Marshall, Powell-Smith, Cavender, *op. cit*., n. 51, p. 389.

of relational contracts. This is particularly clear in the application of the provisions that apply to the contract.

Consequently, parties to a construction contract would be better off if they adopted either of these approaches during the building stage of a construction contract. The reason is that they minimise the potential for *gharar* and *riba* as they ascribe to the requirements of UAE Law.

Part 4 – How to fix the neglect of the effect of these prohibitions

4.1 Introduction

As illustrated in Part 3, parties to a construction contract are neglecting how the *gharar* and *riba* prohibitions are to be applied to parties' rights and obligations in both the formation and administration of the contract. Such neglect, if not addressed, makes the contract void or defective as the requirements of articles 52, 202, 203, 243 and 874, UCC, amongst others, have not been complied with.

Taking cognizance of the author's novel proposed definitions of *gharar* and *riba,* this part examines how standard forms of contract provisions such as FIDIC99 are to be interpreted and applied in order to prevent such neglect, allowing the contract to remain valid.

4.2 Certainty of obligations

This section identifies what the parties must do, during the life cycle of their contract, to avert *gharar* becoming intrinsic to their construction contract.

Thus, this section examines, using FIDIC99 as an example where applicable, and establishes in:

Subsection 4.2.1 - Certainty of the Employer's design – the primary ways in which *gharar* infects a contract is the Employer's failure to prepare a comprehensive design and his acts of prevention. The method to address this is by operation of the agreed contract provisions;

The Contractor's Programme of Works – the Contractor's Programme of Works in UAE Law forms part of the contract documentation as it is an essential ingredient for a valid contract to come into existence;

Subsection 4.2.3 - The Contractor's right to insist on the Employer's performance – which, as such notice under UAE Law is a notice for specific performance makes the Employer liable to compensate the Contractor; and

Subsection 4.2.4 - Mechanism for compensating the Contractor – how the parties agreed contract provisions can negate *gharar* infecting the contract.

4.2.1 Certainty of the Employer's design

This section examines how *gharar* can be removed from the two types of permitted construction contracts under UAE Law, M&V and LS, when *gharar* becomes intrinsic to a contract because of a deficient design or some other act by the Employer impeding the Contractor's performance.

Although this goes against the *gharar* prohibition, such circumstance is accepted on the basis of *istihṣān*[466] as long as the consequences of *gharar* are removed[467].

In order to address such consequences, or what can be termed 'legitimate *gharar'* in UAE Law, parties to a construction contract are obligated to operate the contract provisions such as FIDIC99 in a manner that satisfies the obligations placed on them by the UCC, so the effect of *gharar* infecting the contract is removed. The principle ways this is achieved is set out in the following subsections:

[466] Changes in legislation and more efficient or optimisation of function needs could not be accommodated without the Employer having this right cite whichever case in EW law.
[467] Kamali, M, H., A.O. (2005) Equity and Fairness in Islam, Islamic Text Society, Cambridge, UK, p. 43.

4.2.2 The Contractor's Programme of Works

FIDIC99 obligates that the Contractor issues a Programme of Works to the Employer[468]. The form that FIDIC99 requires the programme to take is that it sets out the order in which the Contractor shall execute the different elements required to build the structure, along with associated durations to perform the same.

The elements presented in the programme are[469]:

1) The actual construction work (structural/architectural/MEP), inclusive of the testing and commissioning and the sequence of execution;

2) Deliverables (method statement describing the work to be done, health and safety, Subcontractor selection and appointment), material approval submissions, manufacture of plant to be incorporated into the structure; and

3) Expenditure of Provisional and Prime Cost Sums.

As stated in subsection 1.2.2 above, these elements, through a critical path methodology, determines the most economical or cost efficient period over which the structure can be delivered.

The reason is that this approach allows the Contractor to identify resources necessary to achieve the agreed delivery date. This produces certainty as to how the mode of performance will be performed, thereby satisfying the precision called for by Jurists to minimise *gharar*.

By using critical path methodology to determine the optimum period in which the structure can be built it identifies how *gharar* can infect the contract, resulting from a deficient design, any other Employer's act of prevention, or some default of the Contractor as it[470]:

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[468] Sub-Clause 8.3; FIDIC99; Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, p. 224; Glover & Hughes, *op cit.,* n. 43, p. 191; Totterdill, *op cit.,* n. 43, pp. 143.

[469] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, pp. 224-226; Glover & Hughes, *op cit.,* n. 43, pp. 191-192; Totterdill, *op cit.,* n. 43, pp. 143-144.

[470] Baker, Mellors, Chalmers & Lavers, *op cit.,* n. 42, pp. 224-226; Glover & Hughes, *op cit.,* n. 43, pp. 191-192; Totterdill, *op cit.,* n. 43, pp. 143-144.

1) Highlights what activities must be done by a specific date if the delivery date(s) is to be met;

2) Provides certainty that the structure will come into existence; and

3) Illustrates what critical elements have to be satisfied if *gharar* is to be avoided.

Consequently, a primary role of the programme is to inform the Employer of the obligations he has to perform in order not to hinder/delay the Contractor's planned mode of performance. Such obligations are when the Employer is to provide[471]:

1) Approvals for deliverable submissions – method statements, goods and materials;

2) Instructions as to expenditure of Provisional and PC Sums and the appointment of nominated Subcontractors;

3) Further design data which will clarify ambiguities; and

4) When the Employer's participation is required so that the Contractor can discharge his obligations such as testing, Employer's manufacturers visits, etc.

The programme also allows the Employer to: 1) monitor the Contractor's progress; and 2) identify when the Employer's lack of action prevents the Contractor's performance[472]. This causes the Contractor to lose control of his ability to manage his mode of performance and his obligation to deliver the structure by the agreed date.

Where such circumstances occur, the Programme of Works, as it was compiled using critical path methodology, can be readily analysed to identify the extent *gharar* has infected delivery and countervalue[473].

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[471] Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, p. 226; Totterdill, *op cit.,* n. 43, p. 144; Hugh Stanley Leach v London Borough of Merton (1986) 32 B.L.R. 51.
[472] Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, p. 227; Glover & Hughes, *op cit.,* n. 43, p. 192; Totterdill, *op cit.,* n. 43, p. 144.
[473] Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC).

To do this the duration of the delay associated with the Employer's act of prevention is simply inserted at a suitable point into the programme, and then by use of the relevant software the delay to delivery will be predicted. This in turn allows the increase in countervalue to be calculated.

The Programme of Works, unless specifically incorporated does not form part of the contract in EW Law, and so any changes in the inter-relationship of activities as to how the mode of performance is to be achieved, and any delays that manifest, do not amend the party's obligations[474].

The obligation placed on the Contractor by FIDIC99 mirrors two of the essential elements that have to be satisfied for a valid contract to come into existence as required by article 874, UCC:

1) There must be a statement of the type and extent of the structure, along with the mode of performance; and
2) The period over which the structure is to be built.

Consequently, the Programme of Works that FIDIC99 obligates the Contractor to issue to the Employer, in UAE Law forms part of the contract.

The effect of this is that any future contingency categorised by FIDIC99 as an Employer's act of prevention that delays delivery, then such act of prevention constitutes a variation under the contract. This obligates the Employer to issue a variation order to cover the additional time and associated cost required to accommodate the delay to delivery[475].

This is further demonstrated by the effect of the following obligations placed on the Employer by the UCC when taking account of the proposed *gharar* definition:

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[474] Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, p. 227.

[475] Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd, 32 B.L.R; Havant BC v South Coast Shipping Ltd (No.1), (1998) 14 Const. L.J. 420.

1) Article 31 - furnish the design to the Contractor to prevent *gharar*;

2) Article 32 - perform the act(s) set out in the Programme of Works;

3) Article 42 - discharge the obligations placed on him by the Programme of Works to prevent harming the Contractor;

4) Articles 52, 202 and 203 - prevent *gharar* becoming intrinsic to the contract;

5) Article 243 - perform the obligations that derives from the contract; and

6) Article 246 - do what is necessary so as not to delay the Contractor, which includes the issuing of a substitute design where any element of the initial design is deficient.

The overall effect of these articles is that the Employer has to perform all matters that require his participation within the timeframes set out in the Programme of Works.

This includes ensuring the Engineer fully coordinates and cooperates with the Contractor in respect of such matters that requires the Employer's participation.

Moreover, as a result of the effect of article 246(1) and (2), UCC the Employer has an obligation to assist the Contractor to perform his obligations so the Contractor can maintain progress against that set out in the Programme of Works. This is on the proviso that such assistance does not go against the interests of the Employer, which it does not as it is in the Employer's interest to have the structure delivered by the agreed date and to his expectations.

Consequently, the Employer is obligated to ensure the Engineer supports the Contractor where submissions for deliverables, method statements and materials maybe considered deficient as a result of misinterpretation or lack of clarity.

Two principles which define good faith in the performance of a contract in EW Law illustrate this:

1) That something which cannot be done unless both parties concur to do it, then each party will do what is necessary to do it[476]; and

2) That party's to a contract have a substantial investment in the contract, the parties will cooperate/coordinate so that the maximum benefit can be derived from the transaction by each party[477].

This creates an atmosphere of teamwork as mutual trust develops between the parties, resulting in predictability and reliability and so certainty as to how the Employer and Contractor will meet the common objectives. The common objectives are those of the structure coming into existence by the agreed delivery date, to the expectations of the Employer and at the agreed countervalue. It also removes *gharar* as to delivery and countervalue so that there is no unfair gain, and the benefits obtained are those anticipated and equivalent.

[476] Lord Blackburn Mackay v. Dick (1881) 6 A.C. 251.

[477] Laggett J., Yam Seng Pte Ltd v International Trade Corporation [2013] EWHC 111.

4.2.3 The Contractor's right to insist on the Employer's performance

Notice clause(s) in standard forms of construction contract such as FIDIC99 gives the right to the Contractor to:

1) Insist on the Employer performing an obligation to avoid *gharar* becoming intrinsic to the contract; or

2) Request the Employer to take measures to negate the effect of *gharar* where it has become intrinsic to the contract due to a failure of the Employer to perform an obligation.

FIDIC99 has categorised the application of this right as to when:

1) The Employer fails to perform an act which he is directly responsible, e.g. the provision of additional design data or where a third party delays the Contractor for which the Employer has accepted responsibility, i.e. his agent, a statutory authority or another contractor engaged by the Employer[478];

2) The Employer varies the Contractor's scope of work, including hindering the Contractor's performance[479]; or

3) The Employer has accepted responsibility for matters that are beyond either party's control[480].

Category 1) Right – The Employer's failure to perform an act

FIDIC99, where the circumstance of a Category 1) Right arises, obligates the Contractor to notify the Employer of an Employer's act that will delay or is delaying the Contractor's performance. The obligation to give notice arises under a specific clause of FIDIC99 that specifies the circumstance under which the Contractor's right to give

[478] Sub-Clause 1.9 - Delayed Drawings or Instructions; Sub-Clause 4.12 - Unforeseeable Physical Conditions; Sub-Clause 4.24 – Fossils; Sub-Clause 7.4 – Testing; Sub-Clause 8.4 (d) – Extension of Time for Completion - Unforeseeable shortages of personnel or goods caused by epidemic or governmental actions; Sub-Clause 8.4(e) – Extension of Time for Completion - Any delay which the Employer is responsible; Sub-Clause 8.5 – Delays by Statutory Authorities; Sub-Clause 13.7 – Adjustment for Changes in Legislation and Sub-Clause 16.1 – Contractor's Entitlement to Suspend Work FIDIC99.

[479] Sub-Clause 13 (b) – Variations; Sub-Clause 8.8 – Suspension; Sub-Clause 10.3 – Interference with Tests on Completion and Sub-Clause 10.2 Taking Over Parts of the Works - FIDIC99.

[480] Sub-Clause 8.4 (c) – Extension of Time for Completion - Exceptional adverse climatic conditions and Sub-Clauses 19.2 and 19.4 – Notice of Force Majeure, FIDIC99.

notice arises, and what action the Employer is to take to address the matter.

This right reflects the right granted to the Contractor by article 380(1), UCC, and provided the Contractor has issued notice in accordance with article 380(1), article 387, UCC gives the right to the Contractor to claim compensation, with article 386, UCC obligating the Employer to compensate the Contractor.

Article 386, UCC excuses the Employer from compensating the Contractor where the Employer can demonstrate the cause of his inability to perform was a result of an external cause. Where the parties agree between themselves who will be liable for an external cause, the right to be excused will not apply.

Where *gharar* manifests in any of the forms determined by FIDIC99 under Category 1), the Contractor has a right to compensation in Law. FIDIC99 obligates the Contractor, when notifying the Employer, to identify the form of *gharar.* This provides certainty as to how *gharar* is to be avoided or negated and allows the parties to establish the extent of compensation due.

Where the Employer fails to provide specific performance causing a breach, then FIDIC99 provides a mechanism to compensate the Contractor, refer Sub-Clause 8.4. The mechanism operates by adjusting the Contractor's obligation as to the time the Contractor has to deliver the structure and amends the countervalue so it is equivalent. This reinstates certainty in respect of these attributes. This in turn negates the effect of *gharar* and the potential for *riba*.

Under FIDIC99 the mechanism to trigger the right for compensation is also conditional on certain notice requirements being met. These are discussed in section 4.3 below.

There are fundamental differences as to how FIDIC99 provisions are to be interpreted and applied in EW and UAE Law. The reason is the effect of the articles of the UCC that apply to a construction contract, taking cognizance of the prohibition test, obligating the parties to ensure

certainty in the operation of FIDIC99 where Category 1) Right arises. These differences are:

Firstly, in EW Law where there is a lack of definition as to what an obligation entails, then the Contractor must be able to demonstrate that the ignorance that resulted from such lack of definition was something that an experienced Contractor could not have foreseen. Failure to do so results in EW Law classifying such ignorance as an accepted risk[481]. In UAE Law it is the opposite as demonstrated in subsection 1.1.3. All a Contractor has to demonstrate is that *gharar* is intrinsic, caused by a lack of definition as to what an obligation entails. This in turn results in him losing control of his mode of performance, and so his ability to comply with his obligation to complete by the agreed date. Once proven the Contractor has a right to compensation in Law. Consequently, the argument advanced in EW Law that an accepted risk associated with any lack of definition is not valid in UAE Law;

Secondly, where an Employer fails to comply with the Contractor's notice directing specific performance, causing *gharar* to infect the contract, then the Employer is liable under the UCC, refer article 387, to compensate the Contractor;

Thirdly, in addition to the Contractor's right in Law to be compensated, article 247, UCC allows the Contractor to cease performing his obligations. Consequently, the Employer's right to insist on performance can only be reinstated once the Employer has agreed the compensation due to the Contractor. The effect of article 247, UCC is that it enacts the prevention principle as defined in EW Law into UAE Law;

Fourthly, for the reasons stated above, unlike EW Law, the Programme of Works [which includes supplementary documentation that supports how the Programme of Works was compiled] in UAE Law is a contract document as it demonstrates how the essential element, the mode of

[481] Atkins Chambers Ltd *op cit.,* n. 19, pp. 875-877.

performance, will be achieved, providing certainty that the structure will be delivered by the agreed date. Where *gharar* infects the mode of performance caused by an Employer's act of prevention (such as loss of productivity, change of working methods or resources), this constitutes a variation in UAE Law to the agreed mode of performance and period of delivery. Consequently, the Employer is obliged to order a variation confirming such change, and by doing so allows the Contractor to be compensated for time and money for such variation; and

Fifthly, where an Employer's act of prevention reduces the period for delivery, which the Employer fails to acknowledge but instructs the Contractor to maintain the agreed delivery date. As the Programme of Works is a contract document in UAE Law, then such instruction will constitute a variation if the Contractor has to alter its mode of performance to maintain the agreed delivery date.

The certainty of the above rights and obligations prevent any dispute arising as to how *gharar* contaminating the contract can be negated.

In addition to these rights and obligations, the Employer and the Contractor have an obligation to comply with the requirements of articles 32, 52, 263 and 354, UCC. The primary requirement of all of these articles where *gharar* infects the design is that it must be removed, otherwise the Contractor's obligation to deliver has no force; and article 42, UCC - that parties are not to harm one another, and where a party causes harm he will remove it.

Category 2) Right – The Employer varies the Contractor's scope

Under FIDIC99 the Employer has the right to vary the Contractor's scope of work which the Contractor has no right to refuse to do[482]. Compensation – time and money - can be dealt with as follows:

By agreement between the parties[483]. This approach applies to M&V and LS contracts. The process allows the Contractor, as part of the variation

[482] Sub-Clause 13 – Variations and Adjustments; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 116-129; Glover & Hughes, *op cit.,* n. 43, pp. 263-269.
[483] Sub-Clause 13.3 – Variation Procedure; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 116-129; Glover & Hughes, *op cit.,* n. 43, pp. 263-269.

process to accommodate varied work, to propose modifications to the Programme of Works and the time to deliver, with the varied work being valued in accordance with Sub-Clause 12 - Measurement and Evaluation. Where the time for delivery increases then the above process allows the Contractor to recover time related costs.

Where the contract is M&V, then the Contractor's right for payment of a variation to measured work is through the measurement and valuing process set out in Sub-Clause 12.3 – Evaluation, i.e. the increase in work is measured and the contract rate applied[484]. The right for this additional payment is automatic by operation of Sub-Clause 14.1 – Contract Sum[485].

Where the contract is LS then the Contractor's right for payment of a variation to measured work, again is by operation of Sub-Clause 12. However, the right for payment requires documentary evidence demonstrating that the Employer instructed the varied work.

Payment for extra work for M&V and LS contracts, i.e. work for which there was no measured item of work, then such work is measured and valued based on existing rates for similar work, or a new fair rate is calculated. Again, the right for payment requires documentary evidence demonstrating that the Employer instructed the varied work.

Compensation as to additional time to deliver for both M&V and LS contracts, caused by the Employer instructing a variation, is by operation of Sub-Clause 8.4[486]. This clause obligates the Contractor to give notice where the ordering of a variation will delay delivery. The issuing of a notice triggers the Contractor's right for compensation – time and payment associated with the delay. The operation of such notice is conditional on certain requirements being met. These are discussed in section 4.3 below.

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[484] Sub-Clause 12.3 – Evaluation; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 157-174; Glover & Hughes, *op cit.,* n. 43, pp. 255-260.

[485] Sub-Clause 14.1 – The Contract Price; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 157-174; Glover & Hughes, *op cit.,* n. 43, pp. 279-281.

[486] Sub-Clause 8.4 – Extension of Time for Completion; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 457-464; Glover & Hughes, *op cit.,* n. 43, pp. 194-204.

These rights and obligations reflect the requirements of articles 886(2) and 887(2), UCC for payment of additional work over and above that measured and itemised in the contract; and the right for valuing extra work not measured and itemised in the contract.

The method set out by FIDIC99 to value additional work reflects that of the requirements of article 888, UCC but sets out a specific process as to how extra work is to be valued. This provides certainty in the operation of this article in order to ensure the equivalence of the contract. This in turn satisfies the obligations placed on the parties by the *gharar* and *riba* prohibitions.

There are again fundamental differences as to how FIDIC99 provisions are to be interpreted and applied in EW and UAE Law for the same reasons as above, to ensure certainty in the operation of FIDIC99 where Category 2) Right arises. The differences are:

Firstly, article 886, UCC obligates the Contractor to notify the Employer where there is a significant increase in quantity, as illustrated in subsections 1.2.2 and 1.2.4, to ensure the equivalence of the contract. The elements, which can cause a significant increase, are not limited to additional/extra work. It includes all attributes agreed by the parties that allow the Contractor to establish precision in respect of the same as expounded by the Jurists. This includes the number of days needed to deliver the structure. The Employer, upon notice of such significant increase has the right to cancel the contract. The Employer's right to cancel demonstrates that the Employer has control of the Contractor's obligation to complete. Failure by the Employer to cancel the contract obligates the Employer to compensate the Contractor time and money. This obligation ensures that the equivalence demanded by the *gharar* and *riba* prohibitions are satisfied. Consequently, there is no basis in UAE Law for the Employer to deny the Contractor's claim for compensation. This is further demonstrated that the Contractor's right for compensation only arises once he has notified the Employer of a significant increase; and

Secondly, article 887, UCC obligates the parties to comply with the variation clause incorporated into the contract. As recorded above, a party agreed variation clause can be for an increase in countervalue, with a separate clause for the additional time to complete. The important point is, that the level of precision demanded by article 874, UCC that a variation, be it additional/extra work or some other form agreed by the parties, will be readily distinguished thereby avoiding any dispute. Thus, again there is no basis in UAE Law for the Employer to deny the Contractor's claim for compensation. Consequently, the Employer, in order to satisfy the effect of the *gharar* and *riba* prohibitions, has to operate the relevant clauses of FIDIC99 in a manner that ensures the equivalence demanded by the said prohibitions.

The certainty that the above rights and obligations establish prevents any dispute arising as to how *gharar* has contaminated the contract. This in turn satisfies the obligations that the Employer and the Contractor have to comply with as set out under articles 32, 52, 42, 263 and 354 UCC.

Category 3) – Force Majeure

Under FIDIC99 where force majeure or intervening contingencies occur, then the Contractor is obligated to notify the Employer of the form of the intervening contingency[487]. Note, Sub-Clause 19 - Definition of Force Majeure provides a definition as to what constitutes Force Majeure.

If the Contractor is prevented from performing his obligations as a result of Force Majeure and wishes to claim compensation - time and money, then FIDIC99[488] obligates him to issue a further notice. The operation of such notice is conditional on certain requirements being met. These are discussed in section 4.3 below.

[487] Sub-Clause 19.2 Notice of Force Majeure; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 497-504; Glover & Hughes, *op cit.,* n. 43, pp. 361-374.
[488] Sub-Clause 19.4 Consequences of Force Majeure; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 497-504; Glover & Hughes, *op cit.,* n. 43, pp. 361-374.

FIDIC99[489], where the intervening contingency has a continuing effect, and provided the notice requirements have been complied with, then there is an option for the contract to be terminated.

There are specific differences as to how EW and UAE Law defines Force Majeure. This is illustrated under the commentary of article 249, UCC. The differences are, that in UAE Law a party suffering unfair loss/harm as performance has become impossible or unreasonably burdensome, then the Courts can rebalance the parties' rights and obligations. The cause of the impossibility or unreasonable burden in UAE Law includes the suspension by the Employer and unforeseeable obstructions, which FIDIC99 classifies as an Employer's act of prevention.

Coupled to this, UAE Law recognises economical impracticability. EW Law does not. In saying this, FIDIC99 does define force majeure to include an exceptional event or circumstance.

Force majeure falls within the doctrine of frustration in EW Law. For parties to invoke the doctrine of frustration under EW Law there must be some unforeseen intervening contingency that goes to the root of the contract; and the event must not have been brought on by one of the parties. Without these circumstances being satisfied, no relief in EW Law can be granted. Hence, without the rights and obligations as stated in FIDIC99, then the parties cannot resolve the effect of the intervening contingency. The problem faced is that the force majeure must fall within the causes set out in Sub-Clause 19 and so can be restrictive in its application.

Whereas under UAE Law, article 249, UCC states what the parties' right and obligations are determined in Law, and includes any circumstance that causes unfair loss/harm as performance is impossible or has become unreasonably burdensome[490], threatening grave financial losses. Consequently, the definition of an intervening contingency, and

[489] Sub-Clause 19.6 Optional Termination, payment and Release; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 497-504; Glover & Hughes, *op cit.,* n. 43, pp. 361-374.

[490] Whelan, *op cit.*, n. 6, Art. 273(1), provides that where *Al-Qūwat Al-Qāhira* intervenes when a corresponding obligation which makes performance impossible, the contract will be automatically cancelled; Art. 273(2) releases the Obligor from performance where the impossibility of performance is of a temporary nature, although the Obligee can cancel the contract by notice to the Obligor during the period of temporary impossibility. This circumstance would correspond to partial or full suspension of the Works.

as illustrated under the commentary for article 249, UCC, covers circumstances that FIDIC99 does not. Thus, the aim of this article is to prevent an excessive financial burden on parties, as the effect can be negative to the circulation of wealth, thereby conflicting with the requirements of article 3, UCC.

4.2.4 Mechanism for compensating the Contractor

As illustrated in this thesis, there are specific differences in how the provisions in standard forms of contract, using FIDIC99 as an example, are to operate under EW and UAE Law. The core difference is where *gharar* is inherent to a contract then the parties have an obligation to remove it. Coupled to this, the party, which as recorded is generally the Employer who is responsible for allowing *gharar* to manifest, is obligated in Law to compensate the Contractor.

As indicated in subsections 4.2.1 to 4.2.3, standard forms of construction contract such as FIDIC99 are to complement the relevant articles of the UCC that apply to a construction contract. The fundamental way this is achieved is by providing a mechanism for compensating the Contractor where *gharar* has manifested in order to negate its effect.

The mechanism starts with the Contractor putting the Employer on notice, informing him of his act of prevention causing *gharar* to manifest. The act will fall within one of the three (3) categories for which the Employer takes responsibility. This effectively legalises the breach by the Employer as there is provision in the contract clauses to adjust the effects of the breach - the time to complete and countervalue.

This, as recorded, the notice clause in FIDIC99 complements article 380, UCC as it requires the Contractor to state the form of *gharar* infecting the contract, so the parties have an understanding as to what elements of the mode of performance will be delayed. This gives certainty as to why the Contractor has a right to be compensated.

This being understood, the loss of time suffered is impacted into the Programme of Works. This period is then valued along with any additional/extra work done. The basis for the right of the Contractor to claim additional time to complete is through Sub-Clause 8.4, FIDIC99. The right to be granted additional time to complete is through the different Sub-Clauses of FIDIC99 that obligates the Contractor to notify

the Employer of the specific performance[491] required. The right for additional payment is either through Sub-Clause 12 or 13.

The level of compensation is subject to negotiations between the Employer and the Contractor, with the Engineer acting as mediator, refer Sub-Clause 3.5, FIDIC99. Once agreement is reached a formal instruction is issued citing the Sub-Clause under which the compensation is due.

Thus, FIDIC99 complements articles:

1) 386, 387, 886 and 887, UCC by specifying the acts of an Employer that allows *gharar* to become intrinsic to a construction contract; and

2) 32, 42, 52, 202, 203 and 243, UCC as it provides a mechanism for how the effect of *gharar* is removed.

It also complements article 3, UCC by ensuring circulation of wealth.

As illustrated earlier, the Employer has full right to decide the level of compensation, both additional time to delivery and increase in countervalue[492]. This Employer's right is examined in section 4.3 below.

The obvious form for which the Contractor will suffer financial harm will be Site administration costs associated with the longer period the Contractor will have to remain at Site. However, as discussed in subsections 1.2.2 and 1.2.4, the BoQ translates the design into an accurate measurement of work to be done. The rates for the work items are subject to the inclusive price principle. Where the Employer delays in furnishing missing data or issues it in a dysfunctional manner, then the Contractor's mode of performance suffers disruption. The form of the disruption is that: 1) the Contractor is unable to purchase goods

[491] Sub-Clause 1.9 - Delayed Drawings or Instructions; Sub-Clause 2.1; Sub-Clause 4.7 – Setting Out; Sub-Clause 4.12 - Unforeseeable Physical Conditions; Sub-Clause 4.24 – Fossils; Sub-Clause 7.4 – Testing; Sub-Clause 8.5 – Delays by Statutory Authorities; Sub-Clause 8.8 – Suspension; Sub-Clause 10.3 – Interference with Tests on Completion; Sub-Clause 10.2 Taking Over Parts of the Works; Sub-Clause 13.7 – Adjustment for Changes in Legislation; Sub-Clause 16.1 – Contractor's Entitlement to Suspend Work; Exceptional adverse climatic conditions and Sub-Clauses 19.2 and 19.4 – Notice of Force Majeure - FIDIC99; Totterdill, *op cit.,* n. 43, pp. 145-148; Glover & Hughes, *op cit.,* n. 38, pp. 194-195; Baker, Mellors, Chambers, Lavers, *op cit*., n. 42, pp. 460-464.

[492] Sub-Clause 3.5, FIDIC99; Baker, Mellors, Chambers, Lavers, *op cit.,* n. 42, pp. 294-298; Glover & Hughes, *op cit.,* n. 43, pp. 65-67; Totterdill, *op cit.,* n. 43, p. 96.

in a timely manner, including necessary incidentals; 2) uncertainty manifests as to the type, number and duration of resources needed to perform work activities.

These circumstances undermine the Contractor's productivity rates, causing the Contractor to suffer unnecessary additional expense and delays in performing work activities as the optimisation of production costs are lost. Thus, *gharar* not only infects delivery, but also contaminates measured work activities causing the Contractor to suffer financial harm.

The right for the Contractor to claim compensation in this circumstance is the same as described above.

The method for calculating compensation as to the delay suffered is recorded in subsection 4.2.2. That is, to assess the period of delay associated with *gharar* infecting the mode of performance by inserting the duration of the delay into the Programme of Works. The dynamics of the software used to create the Programme of Works demonstrates the additional time the Contractor is entitled to in order to negate *gharar* that has infected the contract.

As the Programme of Works is a contract document, the supplementary documentation that demonstrates how the Programme of Works was compiled forms the basis for calculating the cost associated with such disruption, and any additional time needed to achieve delivery. The method for calculating the increase to the countervalue is the additional days that the Contractor is required to remain at Site, multiplied by the daily administrative costs for the Site.

4.3 Operation of Notice clauses

This section examines the notice clauses, using FIDIC99 as an example, that obligates the Contractor to notify the Employer of his acts of prevention and establishes in:

Subsection 4.3.1 - Legality of a Notice Clause – that obligates the Contractor to notify the Employer of an Employer's act of prevention, delaying the Contractor, is ambiguous in its interpretation and operation, thereby making it aleatory. Consequently, the ambiguities are to be interpreted so *gharar* and *riba* are not intrinsic to the contract, thereby giving certainty to its operation, and that such operation is fair in that it complies with the relevant articles of the Law. Such a clause, which *prima facie* exempts or excludes the Employer from liability, is to be interpreted and operated so that it does not contravene the *riba* prohibition and complies with the relevant articles of the Law; and

Subsection 4.3.2 - Content of a Notice - the form and content in which a valid notice must take to satisfy both the UAE and EW Law, and those that complement this Law using FIDIC99 as an example, based on case precedents as determined in EW Law.

4.3.1 Legality of a Notice Clause

As recorded, the reason FIDIC99 has been used as an example as the standard form of construction contract to be analysed in this thesis, is that at the time this research commenced it was the contract provisions to replace the most common contract provisions in Dubai, FIDIC4. However, the analysis that follows is to be taken in a general context, as it demonstrates the importance of the correct construction of a notice clause when taking account of parties' obligations not to contravene the *gharar* and *riba* prohibitions.

The following examination illustrates, using the notice clauses of FDIC99 that obligate the Contractor to notify the Employer of an Employer's act of prevention delaying the Contractor's performance, are ambiguous in their construction.

To define ambiguity reference is made to the EW Law case of *Burns Philip Hardware Ltd v Howard China Pty Ltd*[493] in which Priestly J.A. stated that words are ambiguous if they have,

> *"…two or more plausible meanings when the context of the document is taken into account in the light of any knowledge any ordinary intelligent reader of the document would bring to the meaning of it…"*

FIDIC99 obligates the Contractor to give notice, *prima facie,* under two separate clauses. The first is a clause[494] that defines the form that the Employer's act of prevention takes, which gives the right for the Contractor to claim compensation – time and money. The second is a clause [Sub-Clause 20.1] which is a common clause, referred to in the text of the first clause, that the Contractor has to comply with in order to have a right to compensation – time and money.

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[493] (1987) 8 N.S.W.L.R. 642.

[494] Sub-Clause 1.9 - Delayed Drawings or Instructions; Sub-Clause 2.1; Sub-Clause 4.7 – Setting Out; Sub-Clause 4.12 - Unforeseeable Physical Conditions; Sub-Clause 4.24 – Fossils; Sub-Clause 7.4 – Testing; Sub-Clause 8.5 – Delays by Statutory Authorities; Sub-Clause 8.8 – Suspension; Sub-Clause 10.3 – Interference with Tests on Completion; Sub-Clause 10.2 Taking Over Parts of the Works; Sub-Clause 13.7 – Adjustment for Changes in Legislation; Sub-Clause 16.1 – Contractor's Entitlement to Suspend Work; Exceptional adverse climatic conditions and Sub-Clauses 19.2 and 19.4 – Notice of Force Majeure - FIDIC99; Totterdill, *op cit.,* n. 43, pp. 145-148; Glover & Hughes, *op cit.,* n. 43, pp. 194-195; Baker, Mellors, Chambers, Lavers, *op cit*., n. 42, pp. 460-464.

The following text found in the first clause demonstrates this:

> "…*the Contractor shall give notice to the Engineer and shall, subject to Sub-Clause 20.1 [Contractor's Claims] to*…" – an extension of time to complete under Sub-Clause 8.4 and/or additional payment.

Sub-Clause 20.1 states:

> *"…If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions…the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware or should have become aware, of the event or circumstance…"* and
>
> *"…The Contractor shall also submit any other notices which are required by the Contract…"*

The text "…*subject to Sub-Clause 20.1*…" and the text *"…the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim …"* being the cause of the ambiguity. The ambiguity is the Contractor's right to claim compensation subject to:

1) Complying with the requirements of the first Sub-Clause that defines the act of prevention which is to be issued within the 28-day timeframe; or
2) Issuing notice under Sub-Clause 20.1 describing the event and issuing such notice within the 28-day timeframe.

Coupled to this the text "…*The Contractor shall also submit any other notices which are required by the Contract…"* clearly adds to the confusion, in that is the Contractor to issue two notices for the same act of prevention?

Moreover, the text of Sub-Clause 20.1, states:

> "…*The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware or should have become aware, of the event or circumstance…"* otherwise the contractor forfeits his right to compensation

creating further uncertainty in the operation of Sub-Clause 20.1 as a result of the subjective nature of this extract as to what circumstance determines the meaning of "...*as soon as practicable*…" and that of "*…the Contractor became aware or should have become aware*…".

Is it when the circumstance giving rise to the claim has started delaying the Works and/or causing additional cost to be incurred; or is it when the Contractor discovers that a circumstance has potential to cause a delay and/or additional cost.

The text of these clauses result in speculation as to how these clauses can operate which allows *gharar* to become intrinsic to the contract. The form *gharar* takes is: 1) which clause is the clause that allows the Contractor the right to claim compensation; and 2) what determines when the notice is to be given, and so as to when the 28-day timeframe starts to run.

Consequently, these points bring the legality of these clauses into question. The reason is twofold.

1) The first is which clause does the Contractor gamble on to obtain his right for compensation?
2) The second is what circumstance decides when the 28-day period runs from?

Consequently, the whole mechanism of the notice clauses is aleatory in nature, as the ambiguity has potential to create an immoral incentive for the Employer to increase unfairly its profitability from the contract. Thus, the Contractor's profitability is contingent on the operation of this Sub-Clause.

Hence, the interpretation of all notice clauses are subject to the requirements of article 266, UCC, that such ambiguity should favour the

Contractor. This rule, as recorded in EW Law, is seen as a rule of justice. Such rule embraces the principle that the *gharar* and *riba* prohibitions enforce.

In order to clarify how such ambiguity is to be addressed, reference is made to the EW Law case of *Australian Broadcasting Commission v Australian Performing Right Association Ltd*[495], in which Gibb J. stated:

> "*… if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, even though the construction is not the most obvious, or grammatically accurate', to use the words from earlier authority cited in Locke v Dunlop*[496]*, which although spoken in relation to a will, are applicable to the construction of a written instruments generally; see also Bottomley's Case*[497]*. Furthermore, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid inconsistency between the that provision and the reason of the instrument…"*

The last sentence is important as, where the instrument is that of an article of the legislation[498] that regulates the contract, then the text of a clause, or clauses that operate together in their construction, must be construed in a manner that reflects the obligations placed on the parties by such legislation.

Moreover, again, as illustrated by this extract, where there are two constructions then the one to be selected is the construction which avoids consequences that appear to be unjust.

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[495] (1973) 129 C.L.R. 99.

[496] (1888) 39 Ch.D. 387.

[497] (1880) 16 Ch.D. 681.

[498] As stated by Lord Morris of Borth-y-Gest in Schuler (L) AG v Wickman Machine Tools Sales Ltd [1974] A.C. 235 although parties are free to make whatever contracts they want such freedom is subject to any legal requirements.

The requirement for a "fair result" was reaffirmed in the EW Law case *Cargill international SA v Bangladesh Sugar and Food Industries Corp*[499] when Potter L.J. stated,

> "…*On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstance of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result*…"

The above cases demonstrate again that the aim of EW Law is that contract provisions should be fair in their operation. This further demonstrates, that despite the interpretation of how a notice clause operates as set out in: *City Inn v. Shepherd Construction Ltd* [500], *Multiplex Constructions (UK) Ltd v. Honeywell Control Systems Ltd (No.2)*[501] and *Steria v. Sigma Wireless Communications Ltd*[502], EW Law does seek to enforce the principles of good faith, fair dealing and justice.

As demonstrated by the analysis of article 380(1), UCC, this article allows a party to give notice to the other party in a contract of mutual obligations, compelling the other party to give specific performance of an obligation where such party is failing to do so. Where the defaulting party fails to give performance, then article 386 obligates such party to pay compensation – time and money. For the obligation to arise for the defaulting party to pay compensation, article 387, UCC makes it a condition precedent that notice must be issued in accordance with article 386, UCC. This obligation illustrates, through the statement made by the Judge in the Steria[503] case:

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[499] [1998] 1 W.L.R. 461, CA; also see Laura Investments v Havering [1993] 1 E.G.L.R. 124.

[500] 2003 SLT 885.

[501] [2007] EWHC 447 (TCC); B.L.R. 195.

[502] [2007] EWHC 3454 (TCC); 2008 B.L.R. 79.

[503] Steria Limited v. Sigma Wireless Communications Limited [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC).

> "…*The Employer's entitlement to damages, it might be said, was caused not by the delay but by the delay coupled with the contractor's failure to satisfy the condition precedent*…,

that UAE Law considers a delay by the Contractor in issuing a notice prejudices the rights of the Employer, and so any compensation due to the Contractor should only run from when the Employer becomes aware of his breach.

The 28-day timeframe that the Contractor is obligated to give notice, as illustrated in the analysis in subsection 2.3.2, demonstrates that in UAE Law it acts as a provision exempting the Employer from liability that causes the Contractor financial harm, thereby contravening the *gharar* and *riba* prohibitions. Consequently, this part of Sub-Clause 20.1 is illegal and so shall be ignored as it has no effect. This circumstance is acknowledged under Qatari Law, for which the author has first-hand knowledge as he now works in Qatar. Although this argument was raised under Qatari Law, the Qatari Civil Code is analogous to that of the UCC.

Moreover, it is in conflict with the mandatory periods in UAE Law that a party has a right to make a claim, which is within two (2) years or ten (10) years dependent on whether the contract is civil or commercial.

This obligation also conflicts with the following rights and obligations placed on the parties by article 886 in respect of a M&V contract. These are:

Firstly, the Contractor's right to claim compensation only arises when he has notified the Employer of a significant increase. This reflects the obligation placed on the Contractor by article 246, UCC, that it would be unfair to expect the Employer to be liable if he has no knowledge of such liability;

Secondly, the Employer has the right to cancel the contract once notified of a significant increase. This right demonstrates that the Employer has control of the Contractor's obligation to perform; and the obligation placed on the Employer by article 246, UCC, that it would be

unfair to let the Contractor continue to work if the Employer cannot pay the increase; and

Thirdly, the Contractor's right to notify the Employer to prevent *gharar* becoming intrinsic to the contract; or the directing of the Employer as to what he must do where *gharar* has infected the contract is in the interest of the Contractor. The reason is that it protects the Contractor's profitability by allowing him to regain control over his obligation of performance; and satisfies the obligation of good faith that the parties must do all that is necessary on their part for the thing, a structure in this circumstance, to be completed.

Coupled to this is the effect of article 31, UCC, that articles of the Law take precedence over party provisions; and the effect of article 206, UCC, contract provisions are to supplement the relevant articles of the Law that apply to the type of contract the parties have entered into.

The above examination illustrates that:

1) There is ambiguity in the provisions that obligate the Contractor to notify the Employer of his obligation to perform, and grants the right to the Contractor to claim compensation;

2) Such ambiguity, when considering the construction of the provision, should apply the fairer requirement; and

3) Although parties to a contract can agree provisions to apply to their contract, it is a requirement of the Law that such provisions supplement the Law. Where there is ambiguity in the construction of the provisions, allows them to be operated in an aleatory way by allowing *gharar* to become intrinsic to the contract, then they have no legal effect as there is potential for unfair gain.

Thus, for there to be certainty as to how the notice clauses will operate in a manner that reflects the requirements of UAE Law is:

Firstly, clauses that define the form of the Employer's act of prevention are clauses that satisfies the obligation placed on the Contractor by article 380(1), UCC, as these clauses state the specific performance

that the Employer is compelled to do. Coupled to this, as the Employer's liability to compensate the Contractor only arises once he has been notified of the late performance, the compensation only becomes due from that date. These rights and obligations apply to both M&V and LS contracts where *gharar* manifests because of an Employer's act of prevention;

Secondly, in the circumstance of a M&V contract where there is a significant increase, the right for the Contractor to claim compensation, time and money, only arises once the Contractor has notified the Employer of the same. Until that point the Contractor is responsible for all losses incurred;

Thirdly, the period for making a claim is as stated in UAE Law. However, the right to make a claim is dependent on the timing of the Contractor: 1) issuing notice to compel the Employer to perform an obligation, or 2) requesting the Employer's instruction as to how *gharar,* infecting the contract, is to be addressed; and

Fourthly, the combined effect of articles 380, 386 and 387, UCC are fair and reasonable and satisfies both sides of the prevention principle. The reason is that the Contractor's right for compensation only arises once the Employer is put on notice. Any delay by the Contractor in issuing the notice is his responsibility, and so any financial harm he suffers is for his account. Thus, the notice clauses of FIDIC99 that obligate the Contractor to notify the Employer to perform an act to prevent *gharar* becoming intrinsic to the contract, or to take measures where *gharar* has manifested due to the Employer failing to perform an obligation, shall operate in accordance with these articles. This ensures equivalence of the contract. The period for making the claim once notice is issued will be that prescribed in Law, two (2) or ten (10) years.

In summary, the notice clauses of FIDIC99 are ambiguous. Consequently, there is potential for these clauses to operate in an aleatory manner causing *gharar* to infect the contract. To satisfy the requirements of article 206 UCC, such clauses must be interpreted in a

manner that allows their application to prevent *gharar* and *riba* infecting the contract.

Consequently, the requirements of articles 380 and 886 UCC are to be satisfied. Article 886 obligates the Contractor to notify the Employer of a significant increase in countervalue where the contract is M&V, and only one notice is to be issued. Where the Employer commits an act that will or has caused *gharar* to infect either form of contract permitted by the UCC, the Contractor has to issue one notice in accordance with article 380.

The Contractor's right for compensation starts from the date the notice was issued, whether it is issued in accordance with article 886 or 380. FIDIC99 categorises the different Employer's acts of prevention and therefore supports the requirements of these articles as they bring certainty as to what is needed to negate *gharar*.

4.3.2 Content of a Notice

To determine the content of a notice in respect of FIDIC99, guidance can be taken from the EW Law case *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[504] in which Akenhead J. stated:

> *"…there is no particular form called for in* (Sub-)*Clause 20.1 and one should construe it as permitting any claim provided it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or additional payment or both) under the Contract or in connection with it. It must be recognisable as a "claim".*

To further define this obligation as to the content of the notice, EW case Law is considered. This illustrates that the content needs to specify the circumstances as to the cause of the delay, and those that have caused the delay. The method for illustrating such circumstances is purposive construction or by process of necessary implication, otherwise the notice will not achieve its objective[505].

However, the notice need not explain how and why the relevant circumstances have caused the delay[506], nor is it necessary to state the specific sub-provision of the EOT clause under which the cause falls[507]. The reason is because the intention of the notice is to warn the Engineer as to the current situation with regard to progress. Thus, the delaying event must be affecting progress (a past event but not necessarily a past delay), not a future delay, although a notice may refer to a future delay[508].

The information provided is to be as much as possible as to the cause of the delay to assist the Engineer perform his duty, i.e. to carry out a

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504 [2014] EWHC 1028 (TCC).

505 Steria Limited v. Sigma Wireless Communications Limited [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC).

506 Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC).

507 Merton London Borough v. Stanley Hugh Leach Ltd (1986) 32 Build L.R. 51.

508 Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC); Merton London Borough v. Stanley Hugh Leach Ltd (1986) 32 Build L.R. 51.

contemporaneous investigation and form an opinion as to whether a delay has occurred, and if such delay falls within the listed delaying events[509]. Consequently, the Contractor has not discharged this obligation until he has provided all relevant information[510]; and where a notice does not adequately explain, to the best of the Contractor's knowledge the cause of the delay, is a breach of duty, notwithstanding the Contractor has to expand on the information contained in the initial notice[511].

The above requisites that define the form and content of a notice required by FIDIC99[512] mirrors the obligations to be discharged to comply with the proposed *gharar* definition placed on the Contractor in UAE Law by the following articles of the UCC:

1) Article 32 - obligates the Contractor to notify the Employer of the deficiency;

2) Article 42 - failure to notify will harm the Employer;

3) Article 52 - in order to prevent contradicting the *gharar* prohibition;

4) Article 247 - to notify a party that failure to perform his obligation allows the other party to reframe from performing his obligations; and

5) Article 380(1) - obligates the Contractor, where the Employer is failing to perform an act, to notify the Employer of the same to compel the Employer to give specific performance.

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[509] Steria Limited v. Sigma Wireless Communications Limited [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC); Merton London Borough v. Stanley Hugh Leach Ltd (1986) 32 Build L.R. 51.

[510] Merton London Borough v. Stanley Hugh Leach Ltd (1986) 32 Build L.R. 51.

[511] Merton London Borough v. Stanley Hugh Leach Ltd (1986) 32 Build L.R. 51.

[512] Sub-Sub-Clause 1.9 - Delayed Drawings or Instructions; Sub-Clause 4.12 - Unforeseeable Physical Conditions; Sub-Clause 4.24 – Fossils; Sub-Clause 7.4 – Testing; Sub-Clause 8.4 (d) – Extension of Time for Completion - Unforeseeable shortages of personnel or goods caused by epidemic or governmental actions; Sub-Clause 8.4(e) – Extension of Time for Completion - Any delay which the Employer is responsible; Sub-Clause 8.5 – Delays by Statutory Authorities; Sub-Clause 13.7 – Adjustment for Changes in Legislation and Sub-Clause 16.1 – Contractor's Entitlement to Suspend Work FIDIC99. Sub-Clause 13(b) – Variations; Sub-Clause 8.8 – Suspension; Sub-Clause 10.3 – Interference with Tests on Completion and Sub-Clause 10.2 Taking Over Parts of the Works - FIDIC99 Sub-Clause 8.4(c) – Extension of Time for Completion - Exceptional adverse climatic conditions and Sub-Clauses 19.2 and 19.4 – Notice of Force Majeure, FIDIC99 Sub-Clause 20.1, Contractor's Claims.

These same requirements can also be applied to further the obligation placed on the Contractor by FIDIC99[513], to provide fully detailed particulars of the compensation claimed.

The other side of the said principle is that no party can take advantage of the non-performance of an obligation that delays the other party to the contract[514].

[513] Sub-Clause 20.1, Contractor's Claims.

[514] Roberts v Bury Commissioners (1870) L.R.5 C.P.310.

4.4 Operation of discretionary clauses

This section examines the operation of discretionary clauses, using FIDIC99 as an example that allows the Employer to decide quantity and quality of work to be performed by the Contractor, but also the level of compensation due to the Contractor where the Employer delays the Contractor through an Employer's act of prevention. Thus, this section examines and establishes in:

Subsection 4.4.1 - Discretionary clauses in construction contracts - the two forms such clauses can take and how they operate;

Subsection 4.4.2 - Controlling discretionary clauses in EW Law – how EW Courts control such clauses;

Subsection 4.4.3 - Controlling discretionary clauses in UAE Law – how specific articles in the UCC control such clauses; and

Subsection 4.4.4 - Discretionary clauses, parties' expectations and relational contracts – how these forms of contractual relationships control the operation of these clauses.

4.4.1 Discretionary clauses in construction contracts

The primary discretionary clause in FIDIC99 is Sub-Clause 3.5. This clause allows the Engineer, the Employer's agent, to determine, in consultation with the Employer and the Contractor, the compensation, if any, due to the Contractor where the Employer prevents the Contractor's performance for the reasons stated in subsection 2.3.4 above. This clause therefore controls when the Contractor is to complete and any increase in countervalue.

The reasons discretionary clauses are included in a contract is that they take account of some future contingency[515]. The primary contingency in construction contracts, as illustrated by Sub-Clause 8.4 FIDIC99, is that of an Employer's act which delays the Contractor's performance. The above consultation process ensures the key essential element, that of the date for delivery remains valid. This affords the Employer the right to apply damages where the Contractor fails to deliver by the contractual date.

There are secondary tier discretionary clauses in FIDIC99. These clauses are the Employer's rights, through his agent, to determine what constitutes unforeseeable ground conditions, instructing variations to the Contractor's scope of work, evaluate quality and standards related to deliverables, materials to be supplied, and whether work done has met the requirements of the contract[516].

The secondary tier discretionary clauses are directly related to the primary discretionary clause. Thus, if the Employer delays the Contractor by failing to operate these other discretionary clauses in a timely manner, the Employer still has the right to decide the effect on the Contractor's performance, and so any compensation due to the Contractor.

A more serious problem arises with regard to the unilateral right of the Employer's agent, the Engineer, as he decides whether or not the

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[515] Campbell, Collins & Wightman, *op cit*., n. 372, p. 225.

[516] This includes deciding the extent of work the Contractor has contracted to do see Sub-Clause 4.12 FIDIC99 as an example and whether the required level of quality has been achieved see Sub-Clause 7.3 and 7.4 FIDIC99 as a example.

standard of a deliverable has satisfied the requirements set out in the contract. This right can delay the Contractor's performance and result in 'scope migration', in that goods or services provided are of a higher standard than that called for in the contract, caused by ambiguities in the design as illustrated in section 3.2.

As the Contractor has no control as to how the Employer will act where unforeseen ground conditions are found, nor as to when the Employer may issue a variation or how competent the staff of the Engineer will be, the only hope the Contractor has is that the Employer understands how these circumstances allow *gharar* to manifest in the Contractor's mode of performance as reflected in the Programme of Works.

The inclusion of a clause, as that of Sub-Clause 3.5, demonstrates that it was in the contemplation of the parties that the Employer would delay the Contractor. It also demonstrates that, despite delaying the Contractor the Employer wants to control the right granted to the Contractor in EW Law, through the prevention principle and principally articles 247 and 386, UCC in UAE Law, to suspend work and be paid compensation.

The rights granted by these types of discretionary clauses, particularly that of Sub-Clause 3.5, allows *gharar* to be intrinsic to the contract as they create an immoral incentive to exploit the speculative nature of the matter to be determined, allowing unfair profit. Put simply, the Employer can act in an opportunistic manner by influencing the Engineer to find spurious grounds for not granting due compensation, exploiting the Contractor's position.

To summarise, there are two forms these clauses take in a construction contract. The first is primarily one which allows the Employer, through the Engineer, to decide the level of compensation to be granted to the Contractor. The second allows the Employer to determine the quantity and quality of work to be done by the Contractor. These 'secondary tier' clauses are directly linked to the primary discretionary clauses, as the exercising of a right under these clauses are a cause for *gharar* to infect the contract.

4.4.2 Controlling discretionary clauses in EW Law

In EW Law, due to the principle of autonomy of contract there is a presumption that parties will act in their best interest, and so without any controls parties shall be free to exercise such powers as they see fit[517]. This would include operating the right granted by the discretionary clause in an opportunistic manner. The way the EW Courts address this potential is by the use of implied terms[518].

Subsection 2.3.4 illustrates that the rules that apply exemption clauses in EW Law can be used to prevent such clauses being operated in an opportunistic manner.

Coupled to this is that the rights granted to the Employer by these discretionary clauses through his Engineer are akin to that of a fiduciary[519], in that the Contractor is forced to trust the Employer (the fiduciary) to exercise his rights in an equitable and moral way.

This analogy illustrates that the Employer would have an obligation to exercise the power to decide the compensation due in a manner that reflects fair and open dealing required for both procedural and practical fairness. There would also be the test of reasonableness to be satisfied. Thus, the question to be asked, taking account of a party's expectations, is what are the Contractor's reasonable or implicit expectations as to how the clause would operate.

Where the compensation is for additional time, which this thesis illustrates is a breach that goes to the root of the contract, then a provision will be limited in its use to enable the provision to give effect to the main objective and intent of the contract[520]. In this circumstance, it is for the Contractor to complete within a reasonable time, taking account of the Employer's acts of prevention.

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[517] Campbell, Collins & Wightman, *op cit*., n. 372, p. 222.

[518] Campbell, Collins & Wightman, *op cit*., n. 372, p. 225.

[519] Campbell, Collins & Wightman, *op cit*., n. 372, p. 222.

[520] Anglo-Continental Holidays Ltd v Typaildos Lines (London) Limited [1967] 2 Lloyd's Rep 61 CA Although this case is applying the Unfair Contract Terms Act 1977, the principle is analogous; Karsales v Wallis [1956] 1 WLR 936, CA – although the effect of this case was form in error through Photo Productions Ltd v Securicor Ltd [1980] A.C. 827, it still resounds with Wells v Army and Navy Co-operative Society (1902) 86 L.T. 764.

The reasonable expectation of the Contractor would be subject to the irrationality principle, to justify that the Contractor's expectations were reasonable. Thus, if it can be demonstrated that the discretionary clause has been operated in a manner not to reflect reasonableness, i.e. in a perverse, arbitrary or capricious manner, then it would constitute an act of bad faith[521].

The discretionary clauses that grant the power to the Engineer to evaluate standards or quality, and deliverables as to whether the same have met the requirements of the contract, is similar to power granted to a certifier. Thus, the criteria applied to test if the certifier has acted fairly is that as set out in the *Investor's Compensation Scheme v West Bromwich Building Society*[522].

It is the same criteria as above, that the evaluation process is reasonable, taking account of how the contracting parties anticipated the process would operate in the circumstances it was meant to be used. Thus, where the evaluation is to determine that the quality or deliverable is to the required level, then provided the Contractor can demonstrate his intention to meet or has met that standard, there is no grounds to withhold approval. Failure to do so would invoke the irrationality principle[523].

Reference is also made to the commentary under article 246, UCC in subsection 1.3.3 above, which further illustrates how implied terms can be operated to ensure fairness in the use of such provisions. A primary one is that the operation of such a provision is to be consistent with the overall objective of the contract, and takes account of the other party's interests.

As illustrated, the control of discretionary clauses is subject to how the EW Law will exercise its approach to ensure good faith and fair dealing, and the rules that apply to exemption clauses.

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[521] Paragon Finance plc v Nash [2001] EWCA Civ 1446; [2001] WLR 685, 703.
[522] [1998] 1 W.L.R. 896.
[523] Paragon Finance plc v Nash [2001] EWCA Civ 1446; [2001] WLR 685, 703.

4.4.3 Controlling discretionary clauses in UAE Law

This freedom to exercise such a right, in a manner that a party sees fit, clearly aligns itself with the Jurists understanding of how a right to decide the other party's rights will create an immoral incentive to exploit the speculative nature of this type of clause.

As illustrated, parties to a construction contract are, by article 246, UCC obligated to perform their rights and obligations that arise from a contract in a manner consistent with good faith. However, UAE Law, as recorded in subsection 2.3.5, has a much stronger approach of enforcing that a party does not act in an opportunistic manner through articles:

1) 106(2)(b) which prevents the exercising of a right which contravenes the rules of *fiqh* and the morals of the UAE; and
2) 106(2)(c) which prevents the exercising of a right which results in disproportionate harm to the other party.

The specific aim of these articles is to protect the party to the contract bound by the discretionary powers that the other party has a right to exercise. In addition to this, the operation of the discretionary clauses by the holder of the right is obligated to adhere to articles of the UCC that regulate parties' rights and obligations which apply in a general nature. These are:

1) Article 42 - obligates the Employer not to harm the Contractor. In this circumstance where the Employer caused *gharar* to manifest, then the Employer will compensate the Contractor for a harm suffered resulting from any Employer's acts of prevention;
2) Article 52- obligates the Employer, where *gharar* is intrinsic to a contract such as unforeseeable ground conditions, to remove *gharar* and so the potential for *riba* by re-establishing certainty and so equivalence of the countervalue;
3) Article 206 - not to agree provisions which are of an aleatory nature, but reinforce the objectives of the articles which apply to

their type of contract, which as illustrated by articles 203 and 874, is to ensure equivalence of the countervalue;

4) Article 243 - parties will perform the obligations that arise from the contract. Thus, where a deficiency in the design is discovered, then the Employer has to correct the same, inclusive of compensation where such deficiency caused the Contractor harm;

5) Article 246 - parties will perform the contract in a manner consistent with good faith. As this is an obligation in UAE Law, unlike EW Law, the force behind the obligation is a regulatory requirement. Thus, a party's failure to operate any provision in an equitable and just manner in the prevailing circumstances disobeys the relevant articles of the UCC and the *gharar* and *riba* prohibitions; and

6) Article 249 - obligates the Employer to rebalance the contract by reducing an onerous obligation to a reasonable one, reinstating the balance of benefits, namely profits.

The approach to be taken with regard to the discretionary clauses concerning quality is the same as that stated in subsection 4.4.2 above. This approach is reinforced by the operation of the above articles.

This, as illustrated, UAE Law has a much stricter control over such provisions causing *gharar* to be intrinsic to a contract which prevents the Contractor from losing control of his rights and obligations.

4.4.4 Discretionary clauses, parties' expectations and relational contracts

The following analysis illustrates the approach adopted in parties' expectations and relational contracts in EW Law and reflects the manner in which discretionary clauses are to be operated in UAE Law with regard to a construction contract.

Parties, by selecting these approaches, accept that the concept of good faith plays a central role as to how they discharge their rights and obligations that arise from the contract. This reflects a fundamental requirement of keeping the contract balanced. Hence, an Employer should assist the Contractor meet the requirements of the contract provided it does not conflict with the interests of the Employer. As the interest of the Employer is to take delivery of the structure by the agreed delivery date, there should be no conflict. This allows the Contractor to maintain its anticipated profit.

Consequently, where the discretionary clause is for quality and/or quantity, the Employer should afford the Contractor all the cooperation he can, including that of setting out clear parameters in respect of quality, and consciously understanding how an increase in quality and/or quantity manifested. This approach reflects the obligations placed on the Employer by the *gharar* prohibition, as it allows certainty as to how the structure will achieve the standard required by the contract, thereby satisfying the Employer's expectations.

Consequently, an Employer, by operating a discretionary clause in a manner that reduces the Contractor's profit will prejudice the team spirit as trust will be lost, severely impairing the desire to cooperate. The Contractor's implicit understanding would be that the Employer acted in bad faith. The reason is that the Contractor would be prevented from making his anticipated profit.

To put this into context, an Employer, when exercising the right granted by a discretionary clause to decide the compensation due to the Contractor, should take account of Bowen LJ's comment, that the

objective is not to burden all the 'perils'/risks on to the Contractor. This objective reflects the aims, although not precisely, of relational contracts, parties' expectations and that of the *gharar* prohibition, that 'perils' that arise from the bargain are balanced[524].

The difference is that although the *gharar* prohibition requires certainty of an obligation through precision, there will always be some 'peril' inherent to a contract which should not all be placed with one party.

An example of an Employer accepting 'perils' that, *prima facie* falls to the Contractor, is when the Employer exercises a right to decide if work is within the Contractor's scope. The Employer, when reaching his decision should assess whether the level of data was sufficient enough for the Contractor to appreciate what the obligation entailed.

Construction contracts such as FIDIC99, places the risk/*gharar* with the Contractor where unforeseeable ground conditions[525] are discovered. At tender stage, the Employer provides geotechnical data to the Contractor. This allows the Contractor to establish his mode of performance, which in turn provides certainty of delivery. Where ground conditions are found to be different from that expected which requires changes to the Contractor's mode of performance, this demonstrates that *gharar* was inherent to the contract. Thus, the Employer should accept some or the risk/*gharar* to ensure that work performed is equivalent to the countervalue.

This would be a fair assumption on the Contractor's part under a relational contract and parties' expectations. The reason is that a Contractor's implicit understating of how the mechanism in FIDIC99 would operate in these circumstances, is that it would allow the Contractor to maintain his anticipated profit. The underlying logic is that any other interpretation would illustrate that the Employer, by the discretionary powers granted, had been motivated by such power to act in an opportunistic manner, unfairly increasing its profit.

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[524] This is supported by H.H. Edgar Faye QC in Henry Boot Construction Ltd v Central Lancashire New Town Development Corp (1980) 15 B.L.R. 1.
[525] Rayner *op. cit*., n. 277.

This demonstrates the conscious effort an Employer must make to operate the discretion granted to him in an equitable and just manner. This approach aligns itself to the ethical control that UAE Law enforces through the *gharar* and *riba* prohibitions. This effect is necessary to avoid such provisions being categorised into the third distinct type of exemption clause as determined in EW Law, and so being subject to the force of article 206, that the provision be severed from the contract provisions in order to maintain the balance of the contract.

This would include the Employer waiving the right where the Contractor failed to issue the requisite notice under article 380, UCC. Conversely, where the Contractor has complied with this obligation then the Employer has to take account of the Contractor's right, in UAE Law, to be compensated[526].

A further example is a variation clause that grants the Employer the right to vary the Contractor's obligations. The exercising of such right automatically grants the Contractor the right for compensation. The reason is that the issuing of a variation demonstrates *gharar* was intrinsic to the contract as to certainty of design and so mode of performance and delivery.

The similarity between parties' expectations and relational contracts as to how discretionary clauses should be operated is reflected in article 886, UCC. This article allows the Employer, where the contract is M&V, to terminate the Contractor's employment where there is a significant increase. An Employer will have the same right in respect of a LS contract under UAE Law, as standard forms of contract provisions, such as FIDIC99, includes a provision that also grants such a right.

The implicit understanding that such rights presented to a Contractor when entering into a contract under UAE Law, taking cognizance of

[526] The Contractor's in order to satisfy the criteria to demonstrate it had been delayed by an external cause would have to demonstrate that during the tender period attempt to identify unforeseeable physical conditions by visiting the Site, local authorities and other contractors who have or are working in the vicinity of the Site to see what ground conditions they have experienced and have a geotechnical specialist review the data provided by the Employer in the tender documents.

article 246, UCC, is that the Employer will act in a fair and moral manner where he delays the Contractor, i.e. the Employer will compensate the Contractor accordingly.

This is illustrated where the contract is a LS by the fact that under UAE Law the design and quantity of work to be done shall be prepared to a level of accuracy so that *gharar* is minimal. Hence, unless there is a necessary variation caused by an unforeseen event, then there is no reason why an Employer would need to include discretionary powers allowing him to control the Contractor's rights.

Such understanding, based on Bowen LJ's requirement that all 'perils' are not to be imposed on one party, would be implied as a legal incident of a particular legal relationship in EW Law. Dyson L.J. illustrates this in his conclusion in *Crossly v Faithful & Gould Holdings Ltd*[527]

> "…*It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise a question of reasonableness, fairness and the balancing of competing policy considerations*…."

The policy considerations Dyson L.J. was referring to were those set out in an article by Elizabeth Peden[528]. She grouped these policy considerations into three broad categories: 1) how the implied term will sit with existing law; 2) how the implied term will affect the parties to the relationship; and 3) wider issues of fairness and society.

Such legal incident in UAE Law is that an Employer has the ability, through the provisions of the contract, to release himself from the financial burden, caused by him allowing *gharar* to infect the contract where the contract is a LS. The same right is granted, in Law, in the UAE Law where the contract is M&V. Consequently, it is reasonable and fair considering the said policy considerations, that the Employer compensate the Contractor if he wishes to continue with the contract.

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[527] [2004] 4 All E.R. 447.

[528] Peden E., Policy Concerns Behind Implications in Law (2001) 119 L.Q.R. 459.

Such implication would sit well with UAE Law as it prevents harm to the Contractor if the Employer does not have the finance to continue as he can terminate the contract. The effect to the relationship is catered for in the provisions of the contract in both EW and UAE Law, and in Law in the UAE where the contract is M&V.

The wider issues of society are satisfied as no dispute should arise between the parties, and any potential for financial hardship to either party is avoided. Thus, both parties can pursue other commercial opportunities thereby ensuring circulation of wealth.

Conversely, where the Employer compensates the Contractor then the contract remains balanced, as the goods/services provided correspond to the countervalue paid. The relationship can continue to meet the original objective, satisfying the issues of fairness and society, again as the circulation of wealth will be met.

The above analysis illustrates that the approach adopted under parties' expectations and relational contracts when the requirements of precision have been complied with, require the Employer to act in a manner that reflects business efficacy and cooperate with the Contractor where *gharar* manifests in the design. This is necessary to maintain the balance of the contract where, as a result in design changes, there is potential for disproportionate harm by operation of a discretionary clause. Such disproportionate harm should be prevented by the Employer by making a conscious decision how to operate the discretionary clause, taking account of reasonableness, fairness and the balancing of competing policy as discussed above.

Part 5 – Findings and Conclusion

5.1 Findings

The findings from the analysis presented in the above Parts is that there is a fundamental difference in the formation and performance of a construction contract under EW and UAE Law; and that parties' expectations and relational contracts reflect the manner in which UAE Law obliges parties to perform a construction contract. The reasons for this are:

The UCC, by enacting the *gharar* and *riba* prohibitions, namely articles 202, 203 and 874, obligate the Employer to describe punctiliously the essential elements of a construction contract for it to be valid in the UAE, and that the parties act in a transparent manner in pre-contract negotiations. Coupled to this, during contract performance the parties have to abide by the articles which regulate their rights and obligations which arise from the contract so they do not contravene the said prohibitions. As the UCC enacts the doctrine of good faith into Law, parties to a contract have to abide by this doctrine in the broadest terms, to the extent that the Employer should assist the Contractor to perform his obligations, provided it does not conflict with the interests of the Employer. This includes not exercising a right which can result in opportunism harming the Contractor which the UCC has specific and supplementary articles in place to prevent such possibility. This requires the Employer, whose position is analogous to a fiduciary, to make conscious decisions when exercising rights granted by notice and discretionary clauses in standard forms of construction contract such as FIDIC99, to achieve both parties' objective of the contract. UAE Law also includes the notion of the prevention principle and the *contra proferentem* rule which has been described as a rule of justice.

EW Law adopts the doctrine of freedom of contract that allows parties to decide how they apportion risk/*gharar* which arises from a construction contract. This may result in speculation as to what is needed to perform an obligation. The consequence is that risk

distribution can result in an unbalanced contract, which is further exacerbated by the effect of notice and discretionary clauses; and that EW Law does not recognise the notion of good faith in the formation and discharging of a contract. This is somewhat confusing when there is extensive proof that EW Courts achieve this by use of implied terms such as that necessary for business efficacy, to apportion risk where it has not been expressly placed. In addition, EW Courts also use certain doctrines such as the *contra proferentem* rule and rules against penalties/forfeiture to prevent opportunism. Consequently, their aim can be said to be that of the *gharar* and *riba* prohibitions, but unlike the prohibitions in UAE Law they do not have the same weight in their enforcement. The reason is, that although there are strong similarities in the doctrines of an unconscionable bargain and that of unjust enrichment in EW Law, these doctrines are subject to certain restrictions that control the circumstances in which they can be applied, which in turn can result in the contract not being balanced or equivalent in the benefits gained. In UAE Law no restrictions apply to the *gharar* and *riba* prohibitions, therefore they have an obligation to ensure their contract is balanced. A major difference under EW Law is that parties have no obligation to attain the same level of precision at contract formation as in UAE Law.

Therefore, EW Courts may be required to control risk and so opportunism which is inherent at contract formation, as well as manifesting itself during the performance of the contract. In saying this, it is interesting to note that the traditional methods of procurement under EW Law for a structure, that of a LS and M&W contract, attains the level of precision required under UAE Law. The problem lies in the operation of notice and discretionary clauses.

The concept of parties' expectations and relational contracts in EW Law oblige parties to adopt the doctrine of good faith, in the broadest terms, when discharging their rights and obligations which arise in the contract. It can therefore be said that a consequence of parties adopting either of these methods to procure a structure is that they should hold open and detailed negotiations during contract formation.

This will allow the parties to discuss frankly matters that would otherwise allow *gharar* to be intrinsic to the contract. Moreover, such an approach post contract ensures a high degree of communication, cooperation and predictable performance needed to create mutual trust necessary to give business efficacy to their contract. This is particularly important in a construction contract where a structure is to be built in an environment that parties do not control but where they are making a substantial investment.

Consequently, it is fair to say the approaches adopted in parties' expectations and relational contracts mirror the requirements which UAE Law places on the Employer when exercising rights granted through notice and discretionary clauses, that of consciously deciding whether to exercise such right, and if so, to what extent. Failure to exercise such right in a fair, reasonable and just manner will be considered an act of bad faith, particularly as the Employer's position is analogous to a fiduciary. This would have a negative impact on the objective of the contract so the Employer has to understand the Contractor's implicit understanding as to how such provisions will operate, thereby importing the morality which UAE Law requires. This is the reason these methods for contracting for a structure are suitable for use in the Emirate of Dubai, UAE.

The author has first-hand experience in the resolution of disputes in the Emirate of Dubai and the State of Qatar. This experience being gained in negotiations through the Ruler's Court in Dubai and acting as a tribunal appointed expert in arbitrations in Dubai. In these arbitrations the Arab arbitrators referred to the UCC throughout the arbitration process, resolving matters of the dispute based on the relevant articles. The author has also presented claims on behalf of an Arab client in Qatar who has confirmed that the aims of the *gharar* and *riba* prohibitions are consistent with the interpretation presented in this thesis. Moreover, the author has drafted a referral to the ICC based on the said interpretations which is now subject to arbitration. The lack of definition as to what obligations entail is the main cause of disputes in Dubai. This is particularly prevalent in design and build projects with

which the author is involved in resolving controversies at the time of this submission.

5.2 Conclusion

In conclusion, there are strong similarities in the control of risk/*gharar* in construction contracts in EW and UAE Law. However, as illustrated, UAE Law applies a strong moral approach in regulating *gharar* and *riba*. This is achieved by enforcing the *gharar* and *riba* prohibitions as defined by the author of this thesis through:

1) The nominate contract system, which minimises the extent of *gharar*/risk that can be intrinsic to a contract when it comes into force, and so prevents *riba*;

2) The relevant articles of the UCC, which, by application of the prohibition test as proposed by the author, obliges parties not to discharge their rights and obligations in a manner that disobeys the *gharar* and *riba* prohibitions, particularly in relation to notice and discretionary clauses; and

3) The enforcement of morality into a contract, which requires a conscious effort by a party who has the power to control other party's rights to be fair and just in the use of such right. Failure to do this results in a primary requirement of *fiqh* and UAE Law not being achieved - the circulation of wealth.

It is also clear that in EW Law, parties' expectations and the concept of relational contracts assimilates how UAE Law obliges parties to a contract to discharge their rights and obligations which arise from the contract. Consequently, parties to a contract, when they select a standard form of contract provisions such as FIDIC99, should adopt the approach advanced by parties' expectations or relational contracts as they minimise the potential to disobey the *gharar/riba* prohibitions.

5.3 Further research

This thesis demonstrates that as UAE Law is derived from the Holy Law of Islam, parties to a contract need to adopt a strong ethical approach to the formation and the discharging of the contract. The primary way that this is achieved is through precision in the obligations that arise from a construction contract, which in turn, if complied with, prevents a dispute from arising.

Coupled to this, although the UCC enacts the precepts of Islam, UAE nationals are obligated to abide by these Laws as part of their religious beliefs.

Traditional methods of procurement are Islamic compliant methods used as they provide precision as to how a structure will come into existence. However, due to notice requirements which can act as exemption and discretionary clauses which determine the Contractor's rights and obligations, disputes can arise.

Design and build contracts, *prima facie,* are not Islamic compliant. This is supported by the author's informal survey in Qatar and personal involvement in the Doha Metro, North Orbital Road project, the new Doha Port Project and the new Doha international airport. The reason is ambiguities in the Employers requirements. These ambiguities comprise of: 1) unclear design requirements and approval process for design submissions; 2) lack of clarity as to the type and form of goods/ products for inclusion in the structure.

This is further compounded by onerous contractual obligations in the contract provisions, such as cooperation clauses that obligate Contractors on such mega projects to cooperate with each other despite competing needs.

This thesis demonstrates that parties' rights and obligations which arise from a construction contract under EW and UAE Law are different. This is particularly apparent in the construction, interpretation and operation of notice and discretionary clauses, which unless operated in a manner consistent with the requirements of UAE Law require that such provisions be severed from the contract.

In order to bring forward and develop the methods for contract performance so contract provisions are Islamic compliant, and to ensure the level of precision for contract formation, there is a need for further research in the following areas as to how:

1) The methods applied in parties' expectations and relational contracts can be developed in a manner that ensures parties comply with these approaches to contracting, taking cognizance of the objectives of the *gharar* and *riba* prohibitions so a balanced set of contract provisions are used by the parties. This, in the opinion of the author, as a result of the different nationalities that work in the Arab Gulf, requires express statements defining how parties are to act; and
2) Design and Build methods of procurement can be developed to a level of precision as to those of traditional methods of procurement as defined in this thesis to minimise the potential of a dispute arising. This, in the opinion of the author, requires a well-defined set of criteria such as design development requirements, approval procedures, and a measurement process that takes a fair approach to future changes to Employer's requirements, including other stakeholder requirements. This was the recommendation of decision number 182(19/8) concerning Build, Operate and Transfer, a form of Design and Build for Public Sector projects of the International Council of Fiqh Academy, an offshoot of the Organisation of Islamic Conference (OIC) held 26-30 April 2009 in the Emirate of Sharjah, UAE.

Index of Articles of the UCC referenced in this thesis

Index of Sub-Clauses of FIDIC99 referenced in this thesis

Bibliography

Books

Atkins Chambers Ltd A.O. (2010) HUDSON'S Building and Engineering Contracts, Thomson Reuters (Legal) Ltd., London, UK.

Bailey, J. A.O. (2016) Construction Law (Construction Practice Series), Informa law from Routledge, Abingdon, Oxon, UK.

Baker, E., Mellors, B., Chalmers, S., & Lavers, Anthony., A.O. (2009) FIDIC Contracts Law and Practice 5th Ed., Routledge Taylor & Francis Group, London & New York, UK & USA.

Bunni, N, G, A.O. (2005), The FIDIC Forms of Contract 3rd Ed., Blackwell Publishing, Oxford, UK.

Chan, A.P., Chan D.W., J.F., Yeung A.O. (2010) Relational Contracting for Construction Excellence, Principles, Practice and Case Studies, Spons Press, Oxon, UK.

Chappell. D., Marshall. D., Powell-Smith. V., Cavender. S., A.O. (2001) Building Contract Dictionary 3rd edn; Blackwell Science Ltd, Oxford, UK.

Chappell, D., Cowlin, M., & Dunn, M., A.O. (2009) Building Law Encyclopedia, John Wiley & Sons Ltd, Chichester , UK,

Comair-Obeid, N., A.O. (1996), The Law of Business Contracts in the Arab Middle East; Kluwer Law International, Arab & Islamic Law Series, The Hague, The Netherlands.

Coulson, N.J. A.O. (1964 reprinted 2007) A History of Islamic Law, Edinburgh University Press, Edinburgh, Scotland, UK.

Coulson, N.J. A.O. (1984) Commercial Law in the Gulf Sates The Islamic Tradition, Graham & Trotman, London, UK.

Campbell, D., Collins H., & Wightman, J., A.O. (2003) Implicit Dimensions of Contract Discrete, Relational and Network Contracts, Chapter - Discretionary Powers in Contract, Hart Publishing Oxford and Portland Oregon, USA.

Corbett, E. C., A.O. (1991 reprinted 2000) FIDIC 4th A Practical Legal Guide, Sweet & Maxwell, London, UK.

Crone, P., A.O. (1987) Roman Provincial and Islamic Law, Cambridge University Press, Cambridge, UK.

El-Ahdab & El-Ahdab J., A.O. (2011), Arbitration with the Arab Countries, Kluwer Law International, 2400 AH Alphen aan den Rijn, The Netherlands.

Fyzee A.A.A. A.O. (1949 4th Edition 2008); Outlines of Muhammadan Law, Oxford University Press, New Delhi, India.

Furst, S., & Ramsey, V., A.O. (2006) Keating on Construction Contracts, Sweet & Maxwell, London UK.

Gibson, R., A.O. (2008) Construction Delays Extensions of Time and Prolongation Claims, Routledge Taylor & Francis Group, London & New York, UK & USA.

Glover, J., & Hughes, S., A.O. (2006), Understanding the New Red Book a Clause by Clause Commentary, Sweet & Maxwell. London, UK.

Grose. M., A.O. (2002), Construction Contracts and Disputes in the United Arab Emirates; Michael Grose, Dubai, UAE.

Hallaq, W. B., A.O. (1997 reprinted 2008) A History of Islamic Legal Theories, Cambridge University Press, New York, USA.

Hammond, C.G., A.O. (2005) FIDIC An Analysis of International Construction Contracts, Saudi Arabia, Kluwer Law International and the International Bar Association.

Hurgronje, C.S. (A.O. 1898) Le Droit Musulman, Leroux, France.

Kamali, M. H., A.O. (2006, reprinted 2008), Principle of Islamic Jurisprudence, The Islamic Text Society, Cambridge, UK.

Khadduri, M. & Liebesny, H.J, A.O. (1955), Law in the Middle East Vol. 1, The Middle East Institute, Washington DC, USA.

Imam Malik, *Al-Muwatta* "The Approved," Book 31.

Lewison, K., A.O. (2007) The Interpretation of Contracts 4th Ed., Sweet and Maxwell Ltd London, UK.

Lowsley, S. and Linnett, C., A.O. (2006) About Time Delay Analysis in Construction, RICS Business Services Limited, Coventry, UK.

Mallat, C., A.O. (2007) Introduction to Middle Eastern Law, Oxford University Press, UK.

McKendrick, E., A.O. (2005) Contract Law, Texts, Cases and Materials 2ed, Oxford University Press, Oxford UK.

Murdoch, J., & Hughes, W., A.O. (1992 Reprinted 1999) Construction Contracts Law and Management, Spons Press Taylor Francis Group London & New York.

Peel, E., A.O. (2003 reprinted 2012), The Law of Contract 12 Ed., Thompson Reuters (Legal) Ltd, UK.

Pickavance K., (A.O. 2005) Delay and Disruption in Construction Contracts, Informa Professional London UK

Rayner, S.E., A.O. (1991); The Theory of Contracts in Islamic Law, Graham & Trotman, London, UK.

Royal Institute of Chartered Surveyors (A.O. 2012), The RICS New Rules of Measurement (NRM) NRM 1.

Ibn Rushd, M., translated by Prof. Imran Ahsan Khan Nyazee, Reviewed by Prof. Mohammed Abdul Rauf, A.O. (1996), The Distinguished Jurist's Primer Vol II, Bidāyat al-Mujitahid wa Nihāyat al-Muqtasid, Garnet Publishing, Reading, UK.

Saleh, N., A.O. (1986); Unlawful Gain and Legitimate Profit in Islamic Law, and Islamic Banking. Cambridge University Press: Cambridge, UK.

Saleh, S., A.O. (2006) Commercial Arbitration in the Arab Middle East, Hart Publishing Oxford and Portland Oregon, USA.

Schacht, S., A.O. (1964, reprinted 1982), An Introduction to Islamic Law, Oxford University Press, Oxford, UK.

Schacht, S., A.O. (1950, reprinted 1967), The Origins of Muhammadan Jurisprudence, Oxford University Press, Oxford, UK.

Standard Method of Measurement of Building Works Seventh Editions –RICS.

Totterdill, B. W., A.O. (2001), FIDIC user's guide a practical guide to the 1999 red book, Thomas Telford Ltd, London UK.

Tyser, C.R., Demetriades, D.G., and Effendi, I.H., A.O.(2001, 2nd, reprint 2007) The Mejelle Being an English Translation of the Majallah El-Ahkam-I-Adliya and a Complete Code on Islamic Civil Law, the Other Press, Kuala Lumpar, Malaysia.

Vogel, F. E. & Hayes, S.L., A.O. (1998 Reprinted 2006); Islamic Law and Finance Religion, Risk, and Return. Liedden, The Netherlands: Koninklijke Brill NV.

Whelan, J., A.O. (2011), UAE Civil Code and Ministry of Justice Commentary - 2010. London, UK: Thomson Reuters (Legal) Ltd.

Articles

Abd El-Wahab Ahmed El- Hassan (1985-1986), 'Freedom of Contract, The Doctrine of Frustration, and Sanctity of Contracts in Sudan Law and Islamic Law', Arab Law Quarterly (ALQ).

Ali-Karamali & Dunne, (1994) 'The Ijtihad Controversy' ALQ.

Al-Muhairi Butti Sultan Butti Ali (1996), 'The Position of Shari'a within the UAE Constitution and the Federal Supreme Court's Application of the Constitutional Clause concerning Sharī'a', Arab Law Quarterly (ALQ).

Amkhan A, (1991) 'Force Majeure and Impossibility of Performance in Arab Contract Law', (ALQ).

Amkhan A, (1994) 'The Effect of Change in Circumstances in Arab Contract Law'.

Ballantyne W.M. (1985-1986), 'The Shari'a: A Speech to the IBA Conference in Cairo, on Arab Comparative and Commercial Law, 15-18 February 1987, Arab Law Quarterly (ALQ), pp. 12-28.

Ballantyne W.M., (1988), 'The Second Coulson Memorial Lecture: Back to the Sharīa', Arab Law Quarterly (ALQ).

Ballantyne W.M. (1985-1986), 'The New Civil Code of the United Arab Emirates: A Further Reassertion of the Sharī'a', Arab Law Quarterly (ALQ).

Bakri, A.S, Ingirige, B and Amaratubga, D., Key Issues for Implementing Knowledge Management in Relational Contracting Project Settings, School of Built Environment, University of Salford, UK.

M. Bridge, Doubting Good Faith (2005)11 NZBLQ 430, 450.

Campbell D., and Harris D., "Flexibility in Long-term Contractual Relationships" (1993) 20 J Law Soc 166.

Capper, D., (1998) Undue influence and unconscionability: a rationalisation L.Q.R.

Collins, H., Implied Terms: The Foundation of Good Faith and Fair Dealing, Current Legal Problems, Vol. 67 (2014).

Cohen, Two Freedoms and the Contract to Negotiate in Good Faith and Fault in Contract Law (1995) 12 O.J.L.S.

Elliot, R. F. Penalties: a brief guide to three recent revolutions, Const. L.J. 32(6), 644-658.

Ellis Baker, James Bremen, Anthony Lavers The Development of the Prevention Principle in English and Australian Jurisdictions [2005] ICLR 197;

Hoskins H., Contractual obligations to negotiate in good faith; faithfulness to agree common purpose L.Q.R 131 2014.

Lawson R., A.O. (2008) Exclusion Clauses and Unfair Contract terms 9th Edn., Sweet & Maxwell – Thomson Reuters (Legal) Ltd, London, UK.

Mahdi Zahraa & S.M. Mahmor (eds.), "*Validity of Contracts when the Goods are not yet in Existence in the Islamic Law of Sale of Goods*", (2002) Arab Law Quarterly (ALQ).

A.F. Mason, 'Contracts, Good Faith and Equitable Standards in Fair Dealing (2000) 116 (Jan), LQR 66-94.

Mahmoud A. El-Gamal (2001), An Economic Explication of the Prohibition in Classical Islamic Jurisprudence, 4th International Conference on Islamic Economics, Leicester, UK.

C Mitchell, 'Leading a Life of its own? The Role of reasonable expectations in Contract Law' (2003) 23 OJLS 639.

Nabil, S. "*Definition and formation of contract under Islamic and Arab Laws*" ALQ (1990) pp. 101-116.

Peden E., Policy Concerns Behind Implications in Law (2001) 119 L.Q.R. 459

Rayner S, (1991) '*A note of Force Majeure*' in Islamic Law (ALQ), pp. 86-89.

Ren Z., Atout M. and Jones J., Root Causes of Construction Project Delays in Dubai, Built Environment Division, Glamorgan University, Pontypridd, Wales, UK.

Sami al-Suwailem, "Towards an objective measure of *gharar* in exchange", (Oct 1999 & Apr 2000), Islamic Economic Studies, Vol. 7(1 & 2).

Shimizu H., Philosophy of the Islamic Law of Contract a Comparative Study of Contractual Justice; IMES –I.U.J Working Papers Series #15, the Institute of Eastern Studies 1989;

Shaikh Asif Abdus Saeed - Delays to Projects – cause, Effect and Measures to Reduce /Eliminate Dealy by Mitigations /Acceleration, Institute of Business, The British University, Dubai (2009).

Steyn. J Contract Law: Fulfilling the reasonable expectations of Honest Men Law, QR, 1997.

Top Five Causes of Contract Delays, Arabianindustry.com/construction, 23 February 2014.

Winser, C Shutting Pandora's Box: The Prevention Principle After Multiplex v Honeywell (2007) 23 Const. L.J. 511.

Professor Williams G., Language and the Law (1945) 61 L.Q.R. 71 at 401.

Zaneldin, Essam, Construction Claims in the United Arab Emirates: Types, Causes, and Frequency, Association of Researchers in Construction Management, Vol 2, pp. 813-822.

Common Law Court Cases

Alec Lobb (Garages) Ltd and others v Total Oil Great Britain Ltd, [1983] 1 W.L.R. 87.

Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co. Ltd [1983] 1 W.L.R. 964.

Alghussein Establishment v Eton College [1988] 1 W.L.R. 587.

Anglo-Continental Holidays Ltd v Typaildos Lines (London) Limited [1967] 2 Lloyd's Rep 61 CA.

Association of British Travel Agents Ltd v British Airways Plc [2000] 2 All E.R. (Comm) 204.

Atlantic Shipping & Trading Co. Ltd v Louis Dreyfus & Co [1922] A.C. 250

Australian Broadcasting Commission v Australian Performing Right Association Ltd (1973) 129 C.L.R. 99.

Barque Quilpé Ltd v. Brown [1904] 2 K.B. 264, at 274.

British Movietonews Ltd v London & District Cinemas [1952] A.C. 166.

Boustany v Pigott [1993] N.P.C. 75.

Bremer Handelsgesellschaft Schaft M.B.H. v Vanden Avenne Izegem P.V.B.A. (1978) 2 Lloyd's Rep 109.

BHP Petroleum Ltd v British Steel Plc [2000] 2 Lloyds Rep 277.

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283.

Bottomley's Case (1880) 16 Ch.D. 681.

Burns Philip Hardware Ltd v Howard China Pty Ltd(1987) 8 N.S.W.L.R. 642.

Cargill international SA v Bangladesh Sugar and Food Industries Corp [1998] 1 W.L.R. 461, CA.

Chester Grosvenor Hotel v Alfred McAlpine Management 56 B.L.R. 115.

City Inn Ltd v. Shepherd Construction Ltd 2003 SLT 885.

Copthorne Hotel (Newcastle) Ltd v. Arup Associates (1997) CILL 1318.

Cory (Williams) & Sons Ltd v London Corp [1951] 2 K.B. 476.

Compass group UK and Ireland Ltd v Mid Essex Hospital Services HNS Trust [2013] EWCA Civ 2000; [2013] B.L.R. 265.

Creswell v Potter [1978] 1 WLR 255.

CNT Cash and Carry Ltd v Gallagher Ltd [1994] 4 All ER714.

Crossly v Faithful & Gould Holdings Ltd [2004] 4 All E.R. 447.

Craven-Ellis v Cannons Ltd [1936] 2 KB 403.

David, Barbara Abbott & Ors v RCI Europe [2016] EHWC 2602 (Ch).

Davis Contractors Ltd v Fareham UDC [1956] A.C, 696.

Décor Ceiling Pty Ltd v Cox Construction Pty Ltd (no.2); [2006] CILL (March) p. 2311.

Director General of Fair Trading v First National Bank Plc [2001] UKHL 52 [2002].

Director of Fair Trading v. First National Bank [2000] 1 WLR.

Dodd v Churton [1897] 1 Q.B. 562.

Dorset County Council v Southern Felt Roofing Ltd [1989] 48 BLR. 96, CA.

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79.

East Ham Corporation v. Bernard Sunley & Sons Ltd (1965).

Equitable Life Assurance Society v Hyman [2002] 1 AC 408.

Fry v Lane (1888) 40 CH D 312.

Godfrey Constructions Pty Ltd v Kanangra Park Pty *Ltd* (1972) 128 C.L.R. 529.

Gold Group Properties Ltd v BDW Trading Ltd (2010) B.L.R. 235.

Group Five Building Ltd v Ministry of Community Development; [1996] 3 S.A. 629.

Havant BC v South Coast Shipping Ltd (No.1), (1998) 14 Const. L.J. 420.

Henry Boot Construction Ltd v Central Lancashire New Town Development Corp (1980) 15 B.L.R. 1.

HIH Casualty v Chase Manhattan Bank [2003] 2 Lloyd's Rep. 61 (HL).

Hill v South Staffordshire Railway co (1865) 12 L.T. 63.

Hoffens v Commercial Bank of Victoria Ltd (1980) 1 NZCPR 262.

Hollier v Ramble Motors (AMC) Ltd [1972] 2 Q.B. 71.

Holme v Guppy (1838) 3 M. & W 387.

Horry v Tate & Lyle Refineries Ltd [1982] 2 Lloyds Rep. 417.

Hsin Chong Construction (Asia) Ltd v Henble Ltd.[2006] HKCU 1397.

Hugh Stanley Leach v London Borough of Merton (1986) 32 B.L.R. 51.

Investors Compensation Scheme v West Bromwich Building Society [1998] 1 W.L.R. 898.

James E McCabe Ltd v Scottish Courage Ltd [2006] EWHC (comm).

Johnson v Edgware Railway Co. (1866) 35 Bev.

Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd[1971] 1 W.L.R, 519.

Krell v Henry [1903] 2 K.B. 740.

Laura Investments v Havering [1993] 1 E.G.L.R. 124.

Legione v Hateley (1983) 152 CLR 406 , 445.

Leggett J. Yam Seng v. International Trade Corporation [2013] EWHC 111 (QB).

Lipman Gorman v Karpnale [1991] 2 AC 548Mackay v. Dick (1881) 6 A.C. 251.

Lloyds Bank Ltd v Bundy [1975] Q.B. 326.

Locke v Dunlop (1888) 39 Ch.D. 387.

Lordsvale Finance Plc v. Bank of Zambia [1996] QB 752.

Mackay v. Dick (1881) 6 A.C. 251.

Makdessi v Cavendish Square Holdings BV [2015] UKSC 67.

Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another [2016] A.C. 742, 130.

McCrone v Boots Farms Sales [1981] S.L.T. 103.

McDonald v Coys of Kensington (Sales) Ltd [2004] EWCA Civ 47.

Mellish v Motteux (1792) Peake 156, 157 (170 ER 113, 113-14).

Mitchell (George) (Chesterhall) Ltd v Finney Lock Seeds Ltd[1983] 2 A C 803.

Mitsui Construction Co Ltd v Attorney General of Hong Kong (1986) 33 BLR, 1.

Mirant Asia-Pacific Construction (Hong Kong) Ltd v (1) Ove Arup and Partners International Ltd (2) Ove Arup and Partners Hong Kong Ltd [2007] EWHC 918 (TCC).

Modern Engineering Ltd v Gilbert-Ash Ltd [1974] A.C. 689.

Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd[1949] 2 All E.R. 1014.

Molloy v Liebe (1910) 110 LT 616.

The Moorcock (1889) 14 PD 64 CA.

Movietonews Ltd v London & District Cinemas; [1952] A.C. 166.

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2) [2007] EWHC 447 (TCC); B.L.R. 195.

Multiservice Bookbinding Ltd v Marden [1979] Ch.84.

North Sea Energy Holdings NV v Petroleum Authority of Thailand [1999] 1 Lloyd's Rep 483, CA.

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar

[2014] EWHC 1028 (TCC).

Ogdens Ltd v Nelson[1903] 2 K.B. 287, affirmed by the HL [1905] A.C. 109.

ParkingEye Limited v Beavis [2015] EWCA Civ 402.

Paragon Finance plc v Nash [2001] EWCA Civ 1446; [2001] WLR 685, 703.

Pegler Ltd v Wang (UK) Ltd (2000)) EWHC 137 TCC.

Peak Construction (Liverpool) Ltd. V Mckinney Foundations Ltd. (1970) 69 L.G.R. Perini Pacific Ltd v Greater Vancouver Sewerage (1966) 57 D.L.R.

Photo Productions Ltd v Securicor Transport Ltd [1980] A.C. 827.

Ross-Martyn [1972] 121 N.L.J. 1159 to 1160.

St Albans City and District Council v International Computers Ltd [1995] F.S.R. 686.

SMK Cabinets v Hili Modern Electrics Pty Ltd (1984) V.R. 391Scally v Southern Health and Social Services Board [1992] 1 A.C. 294.

Schindler v Northern Raincoat Co., Ltd [1960] 1 W.L.R. 1038.

Schuler (L) AG v Wickman Machine Tools Sales Ltd [1974] A.C. 235.

Shell UK Ltd v Lostock Garage Ltd [1976] 1 WLR 1187 (CA).

Southern Foundries (1926) Ltd v Shirlaw [1940] A.C. 701.

Steria Limited v. Sigma Wireless Communications Limited [2008] B.L.R. 79; 118 Con. L.R. 177 [2008] C.I.L.L 2544 QBD (TCC).

Sterling v Maitland (1864) 5 B. & S. 841.

Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361.

The Manifest Lipkowy [1989] 2 Lloyd's Rep.138.

The Nema [1982] A.C. 724

Tsakiroglou & Co. Ltd v Noblee Thorl GmBH [1962] A.C. 93.

Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd [1996] 2 B.L.C. 69.

Tennants (Lancashire) Ltd v C. S. Wilson & Co Ltd [1917] A.C. 495.

Thompson v ASDA-MFI Plc [1988].1Tradigran SA v Intertek Testing Services (ITS) Canada Ltd [2007] I.C.L.C.

Trollope & Colls v NW Metropolitan Regional Hospital Board [1973] 1 W.L.R. 601 HL.

Turner Corporation Ltd v Austotel (Pty) Ltd; (1995) 11 B.C.L. 202.

Turner Corporation Ltd v Co-ordinated Industries Ltd; (1997) 13 BCT 378.

United International Pictures v Cine Bes Filmcilk VE Yapimclik [2003] EWCA Civ 1669.

Walford v Miles [1992] 2 AC 128.

Wells v Army & Navy Co-operative Society (1902) 86 LT 764.

Yorkshire Water Authority v Sir Alfred McAlpine & Son (Northern) Ltd, 32 B.L.R.

Arab Court Cases

Dubai Cassation Judgement 165/96.

Dubai Court of Cassation Judgement #90/95.

Dubai Court of Cassation Judgment No. 13/99.

Case #14 of the Syrian Court of Cassation 17/1/1981.

Kingdom of Saudi Arabia, Decision of 6/2/1398 AH (17th January 1978), MAFQ 11, 1992.

Contract Provisions

Roads and Transport Authority of Dubai Standard Form of Construction Contract (2006).

Emaar Standard Form of Construction Contract.

Dubai Municipality Conditions of Contract for Works of Civil Engineering Construction.

Dubai Properties PSJC Conditions of Contract.