THE FORMATION OF CONSTRUCTION CONTRACTS IN TURKEY AND LIBYA AND A COMPARISON OF THE RIGHTS AND LIABILITIES OF THE PARTIES

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APPROVALS

PLAGIARISM

I hereby declare that all information in this thesis is presented and presented within the framework of academic rules and ethical behavior. I also declare that I have made full reference and reference to all non-original sources and results as required by these rules and behaviors; otherwise, I accept all legal responsibility.

Saleh ALSHADLI

Signature.

ABSTRACT

THE FORMATION OF CONSTRUCTION CONTRACTS IN TURKEY AND LIBYA AND COMPARISON OF THE RIGHTS AND LIABILITIES OF THE PARTIES

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This thesis is an attempt to examine the conditions of the construction contracts in the Libyan and Turkish law so as to reveal the weaknesses in the formulation of the Libyan law contracts according to the Turkish law, such as FIDIC contract models to reduce conflicts and disputes, and to benefit from the Turkish experience in the construction industry. This is in light of the fact that there is an imbalance in the obligations of the parties in terms of contracts as regards force majeure conditions and the arbitration clause, in addition to the Allocate of risks cause behind the problems of construction projects in Libya nowadays, which should be corrected and reformulated in line with the development of international contracts.

Keywords: Construction contract, Turkish code of obligation, Libyan civil code. FIDIC, Public works contract

ÖZET

TÜRKİYE VE LİBYA DAKİ İNŞAAT SÖZLEŞMELERİNİN OLUŞTURULMASI VE TARAFLARIN HAKLARI VE YÜKÜMLÜLÜKLERİNİN KARŞILAŞTIRILMASI

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Bu tezde; Libya hukukunda sözleşmelerin yapısındaki eksiklikleri görmek, anlaşmazlık ve ihtilafları azaltan FIDIC model sözleşmeleri gibi Türk hukukunda bulunan cevaplara göre değerlendirmek ve inşaat sektöründeki Türk tecrübesinden yararlanmak amacıyla, Libya ve Türk hukuklarında inşaat sözleşmelerinin koşulları karşılaştırmalı olarak incelenmektedir. Libya'da bugünlerde inşaat projelerinde problemlerin artış göstermesinin temel sebebini teşkil etmesi muhtemel olan, mücbir sebep durumu, tahkim şartı, risk dağılımı gibi hususlarda sözleşme taraflarının yükümlülükleri arasında denge bulunmaması; uluslararası sözleşmelerle paralel şekilde düzeltilerek yeniden düzenlenmelidir.

Anahtar Kelimeler: İnşaat sözleşmesi, Türk Borçlar Kanunu, Libya Medeni Kanunu, FIDIC.

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaties
B.O.T	Build-Operate-Transfer
CEDAW	convention on the elimination of all forms of discrimination against women
CRC	The United Nations Convention on the Rights of the Child
FIDIC	French name FédérationInternationale Des Ingénieurs-Conseils)
FMC	Force Majeure Clause
GNC	General National Congress
GPC	The General People's Congress
GAP	South-eastern Anatolia Integrated Development Project
HUMK	Hukuk Muhakemeleri Usul Kanunu
TBK	Türk borçlar kanunu
TCO	Turkish Code of obligation
TCC	Turkish Commercial Code
TGNA	Turkish Grand National Assembly
ICC	International Chamber of Commerce
IFIS	Islamic Finance Information Service
LCC	Libyan Civil Code
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LNTC	Libyan National Transitional Council

LTJ	Law on Transitional Justice
PWC	Public works contract
PIL	Political Isolation Law
PPL	Public Procurement Law
PPP / P3	Public - Private Partnership
UNCAT	United Nations Convention against Torture
UN	United Nations

INTRODUCTION

Contracts are the main subject of law of obligations both in Turkey and Libya. Contract obligations are those obligations to which each party is legally liable under the contract agreement. In the contract, each party exchanges something of value as a product, service or money, etc. On both sides of the Agreement, each Party shall have different obligations in respect of such exchange. The selectingan appropriate contract form is just as vital as the other important aspects of a project. A contract form is important as it affects the progress of a project by placing it in the right direction, in which a suitable strategy is applied. In this way, supply management is improved in order to deliver maximum value at minimum cost. What's more, there is the issue of how to develop and implement a best-practice process for to manage contracts.In this respect, Bower states his view of the contract form as "the contract formation has a big impact on the timescale and ultimate cost of the project", futher highlighting the negative effects on project outcomes brought about by choosing the inappropriate contract form and stating that, once a wrong contract form is selected, it can easily create budget overheads and delay in completion time.[1]

Identifying and selecting an appropriate form for a contract requires choosing the best way to solve different issues so as to meet the demands of end-users concerning goods and services services through setting proper prices and contractual conditions in a competitive process to best deliver what is expected in time.

In general, to form a contract calls for an offer, acceptance, consideration, and a mutual intent to be present. Today's construction activities rely on two main decisions: selecting a proper contract form and allocating rights and obligations between the parties. These are the main subjects of the present thesis, which primarily uses a comparative legal research method in order to achieve its objectives. In other words, the purpose is to compare the form and conditions of the contract in accordance to the Libyan and Turkish Code of Obligations in order to highlight the areas of weakness in the formulation of Libyan law contracts based on the related

1- Bower, D .(2003) .Management of procurement: Thomas Telford..p.200.

Turkish laws, such as FIDIC contract models so as to minimize conflicts and disputes and make the most of the Turkish experiences in the construction sector, one which has been highly active in the past decade.

The building sector these days is active; yet, numerous issues still remain to be tackled, thus endangering rapid development. Among these are overheads in terms of cost and time – quite common phenomena in the Libyan context.

The thesis is based on improving the models for contracts used in Libya and comparing them with the practices in Turkey as per the modern methods. This is done since it contributes significantly to the development within the Turkish State and the prosperity of construction activity both at the level of companies or the accuracy of contracts and their compatibility with the requirements of modernity. The construction contracts(FIDIC) derive their importance from being model contracts approved by international organization. In this respect, they are the most commonly used forms to regulate construction deals worldwide, and they are vital to establishing a pre-contractual framework to avoid local and international construction problems.

FIDIC Contracts aim to mitigate risks facing stakeholders, contractors and engineers throughout projects abroad and set up common and preliminary foundations to avoid problems arising from such contracts worldwide as well as to prevent the necessity for a wide range of legal rules to be applied once non-domestic parties are involved, in particular when it comes to international construction contracts that use local private contracts despite having different technical, contractual, and lingual cultures and laws. This thesis mainly uses the black letter approach and comparative legal research methods in order to achieve the aims set forth herein. The approach was selected based on the aim of the research questions, which is to compare forms and conditions of contracts in the context of Libyan and Turkish Civil Code. The thesis comprises three chapters.

Chapter 1 includes the main introduction of the topic in Turkey and Libya law and their relationshipand an overview of the Libyan legal system as Turkey's third largest trading partner in Africa. To this end, the two countries have signed a

series of agreements, such as the Development of Economic and Technical Cooperation (1975) and the Bilateral Investment and Protection Convention (2009), to complete the legal framework for bilateral commercial and economic relations. Libya is a civilian Islamic state and the lawful framework has been in power since 1969derived from the Egyptian models and dependent on a blend of Turkish, French and Italian sources (Primarily Napoleonic Law). The Libyan individual/family law is mediated under a 1982 code, educated by Islamic law, or Shari'a, and the Criminal law depends on the Italian variant, going back to the 1930s. Quite a bit of Libya's business law falls under the domain of Libya's 1953 Commercial Code. The Basic People's Congresses are the major authoritative units, presenting laws and revisions for audit by the GPC framework at its different levels. These laws and corrections are distributed (in Arabic just) in the month to month Legal Register, and the Arabic-dialect compendia of legitimate choices identified with financial undertakings are broadly accessible in bookshops. [2]

An overview of the basics as to the formation of contracts, such as the description of contract, freedom of contracts, and limits (offer and acceptance). in addition to the formal requirements in the code of obligations (illegality and immorality) will be explained. Chapter two consists of the terminology used in construction contracts, the modifications in the conditions of contract and modifications or limitations in the terms of the contract as per a study of the language through which the intent is expressed or limitations imposed by rules of court, and which in reality are not part of the contract. These notions appear under the terms "express conditions" and conditions implied in law and review of Construction contracts in the Turkish and Libyan Code of Obligations. Construction contract is an instant performance contract by nature and in some ways it is similar to continuous contracts In long term construction contracts, the performance undertaken by the contractor is similar to the continuous performances.

2- Cotran, E., & Lau, M. (2005). Yearbook of Islamic And Middle Eastern Law (2003-2004) (Vol. 10) Brill. p .617.

A construction contract is arranged in the form of an “individual contract” to contain all the terms and conditions agreed by the parties. Though, in cases of those agreements regarding large-scale works, the contract also includes the general conditions of transaction, such as FIDICType Contracts and Specifications.

In the third chapter, FIDIC as a construction contract (International Federation of Consultants & Engineers) is explained, depicting sample contracts concluded between contractors and stakeholders in the construction industry, civil engineering, mechanical and electrical works. Numerous types of model contracts areavailable with specific terms and conditions pre-drafted and agreed by contract parties. Here, we will also deal with the legal issues caused by the language of contracts as adopted in FIDIC contracts to include the problem of translating FIDIC contracts and their importance at the international level.

Chapter three also provides an overview of a force majeure condition in contracts with a correlation between the power majeure in the Libyan law and FIDIC contracts. A Force Majeure provision is a term to allow a gathering to suspend or end the execution of its commitments when certain conditions out of their control emerge, making execution unwise, industrially impracticable, illicit, or outlandish. In light of this arrangement, the agreement might be briefly suspended, or that it might be ended if the occasion of power majeure continues for a specific timeframe. The rundown of such occasions to be incorporated is a subject for exchange between the gatherings.

Another point focused upon in the present thesis is the arbitration clauses as ubiquitous and profound alter the rights of parties to agreements containing them. Often, though, parties and their counselsonly begin to realise how important these clausesare once a real dispute arises, calling for a well-drafted arbitration agreement to offer a way out and help to shape up the expectations as disagreements are dealt with. With language dealing with different topics, including the appointed administrative body, the delineated powers of the arbiters, the limits of discovery and other aspects, such arbitration clauses help to design a general view of the methods to resolve disputes. Related to this view is the considerations of each clause against specific circumstances to reach an agreement suitable for any particular matter such

as selecting the appropriate arbitration mechanism, administrative body, and individual arbitrators, framing the scope of disputes for arbitration, choosing the seat and location of hearings, and finally choice of law, confidentiality and points related to trade secrets.

Another contract feature addressed in this thesis is how risks are allocated in construction contracts, a subject as a natural fact of the trade and impossible to avoid. Potentially, any type of undertaking contains in itself a level of risk since there is always a certain degree of uncertainty in every decision made. Risk can be defined as, "...the exposure to the chance of occurrences of events adversely or favorably affecting project objectives as a consequence of uncertainty." Therfour , construction contracting to a level is a kind of risk-taking while the nature of the trade demands that projects vary from one another to some degree. Hence, riskis an inherent part of the process of doing business in construction.

This thesis compares the Libyan and Turkish system of law because of their stronger relationship in several fields. When the Libyan civil law was issued on 28th November 1953, it included provisions with historical background in other law systems. [3]

Historically, the period preceding the issuance of the Libyan civil law had witnessed the incorporation of more than one law system, beginning with the justice provisions journal (Adalet hükümleri dergisi) during the rule of the Ottoman Empire as it served as the civil law of that state and was taken from the Hanafi jurisprudence. The code continued to be in use for what was not included in the Italian civil law in force during the occupation in 1911. [4]

As far as history is concerned, Turkish and Libyans are closely connected in cultural terms. Libya was under the Ottoman rule between 1551 and 1911 and passed

3 -Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p .236.

4 -Ruling of the Supreme Court appeal No. 49/17 dated 4/5/1971Journal of the Supreme Court Year 8 First issue, p . 124, 49/17 C.F.R. (1971).

to Italy during the1911-1912 war. After the European domination (of the Libyan territory), the relations between Turkey and Libya remained low-key, only to bounce back to in 1969.[5]

In fact, the roots of Turkey's friendly ties with Libya first came to spread during the US arms embargo (on Turkey after its intervention in Cyprus in 1974. Thenceforth, Turkish building contractors have become mainstream in Libya as part of the foreign participations. Libya is Turkey's third largest trading partner in Africa, and the two signed a number of agreements, mainly on the Development of Economic and Technical Cooperation (1975) and Bilateral Investment and Protection Convention (2009), so asto set up the legal framework for two-sided commercial and economic ties. Attempt is made by both to establish a Free Trade Agreement in the coming years.[6]

Turkey is among the main investors in Libya with projects exceeding 20 billiondollars' worth of construction contracts in Libya. For Turkish contractors offshore, Libya follows Russia and stand second in terms of business volume.[7]

Since 1973, Turkish contractors in Libya have signed 565 projects worth $ 56 billion.Two years before the Arab Spring in 2011, 124 engineering projects worth $ 8 billion were awarded to Libya. It is estimated that the assets of the Turkish institutions, funds and standby repayments in Libya are worth $ 2.5 billion, with overdues worth $ 1.4 billion. The Libyan bank held about $ 100 million in 2011 and given the high earnings that Libya gained in oil revenues in those days, the

5 -Affairs, M. o. F. (2015). Bilateral Relations between Turkey and Libya. Republic of Turkey Ministry of Foreign Affairs: Republic of Turkey Ministry of Foreign Affairs. Nabil Akeed Mahmoud Al - Muthafri. (2011). Libya and Turkey studied political and economic relations during the 1990s. Regional Studies, 23, 117-164.

6 -Kronman, A. T. (1980). Contract law and distributive justice. The Yale Law Journal, 89(3), 472-511 Turkey’s Position on the Libyan Revolution. (2011). Doha, : (Doha Institute). p . 14 .

7 -Welfare, C . (2016). Turkey - Libya Relations . Retrieved n.d. p .12-16.

announcement of a $ 100 billion investments abroad was expected to revive the imagination of Turkish contractors. [8]

Turkey's orientation also manifests itself in its ties with Libya. The trade volume between the two countries increased to $9.8 billion in 2010, followed by Libya's announcement to invest $ 100 billion in Turkish companies by 2013. An amount of $15 billion was invested in Turkish construction companies and, since 2010, 160 Turkish investment projects in Libya have been in operation . [9]

The 1980s were an important decade in the restructuring of the Turkish economy.In line with the Western countries, starting in 1983, Turkey experienced a major transformation from the closed economy of the 1970s to becoming a market economy. New agencies, such as housing development and public partnerships, became the convertibility of Turkish currency.[10]

In this respect, management came into force and other concepts, such as privatizationand liberalization of theeconomy, were introduced. In the meantime, major infrastructuralinvestments started in Turkey and, even though a relative decline was experiencedin the average amount of Turkish investments in Libya, most foreign trade continued between the two at 52.3%, as well as between Turkey and Saudi Arabia (23.4%) and Iraq (11.5%) for years to come. The dismantling of the Soviet Union and dawn of the new Central Asian republics outside the Russian Federation (3.8%) were new developments in this period.[11]

Housing (36,7%) and urban foundation ventures (17,2%) kept on rising, trailed by street/connect/burrow (7%) and water system ventures (5,4%). In the 2000-2009 period, most outside contracts were marked with the Russian Federation (15.5%), Libya (12.4%), Turkmenistan (11.4%), Kazakhstan (7.2%) and Iraq (6%).Turkish International Contract Services (1972-2016 / 3 months). Between

8 -Kayaoglu, B. (2016). Why Turkey is making a return to Libya Al-monitor . p .27.

9 -Turkey's Position on the Libyan Revolution. (2011). Doha, : (Doha Institute). p .10.

10- Aras, D. (2012). Turkish-Syrian relations go downhill. Middle East Quarterly . p .212.

11 -Öz, Ö. (2001). Sources of competitive advantage of Turkish construction companies in international markets. Construction Management & Economics, 19(2), p .135-144 .

March 1972and 2016, in terms of the international projects undertaken by the Turkish contractors, Russia was in the number one spot with 19.9%, trailed by Turkmenistan (14.8%) and Libya (9.0%). Turkish International Contracting Services (1972– 2016/3 months) In this equivalent period, as per the nation circulation of global works embraced by Turkish temporary workers, the Russian Federation has been the main market with an offer of 19.9%, trailed by Turkmenistan (14.8%) and Libya (9.0%).[12]

12- Giritli, H., Sozen, Z., Flanagan, R., & Lansley, P. (1990). International contracting: a Turkish perspective. Construction Management and Economics, 8(4), 415-430 .

CHAPTER 1

THE HISTORY OF THE LIBYA LEGAL SYATEM AND THE FORMATION OF CONTRACTS

I. THE HISTORY OF LIBYA LEGAL SYSTEM

A. The Legal Situation Between 1969-2011

Libya is a civilian Islamic express; the lawful system has been in activity since 1969 taken from Egyptian models and halfway dependent on a mix of Turkish, French and Italian sources – mainly, Napoleonic Law. Concerning the individual/family law, it was endorsed under a 1982 law and dependent on Islamic law, or Shari'a. Thus, its criminal law depends on the Italian variant returning to the 1930s. A lot of Libya's business law depends on the 1953 Commercial Code. The Basic People's Congresses are the essential administrative bodies, presenting laws and corrections for the survey by the GPC framework at various levels. All laws and changes are distributed (in Arabic just) in the month to month Legal Register. In addition, the Arabic-language compendia of the economy-related legal decisions can be easily accessed in bookstores.[13]

The country's legal system based on Civil Law, and the Libyan Civil Code, influenced, inter alia, by Roman law in the form of the modern French Civil Code, "Code Napoleon" and the Egyptian Civil Code, is the foundation for other Libyan legislations. Since Libya is an Islamic country at the same time and that Islam is the official religion of the State, the legal system is to the same level affected by the principles of Islamic law, which is also regarded as a major frame of historical reference for Libyan law.

Based upon Libyan law, public law and private law differ as the former governs the legal relations to which the State, as a sovereign power, is a party;

13 -Cotran, E., & Lau, M. (2005). Yearbook of Islamic And Middle Eastern Law : (2003-2004) (Vol. 10) : Brill

. p .441.

whereas the latter rules are applied to thoserelations between ordinary citizens or private juristic persons. The formal sources of Libyan law are prescribed by the first Article of the Civil Code as follows: (a) Legislative provisions; (b) Principles of Islamic law; (c) Custom; and (d) Principles of natural law and rules of equity. Hence, legislation is taken as the main and general source of Libyan law.[14]

Libya's legal and governmental structure is laid upon two constitutional documents: The Constitutional Proclamation of December 1969 and the Declaration of the Establishment of the People's Authority, enacted in March 1977. The Declaration encompasses most of the issues stated in Colonel Qadhafi's political tract, the Green Book. In view of the common code, the chain of importance of legitimate sources is, in slipping request: enactment, standards of Islamic law, custom and standards of characteristic law and value. Official activities are led by the Chief of State, the Head of Government and the Cabinet. Thusly, the Legislative Branch contains the 2,700-part General People's Congress, while the Judiciary Branch incorporates four levels of courts, coming full circle in the Supreme Court.[15]

As a mirror of its quite varying background the Libyan lawful framework is impacted by Islamic law and the common legitimate practices of Italy and France. Under the Ottoman principle, one court framework managed common issues though another chose debate identified with religious law. The common courts' structure depended on the Napoleonic Code. Islamic judges utilized shari'a law in religious courts. There is no arrangement for legal audit in Libya's sacred setting, and the nation does not perceive the locale of the International Court of Justice.[16]

In 1973, the twofold court structures were consolidated into one, with Shari'a law as the essential legal source in Libya. Four levels of courts set up the legitimate:

14- Cotran, E., & Lau, M. (2005). p .210.

15- Otman, W., & Karlberg, E. (2007). The Libyan Economy: Economic diversification and International repositioning: Springer Science & Business Media. p .159.

16 -Deeb, M.-J. (2007). Great Socialist People's Libyan Arab Jamahiriya. The Government and Politics of the Middle East and North Africa, 432-455 .

rundown courts, courts of first event, courts of offer, and the Supreme Court. The Summary Courts address offenses or cases including 100 Libyan dinars or less, and can be found in humblest towns. The Courts of First Instance are the fundamental courts and limit as three-judge sheets. The interests from the judgments of the Courts of First Instance are heard by separated three-judge sheets in the Courts of appeal, which are discovered spread the nation over and hear both shari'a and non-shari'a matters.[17]

The court of conclusive interest is the Supreme Court, involving five chambers: common and business, criminal, managerial, sacred, and shari'a. Each chamber has a five-judge board. Independently, matters identified with legislative issues and certain monetary offenses used to be attempted before the People's or Revolutionary Court. However, the court was canceled on January 12, 2005, by a demonstration of the General People's Congress.Even however the Civil Code shows up in Gazette of 13 Feb 1954, a considerable lot of its arrangements have been supplanted with shari'a law according to the revisions contained in Law No. (74) of 1972 and Law No. (86) of 1972. An interpretation of the 1954 code was distributed as The Libyan Civil Code. The Code of Civil and Commercial Procedure of 28 Nov 1953. Business code of 1953. revised to fit in with the standards of Islamic law by Laws No. (74) and (86) of 1972. Corrective code of 1953. Law No. (9) for 1968, Issuing the Copyright Protection Law is distributed in the Official Journal, al-Jarida al-Rasmiya. Additionally, the Supreme Court choices are distributed in Majallat al-Mahkama al-'Ulya.- [18]

Libya has marked various UN Conventions and Covenants with respect to budgetary straightforwardness, human rights, and the multiplication of organic, substance, and atomic weapons. Libya joined the ICCPR and ICESCR in 1970 with a general articulation that its increase does not in the slightest degree suggest

17 -International Business Publications, U. (2015). Tunisia Company Laws and Regulations Handbook Volume 1 StrategicInformation and Basic Laws: Int'l Business Publications. p .46.

18 -Otman, W., & Karlberg, E. (2007). The Libyan economy: economic diversification and international repositioning: Springer Science & Business Media. p . 160.

acknowledgment of Israel or going into concurrences with Israel under the terms of the Covenants. [19]

In 1989, the country also acceded to the CEDAW with reservations relating to the following: Article 2 being implemented "with due regard for the peremptory norms of the Islamic shari'a relating to determination of the inheritance portions of the estate of a deceased person"; and to Articles 16(c) and (d) being used "without prejudice to any of the rights guaranteed to women by the Islamic shari'a" Libya jointed the CRC in 1993 without any concerns or conditions.[20]

B. The Legal Situation After 2011

It has to be stated that, upon the removal of Qadhafi in 2011, many challenges have emerged concerning the enactment of legislation brought about by instability. Efforts to change legislation are tampred significantly by violence in many regions in the country. Consequently, most legislation used at the time of Qadhafi remains in force. In this respect, Article 35 of the Constitutional Declaration asserts that all existing legislation – that related to the Qadhafi era – shall remain in force until changed or ruled out as long as there is no conflict with the Constitutional Declaration. In addition, previously Libyan legislation appeared to be rather contradictory and sometimes unclear as to which legislation is in practical use. The issue is that a vast number and sets of rules and laws are being used in the country, in part due to traditional mediation tendencies with no regard for legislation. In what follows, It introducerelevant current Libyan legislation, listed chronologically based on the adoption date.[21]

The Constitutional Declaration: The established record by and by in power in Libya is the Constitutional Declaration, drafted by the NTC in 2011, after the fall of

19 -International Business Publications, U. (2015). Tunisia Company Laws and Regulations Handbook Volume 1 StrategicInformation and Basic Laws: Int'l Business Publications. p .45.

20 -Deeb, M.-J. (2007). Great Socialist People's Libyan Arab Jamahiriya. The Government and Politics of the Middle East and North Africa, p . 432-455.

21 -Analysts, C. (2014). Libya: Judiciary and Security Sector. p .200.

Qadhafi and received on 3 August 2011. The Declaration characterizes the way toward rebuilding a popularity based Libyan state. As per article 34 of the Declaration, every single protected archive and laws received before the reception of the Declaration were denied. As indicated by the Constitutional Declaration, the successor to the NTC, the General National Congress, was assigned to assemble a Constitutional Committee inside 30 days after it initially accumulated. By and by, two days before its expiry on 7 July 2012, the NTC issued an alteration to the Declaration (Amendment No.3), expressing that the Constitutional Committee ought to be selected by the Libyan individuals, and that the Constitutional Drafting Committee should comprise of 60 individuals with 20 delegates from every one of the three noteworthy districts in Libya - (Tripolitania, Cyrenaica and Fezzan).[22]

In light of the Constitutional Declaration, Libya is a free popularity based state set upon political pluralism and majority rule foundations. As per Article 1, Islam is the state religion and Islamic sharia is the primary wellspring of enactment. In December 2013, the GNC casted a ballot to make sharia the lawful reference for all enactment and all state establishments.

On 2 May 2012, the National Transitional Council passed the much-discussed Law on Amnesty conceding insusceptibility to hostile to Qadhafi powers who carried out wrongdoings amid the time of rebellions against the administration. Those wrongdoings incorporate homicide and constrained displacement. The law unmistakably stipulates that no punishment is to be given to military, security, or common activities achieved by the February 17 Revolution and did by progressives to shield the development. In accordance with the Law on Amnesty, Law No. 35 was received, expressing that criminal demonstrations culpable under universal human rights enactment are not absolved from the indictment. All through the expressed period, the inadequacies of the lawful framework in Libya, together with potential logical inconsistencies between these laws, wound up in a typical nonappearance of

22 -Gaub, F. (2014). A Libyan recipe for disaster. Survival .120 -101 ,(1)56 ,

firm activities against genuine human rights infringement, including those submitted amid the 2011 uprising.[23]

Enforced Disappearances and Discrimination in April 2013, the General National Congress passed a law regarding the criminalization of torture, enforced disappearances and discrimination. Although the international community welcomed the adoption of a law that deal with such heinous crimes, concerns were raised as to the conformity of the law with the UN Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (UNCAT), to which Libya is also a state party. In practice, the law has not been applied. Torture and abuse were common in the said period, for instance in detention centres, either state-run or militia-run. Such kidnappings by armed groups with no government control took place quite commonly, and abductions remained largely uninvestigated and perpetrators remained at large.[24]

On 5 May 2013, the GNC ratified the Political Isolation Law (PIL), also known as Law No. 13 of 2013 on Political and Administrative Isolation and intended for banning any entity alleged to have ties to the Qadhafi regime and anyone "who took a position against the 17 February Revolution in deed, by incitement or by financial support" from having governmental positions up to 10 years. The law was put into effect on 5 June 2014 and, upon an amendment, no decisions pertaining to this law can be appealed to the Supreme Court. In essence, authorities can apply the law as a repercussion against those possibly associated with the previous government, regardless of having left the country earlier and having a part in the revolts against Qadhafi afterward. Despite the Supreme Court yet to pass a final

23 -Gaub, F. (2014). p .105.

24 -Deeb, M.-J. (2007). Great Socialist People's Libyan Arab Jamahiriya. The Government and Politics of the Middle East and North Africa, 432-455.

decision on the constitutionality of the PIL, the law remains influential in judicial processing and governs over the country's political affairs.[25]

On 22 September 2013, the GNC passed the Law on Transitional Justice (LTJ)intended to replace the Law on Transitional Justice formerly ratified by the National Transitional Council on 26 February 2012. Regardless of its ratification, the LTJ is yet to be applied as instability and the presence of two separate rival parliaments prevented just about any legal affairs to be progress in Libya and kept transitional legislation from implementation. One main article in the LTJ demands that all those captive without due judicial processing to be delivered to state officials within 90 days from the promulgation of the law.[26]

In December 2013, a Tripoli-based Review Committee, governed by the Ministry of Justice, was given the job of re-examining the country's legislation, marking out the contradictions to sharia's fundamentals, and offering replacements for them. The committee is also to monitor the preent laws in place so as to adopt them to Islamic law.

In April 2014, appointedcommittee members began in al-Bayda, east of Benghazi, to draft a new Libyan constitution. It proved to be a daunting task to achieve the full members as required by the Constitutional Declaration due to unrest in Darna - an Islamist hotspot - and many other places to the south where elections were impossible. In addition, elections were boycotted by the Amazigh community in a way to gain more concessions. In February 2014, the committee was finalized through an election tampered by security issues as well as the Amazigh community boycott. Despite all the hurdles, though, on 21 April 2014 the Committee managed to

25 -Mabrouk, M. F., & Hausheer, S. A. (2014). The State of the Arab Transitions: Hope Resilient Despite Many Unmet Demands. Washington: The Atlantic Council of the United States . p .233

26 -Lamont, C. K. (2016). Contested Governance: Understanding Justice Interventions in Post-Qadhafi Libya. Journal of Intervention and Statebuilding, 10(3), 382-399 .

have its first gathering in al-Baydawhere the Chair, Deputy Chair and Rapporteur were appointed and procedural rules were determined.[27]

II. FORMATION OF CONTRACTS

A. Definition of Contract

Contracts are one of three major sources of the obligations. When an agreement is reached between two or more parties, the obligation arises from the contract. In other words, a contract is a legal transaction that leads to the obligation. The term contract is used in Latin (contractus)in terms of contract. Given the other languages as In German (vertrag), in French (contrat), in English (contract), in Italian terms (contratto) , in Turkish (sözleşme) in Arabic (عقد) in these languages, the contract is still Contract as well as the word used in the same sense. [28]

A contract is an agreement between two or more parties that is legally enforceable to provide something in return for the second party. Contracts can be either quite basic or rather extensive legal documents that are legally binding once drafted professionally. The parties are to observe different obligations as negotiated upon through contract documents, thereby safeguarding each party's interests. [29]

A contract is a main feature in a procurement system and an essential factor in business partnerships by emphasizing on the significance of the family to the stakeholders. In this respect, performance and non-performance becomes consequential. Furthermore, the contract is "an agreement between the two parties, in

27 -Mabrouk, M. F., & Hausheer, S. A. (2014). The State of the Arab Transitions: Hope Resilient Despite Many Unmet Demands. Washington: The Atlantic Council of the United States . p .78

28- Ceylan, S. G. (2014). Roma Hukukunun Günümüz Hukuk Düzenlerine Etkisi . Gazi Üniversitesi Hukuk Fakültesi, p .172 .

29- Kronman, A. T. (1980). Contract law and distributive justice. The YaleLaw Journal, 89(3), 472-511 .

which a party undertakes to offer goods, software or services to a second party within a period of delivery and at a price agreed upon". [30]

Contracts are legally binding, though not all such agreements can be regarded as contracts. Prior to deservedly being called one, a contract needs to include certain elements, such as the authorized parties which can be two or more. The parties have to content and intent their bargain to be enforceable by law in a proper way, and the conditions of a contract shall be drafted so as to guarantee the rights and duties of both parties - The Parties' Responsibility: Contract, Misrepresentation, Duress Extreme Influence.etc. [31]

Contracts are bilateral and the most essential one among multilateral legal transactions. The parties have to state mutual and concordant declarations of will. [32] Plus, a contracts serves as a regular instrument used to determine, change and omit legal relations among parties .[33] In this way, they set up upon personal determination the laws to be in effect as well as their own laws and "law of contract". Legally, speaking, a contract is not just a legal transaction, but a legal relation [34].

First, a contract is a legal transaction. According to Article 1 of the Turkish Code of Obligations, (The contract is concluded by mutual and consentaneous expression of intent of the parties. the expression of intent may be express or implied) and Article No. 89 of the Libyan Civil code states that (A contract is created, subject to any special formalities that may be required by law for its conclusion, from the moment that two persons have exchanged two concordant intentions), the contract is

30 - In't Veld, J., & Peeters, W. (1989). Keeping large projects under control: the importance of contract type selection. International Journal of project management, 7(3), 155-162 .

31 -Elbeltagi, E. , & Eng, P. (2009) . Lecture notes on construction project management : Mansoura University . p . 268.

32 -Reisoğlu, S. (2005). Borçlar Hukuku: Genel Hükümler: Beta. p .581.

33 -Kılıçoğlu, A. M. (2005). Borçlar Hukuku Genel Hükümler (Vol. Genişletilmiş (6). Bası. Ankara: : Turhan Kitabevi . p . 367.

34 -Eren, F. (1994). Borçlar Hukuku, Genel Hükümler, İstanbul 2003. Kısaltma: Eren-Borçlar Hukuku, p .185 .

complete when both parties declare their mutual and concordant consent. Yet, Article 1 of the Law of Obligations include any legal consequences. However, a contract is intended as a legal tool to comprise mutual and concordant consensualwith the aim to form specific legal consequences .[35]

As such, a contract also consists of consensual referring to legalimplications, which are to set up, designate, modify or omit a right or a legal relation.[36]To elaborate, a Contract is a legal transaction that is established by the mutual and concordant consensual of two persons. The required elements for a contract to materialize are the consensual, concordance and agreement of wills, and lastly the presence of cause.The terms for a consensual call for the statement of what is desired. In other words, consensual means the expression of intent to perform a certain task.[37]

The legal conclusion is not only with the will of one of the parties but also with mutual consent of the parties, ie their will. As a general rule, each contract leads to obligation, provided that it remains within legal limits. TBK m. According to 19: The subject matter of the contract may be freely set within the limits of the law. "

In concluding the contract, as a rule, the parties are not bound by many of the types of contracts issued in the law of obligations. The limits of freedom of contract are set out in TBK (Articles 19 and 20). Consequently, the subject of the contract should not be contrary to the mandatory rules of law, morality, personality, personal rights, and public order.[38]

Content is obviously clarified by law in formal legal transactions and, in case not determined by law, declaration has to vividly highlight what is to be offered and whether the performance is onerous or not. The will to make a declaration is the

35 -Karahasan, M. R. (1992). Türk borçlar hukuku: Beta Basım Yayın Dağıtım.Kasaroğlu. (1967). Law of Obligations. p . 81

36 -Eren, F. (2014) , Borçlar Kanunu Genel Hükümler. Kısaltma (17 – ANKARA).p . 369.

37 -Ceylan, S. G. (2014). Roma Hukukunun Günümüz Hukuk Düzenlerine Etkisi . Gazi Üniversitesi Hukuk Fakültesi,, 171-183.p.176.

38 -Eren, F. (1994). Borçlar Hukuku Genel Hükümler, İstanbul 2003. Kısaltma . p . 185.

intention to report the will to the person to whom the declaration is made. The course of action should be in a way that all related individuals understand the consensual based on the common trade traditions; or else, the result will happen to be the consideration of what the other party understands, other than the intention of the declaring. The will to perform a certain task is about the intention to create (or change or remove) a legal relation with the concerned declaration. Also, “agreement of the wills” refer to the concordance of parties, and the offers should be finalized by acceptance and, thus, agreement must take place. A later declaration should be made by giving consideration to the previous declaration:

A contract can not be made from two identical and contradicting offers.In essence, estate dealings cannot be made without a cause and the legal consequences subject to the wills of the parties and another legal effect unite in the event of legal action; there is also a social aspect to this second legal effect in granting. Reason of performance, reason of receivable, reason of granting, reason of guarantee can all be indicated as reasons of cause .[39]

Contract law addresses such legal relations brought about due to a mutual expressions of assent. The parties state their intent in words, or in any other conduct that can be translated into words. The concept is, by no means, uncommon that legal relations called contractual may not occur unless the parties actually wanted them to exist, and that the only courts shall explain what did the parties intend? The issue is not quite as clear-cut as in just about any contract-related case, legal relations are present from the point of acceptance, which either or both parties did not quite consciously anticipate to exist and, hence, cannot be claimed to have actually intended. What’s more, the life span of any contract can be extensive and new facts can emerge post-acceptance of the offer. These are facts that can seriously inpact the already present legal relations and, still, may have remained entirely unforeseeable by the parties. Many such non - contemplated legal relations are, to different extends,

39 -Kılıçoğlu, A. M. (2005). Borçlar Hukuku Genel Hükümler . Vol. Genişletilmiş (6). Bası. Ankara : Turhan Kitabevi . p . 369.

defined as contractual. As such, an important task for the courts is to decide the unintended legal relations as well as the intended ones.[40]

The principle of pacta sunt servanda, implying that contracts and clauses are laws with binding force between parties, demands that each party maintain his obligations. Nonetheless, in commerce, events or changes might take place, causing performanceto become impossible or meaningless or cause a major violation of the economic balance between the parties. In such scenarios, the unbending application of pacta sunt servanda can have adverse effects and cause injustice. For this reason, a disagreement is observed between two principles in contract law, namely the principle of pacta sunt servanda on one side and clausal rebus sic stantibus on the other. Contract laws in all legal system attempt to balance between these two principles so as to guarantee fairness.[41]

The initial step in this process is a merely historical one, that of deciding what the operative facts were. What did the parties say and do? What exact words did they utter? Did they draft a document? Then, the next step is interpretation, when the court raises two questions: one, what was the real state of mind of the parties, their meaning and intention once they stated their intent or carried out other acts that could be interpreted; and two, what meaning do the statements and actions of those parties now have from the perspective of a reasonable and neutral third party? Only scarcely are these questions actively raised by a court, often times, interpretation takes quick and unintended shifts from one angle to another.[42]

B. Freedom of Contracts and its Limits (Offer and Acceptance)

The Convention shall be established by mutual and mutual consent of the parties. The statement will be explicit or implicit. - If the parties have contracted at the essential points of the contract, even if it is not settled, the contract is deemed to have been established. And an obligation is a legal bond, the object to procure an

40 -Corbin, A. L. (1919). Conditions in the Law of Contract. The Yale Law Journal, 28(8), 739-768 .

41 -Wehberg, H. (1959). Pacta sunt servanda. The American Journal of International Law, 53(4), 775 . 786

42 -Corbin, A. L. (1919). Conditions in the Law of Contract. The Yale Law Journal, 28(8), 739-768 .

advantage for one person by constraining another to do or abstain from a definite act.(LCO. Article 90/144 , (TCO . Article 1).[43]

A legal bond can be brought about by a contract or from a source of obligations. The Libyan Code clarifies the main features of an obligation. Indeed, the entity who is bound is always bound whether to an act or an abstention. The obligation to give is a form of undertaking to perform a certain act. However, many major differences exist between the impact of this obligation and that of other obligations; for this, it is better to class the obligation a donner separately.The term 'obligation' and the expression arein fact metaphorical and taken from the Roman law.[44]

An obligation always involves a person legally entitled to a complete fulfillment of the obligation by the other. This person is called the creditor. In the opposite way, there must always be one who can be mandated to carry out the performance, i.e. the debtor. Though, many creditors may be present to each of whom the debtor has the obligations; or many debtors, each bound by the same obligation to the same creditor; or there may be numerous creditors to whom numerous debtors are bound. Once there are many creditors, each might be entitled to a debt paymentor a payment to one of them; alternatively, each creditor may be entitled only to claim a share of the debt. In the same way, once many debtors exist, all may be called upon to repay the whole debt or make them liable only for their own share of the outstanding debt.[45]

The concept of contract as a bargain needs an item to be given in return ofcontract stemming from the declarations of will admits as a contract an offer of the civilian concept of contract rests not on the exchange, but on concordant intent. The mutual declaration of wills creates the contract.relevant definition appears in Article 1 of the Turkish Code of Obligations No: 6098 and Articles 90 to 100 of the Libyan Civil Code. A seclaration is the basic elements of a contract which can be made in

43 -Abdullah, A. A. (2010). Adaptation of the contract in the Civil Code. Tikrit University Journal of Legal Sciences, 2(6), 160-179 .

44 -Alqadi, A. K. Y. A. H. (1999) The Theory of Fraud in Egyptian and Yemeni civil law. p . 63.

45 -Jamil, A.-S. (2017). General Theory of Compliance .C. 2 Provisions of Obligation . p 156.

three different ways: an offer, invitation and acceptance. An offer is a legal action ensuring the establishment of a contract with the statement of acceptance of the other side, carries the validity requirements of legal actions and contains the key elements of the contract to be drawn up.[46]

The offer without the material elements of the contract is regarded as an invitation. The will to commit by the offer is one of the main elements of the offer. Obviously, it is paramount to accept that the will to be bound differs according to the parties to the contract, which can be formed between those who are not necessarily present. The contract may be formed once the parties are mutually present or during direct correspondence via telephone and computer, stated in the Turkish Code of Obligations to be in accordance to the technological developments.

The statement that forms the contract is the declaration of acceptance. Acceptance is the declaration of will made by a party to the contract to be formed in response to the offer by the offering party. This clearly expresses the will to form the contract. Maintaining silence while forming a contract can of course initiate discussions as to the form of acceptance. As generally viewed in the doctrine, "in principle, keeping silent is not a declaration of will and the other party who doesn't respond to the offer is not considered to accept the offer".[47]

The legislator allows the offering side to remove its offer under certain conditions and lets the party giving the acceptance declaration to take back its declaration, thus preventing the formation of the contract. Evidently, forming a contract cannot be avoided by taking back the declaration of acceptance given to the present addressee. The declarations of the parties may not be always concordant or it may not be possible to figure out from the letter of the declarations whether the declaration is indeed an offer or an invitation. Here, we address the interpretation of the declarations and the theory of confidence. In this respect, a resolution by the Turkish Supreme Court Assembly of Civil Chambers offers this short provision:

46 -Altınışık, U. (2003). Elektronik Sözleşmeler. Ankara: Seçkin Kitap. p . 214

47 -Öz, T. (2006). Borçlar Hukuku Genel Hükümler, Istanbul Oğuzman / Öz-Borçlar. p . 378.

" Determining whether a declaration is an offer allowing a contract to be made or an initiation to treat depends on the interpretation of the said declaration." [48]

For a contract to be valid, the parties should be qualified to make the contractto begin with.As the fundamental term for qualifying as a legal transaction, the consensual should have the " distinguishing power ". Contracts without qualification are absolutely null. The person concluding acontract without distinguishingpowercannot claim invalidity of that contract, if he is to make this contract if he has the distinguishing power. Doing as such goes against the rule of integrity (TBK M.12) .[49]

According to Article 27 of the Turkish Code of Obligations, “Contacts that are contrary to the compulsory provisions of law, to morality, to personal rights and of which subject matter is, impossible are null and void. The null and void nature of a part of the terms that contract include does not affect the validity of other terms. Nonetheless, if it is inferred clearly that without those terms the contract would not have been concluded, the entire contract becomes null and void”. Furthermore, Article 109 of the Libyan Civil Code states that “Every person who has not been declared to be under total or partial legal incapacity has the legal capacity to conclude a contract”. Hence, the subject of the contract cannot be against the governing rules of the law, moral personal rights and public order. Similar to the aim of the contract, issues apart from the subject of the contract should not be against the same. This provision is mandatory and the contract containing otherwise is regarded as invalid from the start. Also, the subject of the contract should not violate mandatory provisions; that is, not only the Code of Obligations but the obligation to comply with all mandatory rules of law. The provisions that aim to protect the interest and morals of the society, and personality of individuals are among such

48 -Kılıçoğlu, A. M. (2005). Borçlar Hukuku Genel Hükümler, (Vol. Genişletilmiş (6). Bası. Ankara: : Turhan Kitabevi. p 170. (Yargıtay 9. H.D. 16.01.1996, E. 1995/24545, K. 1996/62)

49 -Demir, Ş. (2013). Kefalet Sözleşmesinin Uygulama Alani. p . 88 .

obligatory issues. Furthermore, the provisions that protect the economically, socially and physically weak ones are mandatory.[50]

Compliance with the Public Order: Even in the presence of a concretemandatory provision, the contract is regarded null and void if it violates public order, publicwelfare and comfort. To provide detail, public order refers to the entire legal order in conjunction with the provisions safeguarding the interest of the society.

Compliance with the Personality Rights: If the subject of a contract is against personal rights, the contract is deemed invalid. These issues encompass honor and dignity as well as to personal freedom.

Compliance with Morals: these are the rules of ethics in regard by the society. Contracts that violate the moral emotions of individuals are invalid on the ground of noncompliance.[51]

If the performance as subject of the contract is objectively impossible at the time of the contract, then the contract is invalid (Turkish Code of Obligations Article 27 and Article 109 of the Libyan Civil Code).[52]

Such impossibility may be de facto or de jury. For example, (B) sold to (A) the painting of an artist (x) that it possessed. Yet, if it is determined that the painting is burned during the signing of the contract, then this is de facto impossibility. On the other hand, if (B) promised (A) the sale of a parcel of 100 sqm of land and if the zoning legislation does not allow a parcel under 200 sqm, this is de jury impossibility. Put differently, legal impossibility is the banning of the obligation of the contract by legal means. The impossibility of an effect on the validity of the contract should be objectively impossible for everyone at the time of contract

50 -Ayranci, H. (2003). Sözleşme Kurma Zorunluluğu. Ankara Üniversitesi Hukuk Fakültesi Dergisi, 52(3), p . 229-252 .

51 -Ateş, M. (2014). Rekabet Hukukundaki "Anlaşma" ve Borçlar Hukukundaki "Sözleşme" Kavramları Üzerine. FMR, 1 . p . 501

52 -Özçelik, Ş. B. (20 14 .(Sözleşmeden Doğan Borçların İfasinda Hukuki İmkanisizlik ve Sonuçları AÜHFD, 63 (3) 2014, p . 569-621 .

signing. If there is impossibility only for the party assuming the obligation, this is regarded as a subjective impossibility and does not affect the validity of the contract. Therefore, the contract remains valid and the debtor failing to complete the obligation is to be held accountable.[53]

C. Defects of Adeclaration of will in the Code of Obligations

A statement of will is a basic element of legal activity, provided to initiate specific legal effects. A legal system, though, calls for certain actual situations, which can imply the result in the form of defectiveness of legal actions by violating certain legaltrends. For instance, the standards relating to deformities of a statement of will, in which case a finished legitimate act is regarded completely invalid or is maybe dropped or nullified thus ofbeing disavowed by one gathering from lawful impacts of this lawful activity.Let us not overlook that imperfections of a revelation of will are substantial just for lawful activities; subsequently, they don't make a difference to other lawful occasions, for example, court decisions or managerial choices, and identify with the conduct of an individual,the individual. The deformity of the announcement of a characteristic individual going about as a legitimate individual expert is treated as the imperfection of this lawful individual.

Such defects are addressed by regulations, including situations in which, despitethe presence of a declaration, no legal effects are generated in the content of this statement. As to specific defects, they can also lead to complete invalidity of legal activity; for instance, in a situation where there will be no legal effects for which a given legal activity was undertaken. Bearing in mind a thorough set of regulations for defects in the declaration of will, and as L. Domański states, a declaration of will can be handed over solely by entities with the ability to perform legal activities. Apart from this, such declaration of will of the entity should be

53 -Şenol, K. E. (2016). Freedom to Determine the Content of the Agreement and General Limitations to this: Turkish code of Obligations Article 27. İÜHFM C. LXXIV, S. 2, 2016. p . 710-715 .

conscious, serious, real and untroubled; in other words, clear of errors, deceit, unlawful threatand exploitation.[54]

1. Being Consensual

A consensual contract arises from the mere unanimity of the parties. No formal or symbolic effort is needed to redress the obligation. Although the consonant contract was known to the common law, it first emerged in Roman law, where four different kinds of contracts called for mere informal approval:

- Power of attorney agreement
- Partnership agreement,
- A sale agreement, or
- A letting or hiring agreement.

Consensual contracts call for no formalities to be formed out of the Pact. Consent by parties is more emphatic in a consensual contract. When the assent of parties is given, at once there forms a contract.

According to Article 30 etcof the Turkish Code of Obligations. "A party who fell into a fundamental mistake while entering into a contract is not bound by the contract". Also, Article 120 of the Libyan Civil Code states that “Where a party to a contract commits a fundamental error, he may apply for nullification of the contract, provided the other party had similarly committed the same error or had been cognizant of it or could have easily discovered it. The fact that the declaration of will is not consensual, in other words, the flaw in the declaration of will is caused by a factor in the formation of the will or by the noncompliance of the declaration with the will.[55]

Otherwise, the contract is formed and the one with mental reservation cannot depend on the faulty provisions since the reservation was intended. Should a person declare an offer or acceptance assuming the other will not heed the declaration as he

54 -Domański, L. (1936). Instytucje kodeksu zobowiązań: część ogólna. Marian Ginter-Księgarnia Wydawnictw Prawniczych. p 226.

55 -Eren, F. (1994). Borçlar Hukuku, Genel Hükümler, İstanbul 2003. Kısalt-ma: Eren-Borçlar Hukuku, p . 185 .

does not seek any legal consequences, then this can constitute a defect in the formation of the will that guides the person to make Consensual.[56]

2. Error

According to article 32 of the Turkish Code of Obligations, “The error in motive shall not be deemed to be a fundamental mistake. The error shall be deemed to be fundamental where the person in mistake considers that motive as an essential element of the contract and if it in accordance with the principle of honesty in business relationships. Nonetheless, the situation shall be knowable for the other party”.In this respect, Article 123 ofthe Libyan Civil Code holds that “mere errors of calculation or clerical mistakes do not affect (of the mistake in a manner contrary to the principles of good faith.” A mistake is the noncompliance of the thinking with the real condition in a manner affecting the formation of the desire (will) or unintentional non-compliance of the declaration of will with the desire. In the first case, there is mistake in the declaration. In the second case, the mistake includes in the motive affecting the formation of the desire (will).[57]

Error as to motivate takes place in the formation of the will. Article 32 of the Turkish Code of Obligations protects the mistaken one in the event of material mistake, also referred to as “basic mistake”. The requirements for considering a mistake to be a basicone are as follows: One party must be mistaken in a way that influecnes the formation of will to sign a contract. The subject of mistake should be about an issue without which the contract cannot be made for the mistaking party. The fairness rules in business lives should justify that the mistaken matter is actually right. If one party knows that the other is mistaken, then one cannot raise the issue of mistakingin the first place. At this stage, one has to ask whether the contract is formed upon concordant wills.[58]

56 -Eren, F. (1994). Borçlar Hukuku, Genel Hükümler, İstanbul 2003. Kısalt-ma: Eren-Borçlar Hukuku, p 186 .

57 -Karahasan, M. R. (1992). Türk borçlar hukuku: Beta Basım Yayın Dağıtım. p . 123-130.

58 -Öz, T. (2006). Borçlar Hukuku Genel Hükümler, Istanbul Oğuzman/Öz-Borçlar. p .246

Once an unintentional declaration ismade by one other than his will to enter into a contract, this is called ‘declaration mistake’. As per Article 31 of the Turkish Code of Obligations “A mistake is fundamental in the following cases especially:

- Where the party states his intent to conclude a contract different from the one which he desires to conclude;
- Where the party states his intent to a subject matter other than the one that he desired;
- Where the party states his intent to enter into a contract to the person other than the one he intended to enter into a contract with;
- Where the party states his intent to a person other than the one he with specific characteristics while entering into the contract.
- Where a party states his intent for a significantly more performance than he desired or for a significantly less than he desired.

Simple calculation mistakes do not affect the validity of a contract; their correction suffices ". In this respect, Article 121 of the Libyan Civil Code asserts that “a- A mistake is an essential mistake when its gravity is of such a degree that, had it not been committed, the party who was mistaken would not have concluded the contract.b- The mistake is deemed to be essential more particularly: when it has a bearing on the quality of the thing which the parties have considered essential or which must be deemed essential. taking into consideration the circumstances surrounding the contract and the good faith that should prevail in business relationships. when it has a bearing on the identity or on one of the qualities of the person with whom the contract is entered into, if this identity or quality was the principal factor in the conclusion of the contract".Mistaking in the Nature of the Contract, When the party claiming to be mistaken declares his will on a contract, meaning a different contract is a material declaration mistaking. In other words, it is the mistake in the type of the contract. For example, signing a contract to take on an obligation while being under the impression of making a contract of warranty.[59]

There can be a mistake in the Contract, If the party claiming the mistake makes a declaration meaning other thanthe subject of the contract, this is regarded as

59 -Eren, F. (1994). Borçlar Hukuku, Genel Hükümler, İstanbul 2003. Kısaltma: Eren-Borçlar Hukuku, p . 185 .

‘material mistake of declaration’. For example, a person wanted to order item no.135 from a catalogue, but marked item no.153, then the contract is formed on the item no 153. Yet, the person may claim a declaration mistake.

Mistake in the person: The mistaking party takes a person with certain qualities into consideration when making the contract, and declares his will for another person. This is ‘mistaking in the person. For example, a babysitter makes a contract to look after a mentally disabled child while she was thinking to make contract for a healthy child.

Mistake in the amount of the contract: This occurs when the performance undertaken by the mistaking party is significantly less or more than the performance meant. In ordinary calculation mistakes, the contract cannot be terminated on the basis of mistaking. As a result, if there is a noticeable and calculable mistake in the text of the contract, this condition is corrected without applying the related mistaking provisions.[60]

According to Article 30 etc of the Turkish Code of Obligations “- A party who fell into a fundamental mistake while entering into a contract is not bound by the contract".On the same note, Article 120 of the Libyan Civil Code says “Where a party to a contract commits a fundamental error, he may apply for nullification of the contract, provided the other party had similarly committed the same error or had been cognizant of it or could have easily discovered."Henceforth, the party with material motive cannot be bound by the contract, which remains valid if there is no declaration of termination to invalidate it within 1 year following the mistake being revealed.

The legal action in the event of material mistaking is "remediable invalidity". If the mistaking party does not terminate the contract within 1 year following the discovery of the mistake, this situation refers to the approval of the contract and, as such, the contract is regarded as valid since beginning.[61]

60-Karahasan, M. R. (1992). Türk Borçlar Hukuku: Beta Basım Yayın Dağıtım. p . 123-130.

61-Demirci, İ. (2013). Hata Sebebiyle İrade ve Beyan arasında Meydana Gelen Uyuşmazlığa Fukahanın Yakaşımı. Journal of Islamic Law Studies (21) p . 258.

According to Article 35 of the Turkish Code of Obligations, “A party in a mistake is obliged to compensate loss or damage arising from the nullity of the contract where the mistake is originated from to his own fault. Nonetheless, the compensation cannot be demanded if the other party knew or should have known of the mistake. In the interests of equity, the court award further compensation of damages under the condition that it does not exceed the expected benefits from the performance."In this respect, Article 123 of the Libyan Civil Code states that “mere mistakes of calculation or clerical mistakes do not affect of the mistake in a manner contrary to the principles of good faith." Therefore, the party terminating the contract due to mistake is obliged to compensate for the damages incurred to the other party due to the invalidity of the contract based on the mistake caused by him. The damage to be mistaken is the damage caused by the fact that the contract which is believed to be valid becomes invalid due to a certain cause, known as "negative damage".

3. Threat

According to Article 38 of the Turkish Code of Obligation, "Where the party under duress has a good cause to believe that an imminent and substantial risk of loss or damage to his own personal rights or property or to the personal rights and property of persons close to him according to the circumstances, it is deemed that duress has taken place.Where a contract is concluded by fear caused by the declaration that a claim arising from a right or from the law will be used, it is deemed that duress exists under the condition that the declaring party is exerting excessive benefits from the straitened circumstances of the other party under duress."Similarly, according to Article 127 of the Libyan Civil Code, “A contract is voidable as a result of duress if one of the parties has contracted under the stress of justifiable fear unlawfully instilled in him by the other party.

- Fear is dammed to be justified when the party who invokes it has been led to believe. in view of the circumstances, that a serious and imminent danger to life , limb, honor or property threatened him or others.
- In appreciating the extent of duress, the sex, age, social position and the condition of health of the victim should be taken into consideration, as well as any other circumstance that might have aggravated the duress ".

A person makes a contract by being deceived by an active or passive action of the other party or a 3rd party. In this sense, deceptionis defined as purposefullyleading one to mistake as to motive. Deception is classified as related to either the role of the other party or that of a 3rd party.[62]

There are certain requirements for this, of course. To begin with a party should be mistaken by the deeds of another party concerning the contract regardless of the mistake being of material nature. If there is a simple mistake as to motive, the deceiving action may have taken place by either actively or passively. Lying, denying, or stating wrong comments are examples of active action. However, remaining silent and not expressing matters to the others as per the principle of fairness are examples of passive action. Keeping silent once the liability of disclosure is at issue according to law or contract is another passively committed for mof deception. Deception has to be purposeful; that is, intention has to exist and, once a person is aware that his behaviorcan potentially mislead others as he wishes, then we need to accept the existence of intention. The individual has to be awae that that such conduct establishes a deception.

Another condition that deception should cause the contract to be made. That is, there must be a causal relation between the deception and the contract. If one of the parties wouldn't make the contract if he wasn't mistaken by the deception.[63]

If the 3rd party commits the deception, then he has to know that the deception can impact the validity of the contract. Hence, the party subject to deception is not bound by this contract "Article 28". Such non-binding is subject to time, and the deceived party may terminate the contract within 1 year after discovering the deception. Otherwise, the contract remains valid from the beginning.[64]

The deceiving party or the 3rd person is bound to cover the damage caused to the deceived party regardless of whether or not termination is due to deception. Also, approval of the contract does not imply waivering the compensation claim (Article 39/2 of the Turkish Code of Obligations). The responsibility of the deceiving party

62 -Nomer, H. N. (2012). Borçlar Hukuku: Genel Hükümler: Beta. p .312.

63 -Nomer, H. N. (2012). p . 315.

64 -Eren, F. (2014). Borçlar Kanunu Genel Hükümler. Kısaltma: (17) . p . 380.

for his act falls within the principles of culpa in contrahendo, whereas deceiving a 3rd person is subject to the principles of tort.[65] [66]

D. Conditions of The contract

1. Force Majeure Clause in contract

A Force Majeure clause is a provision aloowing a party to suspend or terminate the performance of its obligations once specific conditions out of their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. Accordingly, the contract is temporarily suspended or terminated if the event of force majeure carries on for a specified period of time.The list of events to be regarded as such a point of discussion between the parties. Though, typically, the list comprises war, riots, fire, flood, hurricane, typhoon, earthquake, lightning, explosion, strikes, lockouts, slowdowns, prolonged shortage of energy supplies, and acts of state or governmental action prohibiting or impeding any party from fulfilling itsown undertakings as per the contract. Therefore, for example, should a hurricane hit a port and cause it to close, the seller intending to ship its goods through that port cannot be held accountable for late delivery. [67]

Once this clause does not appear in a contract, the parties are subject to restricted common law doctrines on "impracticability" and "frustration of purpose," which can only scarcely end in excuse of performance.Certain events outside the control of the parties, can also prevent them from performing their duties and obligations as per the contract, to avoid whose breach, these parties can choose to excuse contractual obligations to the extent of the inhibition. There are various doctorines proposed with respect to this need [68] , including those on impossibility and frustration in England and the the US, as well as force majeure in France. Under

65 -Eren, F. (2014) . p . 369.

66 -Koca .Y. P . N. Borçlar hukuku, genel bölüm: Fakülteler Matbaası. p .501.

67 -Salama, A. A. (1989b). Theory of the International Free Contract Cairo,: Dar Al-NahdaArabic . p . 199.

68 -Salam, A. W. A. (2016). The Authority of the Administration to Impose Penalties on its Contractor in Public Works Contracts. p . 206 .

the latter's laws, force majeure is unforeseeable, unavoidable and external to the extent that performance is impossible. [69]

For preventing uncertainties and delays caused by reliance on the applicable law, parties often choose a certain policy for force majeure as well as a definition of all events deserving special treatment. The term 'force majeure' used in drafting project documents comes originally from the Code Napoléon of France, It is sometimes regarded as a standard clause without the possibility for modifications. However, as it allows a party to stop performing, for instance, various and indirect events have to be included that might generate unforeseeable results as well. [70]

A difference exists between compensation events " where authority takes responsibility and contractor is compensated" relief events which relieve the contractor from termination for failure to perform but not of the financial effects of delays" and Force Majeure Events "which relieve the affected party from liability for breach and where the parties share the financial effects of delay". [71]

Identifying force majeure events may not generate controversy due to its stable nature and presence in different law systems. Crises and similar circumstances experienced throughout the world can be taken as such, though the extent of such considerations is also another matter be addressed. [72]

The Libyan civil law is the origin of rules that organize financial relations between natural persons or entities. Issued in 1953 enriched with the soul of individuality, its content includes many rules that came in flexible form to grant more freedom to contracting parties only in cases where they fail to come to an agreement. Among them is force majeure, which law does not include a definition,

69 -Salam, A. W. A. (2016). The Authority of The Administration to Impose Penalties on its Contractor in Public Works Contracts. p . 206 .

70 -Mzghish, B. A. A. A. (2014). Legal system of the book of conditions in administrative contracts . p . 610

71 -Mariah, K. (2013). Invalid Contract: Legal Event. Université Benyoucef Benkhedda Alger 1. p . 419.

72 -Albashkar, A .M. (2003b). The Concept of Force Majeure (Master Thesis, ,), Faculty of Law Tripoli University, Tripoli. p . 98.

nor does it even apply a certain term in its regard. Sometimes, it considers it under the term "foreign reason " in article 168 whereas elsewhere it appears under sudden accident or just a foreign reason, without mentioning ‘force majeure’ as in Articles 218 and 360. In other cases, it is stipulated individually in Article 1/672.

As it appears, the Libyan legislator regards force majeure and burdens its consequences on the obligations of contracting parties without clearly defining it. This cannot be denied on the legislator as the definition is a jurist matter seen in jurist references or jurisdiction provisions. [73]

The provisions of the Libyan civil law indicate that force majeure is an external factor and out of parties’ control, thus making performance impossible. Impossibility here means that the contract parties cannot avoid or overcome that reason. As to the condition of such impossibility, the legislator does not require it to be definitive or still in progress. However, certain cases may occur and lead to impossibility of execution or delay Article 218, this means relative impossibility.Nothing in the Libyan law states that the incident creating the occurrence of force majeure must be unexpected, and this doesn’t mean that it is not accounted for. Yet, it has to do so as the Libyan legislator fails to clearly determine the concept of force majeure and suffice to its inclusionin such cases. [74]

As to procedure, the Libyan civil law does not lay out the conditions notices or reporting by any party as to invoke force majeure, leaving it to contractual will. However, it does state that proving force majeure lies with the alleger or the invoker Article 168, 360. The question of proof may arise in particular cases requiring evidence on force majeure when it occurs as a natural accident or a strike in some area without being widely spread as then no difficulty in proofing it as what happened during the Libyan revolution.Furthermore, the Libyan legislator does not indicate duration as to continuity of force majeure based on which to revoke

73 -Al-Sanhuri., A. R. A. (1952). The mediator in explaining the Civil Code (Vol. 1): Publishing House of the Egypt University. p . 801.

74 -Albadawi, M. A. (1997). General Theory of Commitment) ,Vol. 1). University of Tripoli: University of Tripoli. p . 401 .

obligation, leaving it to the condition of concluding a contract, if at all, or to the outcomes of related negotiations on the matter. There is no statement of obligation abiding any party during the period of force majeure. Therefore, such deficiency in general can generate confusion as to obligations not agreed upon in the contract and, hence, end up in further future disagreements.As a whole, the Libyan legislator's regulation for force majeure lacks details, thogu this should not be treated as a fault since there is room for volition to find better regulation for the relationship between parties. Even in cases where certain provisions have been adopted regarding effects,it is stated that complete provisions can be followed or agreed on otherwise. [75]

2. Arbitration Clauses

An arbitration condition is an agreement between the parties to refer to arbitration all or some of the specific disputes that have arisen or may arise between them over a specific legal relationship that is contractual or non-contractual. The arbitration agreement may be in the form of an arbitration clause contained in a contract or a separate agreement. [76]In the force of finalizing a negotiations or settlement, they frequently neglect to address the dialect of the intervention provision. In spite of the fact that consenting to utilize a specific intervention supplier, insufficient consideration is paid to the principles . governing the process. Regrettably, those clauses proposed by arbitration providers and appearing most contracts are too broad with usually unanticipated consequences, one of which is granting the arbitrator the power to decide "Arbitrability"—whether a claim is subject to arbitration— though this is only one of the subjects that are referred to the jurisdiction of the courts . [77]

75 -Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p . 73.

76 -Harding, M. M. (1996). The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power. DePaul L. Rev. p . 46, 109 .

77 -Sternlight, J. R. (1997). Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns. Tul. L. Rev. p . 721 .

To make matters more complicated, there is also serious tendency towards arbitration. The U.S. Supreme Court in Buckeye Check Cashing, Inc. v. Cardegna))(78(79,as of late clarified that even once a concurrence with an assertion condition is viewed as illicit completely and consequently void abdominal muscle initio, the intervention proviso can be isolated and a referee, not a court, may choose if the assention is without a doubt unlawful. The main special cases permitted to this standard are the point at which the intervention proviso itself is tested or if the specific presence of the agreement is addressed because of an imperfection, for instance extortion, as far as development or execution. [80]

The Supreme Court's in the Fourth Circuit likewise ruled in Agostini Bros. Bldg. Corp. v. The United States. Inclination to require discretion in spite of the arbitration being illicit shows that it is so basic to unmistakably make reference to in every understanding the subjects the gatherings are consenting to referee and who will choose what. Since arbitration statements have various structures, the rights of the parties may be violated whether expressly or implicitly through the language used in the respective clause. The educated and watchful choice of a discretion proviso and judge can avoid undesirable outcomes. At the point when a court chooses that the arrangement of a discretion understanding isn't in issue,it will lead the parties to start arbitration according to the terms of the agreement. [81]

78 -Ware, S. J. (2007). Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna. Nev. LJ, 8, p . 107

79 -The U.S. Supreme Court in Buckeye Check Cashing, Inc. v. Cardegna . No. 04–1264. Argued November 29, 2005—Decided February 21, 2006.

80 -Sternlight, J. R. (1997). Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns. Tul. L. Rev., 72, 1.

81 -Sturges, W. A., & Murphy, I. O. (1952). Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act. Law and Contemporary Problems, 17(3), p . 580-629 .

In this way, the court's part in examining the arbitration-related issues is often restricted toonly two:

- if a valid agreement or obligation to arbitrate exists, and
- if a party to an agreement has neglected or refused to arbitrate. [82]

Top understand an agreement of arbitration, like some other, the definitive component is the goals of the gatherings. In any case, such expectations are "liberally understood as to issues of arbitrability." [83]Any reservations with respect to the extent of arbitrable issues are normally settled for discretion. [84] As a general rule, when in doubt, the issue of arbitrability ahs to be taken care of with "a sound respect for the government approach favoring mediation." Indeed, when contracts contain discretion, an assumption of arbitrability emerges, and inquiries regarding the degree of arbitral issues are settled dependent on such an assumption. [85]When choosing if the gatherings have in actuality consented to referee a specific issue, including arbitrability, courts need to utilize a similar state law standards administering the development of agreements. [86]

82 -Egle, A. V. (2003). Back to Prima Paint Corp. v. Flood and Conklin Manufacturing Co.: To Challenge an Arbitration AgreementYou Must Challenge the Arbitration Agreement. Wash. L. Rev., 78, 199.

83 -Sopata, L. (1985). Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth ,Inc: International Arbitration and Antitrust Claims. Nw. J. Int'l L. & Bus., 7, p .595 .

84 -Jones III, I. R. (1995). Exemplary Awards in Securities Arbitration: Short-Circuited Rights to Punitive Damages-Mastrobuono v. Shearson Lehman Hutton, Inc. J. Disp. Resol., p .129 .

85 -Hughes, J. D. (2003). Applying the Eligibility Rule in Securities Arbitration: Resolving Circuit Court Conflict regarding the Proper Role of Arbitrators and Courts-Howsam v. Dean Witter Reynolds, Inc. J. Disp. Resol., p . 565 .

86 -Wyss, N. (1997First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz. Tul. L. Rev., 72, p . 351 .

As no party may be required to enter into an agreement to submit an arbitration to any question that the parties have not agreed to do so . [87] The concept of arbitration is whether the parties agree to put a specific issue to arbitration for their discretion. Usually, two important points are addressed: (a) whether the Commission should determine the scope of the parties' consent to participate; [88] and (b) if the parties agree to mediate in order to resolve the dispute. In any event, if the arbitration contains any ambiguity about who chooses it, the presumption of the demonstration in favor of arbitration can be dealt with in such circumstances and the court generally raises a crucial question: Just as the arbitration relies on the outcome of the dialogue on whether the parties agree to raise this issue, The question of who has the required ability to choose arbitration will be the task on the issue. In particular, whether the parties agreed to leave arbitration to question themselves for arbitration or not.[89]

The parties may leave to an arbitrator the question of whether a claim is in fact arbitral. Yet, "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." [90]

Unfortunately, this critical presumption favoring the court's authority to decide issues of arbitrability is often unintentionally extinguished by adopting a standard, broad arbitration clause recommended by an arbitration provision, and failing to carefully consider which arbitration provider is selected. Either way, a client may subsequently come to believe that he or she did not get what was bargained for. In many arbitration clauses, parties commonly agree that all matters "arising out of or relating to" their agreement will be arbitral. They do so at the suggestion of many arbitration providers. Even though the arbitration providers do

87 -Wellington, H. H. (1962). Judicial Review of the Promise to Arbitrate. NYUL Rev., 37, p .471 .

88 -Mentschikoff, S. (1961). Commercial arbitration. Columbia Law Review, 61(5), p .846-869 .

89- Wyss, N. (1997) . p .201

90 -Brower, T. (1989). Towards a Unified Accommodation of State Law and Collective Bargaining Agreements: Federalism, Public Rights and Liberty of Contract. Hous. L. Rev., 26, p . 389 .

not expressly say so, their broad recommended clauses have been interpreted to confer on the arbitrator the authority to decide his or her own jurisdiction and to divest the courts of all jurisdiction over questions of arbitrarily.

An example is the American Arbitration Association's proposal that parties utilize the dialect that pursues for provisions in business contracts: " Any discussion or case emerging out of or identifying with this agreement, or the break thereof, will be settled by intervention managed by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the honor rendered by the arbitrator(s) might be entered in any court having jurisdiction thereof. " [91]

The International Institute for Conflict Prevention and Resolution (CPR) "formerly the CPR Institute for Dispute Resolution recommends the standard language to be like this " any dispute arising out of or relating to this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration in accordance with the International Institute for conflict prevention and resolution rules"

Another example clause suggested by the International Chamber of Commerce is: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.Practitioners should beware of these provider suggested clauses." Courts now realize that language of these recommendations is " the paradigm of a broad clause" and "the broadest language the parties could reasonably use.[92]

While these clauses do not expressly mention who decides the issue of arbitrarily, the language is taken meaning that the parties intended to submit questions of arbitrarily to the arbitrator. In this way, the clauses clear the assumption in favor of determining this important issue. In fact, there are incidents that show the

91 -Alderman, R. M. (2001). Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform. Hous. L. Rev., 38, 1237

92 - Dempsey, P. S. (2002). Transportation: A legal history. Transp. LJ, 30, 235.

extent of an arbitration clause alone can determine clear and unmistakable intent to have arbitrarily decided by the arbitrator:

When construing arbitration clauses, courts often separate “broad” clauses that address all disputes out of a contract to arbitration from “narrow” clauses that bind arbitration to particular kinds of disputes. If a court decides that a clause is a broad one, then it will order arbitration and any future formation of the contract and of the parties’ rights and obligations within that arbitration fall under jurisdiction of the arbitrator. [93]

Courts have clarified that an objective interpretation of an arbitration clause referring “any and all controversies” to arbitration results in parties intending to arbitrate issues of arbitrability. Hence, referring to arbitration “all disputes...concerning or arising out of” an agreement evinces a “clear and unmistakable intent to submit questions of arbitrability to arbitration.” This view is bolstered by the policy against separating disputes into substantive and procedural ones to be decided in part by arbitrators and in part by courts. [94] Some courts have stated that the language of such broad clauses fails to clearly and unmistakably show the parties’ intent toarbitrate arbitrability. Still, a common approach seems to be interpreting broad arbitration clauses in line with the common approach in favor of arbitration and to leave to the arbitrator all questions of arbitrarily. [95]

Henceforth, through incorporating commonly used or suggested language in such clauses, clients may involuntarily approve of relinguishing their right to allow courts to decide on the scope of the arbitration agreement and the limits of the arbitrator’s jurisdiction. This greatly influences a client’s rights since decisions by

93 -Furrow, B. R. (1996). Managed care organizations and patient injury: Rethinking liability. Ga. L. Rev., 31, 419.

94 -Park, W. W. (1997). DeterminingArbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators. Am. Rev. Int'l Arb., 8, 133-367.

95- Bedell, S. P., Cyze, M. B., & Davis, D. M. (1989). Current Developments in Arbitration: Arbitrability and Punitive Damages, 22 J. Marshall L. Rev. p. 603 (1989). The John Marshall Law Review, 22(3), 4.

arbitrators are immune from review and not court can rectify any arbitral errors in law or contract interpretation. As such, making well-informed decisions on the language of such clauses and taking into careful account the rules of the chosen arbitration provider can can help, as such, in preventing unexpected surprises in future.

a. **Arbitration in Turkey**

Arbitration was since the Republic of Turkey stable, and the procedurewas controlled by the "HUMK - (HMK) - Statute of Procedural Law" in 1927. There are additionally those methods and controls identified with worldwide private law, also that Turkey has been a signatory to pretty much all-significant universal concurrences on business mediation, including the Geneva Convention on the Execution of Foreign Arbitral Awards, New York Convention on the Enforcement of the Arbitral Awards and the Washington Convention (International Center for the Settlement of Investment Disputes). Besides, the Turkey government perceives the method of mediation in some Bilateral Investment Treaties (BITs) with different states if there should be an occurrence of a debate between the Turkish state and remote private people. [96]

From universal view, Turkey perceived the idea of universal business intervention in the early long stretches of the Republic and consented to the significant arrangements identified with the requirement of global arbitral honors. Despite the fact that Turkey had consented to all these worldwide arrangements, in regard to the all inclusive ethic of universal law that is pacta sunt servanda, Ankara

did not sanction these global assentions until the mid 1990s. As indicated by article 90 of the Turkish Constitution " The sanction of arrangements closed with outside states and worldwide associations in the interest of the Republic of Turkey are liable to reception by the Grand National Assembly of Turkey by a law endorsing the confirmation.

96 -Yılmaz , A. (2002). Milletlerarası Tahkim Kanunu Uyarınca Yabancılık Unsuru. Ankara Barosu Dergisi, S, 1. p. 242.

Arbitrations controlling monetary, business and specialized relations, and covering a time of close to one year, might be put into impact through declaration, if they don't involve any budgetary duty by the state and furthermore under the condition they don't encroach upon the status of people or upon the property privileges of Turkish natives abroad. In such cases, these understandings are taken to the Grand National Assembly of Turkey inside two months of their declaration. Understandings regarding the execution of a worldwide bargain and additionally monetary, business, specialized, or regulatory assentions finished up contingent upon an approval given by law don't require endorsement by the Grand National Assembly; still, those closed under the arrangement of this passage and influencing the economy or financial relations and private privileges of people can't be put into impact except if proclaimed.

What's more, arbitrations bringing about alterations to Turkish laws are liable to the arrangements of the principal section. Universal assertions properly put into impact convey the power of law without anyone else's input and no interest to the Constitutional Court can be made as to these understandings, on the ground that they are "illegal." which has been in power since 1982, the authorization of a global assertion can be acknowledged by endorsement of the Turkish Grand National Assembly ordering it into law.

A similar article of the Turkish Constitution additionally puts forward the comprehension of the contention of laws. With reference to the Constitution, every single global understanding is equivalent to the next national laws if the universal assention is sanctioned by the method, which is portrayed in article 90 of the Constitution. The acknowledgment of remote arbitral honors and tolerating requirement of such honors were acknowledged through two particular laws: The International Private (Law No. 2675) empowered the implementation in Turkey of outside arbitral honors in 1982; additionally, Turkey sanctioned the New York

Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Law No. 3731 out of 1991. [97][98]

Despite no hurdles to implementing international commercial arbitration after approving international agreements based on the Turkish Constitution, conflicting constitutional articles appeared to disable such efforts in concession agreements for public services. Such contradictions as articles 125 and 155 were amended in 1999 allow the Statute on the Procedural Law and The Statute on The International Private And Procedural Law to be applied to international arbitration even for concession agreements.

Arbitration in Turkeyis rare as elsewhere as choice for dispute settlement.The concept is regarded mainly for international dispute purposes. However, the MHK (Statute on the Procedural Law) also allows local disagreeing parties to choose

97 -Elver, N. C. (2004). Turkish International Arbitration Law and Restrictions on its Application. J. Int'l Arb., 21,p . 453.

98 - The difference between the domestic and foreign arbitral awards has been stated in a decision of the Supreme Court of Appeals General Assembly (HGK. E.1 26 K.1 09 T.7.11.1951). In the decision "... if the decision of an arbitrator has been given under a foreign law authority, the decision may be deemed to be the arbitral award of the arbitrator, and the arbitrator shall decide whether the arbitrator shall It is emphasized that ın the decision of the arbitrator under the authority of a foreign state law ğ will be taken as the basis for the determination of the foreign element. This decision given in 1951, when the decision on the determination of the foreign element in the arbitral awards (the decision to issue a decision under the rule of a foreign state law) was determined, whereas in another decision dated 10.3.1976 of the Court of Cassation the place where the arbitral award was made, it is stated that it will be effective in determining the foreign element in the referee decision. Although the fact that the Supreme Court of Appeals differed in 1976, nowadays, the criteria of the ti law of the parties subject to the arbitration procedure ın remains important in the determination of the nationality of arbitral awards. Arbitration is the nature of domestic or foreign arbitral decision of the arbitral proceedings as a result of having, it said the decision is important in performing in Turkey..

arbitrationfor their disputes (Articles 516- 536). Yet, national arbitration is not a common dispute-solving method in use. In developed countries, arbitration is generaaly applied in business circles with seventy percent of the conflicts related to business law settled with alternative mechanisms, chiefly with arbitration.[99]

Apart from laws aiming to encourage foreign investments and policies adopted to liberalize the Turkish economy, international commercial arbitration has turned into a major part of foreign investment similar to globalizing economies. Prior to assessing constitutional amendments made toward international commercial arbitration on concession and investment agreements, one has to address the aim of international commercial arbitration. Looked upon from a simplistic view, international arbitration has been brought into the spotlight as one of the requirements to attract foreign investments in Turkey. What joins foreign investment and arbitration is mainly the lack of confidence in the local judiciary system and the awards made by local courts. Still, such a relationship may not be downgraded by simply relying on confidence. According to YILMAZ, A. (2002) from the Standard and Poor" an internationally recognized creditor and rating institution, the legal dimension of an investment is a major aspect of rating investment plans. Related risks are analyzed by evaluating the choice of legal jurisdiction and enforceability of the international arbitration awards. Based on such assessments, " the issues of the documentary enforceability lie at the heart of any project financing". [100] All procedural rules are done without to accelerate arbitration awards, cost of jurisdiction and secrecy of the conflicts. [101]

Turkey has endeavored to attract foreign capital to its economy through tax regulations and capital transfer. However, investment cannot be made simply by means of financial feasibility. Apart from this, there are no laws in the Turkish

99 -Şanlı, C. (1999). İdari Sözleşmeler ve Uluslararası Tahkim-Panel: Türkiye Barolar Birliği, Ankara. p .710.

100 -Yılmaz, A. (2002). MilletlerarasıTahkim Kanunu Uyarınca Yabancılık Unsuru. Ankara Barosu Dergisi, S, 1 p .240.

101 -Yılmaz, A. (2002). p .246

Judiciary of prohibitive nature concerning international arbitration with parties to an agreement being two private entities. Turkey connected global business arbitration as an option was to settle a question in speculation understandings, through the establishment of the law on the Engagement in Investments and Services on Build-Operate-Transfer (B.O.T) Model meant to support outside interest in 1994. The two financial specialists and leaders from abroad expected the appropriateness of global business mediation in their B.O.T. understandings as trust in the Turkish Judiciary System has never been high. A year from that point onward, the Constitutional Court dissolved Article 5 of the Law No: 3996 (Law Regarding Engagement in Investments and Services on Build-Operate-Transfer Model) which expressed "the agreement is liable to private law arrangements" that consequently empowers global business discretion. In a similar choice Constitutional Court additionally underlined that the B.O.T. Display was deciphered as a "concession arrangement" where an authoritative law can be connected. [102]

In 1991, Turkey accepted major international treaties in favor of applying international commercial arbitration and enforcing arbitral awards, contradictory articles within the Constitution remained unchanged until 1999. In that year, the Turkish Grand National Assembly (TGNA) carried out Constitutional amendments so as to guarantee the coherence of the accepted international treaties and laws.Regarding the changes made by Article 2 of “The Act Concerning Amendments on Certain Articles of the Constitution of Republic of Turkey” (Law No. 4446) approved on 13th August 1999, the related article 125 of the Constitution was amended, based on which international commercial arbitration was made possible concerning also disputesin concession agreements. Still, the Parliament devised a reservation on this clause according to which international arbitration can be applied merely if there is a foregin elementpresent in the agreement. [103]

102 -Öncel, S. (2006). International commercial arbitration as an alternative dispute solving mechanism and its role in the Turkish judiciary system. Bilkent University. p . 288 .

103 -Yargıtay İçtihadı Birleştirme Kararı 1993/4 E. – 1994/1 K .28.01.1994 tarih.

The last two decades have witnessed an expansion in globalization and development of transnational organizations, bringing about an acceleration of cross-fringe question. In capital-bringing in nations like Turkey, this expansion has prompted a critical development in the number of global parternships. In 2010, the amount of debate alluded to the ICC Court of Arbitration that hosted no less than one Turkish gathering was 76, i.e. almost 10% of the aggregate number of 793 cases raised under the protection of the ICC that year. In 2011, this proportion was somewhat less, with 46 parties from Turkey out of a total of 796. This expansion in ongoing mediations has at long last brought about genuine endeavors to build up a global intervention focus in Istanbul, and has likewise provoked the improvement of more nitty-gritty arrangements on neighborhood discretion in the Turkish Civil Procedure Law.[104]

The Arbitration Law in 2001 [105] was followed by an increase in the use of mediation upon enactment of the Law on Mediation for Civil Disputes in 2012.[106]It is expected that the number of arbitration proceedings will increase, even more, because of the enactment of the Law on the Istanbul Arbitration Center in late 2014.[107]

b. **Arbitration in Libya**

The status of Libya is different in temrs of ordinary judiciary in modern states as it has general authorization and competency in settling all disputes of any subject that may arise within the state region, unless otherwise stipulated in a special provision. The Judiciary of the States is a manifestation of sovereignty practiced by the judiciary authority, one of the three authorities in modern democratic state systems. Due to complexity of life, slow and complicated development of institutions, and expenses and time required to recourse to judgment, states have

104 - Özsunay, E., & Özsunay, M. R. (2012). Arbitration in Turkey: Analysis of the Turkish Legislation on Arbitration in the Light of UNCITRAL Model Law. p .223.

105 -Published in the Official Gazette dated 5 July 2001.

106 -Published in the Official Gazette dated 7 June 2012.

107 -Published in the Official Gazette dated 29 November 2014.

authorized individuals and groups in case of disputes to recourse to individuals or private institutions for arbitration. This alternative is considered to be an easier, economic and unique way known to all countries for a long time now. [108]

Going back to its roots, Romans and Greeks applied this system as will as Islamic law also adopted different forms of arbitration. Nowadays, it is an effective method of settlement of disputes whether civil, criminal, administrative or commercial issues , that arise between individuals, companies or even states about various issues such as demarcation of borders or determination of continental shelf. It is noteworthy that the number of cases filed by foreign companies against the Libyan state has increased in international arbitration courts, because of the mutual agreements wish it has sign between the Libyan state and several others which refer to arbitration in case of disputes, but without considering the interests of the Libyan side and without sufficient background about the rules and the laws that specify arbitration procedures and, lastly, without the existence of laws that organize arbitration in the state. [109]

The state of Libya, like other modern states, considers judiciary as primary in settling disputes and crimes, Article (3) of procedures law states that: “Competency in cases filed against foreign parties: Libyan judiciary is the authority specialized in considering cases that are filed against foreign party in the following cases:

- If that foreign party resides legally in the country, has a registered address, has a representative who is authorized to appear before courts or has accepted ruling of Libyan judiciary unless the case is related to a property outside Libya.

108 -Hafey, M. E. (2017). Libyan Experience of Settling Disputes by Arbitration. Paper presented at the First Conference of Heads of Justice and Heads of Supreme Courts of African States, Khartoum - Sudan. p . 173 .

109 -Rashed., S. (1986). Arbitration in Private International Relations, Arbitration Agreement. Alexandria: Al Ma'aref Establishment. p . 214.

- If the case relates to funds located abroad or heritage of a Libyan citizen or a heritage or insolvency established in Libya or the case is based on a contract made, has been executed, or has been required to be executed in Libya, or the case is based on an incident occurred in Libya.
- If the claim relates to a case already filed at Libyan judiciary or to precautionary measures applicable in Libya or to affairs in which Libyan judiciary is competent.
- Cases filed against Libyan and in which foreign judiciary is competent just for reciprocity. [110]

However, at the same time, other dispute settlement methods are also recognized as the Libyan procedures law addresses the issue of organized arbitration as a method to settle disputes in a specific section composed of 39 articles; the first chapter of this unit is dedicated to the general rules of arbitration, and the second chapter is for arbitration between spouses. The law authorizes arbitration by judiciary or reconciliation or recourse to arbitration under arbitration conditions. It also shows arbitration procedures, issuance and execution of arbitration award and possibility of being challenged. Though, the law excludes from arbitration procedures some issues related to the public system, work injuries, social security, nationality and personal status. In addition, there are some restrictions imposed on the arbitrators' powers by excluding their competency regarding some issues. [111]

It is worth mentioning that such arbitration does not include the disputes of public legal persons such as state-owned authorities, institutions and general companies in which ordinary judiciary is competent. The Libyan legislator did not prevent Libyan parties from recourse to foreign or international arbitration. In

110 -Hafey, M. E. (2017). Libyan experience of settling disputes by arbitration. Paper presented at the First Conference of Heads of Justice and Heads of Supreme Courts of African States, Khartoum - Sudan.. p . 44.

111 - Abdoa, A .c. A. (2012). Consideration of The Effective Role of The National Judiciary. Sharm El Sheikh . p .98.

administrative contracts, despite the applicable policy of such contracts made in 1980, it is made clear that settling disputes related to such contracts the competency of the national jurisdiction. nevertheless, the mentioned policy in cases of contracting with foreign companies and if necessary allows recourse to arbitration; in this case, the contract shall specify which disputes are to be referred to arbitration, arbitration procedures, the rules of choosing arbitrators ensuring that the Libyan side has equal opportunities to choose them, and the extent of authorities and powers are given to arbitrators with prohibition of agreeing to insolvency established in Libya, or whether the case is based on a contract made, has been executed, or has been required to be executed in Libya, or whether the case is based on an incident occurred in Libya "Art. 83 of Administrative contract policy, 2007" [112]

A so-called Petroleum Arbitration System is being experimented with recently in Libya. The Petroleum Law No. 25 of 1955 in its Art. 21 directs to refer any petroleum contracts made between parties to arbitration by one arbitrator (Art. 83 of Administrative contract policy, 2007).Petroleum Arbitration System is experienced recently in Libya, the petroleum Law No. 25 of 1955 in its Art. 21 directs to refer any petroleum contracts made between the government and foreign companies to arbitration, the law has determined arbitration procedures and appointment of arbitrators, and provides for the application of the Libyan laws with the provisions of international law which are relevant and not contradicted with the Libyan general system. [113]

In order to mitigate the slow pace of justice among individuals, the legislator has issued the law of conciliation and arbitration number (74) of the year 1975; it refers adjudication of disputes that are under jurisdiction of the district court to arbitration. As such, the Libyan legislator allowed recourse to arbitration as a way of settling disputes and as an exclusion of the original rule, which states that all disputes that arise on Libyan land are under competency of the ordinary judiciary. In addition,

112 -Al-Mortadi, A. R. (2006). Research in International Commercial Arbitration and Libyan Oil Contracts. The Academy of Graduate Studies –Tripoli. p .83.

113 -Ahdab, A. H. A.-. (2008). Arbitration in the Arab Countries (1 ed.): Al - Halabi Rights Publications. p .510.

the arbitration rules were organized by the commercial civil proceedings law in a separate chapter composed of 39 articles. [114]

For internal arbitration purposes, the Libyan legislator gave the option to individuals and private companies in accordance to the terms and conditions prescribed by law. The legislator introduced a special type of arbitration among citizens to settle their disputes about some individual issues and conflicts. The Libyan law made arbitration an obligatory issue like the petroleum law case, and made special regulations for it. The policy of administrative contracts authorizes recourse to international arbitration after permission has been obtained from the council of ministers. [115]

Thus, it is clear that the Libyan legislator, even if it gives the option to go with internal arbitration, is still reticent about seeking international arbitration especially for administrative contracts. There is still emphasis on judicial competency as a sovereign issue despite that the Libyan state have entered international arbitrations based on mutual agreements - such as border demarcation - and it has renounced its sovereignty in favor of judgments made against it during the 1990s. Thus, the Libyan legislator guides experts to the basics of the arbitration system whether internal or international, free or institutional, and regardless of the nationality of the arbitrators. Within the frame of this regulation, the law dealt with all provisions related to the arbitration process starting from filing, considering and adjudicating lawsuits to recognition and execution of judgment. [116]

However, at this point, it has been emphasized that the Libyan legislation is still missing a special arbitration law which determines rules and conditions of arbitration limited to general rules of the proceedings law. Despite the Libyan jurists'

114 -Al-Menshawi, A.-H. (2014). International and Internal Arbitration in Civil, Commercial and Administrative Law. Alexandria: New University Publishing House. p . 499.

115 -Bader, A. S. (2003). Arbitration in Civil and Commercial MaterialsCairo: Dar Al-Nahda Al-Arabiya. p .660.

116 -Hashish, A. (2012). The Executive Power of the Arbitral Tribunal: Arabic Renaissance Publishing House. p .211.

call on the legislator to enact this system along the lines of the arbitration law in Egypt and Tunisia, it is still rejecting, making us recall for this project to be progressed one step ahead and enact such legislations.The role of the judiciary in relation to arbitration is a positive role initiated by cooperation in the constitution of arbitration bodies; Article (746) of Proceedings Law states that "If one party has failed to appoint its arbitrator during 20 days of a served notice, the stakeholder may request the competent court to appoint that arbitrator and the decision of the court shall be unappeasable".

Article (749) of the same law allows the court to dismiss an arbitrator upon the request of one of the litigants, and in accordance to article (753) the court is authorized to appoint other arbitrators if they fail to settle the dispute within the specified arbitration period; or it may settle the dispute directly if ordered by litigants. The legislator authorized national courts to intervene in incidental issues and to take precautions related to arbitration cases, and the court may impose penalty on retarded witnesses. [117]

However, the important role assigned to the national judge comes after the arbitration decision. In this respect, Article (762) of the Proceedings Law commits a stakeholder to deposit the original award at the records of the competent court within five days following judgment. The arbitrators' decision shall not be enforceable unless by an order issued by the judge of temporal matters of the court in which the original award is deposited upon request of one of the concerned parties. According to article (763) of the above-mentioned law, the judge has to ensure that the award has been deposited and arbitration requirements have been met, then, ensure that there is no impediment to implementation. When the court starts this task - the decision about the request for giving the executive form - the reference to which the judge shall return in order to make such a decision is what is provided in article (407) related to the executive orders of the Proceedings' Law, although this article is

117 -Khalifa, A. A. (1990). Arbitration in the disputes of internal and international administrative contracts: Legal Book House. p .166.

provided under the chapter entitled “Execution of obligations and foreign awards”, it is still the general reference in the subject of enforcement . [118]

Therefore, the judge has to ensure that the arbitration decision has been made by a body composed of three arbitrators and not just one, and that it has not been taken in a case related to providing a public system or contradicts with disciplines, provided also that litigants have been represented legally, and that the award is not inconsistent with a previous award or order. After confirming by the competent judge that all those conditions have been met it shall be appended to arbitration award. The court that has issued the order is authorized to correct material and computational mistakes in the arbitration award in accordance to the adopted procedures. Also, the same courtis specialized in all execution procedures such as execution problems whether temporal or objective. [119]

After the arbitration decision has become enforceable, the affected litigant may challenge the arbitration award and seek reconsideration. The challenge of awards can be proceeded following they have been approved in accordance to appeal rules issued by courts pursuant to Article (767). Then, the appeal will be refused if litigants have expressly renounced it. If the arbitrators are delegated for conciliation, the arbitration award cannot be challenged; the court then may assume the appeal and the consideration of the same case or any other case of appeal, and may eventually cancel or refuse the lawsuit. The request for reconsideration of arbitration award is pursuant to Article (768) in accordance to the approved rules of request of reconsideration stated in Article (328) of the Proceedings Law.

For the request for revocation, the court will consider it, guided by rules of Article (769) of the Proceedings Law in seven cases; the award then is appealable by legal procedures. According to Article (773) the judge has the right to challenge the subject after revocation decision of arbitration award has been issued. This is under

118 -Abdoa, A. C. (2012). Consideration of the effective role of the national judiciary. Sharm El Sheikh. p .411.

119 -Khalil, A. M. (2010). Arbitration in the disputes of administrative contracts Legal effects. Cairo: The Arab Thought House. p .220.

the condition that the judge finds that the case is valid for judgment. Judiciary has a role in arbitration between spouses, according to Article (777) of the mentioned law, the arbitrators shall submit their decision to the court and then the court will consider the case in accordance to it. [120] At this stage, it is worth stating that the same rules are applied on international commercial arbitration awards if requested to be applied in Libya. Here, the affected litigant is facing an award of revocation pursuant to Article (279) of the Proceedings Law without being entitled to challenge the issued award by a way of appeal or request for reconsideration as faced with internal arbitration awards in which adopted procedures of the mentioned Libyan proceeding's law was applied. [121]

The local judge reviews the international arbitration award which was issued outside the Libyan region in accordance to provisions of Articles (405 to 411) of the Proceedings Law. The judge is not authorized to order execution of such decisions unless the conditions stated in Article (407) of the same law are complied with. From this point, the Libyan judge agrees to consider a dispute if its parties have already agreed on referral to arbitration unless the stakeholder challenges by claiming non-competency due to arbitration conditions and before a statement of defense is deposited. This is what was adopted by the Libyan high court in this respect according to its judgment in the civil appeal number (219) 45k on 2/7/2003. [122][123]

Arbitral disputes usually connected to the general activities in the country and the economic boom that was witnessed in Libya following discovery of oil is what turned arbitration into an alternative way for dispute settlement. Development

120 -Mabrouk, A. (2011). The legal system for the implementation of arbitration provisions (1 ed.). Egypt: House of Thought and Law.p . 320 .

121 -Radhi, M. L. (2011). Administrative Contracts (1 ed.). Amman: Dar Qandil Publishing and Distribution. p.176.

122 -Shadia Almahrouqi, A. M. (2012). Arbitration in administrative contracts - study. Riyadh Law and Economics Library. p .290.

123 -Libyan Supreme Court on Civil Appeal No. 45,219 dated 2/7/2003.

contracts and infrastructure built in Libya during the 1980s contributed in this field as most of those contracts included referral to arbitration in case of any dispute in their respect. The following are some arbitration cases in which Libya or one of its institutions was a party. Note that the internal and external cases were multiple and varied.

aa. Disputes related to oil concession contracts

An arbitration suit was filed by the BP Oil Company against the Libyan government because of the decision to nationalize the foreign oil company's privileges in 1972. The arbitration body issued its decision to indemnify the company against the Libyan Government based on illegality of the nationalization.Another arbitration suit was filed by Texaco Overseas Petroleum Co against the Libyan Government objecting to nationalization of the company. There, the arbitrators, considering that Libya has breached the oil concession contract granted to the nationalized company, decided to indemnify the company.Another arbitration suit filed by the Libyan American Oil Company (LIAMCO) against the Libyan Government was due to a decision for nationalization, though nationalization is a legitimate right, but the provisions of the concession contract require indemnify for the contracting company.

bb. Commercial civil international and internal arbitration lawsuits

An internal arbitration suit was filed by MONTUBI, an Italian company, against Arabic Gulf Libyan Oil Company requesting compensation for an oil pipeline project. In this case, the arbitrators decided indemnification for the Italian Company, but the award was canceled by Libyan courts because one of the arbitrators was a judge and had not been authorized to practice arbitration.

A corporate arbitration suit was filed by Spain Amec Foster Wheeler Co against a Libyan Company for fish-packing at the International Chamber of Commerce in Paris. Based on the arbitration regulations of this chamber, the company requested indemnification for non-fulfillment of obligations by the Libyan party in constructing two fish-packing factories. The arbitration body decided to indemnify the Spanish company, and the Libyan party challenged the award by claiming revocation before the Libyan Judiciary, which at the end decided to confirm the arbitration award.

An arbitration suit filed by Kharafi National Co. LLC against the Libyan Government pursued arbitration rules listed in the Arab Investment Agreement signed within the frame of The Arab League. The company requested indemnification for non-fulfillment of obligations by the Libyan party in contracting with the company for an investment project at the Libyan coast near Tripoli. The arbitration decision was in favor of the Kuwaiti Company (Kharafi National) but the arbitrator of the Libyan party refused to sign the award. Currently the Libyan state is still facing execution of this award by claiming revocation before the Egyptian courts.

cc. Arbitration lawsuits based on international agreements related to demarcation of the border or the continental shelf.

An arbitration case filed before the International Court of Justice to settle a dispute between Libya and Chad concerned southern borders in an area called “Ozo”. There, the arbitration court decided that the border strip is a property of Chad and, hence, that piece of land was given to Chad.

Another arbitration suit was filed before the International Court of Justice for demarcation of the continental shelf between the Libya and Malta “Seabed” A decision was issued and executed amicably.

An arbitration suit was also filed before the International Court of Justice for the demarcation of the continental shelf between Libya and Tunisia, and again a decision was issued and executed amicably.It is notable that referral to arbitration in all these disputes has been done under mutual agreements in which arbitration conditions were stated and the parties accepted the arbitration award. This was performed within the frame of settling disputes amicably and in contribution by the concerned state to promote security and peace between both countries.

After this review of dispute settlement through arbitration, which is an alternative of the original court, it should be emphasized that arbitration according to the Libyan experience and despite the number of different local and international arbitration lawsuits in which Libyan state was a party still remains a simple and not as complicated an experience when compared to those of other countries. Recourse

to arbitration by the Libyan parties, especially in the development contracts, was under pressure by foreign companies that did not accept any nationaljudiciaries to settle any disputes with the Libyan party. Therefore, the Libyan judiciary remained in doubt and usually maintained strict policies as to granting permission for executing the arbitration award.

The fact is that the rules applied by the arbitrator are not similar to those on which judiciary is based, as arbitration is a balance of economic and political interests and more than a mere commitment to regulations of justice and law. Therefore, the judge, despite his oer her knowledge of law and rules of justice, may fail to consider the balance of economic and political interests in his or her ruling, rending them not qualified to perform as an arbitrator in such cases. In addition, given arbitration bodies' and parties' keenness on choosing a qualified and neutral arbitrator, the issues of qualification and neutrality may prevail over considering interests of the party who has chosen that arbitrator. [124]

Therefore, accepting settlement by way of arbitration has been surrounded by many risks to the Libyan state, which is usually found forced to enter this way under pressure by major western companies that work on vital projects within its territory. Thus, the Libyan state shall pay attention to this matter, prepare national cadres in the field of commercial arbitration, modify local laws for the validity of arbitration procedures, enable arbitration parties from standing in defense before arbitration bodies, and choose highly qualified lawyers to defend its interests against those of major countries. As a result, it can be stated that from the example of the Libyan state which has had negative experiences in international commercial arbitration awards, thereis often prejudice and one-sided service leaning toward the interests of western countries. [125]

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124 -Shadia Almahrouqi, A. M. (2012). Arbitration in administrative contracts - study. Riyadh Law and Economics Library.p .259

(125)-Shadia Almahrouqi, A. M. (2012). Arbitration in administrative contracts - study. Riyadh Law and Economics Library . p .130

As international arbitration is an important concept which needs to be focused on, it is necessary to establish training courses for the legal departments in Libya in order to introduce related international arbitration rules and know how to make administrative contracts and review the evolutions of the international arbitration field. This will help to prevent losses to the State under the volume of contracts concluded with third parties inherited from the former regime as there are potential risks to the national economy which, under international arbitration, there are many steps that can save time lost in court proceedings before ordinary courts.

- The Libyan Judiciary shall deal with all agreements made between the Ministry of Finance and foreign companies to be studied and to verify the validity of award and It has to be confirmed that the agreements made include explicit legal provisions that secure the rights of the state, and not to file lawsuits in the same subject of agreement inside or outside the country. Also, there has to be reassurance that municipalities and municipal councils do not to conclude any administrative contracts that may lead to financial obligation contrary to the law of the general budget of the state. The legal responsibility shall become by the undersigned and work in coordination with the state cases management with the approval of the Council of Ministers about any violation, against which a final award is issued; review objective causes and the responsible bodies of such award in preparation for taking legal actions against the violators..
- The work in coordination with the state shall be cases management to study and identify the weak points and the legal gaps in the legislation and laws that organize the work of the administrative body of the state; and study the nature of failure derived from award issued against the Libyan state in order to activate the consultative role of the government. Also, work and coordination are required between the Information and Documentation Center of the Ministry of Justice, case management department and the courts in order to establish a system for documentation of all cases filed against the Libyan state under a unified code for each case. Such information shall include all personal data of the claimants and the defendants whether the natural or legal

person and a statement of the case shall be made for all litigation levels in order to prevent the repetition of the subject of the lawsuit.

- All sectors and the government should oblige the case management department to form a common defense team in case there is a lawsuit with a special technical nature which needs specialized bodies. Support is to be given to the government case management department with personnel qualified in the field of international commercial law as well as international law, and work to train other legal and professional cadres on international laws and rules that set up international arbitration in order to address the large number of disputes; work to update Law No.87 of 1971 regarding the establishment of government case management department in a way consistent with the developed style of local and international judicial work.
- The Laws which organizes arbitration, as well as the rules and procedures that able to apply in Libya might be proposed in coordination with the Government Management law management at the Ministry of Justice.the Ministry of Finance and Governmental Case Management have to be required to design a system through which electronic correspondence is established between the two bodies. Pursuant to Article 172 of Budget Accounts and Stores Policy, the Audit Bureau can also be connected to follow up in accordance to law to prevent fraud and to correspond letters and awards. The Ministry of Finance shall document the incoming awards to be distributed through an electronic system, archive documents related to all awards, categorize them according to the subject of the award, determine all data of execution and identify beneficiaries of the award in order to prevent repetition of the same subject.[126]

126 -Ali, F. (2007). Arbitration Law in Theory and Practice (1 ed.) Alexandria: Knowledge Establishment. p .405

3. Allocation of risks

a. Definition of Allocation Risks

Many organizations and researchers in the field of project management addressed the definition and concepts of risk. These studies confirmed the correlation between risks to the environment and the nature of projects and the emergence of the industrial revolution and the resulting large-scale projects. they believe that the risk is the possibility of an adverse deviation from the desired or expected the desired outcome and that the main objective of risk management is to measure the risks of monitoring and control. The industry by nature has shown that no two projects are quite similar. Henceforth, major risks are a part of the business in this sector.[127]

A logical and systematic view to managing risk is necessary to succeed in the sector. Though success can mean different things it goes without saying that, for a contractor, making profit is part of the equation. Just like any prudent business person has to be alert of time and money, almost any factor in a project can be translated in financial terms. Risk assessment is no different from its potential impact. Failure to attend to or mistreat risk can have negative monetary outcomes for all involved. How construction risks should be allocated to all stakeholders is a major question, and a large number of lawsuits can be referred to sharing this same cause to begin with. [128]

Contract documents are the main instruments governing the allocation of certain risks. Others contain legal action and statutory rules, judicial case laws, precedents, and common industry practices. Similar to any contractual relationship, construction agreements often designate risks and liabilities to one or more parties in privacy. Although the aim for such agreements is to document the shared intent of these parties once the contract is prepared, many potentially dangerous risks can still

127 -Al-Bahar, J. F., & Crandall, K. C. (1990). Systematic risk management approach for construction projects. Journal of Construction Engineering and Management, 116 (3) p . 533-546 .

128 -Babchyck, B. C. (1992). Risk Allocation in Construction Contracting: DTIC Document. p .68

exist well hidden in the specific wording of the document. The courts constantly adhere to the parole evidence rule, which bans any prior verbal agreements between the parties from taking over the actual language of an agreement. [129]

If construction risks bring about such potential outcomes, why then anyone has to take them? Evidently, the prospect of potential reward is in fact the inspiration behind this notion. Though there is the possibility of dire outcomesin any given project, a professional contractor can still make a sizeable profit. As most construction risks can be expressed in numerical and monetary terms, risk and gain become inextricably connected. Although all stakeholders' participation in a project may be based on different objectives, they do not have to be mutually exclusive or competing.[130]

Some entities can be of importance in a construction project each of whom has, up to a level, a portion of risk to deal with. Most such involvements include: the owner or grantee, the architect-engineer, the contractor, subcontractors, material suppliers, trade unions, the surety and the insurer. Different arrangements can be made according to the delivery method. Three requirements determine how risk can be divided separately. Almost all aspects of a contract somehow involve risk; yet, some are more decisive than others in terms liabilities, and the General Conditions clauses often involve language determining the contractual responsibilities of theparties.[131]

Normally, regarding public projects, long-term contracts are used with nmumerous interface concerns associated with planning, design, construction and handover stages. To minimize such risks, the owner transfers all potential liabilities to the contractors in the form of clauses; still, to finish a multi-stage project, he or

129 -Babchyck, B. C. (1992). Risk Allocation in Construction Contracting: DTIC Document. p .36

130 -Atwood, M. E., Ramsey, H. R., Hooper, J. N. & Kullas, D. A. (1979). Annotated Bibliography on Human Factors in Software Development : DTIC Document. p .710

131 -Kozek, J. B., & Hebberd, C. (1989). Contracts: Share the risk. Water Engineering & Management, 136(6). p . 20-26 .

she has to contract other specialists as well. Naturally, a minimum of two main contractors, for construction and for core systems, are needed simultaneously. Because of project uncertainties and unknown events, concerns over unfair distribution of these risks through one-sided agreements among the parties become unavoidable – and such is the case in Libya as well. [132]

Infrastructure projects, in particular, call for the core system contractor and construction contractor to at times pass requests as to ambiguous conditions of interfaces to the owner by modifying the design or the overall works. Whether a request is reasonable or not, this situation creates ever-present and unexpected outcomes unknown risks for all. In addition, one cannot quite measure the additional cost and time created by the interface risks. Moreover, damages can occur to quality as well as delays. [133]

Nevertheless, numerous issues with risk allocation in the engineering interfaces occur between construction and core system contracts and create disagreements without any necessary contract relationship between the construction contractor and core system contractor. Numerous unfair and unreasonable matters are rooted in such vague relations among the owner, construction contractor and core system contractor. [134]

Within the articles related to risk sharing in domestic public construction, contracts may not be quite fair and reasonable, often resulting in disputes and, in

132 -Tsai, T. C & Yen, C.-C. (2006). Risk Allocation of Interfaces Between Construction and Core System Contracts: A case study on Taiwan High-Speed Railroad Project. Paper presented at the International Symposium on Automation and Robotics in Construction (ISARC 2006) 23rd. p .302

133 -Wang, M.-T., & Chou, H.-Y. (2003). Risk allocation and risk handling of highway projects in Taiwan. Journal of management in engineering, 19(2) p . 60-68 .

134 -Lowe, D. (2007). Contract Management. The Wiley Guide to Project Technology, Supply Chain & Procurement Management. p . 317

turn, causing delays, quality impacts, and other problems that have to be addressed urgently.[135]

Once public construction contracts are overviewed as to the so-called" Public Construction Contract Risk-Sharing" as to the form for risk-sharing decision model against different possibilities and through adequate contract arrangement, those risks within certain levels and scopes are taken by the owner and/or contractor, whichever can deal with the risks in most economical and effective ways. Various feasible measures of risk-sharing are proposed to optimal adjustment of the general risk burden for both parties expecting to gain maximum benefit of procurement contract. [136]

aa. The priority of risk-sharing decision

- The priority of risk-sharing decision depends on chosing appropriate ways of classification; it carries out systematic classifications on each contract risk item in the project, and further analysis and definition is then made against the property of risk – perhaps, to predict and avoid early - and characteristics of loss (individual and type of loss), altogether establishing the core of risk distribution.
- The question as to risk-sharing does not go cover the method of handling the risk itself; rather, discussions take place on the most "effective" way of handling the risk or choosing the best "economical" way in accordance with the characteristics of the risk.
- On top of individual undertakings of certain risks, there is still the choice as to the method of risk-sharing bsed on the outcome of a decision analysis: The loss from risk is divided between both parties at fixed amount and/or proportion, and one takes the loss from work duration while the other carries the loss in cost. One has to prevent or reduce

135 -Barnes, M. (1983). How to allocate risks in construction contracts. International Journal of project management, 1(1) p . 24-28 .

136 -Ashley, D. B. (1981). Construction project risks: mitigation and management. Paper presented at the Proceedings of PMI International Symposium. p .177.

occurrence or damage from the risk, whereas the other takes over the actual loss from risk.

- The authority can consider characteristics and budget of project construction, as well as the resources and the managing ability of itself to discuss feasible sharing measures for "risk reduction" and "finance benefit," thereby minimizing financial (or risk) burden for the supplier and enhances supplier's ability of contract performance.
- Upon establishing sufficient arrangements later, and under the pre-requisite of not violating legal matters, the agreed program of risk-sharing is carried out in practice entirely and precisely in line with contractual requirements.

Regarding the expected requisition of benefit on procurement contracts from a fair sharing of contract risk .[137]

bb. The benefit provided :

- Remind the parties to be mindful of rights and obligations of each other under the contract, thuncreasing cost benefits.
- Reduce uncertainty as to risk, thus reducing risks not needed by either party to take on.
- Minimize fixed cost necessary to rtake on the risk through reasonable sharing of contract risk by both.
- Promote amicable workingties between both parties and reduce disputes in this way. [138]

b. Dealing with Risks

A contract is an early chance to predict, define and address possible upcoming issues and prevent disputes. Mainly, the operation beings once the

137 -Erikson, C. A. (1979). Risk sharing in construction contracts. University of Illinois at Urbana-Champaign . p .166

138 -Barnes, N., & Lau, K. (1974). Bidding Strategies and Company Performancein Process Plant Contracting. Transactions . p .287

gatherings endeavor to figure out what may happen startlingly, what may occur, and the most ideal approach to managing them through educated and edified hazard distribution. The entire of hazard designation by the outline of fitting undertaking conveyance instruments involves anticipating such dangers and other venture related issues affecting the gatherings, and furthermore managing those dangers in a most useful, impartial and critical thinking way that it very well may be finished. To do as such, the necessities of each venture and the role to be taken on by each participant has to be evaluated and, because contracts are channel within which project risks are allocated and addressed, the form of a contract is important to the potential for best performance and production. [139]

Normally, most question in development ventures begin from deficient degree definition, unseemly contract types, insufficient correspondences and vulnerability and oppressive desires. Henceforth, the need to precisely evaluate and dispense development dangers leaves the plain idea of such opertations as development. Activities more prone to strife frequently are the aftereffect of contradiction of the gatherings' unique aims and points. Such destinations and their appearance between the undertaking Owner and the contractual worker represent the majority of the contradictions on the most proficient method to approach and finish a venture. [140]

Obviously, in numerous ventures, the Owner will in general increase greatest quality, usefulness, style and limit at least expense, though the contractual worker is in the wake of meeting its money related objectives by consuming the base assets expected to make the least work finished. To accomplish in this, consequently, an appropriate task conveyance component must be contrived to build the possibility of building up a joint innovative and powerful way to deal with handle clashes before they transform into the debate. Contracts can be organized under these conditions so as to forestall dispute equitable hazard sharing to defeat the solid versus-feeble

139 -Akintoye, A. S., & MacLeod, M. J. (1997). Risk analysis and management in construction. International Journal of project management, 15(1). p . 31-38 .

140 -Papageorge, T. E. (1988). Risk management for building professionals: RS Means Company. p .609

arrangement situation and advance a sensible attribution of jobs and obligations in ventures and relying upon the capacity of the gatherings to perform.

As respects, evenhanded hazard sharing, the primary rule of hazard assignment ought to be that the gatherings included a search for a multi-gainful strategy for isolating the hazard as powerful allotment relies upon having reasonable contracts altogether comprehended by each one included. [141]

c. **The Risk Allocation Plan**

Deciding where risks are to be allocated when it comes to construction projects is not that simple as they will obviously affect the expense of the task and the capacity of the gatherings to complete is dependent on the expense and time necessities by the Owner. The conceivable effect of hazard designation goals must be inspected and evaluated with the Owner preceding setting up the delicate arrangement of Contract Documents; generally, the Owner and the plan proficient may encounter unforeseen astonishment by the response of the contracting network to the hazard distribution estimates received. Accordingly, among the underlying errands to be finished by the structure experts deciding the uncommon interests and sensitivities of the Owner and also the territories of obligation where the Owner has no arranging room practically speaking, regardless of whether because of the loan specialist's prerequisites or in light of his own consummation time or venture cost imperatives. [142]

In a similar way, design professionals need to review the project carefully, along with the location, environmental considerations, site access concerns, geotechnical challenges, possible concerns over jurisdiction and changes made during the course of the work, and make overall risk allocation plans accordingly. In preparing his plan, the architect/engineer will need to examine sound methods of handling risks through avoidance, mitigation and management. Risk avoidance in

141 -Touran, A., & Wiser, E. P. (1992). Monte Carlo technique with correlated random variables. Journal of Construction Engineering and Management, 118(2), p .258-272 .

142 -Freeman, R. B., Wiesner, R. H., Edwards, E., Harper, A., Merion, R., & Wolfe, R. (2004). Results of the first year of the new liver allocation plan. Liver Transplantation, 10(1), p . 7-15..

this way, is possible by allocating risks to one party or another, in accordance to whether a specific party can bear that risk. Alternatively, risks can be allocated simply based upon strength in negotiation processes. which criteria is not exactly a best and final answer for the Ownerin this respect. [143]

Since the Owner, helped by design professionals, is most often the author of the contract document packagecontaining therisk allocation, he or she reserves the best position to decide on the related criteria as well. As stated previously, such position ands its strength needs tempering by an understanding of the dire impacts of unilaterally assigning risk since it can end up increasing costsin such ways that make the project no longer financially viable.Under particular circumstances, risks may be divided as upon the ability to mitigate the effect of the allocation in certain settings. For example, using different forms of construction insurance. Construction bonding and insurance generate more security, specifically for performance by the Contractor. In this respect, the Owner needs to feel at ease with the Contractor's ability to assume project obligations as determined in the Contract. [144]

The Owner may regularly complete an audit of the credit danger of the distinctive potential Contractors. Once not happy with the results of sych a survey, he may utilize different strategies to reinforce its position, including acquiring securities and assurances from the Contractors. Regularly, proprietors see development holding as a strategy for anchoring proper execution. Additionally, the commitments of the Contractor to the Owner to perform are guaranteed by requesting the Contractor to supply a Performance Bond ordinarily drafted for half or 100% of the agreement cost according to the development Contract to guarantee the Contractor's incite and dependable execution in ideal understanding with authoritative terms.Such bonds limit the monetary hazard to the Owner, amid development, as well as post-upkeep

143 -Adler, B. E. (1991). Bankruptcy and risk allocation. Cornell L. Rev., 77, p . 439 .

144 -Ng, A., & Loosemore, M. (2007). Risk allocation in the private provisionof public infrastructure. International Journal of project management, 25(1), p . 66-76 .

period. Experienced Contractors will likewise limit chance by requesting their subcontractors and providers to give such bonds to them. [145]

Different types of hazard administration can involve positive or negative support into contracts as an approach to empower a gathering – regularly, the Contractor - to set up particular time, cost or creation criteria, disregarding which the Contractor will confront an impediment through sold harms; then again, as to encouraging feedback, he may pick up an advantage, for example, through reward. By relegating hazard for time and cost of culmination, proprietors and their plan specialists settle on the benfits and dangers of positive versus negative fortification for the development . contractors in accordance to the type of contract in view. [146]

In case an Proprietor is time-delicate and requests his structure master to devise farfetched contract culmination periods with direconsequences and fines as sold harms for inability to perform, he does as such as to get ready against cases from the Contractor with regards to the wellspring of undertaking consummation delays. Moreover, the Owner is presumably envisioning significant increments in development cost past what he had anticipated that would be considered.

Besides, contracts now and then incorporate strict increasing speed arrangements allowing the Owner's specialists significant forces to decide the wellspring of venture delays, and furthermore give the Consultant the ability to arrange quickening of the work at the expense of the gathering decided all things considered to have caused the deferral. [147]

There are commentaries written about the impact of negative versus uplifting feedback on development ventures. [148] The author will in general agree with encouraging feedback administration procedures, with the start that concentrating on

145 -Adler, B. E. (1991). Bankruptcy and risk allocation. Cornell L. Rev., 77, p . 439.

146 -Ng, A., & Loosemore, M. (2007). Risk allocation in the private provisionof public infrastructure. International Journal of project management, 25(1), p . 66 .

147 -Ng, A., & Loosemore, M. (2007). p . 76.

148 -Adler, B. E. (1991). p . 430 .

positive side of agreement finishing and participation can eventually bring in more partnership and less disagreement, thereby providng the Owner with a higher chance to reach ideal outcomes concerning the project cost and time. [149]

d. **Transfer of Risk**

The decisions by the Owner and his design expert regarding what risks are to be transferred to the Contractor have crucial impacts on the ultimate cost of the project since he, in most cases, is likely to attempt to level the playing field based upon his own understanding of the risks undertaken so as to guarantee sufficient compensation for accepting those risks. Evidently, each tender calls for the Contractor to decide whether nor additional payments to be charged through the Owner are worthy of the risks allocated to him in the contract documents. [150]

A perfect case of transference of hazard shows up out in the open private associations, otherwise called (PPP or P3) extends ordinarily including various distinctive authoritative connections and officeholder on the gatherings to foresee extraordinary dangers to be looked by every member and to address each appropriately in the individual (PPP or P3) venture contracts. A common contract of such nature influenced by conveyance of hazard is the Concession Agreement, one between people in general part Owner and the private division venture organization through which concession is given. Similarly also, there is regularly a Design/Build development contract between the private part venture organization and the Design/Build Contractor for related administrations – also an Operation and Maintenance contract between the task organization and the Operator/Manager to keep up the undertaking amid either certain areas of or the whole (PPP or P3) venture concession period. [151]

Contracts of this kind incorporate the transference of hazard and the requirement for task members to modify the agreements to the venture at issue and

149 -Adler, B. E. (1991). Bankruptcy and risk allocation. Cornell L. Rev., 77, p . 439 .

150 -Babchyck, B. C. (1992). Risk Allocation in Construction Contracting: DTIC Document . p .150

151 -Grimsey, D., & Lewis, M. K. (2002). Evaluating the risks of public private partnerships for infrastructure projects. International Journal of project management, 20(2), p .107-118.

not the other path around. No standard contract frame can fit stage and mix of agreement possibilities, and each agreement needs separate drafting to meet the prerequisites for each undertaking, and this additionally covers hazard designation to partieswith the best capacity to manage them, while likewise recalling the need to enhance venture results for the Owner from monetarily and sequentially. [152]

In the (PPP or P3) venture case, evaluating which parties are probably going to be influenced by a specific component of hazard, and how, can be confused and difficult to pinpoint since undertaking members regularly accept a few distinct jobs. For example, the Design/Build Contractor might be one of the investors or potentially the Operator in the meantime. In most (PPP or P3) ventures, the working danger distribution components are expected as pursues:

- Market chance by the undertaking organization.
- Design, development and dispatching hazard by the Design/Build Contractor.
- Operation and upkeep related dangers by the Operator.
- Most political dangers and postponements from experts by general society part Owner through the Concession Agreement between the Owner and the venture organization.
- Any other remaining danger, fundamentally, by the venture organization, who will regularly attempt to exchange such dangers to the Owner. [153]

Terms covering hazard divide between the venture Owner and the Design/Build Contractor and the Operation and Maintenance Contractor can be composed up to mirror the dialect of the Concession Agreement between the task Owner and the undertaking organization. To basically manage conceivable ambiguities between the different contracts, one needs to incorporate the utilization

152 -Barnes, M. (1983). How to allocate risks in construction contracts. International Journal of project management, 1(1), p . 24-28 .

153 -Hartman, F., & Snelgrove, P. (1996) Risk allocation in lump-sum contracts . Concept of latent dispute. Journal of Construction Engineering and Management, 122(3), p . 291-296 .

of "if and when" dialect in the Design/Build development contract; for example, expressing that the Design / Build Contractor is qualified for expansions of time under particular conditions if and when such augmentations are taken into consideration the undertaking organization under the Concession Agreement with the Owner. Further, the task organization might see an abrogating arrangement in the Design / Build Contract in a way that the Design / Build Contractor goes under a commitment to perform so as not to leave the undertaking organization in rupture of its commitments in the Concession Agreement. Finish dangers, containing components of the structure, and development and appointing hazard and other leftover dangers are an element for all key task members, and certain gatherings regularly convey the most hazard, specifically, the Design / Build Contractor. [154]

In the end, choices of the undertaking Owner and his counsels, regardless of whether modelers, architects or venture administrators, in the beginning periods of agreement delicate arrangement, are probably going to have essential impacts in setting the tone for future associations between those included. While one needs to welcome that standards of value and decency ought to be authorized while assigning hazard, basically dispensing danger to the weaker party more averse to deal emphatically in the arrangement procedure bears the threat of pointless accelerations in the expense of the undertaking, as the alleged weaker gathering will see such dangers as being cumbersome and, consequently, will go for broke into its cost projections to convey administrations. [155]

Unequal or exceedingly one-sided contracts, allocating most major risks to the Contractor, may end up breaking the ties among parties while a projectis ongoing, instead of creating easy cooperation all along the term of construction. Such a hinderance can eventually end up in acrimony, claims and difficulty in completing

154 -Kozek, J. B., & Hebberd, C. (1989). Contracts: Share the risk. Water Engineering & Management, 136(6), p . 20-26 .

155 -Ng, A., & Loosemore, M. (2007). Risk allocation in the private provisionof public infrastructure. International Journal of project management, 25(1), p . 66-76.

a project successfully as one party or the other believes it is being misused and that it has signed a less than fortuitous contract. [156]

156 - Barnes, M. (1983). How to allocate risks in construction contracts. International Journal of project management, 1(1), p . 24-28 .

CHAPTER 2

CONSTRUCTION CONTRACTS

I. CONSTRUCTION CONTRACT IN TURKEY AND ITS DEFINITION AND LEGALITY

A. Definition and Parties

1. Definition

The construction contract is not regulated in the Code of Obligations. Therefore, the Turkish Code of Obligations does not include the definition of a construction contract. The Turkish Code of Obligations has only indirectly referred to the construction contract in certain articles of the contract. For example, TBK m. In 478 there is clearly the term "immovable construction (construction)". However, as stated above, the construction contract is a contract of construction with the nature of the contract, and the contract for which the contractor assumes the construction contract is an immovable property. Therefore, it is necessary to define the construction contract from the contract of work. [157]

Work of the Old Code of Obligations. According to Article 355, which defines the 2nd contract, "An exception is a contract with him (the contractor) [158], the other party's business owner", which is committed against the semen he is committed to giving ". The term "thing" in the definition of the former contract in the former Code of Obligations should be understood as "work" in accordance with Article 363 of the Swiss Code of Obligations; because in our law the word "thing" refers to a material (bodily) existence; however, the contract work is not required to have also indicated the presence of strong results, it owed to the contractor.

157 - Kocaağa, K. (2014). İnşaat Sözleşmesi, Ankara. p .25.

158 - Contractor in the old Code of Obligations to refer to (Yükleniciyi) in Turkish. The term (müteahhit) replaces the term contractor .

Indeed, the Turkish Code of Obligations in the contract to identify substances 470. "thing" instead of the word "work" was the word used. On the other hand, the construction contract, which is one of the types of works contract with the widest field of application, constitutes works that have the material (material) existence.

On the other hand, it is stated that it is more appropriate to use the term "constructing", which includes the changes in an existing work, rather than the word "manufactured", which is included in the definition in the former Code of Obligations. The reason for this is that the word manufacturing means expressing a new work. However, as in the creation of a new work, the modification, repair, maintenance and even the elimination (destruction) of an existing work can be the subject of a work contract. For the same reason, Article 470 of the Turkish Code of Obligations replaces the concept of "manufactured" The term "forming" is used.

Finally, Article 355 of the former Code of Obligations, which defines the work contract. Although the word "semen" is used. in the contract of construction (construction) on the grounds that it refers to the money the buyer will pay in the contract of sale. It was stated that it would be more appropriate to use words such as "reckoning", "compensation", "price", "wage". [159]

The same reason, Article 470, which defines the contract of the Turkish Code of Obligations, used the word "cost". Article 470 of the Turkish Code of Obligations defines the work contract as follows: "The contract of employment is the contract where the contractor undertakes to create a work, and in which case the contractor undertakes to pay a price." 470'de this definition, TBK m. 355, such as the definition of the contractor's "work debt" is missing.

In this case, it is possible to define the contract as a contract in which the contractor undertakes to produce a work and submit it to the business owner in return for a certain price the business owner has committed to pay. A contractor works with

159 -Gümüş, M. A. (2012). Borçlar Hukuku Özel Hükümler. Istanbul 2012 . p .135

a work contract to deliver it to the business owner; the owner of the business in return to pay the price. [160]

In the contract, the contractor undertakes to create a real estate. The contract is called "construction contract". The construction contract is a type of contract, where the contractor's action is directed towards the construction of an immovable structure. In terms of remuneration, there is no different situation from the works contract. Therefore, the construction contract is a work contract in terms of its nature, the provisions of the Turkish Code of Obligations related to the contract of works, as will be applied directly to the construction contracts, the definition and explanations included in the doctrine and judicial decisions regarding the contract of work are also valid in terms of construction contracts. From this point of view, it is possible to define the construction contract as a contract in which the contractor undertakes to make a construction (construction) and undertakes to deliver this to the owner. With the construction contract, the contractor has to make a construction and owe it to the business owner; the business owner also owes the payment of the price.

In the Turkish law, some laws related to the public procurement legislation also contain provisions regarding the construction contract. One of these laws is the Tender Contracts Law, which has been enacted with the aim of determining the principles and procedures related to the Public Procurement Law No. 2886 and the Public Procurement Law No: 4734 and the contracting and implementation of the contracts in accordance with this Law. Although these laws clearly do not mention the construction contract, "construction works" is used. However, there is no doubt that the construction contract entered into the scope of the term dir construction works ".

As a matter of fact, the title "Definitions" of the Public Procurement Law No: 4734. It is possible to reach a conclusion from the definition of the concept of "production" in article 4. Construction according to this definition; building,

160 - 470 That defines the work contract of the Turkish Code of Obligations. Although the term 'semen' is intended to be used to express the sales value, the counterparty payable to the contractor must be expressed in the term 'cost'.

highway, railroad, highway, airport, dock, harbor, shipyard, bridge, tunnel, subway, viaduct, sports facility, infrastructure, pipeline transmission line, communication and power transmission line, dam, power plant, refinery plant, irrigation plant , land reclamation, flood protection and pickling, such as all kinds of construction work and related to this work, manufacturing, export, transportation, completion, major repair, restoration, landscaping, drilling 4735 No. Public demolition, strengthening and assembly works would.

A construction contract is an instant performance contract by nature and, in some ways, it is similar to continuous contracts. In long-term construction contracts, the performance undertaken by the contractor is similar to the continuous performances. A construction contract is arranged in the form of an “individual contract” including the terms and conditions agreed by the parties. However, in the contracts of construction involving major construction works, the contract also includes the general transaction conditions, such as FIDIC-Type Contracts and Specifications.[161]

Worldwide development contractual workers are frequently looked with the circumstance of working in a new place. Under such conditions, one of the contractual worker's fundamental worries in offered basic leadership is the appraisal of hazard. One potential wellspring of hazard is the legally binding necessities exemplified in the general states of global contracts, particularly when these conditions are unique in relation to FIDIC conditions or other entrenched ones. For this situation, the universal contractual worker needs to utilize a methodical and quantitative way to deal with evaluate the related hazard. [162]

By "conditions precedent", It means conditions which require that some uncertain event must occur before the promissory is obligated to perform. By ‘mutual and concurrent conditions’, it is intended that the parties to the contract are to

161 -Celal, N. (2005). Türk ve Irak Hukukunda Mukayeseli olarak İnşaat Sözleşmelerinde Müteahhidin Teslimden Sonraki Ayıplardan Sorumluluğu. p .98

162 -Bubshait, A. A., & Almohawis, S. A. (1994). Evaluating The General Conditions of A construction Contract. International Journal of Project Management, 12(3), p . 133-136 .

perform concurrently; and ‘condition subsequent 'means a subsisting obligation is terminated by the happening of the uncertain event designated in the contract. While these rather outdated terms may be convenient, it is believed that conditions in reality are all precedent.[163]

The moderately mind-boggling nature of development ventures directs the utilization of protracted and deliberately composed contracts with the end goal to depict absolutely the lawful, budgetary, and specialized parts of the projects in as much detail as it tends to be. The most critical piece of the development contract is the general-conditions archive originating from its job in characterizing the connections (rights and duties) of the contracting parties in every one of the tasks inside an office or a nation. Moreover, the record itself explains the general task rules and pertinent business terms. [164]

Attributable to this vital job, and combined with their proposed materialness in every one of the undertakings inside an association or even a nation, institutionalized types of general conditions have been created by various expert bodies and are being used all through the development business. Such wide assortment of utilization mirrors an acknowledgment of the benefits of utilizing institutionalized general conditions one of which is the potential for development. By utilizing the equivalent institutionalized conditions over a significant lot of time, the clearness, reasonableness, and productivity of the arrangements can be tried, and territories of insufficiency recognized and in this way redressed. [165]

Another significant favorable position of utilizing institutionalized conditions is the recognition of the contracting parties with the pertinent arrangements of the

163 -Ashley, C. (1904). Conditions in Contract. Yale Law Journal, 14, p .424 .

164 -Celal, N. (2005). Türk ve Irak hukukunda mukayeseli olarak inşaat sözleşmelerinde müteahhidin teslimden sonraki ayıplardan sorumluluğu. p .102

165 -C. William, I., & Ashley, D. B. (1987). Impact of various construction contract clauses. Journal of Construction Engineering and Management, 113(3), p . 501-521 .

agreement, at that point diminishing the time and exertion expected to get ready and audit the agreement records and furthermore the offered value possibilities.

Institutionalized conditions likewise decrease the likelihood of misconception, undue pay, the probability of progress orders, and the event of cases or case emerging out of legally binding execution. The above focal points in any case, institutionalized general conditions have impediments also since, when all is said in done, they support the supporting association and reflect suspicions that may not be justified for particular applications .[166]

The urgent job of the general conditions has imperative repercussions for the probability and level of undertaking achievement as far as cost, time, quality, and the fulfillment of the contracting parties. Thus, these conditions - regardless of whether standard or not - should be seen by both the venture proprietor and the contractual worker as a wellspring of undertaking hazard that should be surveyed. The generally mind-boggling nature of development ventures requires the utilization of long contracts with the end goal to portray definitely the lawful, money related and specialized parts of the undertaking. Here, one potential wellspring of hazard is the authoritative necessities typified in the general conditions. In assessing the general conditions, there are different angles that should be considered, to be specific lucidity, compactness, fulfillment, inward and outer consistency, common sense, reasonableness, and impact on undertaking execution, i.e. on quality, cost, timetable, and security. [167]

2. Provisions

As mentioned above, in accordance with the Code of Obligations, it is a work contract in terms of arrangement. For this reason, the provisions of the Turkish Code of Obligations relating to the contract of works (Article 470 - 486 of Turkish

166 -Carty, G. J. (1995). Construction. Journal of Construction Engineering and Management, 121(3),p .319-328 .

167 -Bubshait, A. A., & Almohawis, S. A. (1994). Evaluating the general conditions of a construction contract. International Journal of project management, 12(3), p .133-136 .

Commercial Code) shall apply directly to the construction contracts. Parties to the contract of construction, contract. In accordance with the principle of freedom, they can make the arrangements they want, provided they remain within the limits drawn by the law. If the contract of contract is agreed between the parties, if there is no provision in this direction, the provisions of the Turkish Code of Obligations related to the contract of work are covered.

In case the dispute cannot be resolved by these provisions, the Turkish construction contract, which does not have the debts, finds the application of the general provisions of the Law of the Contract. It should be noted, however, that the provisions to be applied only to construction contracts subject to private law jurisdictions and provisions to be applied to construction contracts subject to both private and public law provisions.

It is different. The construction contracts concluded between private law real and legal person owners and contractors are subject to the provisions of the private law, firstly the provisions of the contract and its annexes, followed by the provisions of the Turkish Code of Obligations related to the contract and the general provisions of the Turkish Code of Obligations.

In the Turkish law , especially in the public procurement legislation, it is seen that special arrangements related to construction contracts are included. The most important of these is the Public Procurement Contracts Law No. 2886 and the Public Procurement Contracts Law No. 4734 on Public Procurement Law and the regulation and implementation of tenders for this law. In the article 2 of the Public Procurement Law, numbered 4734, this law shall be "procurement of goods or services received from any source in the use of administrations and tenders of construction works" maintenance.

Therefore, the provisions of the Public Procurement Law and the Public Procurement Contracts Law shall not apply in respect of tenders that do not require public expenditure. In this respect, the scope of the State Tender Law No. 2886 is broader. According to Article 1 of this Law, "General budget and the administration of annexed budgeted administrations with special budget and municipalities shall be

carried out in accordance with the provisions set forth in this law." The Public Procurement Law No: 4734 has not abolished the State Tender Law No: 2886 and stipulates that it will not be applied only for the auctions covered by it. Therefore, the provisions of the State Tender Law No. 2886 continue to be applied in respect of tenders other than goods, service and construction tenders. [168]

On the other hand, the General Conditions of Public Works (BIGS) prepared for the purpose of determining the general principles to be applied in carrying out the construction works exceeding a certain amount subject to the State Tender Law no. No. 19 of the General Contracts for Construction Works (YİGŞ) [169], which are prepared to determine the general principles to be applied in the execution of the works contracted under the Public Procurement Contracts Law. as a reason for this, the complexity and long-term extension of the construction works is underway. Public procurement legislation is applied to the disputes arising out of such work.

The provisions of public procurement legislation are specific provisions for the construction works arising from public procurement contracts. It should be noted, however, that the construction contracts in question are private law contracts and the implementation of public procurement legislation does not eliminate the quality of being a contract subject to the provisions of private law. [170]

168 -Law No. 4734 on public procurement. (a) of this Article; tenders within the scope of The provisions of the State Procurement Law dated 28.09.1943 and numbered 2886 shall not apply.

169 -Law 4734 of the Public Tender Law. (b) to the second paragraph of The purpose of the General Conditions of Construction Works, which are prepared on the basis of the lı Purpose "of the Specification, is in Article 1 /4735. No. sayılı Public Procurement Contracts "in accordance with the Law on the execution of all kinds of contract work to determine the general principles to be applied.

170 - The regulations similar to those in our Law are also included in the Swiss (SIA - Norm 118) and German (VOB) laws, In the same way, there are FIDIC General Conditions in France which are prepared by the International Federation of Engineers (FIDIC) and implemented in large international construction projects. The application of these general rules to the construction contracts depends on their

B. Parties

The parties to the construction contract are the contractor with the contractor. business owner construction; the contractor is the person who undertakes the construction of the construction. In the Old Code of Obligations, the contractor is used instead of the contractor, but the Turkish debt doctrine has become widespread in practice. it is preferred to use the term "contractor" instead of the term "contractor". It prefer to use the concept of contractor in the Law on Contracts because of being mostly settled in practice and included in the Turkish Code of Obligations. In practice, the businessman "commissioning contractor" is ordered ".[171]

The owner is the person who orders the construction and makes the order. The owner, the owner of the real estate which is usually built on it, is the person to whom the building will be delivered. As a rule, any person with a legal capacity may constitute the business side of the contract. Legal entities, such as natural persons, may also have the title of business owner. Business owner, private law may be a natural or legal person or public law legal entity. In practice, it is common for the business owner to be a public law legal entity. However, it should be noted that in such a case the construction contract has the character of private law. [172]

The contractor is the person who is in charge of doing the ordered construction. The contracting party may be a natural person or a legal entity, in particular a joint venture, limited or collective partnership. Likewise, it is also

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acceptance of the contract and these rules are not directly applicable. The subject of public procurement contracts is not only about construction works, but also for the procurement of goods and services, the provisions of public procurement legislation are applied. However, since the subject of our study is constituted of construction works, the issues related to the purchase of goods and services have not been discussed.

171 - Kocaağa, K. (2014). İnşaat Sözleşmesi, Ankara. p .29.

172 - Özdoğan, N. D. Sözleşmenin Yorumunda Gerçek İradenin Tespiti. İnönü Üniversitesi Hukuk Fakültesi Dergisi, 8(1), p . 33-52.

possible for contractors to come together as a joint venture, such as a joint venture or a consortium, and to undertake the construction of the construction together .

The contractor may undertake to do all of the construction, or undertake some of it. The whole of the construction of the contractor under the debt of the "general contractor" is called. The general contractor undertakes only the construction of the construction, and the plan and project of the construction is given by the owner. However, the contractor may undertake the preparation of the plans and projects used in the construction of the construction. If the general contractor is also obliged to prepare the plans and projects, then the contractor shall undertake the planning and coordination of the construction as well as the production. In such a case, the incorporation of elements such as planning and coordination, which are included in the content of a separate contract (for example, a power of attorney), in the construction contract do not alter the legal character of this contract. This is because the planning and coordination in question is mainly in the content of the contractor's performance of completing the construction and delivering it to the businessman. [173]

The business owner can divide the work into sections and make each of them different and independent contractors. For example, a contractor may conclude a contract with a contractor for the construction of a building, and a contract with another contractor for the construction of garden walls. In such a case, there is no contractual relationship between the contractors. In the doctrine, the term "partial contractor" is used to refer to the contractor who only owes certain parts of the work. The partial contractor can take the work from which he undertakes the work from another contractor, for example, the contractor who undertakes the entire construction. In this case, the partial contractor shall also have subcontractor approval. The "pre-contractor" and "post-contractor" expressions are used when partial contractors work in succession rather than simultaneously.

In the event that the work is divided into sections by the business owner and made to different contractors, the task of coordinating the work belongs to the owner

173 - Kocaağa, K. (2014). İnşaat Sözleşmesi, Ankara. p . 31.

and the risks arising from the coordination shall be doubled. Business owner, the coordination task to appoint the expert architect or Engineers can also do this "by the owner, these architects or engineers are appointed by the consultant (consultant) is called an engineer. Consultant engineer, contractor and contractor is not a party to the contract. Consultant engineer and business owner, construction There is a separate employment contract from the contract. In practice, consultant engineers are particularly involved in large-scale construction works and in works subject to public procurement legislation. [174]

As a matter of fact, the consultant has been defined in Article 4 of the Public Procurement Law No. 4734 entitled "definitions." service providers in who advise, use their knowledge and experience for the benefit of the administration. As you can see from the provision, there is no contractual relationship between the consultant and the contractor. It supervises the execution of the consultant engine, which is the representative of the business owner, on behalf of the business owner. Therefore, the consultant engineer, TCO In the sense of 116 , it is accepted that he has the successor aid. However, if a contractor who undertakes the entire work, has divided the work into different contractors, the principal contractor is able to fold the risks arising. [175][176]

174 - Gokyayla, K. E. (2017). The Event of the Penalty Clauses in Cases Where the Court Has Decided to Terminate the Contract in Construction Contract against Land Share. Dokuz Eylul Universitesi Hukuk Fakultesi Dergisi, 19, p . 47.

175 - The number of consultancy services is 4734. item. According to this article, architecture and engineering, survey and project, map and cadastre, zoning plan of any scale, zoning application, preparation of EIA report, plan, software development, design, technical specification preparation, supervision and control such as technical, financial, legal or similar the services in the areas are taken from the advisory service providers ".

176 - In the FIDIC General Conditions applied in international construction contracts, it is decided that an engineer can be appointed to work in consultation with the consultancy services..

On the other hand, the contractor may leave the construction of certain parts of the contract to other contractors. These contractors, who are contracted by the principal contractor, are called subcontractors. As, In such a case, the existence of a construction contract between the main contractor and the sub-contractor is accepted. "In contrast, there is no contract between the subcontractor and the contractor. Therefore, the subcontractor shall be delayed and in the event of a downfall, the business owner cannot, of course, make a direct claim against him.

Against the contractor "Although this is the rule, the business owner may apply directly to the subcontractor on the basis of the contract in two cases. The contractor is responsible for the delays caused by the subcontractor, if the delays caused by the subcontractor have delayed the entire work, the principal contractor will default to the owner. the contractor is the person "performance assistant" in the relationship between the principal contractor and the business owner in the meaning of the contractor of the contractor, TCO :116. The delays caused by the subcontractor shall enter the risk of the principal contractor '. [177]

C. Legality and Characteristics

1. Generally

The contract of the contractor is a contract of construction in terms of the legal nature of the construction contract, in which the business owner owes a price to the owner of the project and which he owes to deliver to the businessman6. Therefore, the work on the legal nature of the Turkish contract, construction contract also applies. Accordingly, the construction contract, in which the contractor owes the construction of the contractor when the cost to be paid by the contractor, is a typical contract, which imposes a mutual debt and does not depend on its validity.

According to the prevailing opinion in the doctrine, the construction contract is not a contract that establishes a permanent debt relationship between the parties as a rule, but it is a "swift" contract. However, as it can be understood from the explanations

177 -Kodakoğlu, M. (2007). FIDIC Standart Kuralları'na Göre Hazırlanan Milletlerarası İnşaat Sözleşmelerinden Doğan Uyuşmazlıklarda Tahkim (Master's thesis, Başkent Üniversitesi Sosyal Bilimler Enstitüsü). p . 173.

below, the construction contract is similar in some respects to contracts that give permanent debt. For this reason, it can be said that the contract discrimination contract is a, contractual contract like contracted in terms of the separation of the contract, which gives rise to a permanent performance debt. If the contract is intended for the construction of the land belonging to the landowner and the owner pledges to transfer his / her shares to the contractor instead of the money as a price, a mixed contract, "land share construction contract" shall be in question.

The contract for construction of land is not regulated by the law and is a mixed contract. The contractor's contract in this contract, the work contract; the owner of the landowner (the business owner) carries certain characteristics of the contract for the promise of real estate. To the extent that the mixed contract falls in accordance with its nature, the provisions relating to the contract in which the act is a part of the act are comparatively applied. If such an application does not conform to the nature of the work, the general provisions of the Turkish Code of Obligations shall apply. If a solution cannot be reached with the help of these provisions, In TCC If a solution cannot be found in the law of customary law, the judiciary shall adopt the rule.

2. Consideration

The contractor with the construction contract, to make a construction and deliver it to the business owner; the business owner also owes a certain amount of money. In return for the contractor to build and deliver it to the business owner, the business owner is obliged to pay a certain amount to the contractor. The factor element is a mandatory element of the construction contract and leads to its contractual contract .

It is not necessary to determine the amount to be paid in the contract and the amount of it must not be determined at the time the contract is established. 181. This issue, TBK m. 481. It can be decided clearly whether the payment of the payment . It may be agreed. In case of disagreement, the contractor shall confirm that it is decided to pay the price. If the contractor undertakes to undertake the construction without any compensation, there will be no construction contract. In such a case, it is

controversial whether there is an anonymous convention such as a construction contract or a construction contract. The problem should be solved according to the concrete characteristics of the event; In case of doubt, TBK m. In spite of the 502 / Il, it is assumed that there is an unnamed (mixed) contract similar to the construction contract.

With the establishment of the construction contract, the contractor is obliged to deliver the contractor to the business owner by making a construction, and to pay the price to the business owner. The purpose of this contract is the change of such essential acts. Since the actions of the parties constitute the equivalent of each other, the construction contract is a contract that gives mutual debt. The essential acts that the parties are debiting constitute the essential elements (points) of the contract. The main elements of the construction contract, the original acts borrowed by the parties, the contractor undertakes to undertake the construction of the contractor is obliged to pay the price. The principal act of the contractor is the debt of debt, which is the principal act of the owner and the contractor. [178]

The construction debt of the contractor completes the construction and results in the delivery to the business owner. Therefore, the essential contractual obligation of the contractor in the construction contract consists of a combined structure in the form of construction and submission to the business owner. In other words, construction and delivery debts constitute the performance obligation of the contractor. In this respect, in the construction contract, the contractor undertakes to perform a certain service and therefore a certain service. In this respect, the construction contract is similar to the service contract. On the other hand, the contractor is obliged to undertake a construction with a particular result. In the end, the contractor is obliged to deliver the construction (structure) that he has made to the business owner. This feature brings the construction contract closer to the sale contract. In order for the contract to occur, it is stipulated that the parties' mutual

178 - Kocaağa, K. (2014). İnşaat Sözleşmesi, Ankara. p . 50.

will declarations should be adequately determined on the essential acts. It is accepted that the declarations of will on the cost element do not have to be appropriate.

3. Consensual

The construction contract is established with the mutual and mutual will of the parties. Therefore, the construction contract is an agreement, the delivery of the construction is a matter of performance and is not important for the establishment of the contract. The General Contracts and Works of Public Works prepared for the purpose of determining the general principles to be applied to the Public Procurement Law No. 2886, the Public Procurement Law No: 4734 and the Public Procurement Contracts Law No. 4735 and the construction works that are subject to these laws. It was stated that the General Specification will be implemented. The implementation of the provisions of the public procurement legislation on these constructions does not eliminate the quality of such construction contracts as a contract under the law of obligations.

According to the prevailing opinion in our law, there are two stages in the special contracts where the administration is a party: The first stage is the stage until the conclusion of the contract, which consists of the initiation of the procurement process, the procurement and finalization of the procurement. The second stage is the execution of the administrative process completed in the first stage, and in the second stage, after the first stage subject to the administrative law rules, the contract subject to the rules of private law is concluded. to settle all contractual issues, for example, whether the contract is valid, whether it can be terminated or not, etc. The provisions of the law of obligations shall be enacted. In this sense, the procedures and principles related to the procurement stage prior to the establishment of the contract are set out in the Public Procurement Law of 4734, while the stage after the establishment of the contract is regulated in the Public Procurement Contracts Law No. 4735.

The Public Contracts Law, which includes the principles of the establishment of the contract and its contents, is based entirely on the principles of private law. 4 / II of this law. [179]

According to the article, "The parties of the public contracts made under this law have equal rights and obligations in the implementation of the provisions of the contract and the articles that are contrary to this principle cannot be included in the provisions of the contract. This principle is taken into account in the interpretation and implementation of the law". Article 36 of the same law, the provisions of the Turkish Code of Obligations in cases where there are no provisions in this law. will be applied. In the face of these provisions, it is stated that the contracts established as a result of tenders subject to the Public Law No. 4734 should not be suspected as having a private law contract. Even according to Buz, "Public Procurement Contracts Law No. 4735 has not only stated that contracts are a private law contract, but also eliminated the possibility of making administrative contracts."

D. Agreement of Parties

1. Generally

Construction contract is a work contract in terms of Law of Obligations. For this reason, the construction contract is generally referred to as TCO m. 1. The basic elements of the contract "the main points" according to the mutual and mutual will be established with the declaration of will. The contract of construction is a contract of contractual nature. For this reason, the declaration of will of the parties is sufficient for the contract to occur. In other words, understanding the result of the interview is sufficient to establish the contract. The delivery of construction is a matter of performance and does not matter in terms of establishing the contract.

179 - Nomer, H. N. (2008). Borçlar Hukuku Genel Hükümler. Beta . p . 478.

In the construction contract, the owner is one of the pay-per-share elements in return for construction. In order for the contractor to undertake a contract and the relationship of this contract to be considered as a construction contract, the contractor must make the construction at a certain cost. However, in order for the construction contract to occur, it is not obligatory for the parties to agree on the amount of the price. The lack of clarity on the amount of the contract in the contract does not prevent the establishment of the contract. [180]

The amount of the price is not an objective element of the construction contract. Payable if it has been agreed but the amount has not been determined, a construction contract will still be established. If the parties do not determine the amount of the price, TBK m. According to 481, the price is determined by the value of the structure (work) and the expense of the contractor at the time and place of construction. However, it should be noted that both parties in the contract negotiations wanted to make the agreement on different sums and could not reach an agreement on this issue at the end of the negotiations or about the determination of this point. If they did not match, TBK m. 481 shall not apply. In this case, there is a non-conformity between the declarations of will of the parties is not mentioned water, construction contract has not been established.

The construction contract usually includes the terms and conditions agreed by the parties together is regulated as "individual contract". However, it can be seen that the construction contracts on major construction works include general terms and conditions. This is the General Conditions for Construction Works and General Terms and Conditions of Construction Works prepared to determine the general principles to be applied in the execution of construction works in accordance with the Public Tender Law No: 2886 and Public Procurement Law No: 4734 and Public Tender Contracts Law No. 4735.

180 - Kocaağa, K. (2014). İnşaat Sözleşmesi, Ankara. p .57.

2. Form of Construction Contract

According to the article 12 of the Turkish Code of Obligations "The legitimacy of an agreement isn't liable to a specific shape except if generally is indicated by law. In rule, the predetermined frame stipulated by law for contracts is the standard of legitimacy. The agreements closed without fulfilling the predetermined shape don't become effective.) As such, the validity of a contract is not subject to form unless otherwise prescribed by law; that is, free form is essential. In line with this provision as the reflection of one result of the free contract principle, the parties may draft a contract in any form unless otherwise prescribed by law, and such a contract stands as a valid contract provision with respect to form. [181]

The Turkish law does not prescribe a legal form condition as a rule with respect to the validity of construction contracts. As mentioned earlier, these contracts are considered to be a type intended for construction contracts; hence, the provisions of the Code of Obligations on the construction contract will have a place for implementation. [182]

Since there is no written or official form condition about the work contracts, the parties of the construction contract will be able to conclude the contract on the construction in any form (verbal, written etc). Therefore, the construction contract between the employer and contractor can be formed by a written contract as well as a covert declaration of will. In line with these explanations, it is clear that the construction contract for price and profit share contracts without assignment of ownership to the contract are not subject to any verbal or official form condition. However, it has to be stated that construction contracts are usually formed in writing and used to facilitate proving the basic matters agreed by the parties rather than the validity of the contract.

181 -Altaş, H. (2006). İstisna Sözleşmesinde İş Sahibinin İfadan Önce Sözleşmeden Dönme Hakkı (BK. mad. 358) p . 307.

182 -Eren, f. (1996a). Borçlar Kanunu Açısından İnşaat Sözleşmeleri. Banka ve Ticaret Hukuku Enstitüsü, 381(2), p . 50.

Article 200 of Turkish Code of Civil Procedure addresses the provision of proof by a written document in the event of costs more than a certain amount and in the event of discharge. The same law provides that it is not possible to prove counter claims against a written bill by a witness. [183]With respect to keeping the essence of a right against this legal arrangement and for ease of evidencing, it is clear that it will be useful to have the construction contract in written form regardless of the size of the work .[184]

In construction contracts, the construction of a building forms the main performance of the contractor and the employer needs to make a certain payment against this performance. However, in practice, construction is a costly job requiring expertise, for which reason land-owners do not wish to assume the possible risks and costs and merely sell their lands to construction companies/contractors and receive a certain amount of money and/or a certain amount of the independent section of the construction. In other words, the cost of the construction is paid with the land share. Therefore, construction contracts against land share are very frequent today and constitute an important part of such contracts. [185]

Since the construction contract against land share includes the elements of the construction contract and real estate sales promise, the legal nature of this contract is accepted to be the as mixed contract because The contract to build the land share as a result of the freedom to determine the content of the contract, which is the point of view of freedom of contract, is one of the principles governing the law of obligations. As a matter of fact, the construction contract was not to build a land share overrun by law . Therefore, land share A construction contract is a non-standard contract. Land ownership includes elements of two model contracts, such as a construction contract, a real estate sale, and a contract of employment. On the other hand, the implementation of its provisions for each contract is not sufficient to resolve legal disputes relating to the contract. So, A contract to build a land share can

183 -Altaş, H. (2006). İstisna Sözleşmesinde İş Sahibinin İfadan Önce Sözleşmeden Dönme Hakkı (BK. mad. 358). p . 310 .

184 -Öngören, G . (2016). İnşaat Hukuku. p . 83.

185 -Durak, Y. (2015). Arsa Payı Karşılığı Kat Yapımı Sözleşmesi . p .631.

not be accepted as a joint contract. Similarly, the elements of the contract of construction versus land share are not in the specified contract because they are included in the contracts regulated by law. The construction contract for the land share is a mixed contract since the legal result does not occur with elements belonging to only one of the two agreements that form the land share contract and that these contracts lose their independence.

It is controversial whether the construction contract for land share is either effective or continuous. the contract of construction of the land share will be effective immediately. Because, although the borrower's actions towards performance are time-consuming, the creditor's interest depends on performance and achieves the creditor's interest each time. On the other hand, construction contract land share, ongoing Debt Relationship. Because the work is carried out in a timely manner and in the form of sections to produce the result 16. The same discussion also showed itself in the decisions of the Supreme Court. Finally, the Court of Cassation, 25.01.1984 dated E.1984 / 3 numbered the decision to merge the case has been dissolved with the decision.

This contract is established with the mutual and concordant declaration of will between the land owner and the contractor. Therefore, it is a “sinallagmatic” contract that burdens debt on both parties. Likewise, with the formation of the contract, the land owner has the obligation to make its land fully ready and in time free from all defects, and deliver to the contractor and, once the performance of the contract is fulfilled, to transfer the title deed of the independent section. In turn, the obligation of the contractor is to construct the building in line with the contract and legal legislation, and to deliver to the land owner. In practice, there are many types of construction contracts against land share. [186]

186 -Arıkan, M., & Erdoğan, K. (2015). Müteahidin Arsa Payı Karşılığı İnşaat Sözleşmesinden doğan Alacak Hakkının Üçüncü Kişiyedevri . Selçuk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi(34), p .145-172. The construction contract for land share, as a concept, was mentioned in MK.m.1009 as, personal rights that can be declared m. However, this situation shows that there is no change in the construction of the land share contract in terms of an atypical contract. It is subtraction.

The most frequent types of this contract:

- All of the land or certain land shares are transferred to the contractor before the construction,
- The land shares are transferred to the contractor part by part depending on the level of the construction, or the contractor is authorized for sale to third persons,
- The land owner undertakes to ensure the sales of the land shares while the contractor undertakes to construct on the land.

A construction contract against land share is a mixed contract bearing the elements of a construction contract with the sales of immovable property. According to Article 706 of the Turkish Civil Code and Article 811 of the Libyan Code of Obligations “the validity of the contracts that aims the transfer of the ownership of the immovable property depends on whether they are officially arranged or not.” Again, Article 26 of the Turkish Law on Title Deed and Article 213 of the Turkish Code of Obligations suggest formal a method in the sales of immovable property based on which rule, construction contracts against land share united with the promise of immovable property sale need to be carried out officially at a land registry office only . [187]

In practice, large and important construction contracts are usually written and even officially done in the doctrine, large-scale and important construction contracts, the parties TBK m. 17 in accordance with the written form implicitly stated that they should be considered as presumed. The validity of the contracts with the transfer of the immovable property is subject to the formal execution (Article 706 / I of the TCC, Article 237, Title 26 of the Land Registry). For this reason, if a real estate is sold together with the construction contract, this must be done in the official manner.

This is the case, for example, if the contractor is committed to constructing a building on the land of the contractor and handing it over to the owner. In our law, contracts for the transfer of the ownership of the property or the ownership of the

187 -Yavuz, C., Acar, F., & Özen, B. (2012). 6098 Sayılı Türk Borçlar Kanunu'na Göre Borçlar Hukuku Dersleri:(özel hükümler). p . 1922.

movable property to another person must be made by the land registry offices. Likewise, it is accepted that, in terms of validity, these should be done in a formal manner, as it is intended to transfer the ownership of the land shares (independent of the immovable property) to the contractor. The contract for construction of the land in return for the land share between the contractor and the landowner is, in terms of its nature, a mixed contract. In this contract, the contractor's construction work, the contract of work; The act of transferring the land shares of the landowner (business owner) is the elements of the contract for the promise of real estate.

According to an opinion , from the shape of the contract to this contract, the rules of the contract for each act (element) applies. Accordingly, the land share in the construction contract, the contractor to make the construction of the construction, including the work of this kind of work contract regulating TBK m. 470 et al. When applying; about the commitment of the landowner, the ownership of the land shares to the contractor, the promise of the sale of the immovable property. TMK m. 706, Land Registry Law m. 26 and Notarial Law m. According to another opinion, "!", The contractual commitment of the contractor must be included in the formal form, as the construction contract for the land share is mixed and the commitment of the contractor to build the construction constitutes the equivalent of the commitment of the transfer of the movable property. [188]

Officially, Official form is a requirement of validity and it is accepted in our law that such agreements may be made in the form of notarizing the land registry offices or notaries. It is not sufficient to approve the signatures of the contract signed by notary public, namely the signature of the contract. Since the official form is a form of validity, the contract which is not made in this way or the Supreme Court shall be obliged to take into account the violation of the form. However, it is sometimes considered to be the abuse of the right, although it is necessary to comply with the official form, and the invalidity of the contracts without complying with this

188 -Bubshait, A. A., & Almohawis, S. A. (1994). Evaluating the general conditions of a construction contract. International Journal of project management, 12(3), p .133-136 .

form. Especially after the parties fulfill all or a large part of their actions, the lack of form is considered to be the bad use of the right.

The construction contracts to which the public institutions are parties are subject to the provisions of the Public Procurement Law No. 4734 and the State Tender Law No. 2886 in cases outside the scope of this law. The State Tender Law No. 2886 stipulates the contracting works of the institutions and organizations subject to the provisions of this Law (art. 53/1) and notary public registration (art. 57).

According to this law, the general budget of the apartments and annexed budget administrations, the contracting contract of the private administration and municipalities should be contracted. It is not mandatory that the contract constituting a validity condition should be made in the form of a notary public order, but it is sufficient to sign it as a signature. According to the Article 46 of the Public Procurement Law of the Public Procurement Law No. 4734 concerning the contracting of the works of the institutions and organizations under the provisions of this law, "all the auctions are subject to a contract. Contracts are prepared by the contracting entity and signed by the contracting authority and the contractor.

If the contractor is a joint venture, the contracts are signed by all partners of the joint venture. Unless stated otherwise in the tender document, notation and approval of contracts are not compulsory. In the article 7 of the Public Procurement Contracts Law No. 4735, which was enacted in order to determine the principles and procedures related to the contracting and implementation of the contracts in accordance with the Public Procurement Law No: 4734, some issues should be found in the contracts concerning the tenders under the Public Procurement Law. these were counted.

E. The Responsibility of The Parties in Turkish Construction Contracts

The parties of the construction contract are the contractor and the owner, who is the person ordering the construction. The contractor is the person who undertakes to

carry out the ordered construction. In practice, the owner is also referred to as the 'ordering party'. [189]

A contractor may be a real person as well as a commercial partnership in the form of an incorporation, limited or unlimited company. Even a number of contractors may come together as an ordinary partnership and carry out the construction together. The most common types of an ordinary partnership are joint ventures and consortiums, which involves many contractors who come together to carry out a construction together. In turn, a consortium is an ordinary partnership as to its legal nature. Contractors may also conclude a construction contract in the form of a joint venture; The latter is also an ordinary partnership as to its legal nature, while the former is usually an independent operator. [190]

A contractor may be a general contractor as well as a subcontractor. The contractor, in line with the contract with the main contractor, undertakes the main contractor to carry out the construction of the building fully or partly that the main contractor has undertaken before the employer. The person who assumes to carry out a construction fully or partially against the employer is called a 'general contractor' and only assumes the construction. The provisions of the Code of Obligations related to the construction contract are also valid for this contract. The contractor may also assume the plan and project in addition to the construction. The owner may be a real or legal person.[191] Obligations arising from a liability relationship are firstly set aside as performance obligation and contingent liability. [192]

189 -Tandoğan, H. (1982). Borçlar Hukuku, Özel Borç İlişkileri, C II, İstisna (Eser) ve Vekalet Sözleşmeleri, Vekaletsiz İş Görme, Kefalet ve Garanti Sözleşmeleri. B II . p . 280.

190 -Öngören,G.(2016).İNŞAATHUKUKU. p .352 .

191 -Durak, Y. (2015). Arsa payı karşılığı kat yapımı sözleşmesi. p .521.

192 -In this direction: 14. HD. 07.05.1985, E. 1984/8820, K. 1985/3269: liği şekil Although the construction contract has not been regulated, the lack of form is not effective in the conclusion of most of the conditions by its contract, the contract is legally valid. Contractors who have personal right in the amount they fulfill the obligations stipulated in the contract, may demand the transfer of ownership from the land owners to them in accordance with this right şah ik (YKD. 1986, p .89).

1. Contractor

Article 9 of the Building Control Governing Regulation defines the construction contractor as the real or legal person that undertakes the owner of the construction or the concerned administration that it can construct the building in accordance with the plan and legislation, science, art and health rules, license and annexed projects and under the supervision of the architects and engineers and other experts and that assumes the construction work by its own technical and financial resources or through subcontractors.[193]

According to Duman [194], the construction contractor is responsible for providing the required organization of contract and work to carry out the construction work in line with the license and the annexed surveys and projects; for taking, implementing and having implemented all measures required by legislation; for employing the masters with certificate of qualification in the construction and facility works, for keeping a copy of the documents in the site folder; for taking all measures to provide the occupational health and safety required by legislation, for keeping the tools and instruments intact, for inspecting whether the occupational health and safety measures at the work place are followed, for informing the works against the professional risks they face, the measures to be taken, and their legal rights and responsibilities, for providing the necessary training for the occupational health and safety.[195]

According to the Liability of Contractors Under Previous and Current Turkish Code of Obligations and Laws "Due to the latest amendments of the Turkish Code of Obligations" ; there is un clarity among the businesses and the subcontractors who are involved with a development contract with regards to the pertinent obligation time frames to be set up on the subcontractors in terms of

193 -Özyörük, S. (1988). İnşaat sözleşmesi: yapısı, feshi, Borçlar Kanununun 371. maddesine göre feshin sonuçları: Kazancı Matbaacılık Sanayii. p . 419.

194 -Tüzemen Atik, E. (2014). FIDIC Kırmızı Kitap (New Red Book) Kuralları Uyarınca İnşaat Sözleşmelerinde Müteahhidin Sorumluluğ . p . 290.

195 -Tüzemen Atik, E. (2014). p . 214 .

administrations rendered by the equivalent under such contracts. Accordingly, the reason for existing is to decide and elucidate such risk commitments under both the New Code of Obligations and the past one abrogated starting at July 1, 2012.To start with, it ought to be noticed that the past Code of Obligations No:818 isn't as a result any more extended as of a similar date and is supplanted with new ones. [196] [197]

2. Subcontractor

A subcontractor is a contractor who, in line with the contract and alongside the main contractor, undertakes (the main contractor not necessary here to carry out the construction of the building fully or partly that the main contractor has undertaken before the employer. [198]

Article 15 of the Public Tender Law states the following provisions about the subcontractor "If necessary due to the nature of the tender work, at the procurement stage, the bidders may be asked to state the works they plan to have carried out by subcontractors, to submit the list of the subcontractors to the approval of the administration before signing a contract". However, in this case, the responsibility of the subcontractors regarding the works they do does not eliminate the responsibility of the contractor. [199] [200]

196 -The Court of Cassation also called Supreme Court of Appeals of Turkey.

197 -Kasaroğlu.(1967).Law of Obligations. p .210.

198 -Yalçınduran, T. (2000). Alt istisna (taşeronluk) sözleşmeleri: Yetkinp. p . 390.

199 -Özyörük, S. (1988). İnşaat sözleşmesi: yapısı, feshi, Borçlar Kanununun 371. maddesine göre feshin sonuçları: Kazancı Matbaacılık Sanayi. p .691.

200 -In this view: Zeltner, p.108, no: 269, 270. Candidate, p.196. As it is accepted in our study, the participation of the creditor in practice is, as a rule, a technical requirement. In my opinion, the performance of these acts cannot be demanded in accordance with the opinion to be accepted. In a system where the owner is entitled to terminate the contract without any reason until the construction is completed, it is not appropriate for the contractor to request the executioner to execute the execution by execution [Gauch / Schluep / Schmid / Rey, p.63, no: 2448; Frank, p. Teetisch (BB 1979/11), p. Teetisch (JZ. 1984/17), p.757; Zeltner, p. For this reason, if the contractor refrains from performing the actions of the contractor

A subcontractor is an assisting person working for his own account and who takes over by a contract in his name the performance of the undertaking of the main contractor to build the work. It is possible to have multiple levels of subcontracting; that is, a subcontractor may have a part of the works left to him done by another subcontractor. There is usually a service contract between the dependent auxiliary people and the main contractor, while the contract between the subcontractor and the main contractor is a construction contract. The main contractor is not liable to carry out a supervision on the subcontractors like on the dependent auxiliary people. [201]

According to Article 30 of the Turkish Law No.4735, the contractual worker and the subcontractor are together and severally subject not just for the term of the agreement successful as of the culmination date of the works until the last acknowledgment of the equivalent, yet additionally for a time of 15 years as of the last acknowledgment date of the development works, for any misfortune or harm emerging from: the resistance with logical/specialized and proficient standards while building, the use of flawed material and gear and others. Any misfortune and harm

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to make the construction or the actions of participating in the performance as defective, the contractor should only be able to demand the compensation of the damages caused by this reason. It is also possible to terminate the contract due to the default of the creditor. Contrary to the construction contract for the land share: Erman (Construction), p.51, dn.76, p.53 and especially p.196. According to the last author, the contractor may apply to the court to grant the authority to represent, for example, the administrative procedures.

Supreme Court 15 HD. 22.02.2001, 440/997 [Erman (Construction), p.53, dn.81]. In a decision of the Court of Cassation, it was decided that the performance could be requested: 15. HD. 05.05.2004, E. 2003/5372, K. 2004/2508: 4 tahliye the contractor claimed that the claimant had already evacuated the building on the plot of land and submitted it to the owner of the land. he did not deliver… this is the case; It is necessary to accept that the landowner has defaulted on the performance of the stated priority act (BK.md.90).

201 -Özyörük, S. (1988). İnşaat sözleşmesi: yapısı, feshi, Borçlar Kanununun 371. maddesine göre feshin sonuçları: Kazancı Matbaacılık Sanayi. p . 720.

emerging from such reasons will be secured by the Contractor and Subcontractor as per general arrangements. To fully examine the impact of the provisions of this article, one has to first determine the type of liability the article refers to; also, that the provisions merely deal with latent defects which may not be observed during routine inspections, but after a certain period of time past final acceptance.[202]

Though Article 30 was devised to extend the duration of liability by contractors for later defects for 10 years as determined previously by the Code of Obligations No. 818, given the new period of 20 years as envisaged under the Turkish Code of Obligations, such a 15-year liability imposed by the Law No: 4735 is likely to be regarded as a limitation of the liabilities of the contractors rather than a mere extension of liability.

3. Employer

An employer is the real and legal person who has the interest and benefit in building and receiving the work of the construction contract, who has it done or who orders it.[203]

The employer is the owner of the private registered lands, and those present on a private registered land with the rights of benefitting, using, living, hiring and similar rights cannot conclude a construction contract against land share. As the employer will provide the land share as fee, he has to own the land share and, hence, the qualification to sign a contract. If the employer is not adult, he can have a contract with the participation of his legal representative. If the employer is limited, the guardianship authority needs to authorize the guarding in this matter. The judge will obtain reports from the expert according to the contract draft, zoning status, concept design and similar documents and examine whether the contract provisions are for the benefit of the limited person. Then, he will authorize the guardian to sign

202 -Eren, F. (2014). Borçlar Kanunu Genel Hükümler. Kısalt-ma: Eren-Borçlar Hukuku(17 – ANKARA). p .266

203 -Kodakoğlu, M. (2007). FIDIC Standart Kuralları'na Göre Hazırlanan Milletlerarası Inşaat Sözleşmelerinden Doğan Uyuşmazlıklarda Tahkim. p . 97.

the contract. Upon examination, the judge is free to make changes in the draft contract as well as reject the request to join the contract fully. [204]

An employer or corporation who require the contract can have more than one representative . The owners of the immovable properties with shared ownership and co-ownerships need to act together to sign the construction contract. [205]

In line with Article 57/1 of the Libyan Public Procurement Law, tender contracts need to be in writing and registered at a notary. Again, construction contracts including the transfer of the right can be done officially either at a notary or at the land registry office. Otherwise, the tender is broken without requiring to enter a protest or make a decision, and the bind bond, if any, is registered as revenue. In line with Article 46 of the Public Procurement Law, public construction contracts need to be done in writing. [206]

The approval of the public tender contracts is not generally necessary. However, public administrations may make the notary approval compulsory for some contracts. A contract approved by notary is under the discretion of the concerned authorities. However, this type of notary approval obligation does not make the notary contracts compulsory.[207]

Development contracts are considered as self-employed entity contracts as per the Turkish Code of Obligations, henceforth subject to the arrangements according to (Articles 470-486 TBK)of a similar Code. In there, two unique sorts of deformities are envisaged, in particular, "open imperfections" and "inactive deformities". According to (Article 477 TBK) in that, "open imperfections" will be the ones that could be identified amid a typical course of assessment that will cause the renunciation of the works. Any imperfection which can't be distinguished amid

204 -Şekerci, S. (2010). Anahtar Teslimi Inşaat Sözleşmesi -Şekerci, Sena. Başkent Üniversitesi , Ankara. p .133.

205 -Öngören,G.(2016).İnşaat Hukuku. Eylül: Öngören Hukuk Yayınları. p . 83.

206 -Karaca, M. (2008). Kamu Kurum ve Kuruluşlarının Taraf Olduğu İnşaat Sözleşmelerinin Müteahhitten Kaynaklanan Sebeplerle Sona Ermesine İlişkin Özel Hükümler. İstanbul Kültür Üniversitesi/Sosyal Bilimler Enstitüsü. Özel Hukuk Anabilim Dalı . p .189

207 -Öngören,G.(2016). p . 101 .

an ordinary course of review, however, can be recognized after a specific timeframe as from the acknowledgment of the works would need to be considered as "inert deformities" except if the contractual workers deliberately stows away such deformities and some way or another misdirects the organization in such an approach to demonstrate the deficient fills in as non-blemished. [208]

But what is the defect criterion and its positive conditions for contractor liability? The defect here, whether hidden or apparent, is the defect that affects the building or origin, which requires the origin of the workmanship and the rules of art free of it, and this defect in the building fulfills the responsibility of the contractor, regardless of its severity or seriousness,

Given this definition for open deformities, they must be concluded and told by the proprietor amid the acknowledgment of the works. In the event that the works performed by a temporary worker are acknowledged by the proprietor paying little heed to the nearness of such deformities and, later on, should he guarantee blemished attempts to be fixed by the contractual worker, it is the proprietor's duty to demonstrate inactivity of these imperfections. [209]

According to Articles 126 and 363 of the past Turkish Code of Obligations No. 818 with regards to the status of limitation, the greatest time of obligation for temporary workers as per development contracts was 5 years as of the conveyance date. However, in the event that his powerlessness to finish the works appropriately and as indicated by legally binding commitments is because of unyielding unfortunate behavior or gross carelessness, at that point such risk time of the

208 -Yener, M. D. (2011). Alacağı Devredenin Garanti Sorumluluğu ve 6098 Sayılı Borçlar Kanunu ile Yapılan Değişiklikler. Finansal Araştırmalar ve Çalışmalar Dergisi, p . 35.

209 -Morgan, G. K., & Phillips, A. E. (2006). Design Professional Contract Risk Allocation: The İmpact of Waivers of Consequential Damages and Other Limitations of Liabilities on Traditional Owner Rights and Remedies. JC & UL .1 . p . 133.

temporary worker would reach out to 10 years. [210] Utilizing broken materials or works by the contractual workers are additionally considered as gross carelessness for his benefit and, along these lines exposing him to 10 years as risk term dependent on the past Code of Obligations No. 818. [211]

The beginning date for the times of examination and warning of deformity is the date of the conveyance of the entire works, at the end of the day, temporary acknowledgment of the total works by the proprietor. Despite the fact that the law recently managed two kinds of slip by of time for the deformities under the development contracts, there are three sorts currently as per the new Code, stretching out 10 years to 20. As indicated by Article 478 of the Turkish Code of Obligations, if the temporary worker conveys a blemished work, the pass of time for the case to be documented with respect to such desert will be 2 years for the movables and 5 years for the ardent. Notwithstanding, if such deformity is come about because of the gross carelessness of the contractual worker, at that point the pass of time will be 20 years, paying little mind to the of the idea of the related work. give it a chance to be underlined yet again that since utilizing broken materials or works by the temporary workers is taken as gross carelessness by him in Turkish law, for pretty much any idle deformity thing, contractual workers subject for a long time after conveyance if there should arise an occurrence of private law contracts finished up as indicated by the Turkish Public Procurement Law .[212]

According to Turkish laws, one can insert into a contract a clause to limit or exclude certain liabilities of the contractor, but this excludes gross negligence according to Article 115 of the Turkish Code of Obligations, based on which

210 -Yarg. 14. HD. 20.11.2003 T., 5341/8244 ; Yarg. 14. HD., 19.04.2002 T., 2697/3044 (Gümüş , s. 49, 258). Aynı yönde bkz. Yarg. 15. HD. 03.11.2004 T., 2004/1391 E., 2004/5609 K. (www.kazancı.com).

211 -Büyüksagis ,E. (2016). Turkish Contract Law Reform: Standard Terms, Unforeseen Circumstances, and Judicial Intervention. European Business Organization Law Review, 17(3), p . 423-449 .

212 -Eren, F. (2014). Borçlar Kanunu Genel Hükümler. Kısaltma: Eren Borçlar Hukuku(17 – Ankara). p . 501 .

"Previous agreements which cause the debtor to be discharged of his liabilities in case of gross negligence shall be deemed to be null and void." Therefore, despite the inclusion of such a clause, such limitation shall be invalid in gross negligence cases. Henceforth, one may state that the Article 115 provisions apply to any liability brought about by gross negligence and, so, the contractor has to compensate the losses and damages of the other party. [213]

Since contracts based on Turkish Law No. 4735 are standard, no changes to these standard contracts can be made by the Administration in accordance with the content of the relevant laws and regulations. As a result, it is impossible for contractors to retain the inclusion of a restriction clause in these contracts. Accordingly, the various regulations emphasize different types of periods for liability of potential disadvantage to contractors, which can not be restricted by a clause in contracts when it comes to gross negligence and intentional misconduct in the light of article 115 of the Turkish Code of Obligations. [214]

As to the limit and nature of such damages to be remedied by contractors once detected as latent defects, regardless of the contract being pursuant to the Turkish Code of Obligations or Laws No: 4734 and 4735, such damages are considered not just as direct but also as indirect damages, and cover loss of productivity, loss of profit, etc., because no clear classification has been made by legislation concerning the claimable damages and losses. [215]

213 -Kasaroğlu.(1967). p . 300 .

214 -Kasaroğlu.(1967). p . 315

215 -Yener, M. D. (2011). Alacağı Devredenin Garanti Sorumluluğu ve 6098 Sayılı Borçlar kanunu ile Yapılan Değişiklikler. Finansal Araştırmalar ve Çalışmalar Dergisi, p . 35

II . CONSTRAUCTION CONTRACTS IN LIBYA AND ITS DEFINITION

A. Definition

The Code of Obligations in the Libyan Law does not regulate the construction contract separately; nor does it include a definition for it. The Code of Obligations only indirectly mentions the construction contract in some articles about the contract of work. In this sense, Article 363 of theTurkısh Code of Obligations clearly states the following: [216]

"Construction contract is the contract where the contractor undertakes to construct and deliver a building against a price the payment of which is undertaken by the employer". "Construction contract is a contract of work by nature. With the contract of work, the contractor undertakes to create a work, and the employer undertakes to make a payment for it". The contract of work is regulated in Articles 355 through 371 of the Turkish Code of Obligations and in case of the Libyan version, (Articles 645- 672 of LCO). [217]

Among the parties of the construction contract, the contractor may be a real person as well as a legal entity (incorporation, limited or unlimited company). It is even possible that the contractors come together in an ordinary partnership and construct a building together. The most common types of ordinary partnership in practice are “joint ventures” or “consortiums”. The person assuming the construction of whole or a part of construction against the employer is called “general contractor”. The contract between the employer and the general contractor is a construction contract, and the provisions of the Code of Obligations regarding the contract of work are applied in this contract. The general contractor assumes only the construction of the building; whereas the total contractor undertakes the making of plans and projects in addition to the construction. The employer may be a real or legal person.

216 -Eren, F. (1996b). Borçlar Kanunu Açısından İnşaat Sözleşmeleri. Banka ve Ticaret Hukuku Enstitüsü, 381(2), 49.

217 -Eren, f. (1996a). 381(2), p . 50 .

Construction contracts burden debt to both sides and are, as such, similar to onerous and continuous contracts. The primary performances undertaken by the parties constitute the material elements of the contract. The contractor undertakes a certain service performance; therefore, they are similar service contracts. In addition, the contractor has to deliver the work to the employer and, therefore, the construction contract is similar to a sales contract in this respect. [218]

A construction contract is an onerous contract; if the contractor assumed the building of the work gratuitously, one cannot talk about the construction contract. In such a case, it is disputable whether there is a proxy contract or an in nominate (or mixed) contract similar to a construction contract. The problem should be solved according to the concrete qualities of the event and if in doubt, it is accepted to be an in nominate contract. [219]

The Libyan state has used contracting widely throughout its development plans, while the government procurement code and its regulations (Administrational contract regulation) aims to organize the procedures of selecting a contractor with the government. The main rules for implementing projects, as this law consists of 142 clauses, have not been subject to any objective evaluation, revision or significant modification since its issuance in 2007 during the peak time of the construction activities when there was persistent need for completing infrastructure works. These works have not been given priority for their cost and quality and, the law itself was not subject to periodical follow-up procedure and reissuance, thus necessitating the review of some of its clauses due to their ambiguity and inapplicability. [220]

The policy of administrative contracts organizes contracting and governmental procurements in general, including contracting for execution of

218 - Öngören,G.(2016).İnşaat Hukuku .p .122. http://www.ongoren.av.tr/wp-content/uploads/2017/02/insaat-hukuku-02-02-2017.pdf

219 -Eren, F. (1996b). Borçlar Kanunu Açısından İnşaat Sözleşmeleri. Banka ve Ticaret Hukuku Enstitüsü, 381(2), 49.

220 -Abdullah, A. A. (2010). Adaptation of the contract in the Civil Code. Tikrit University Journal of Legal Sciences, 2(6), p . 160-179.

construction projects. The Libyan policy of administrative contracts (Administrational Contract) was defined as any contract concluded with the government or state departments or their affiliates with the aim of executing projects, supervising the execution of such projects, give or develop technical advice, and regular management of public facility as long as such the contract contains exceptional conditions unfamiliar in civil contracts but aims to achieve public interest. [221]

The policy considered that a public works contract is an administrative contract as long as it fulfills the mentioned definition. Most of its clauses are formed based on the classical method, which adopts the separation between design and execution and burden the contractor with most of the project risks according to the theory of administrative contracts. It is an administrative contract made between the management and some contractor "Individual – Entity" with the aim to assign that contractor to construct, repair or maintain properties in favor of a public legal entity in order to protect public interests against previously agreed compensation.

The subject of the contract is always about a property: this means exclusion of contracts that relate to any size of assets owned by the administration even if they are still administrative contracts. The term ‘public works’ relates to works such as building and reparation of bridges, tunnels, dams and the like that are executed by the contractor in favor of a public legal person. Judicial consideration concluded that the executed works are considered to be in favor of the administration if they are done under its direct control and supervision. The purpose of works that constitute public works is to achieve public interest even if they were not originally for public funds . [222]The contractor obligations can be summarized in its commitment to personal execution and to abide by contract duration and provisions.

221 -Albashkar, A .M (2003b). The concept of force majeure (Master Thesis) Faculty of Law Tripoli University, Tripoli. p .36

222 -Aljamal, H. A. A. (1979).The legal system of sanctions in the contract of public works . p .287.

B. The Responsibility of The Parties in Libyan Construction Contracts

1. Contractor and Subcontractor

A contractor is personally committed to fulfilling all its obligations because at the time of concluding a contact the administration takes into consideration the qualities of the contractor\ especially its financial and technical capacities(article 647 of the Libyan Code of Obligations) . This principle is applied even to contracts built on tenders, and considered by administrative judiciary even if not stipulated in the contract. However, this is not a definitive rule since several exclusions may be applied in subcontracting, waiver of contract and termination of contract. [223]

In subcontracting, the provisions of articles of public works contracts allow the original contractor to assign part of its obligations to a subcontractor subject to prior consent by the administration. In this case the original contractor remains solely responsible for the agreed obligations under the contract; the subcontractor shall not have any relation with the administration and shall not be held responsible towards it unless otherwise stipulated therein(Article 660 of Libyan Code of Obligations) . [224]

The waiver of contract allows for the replacement of the original contractor by another to assume the execution of all its contractual obligations assigned to that original contractor under the original contract subject to prior consent of the administration. In this situation, the assignee will replace the original contractor for all rights and obligations, thus forming a direct relationship between the administration and the assignee. Then, the original contractor is relieved from all its obligations unless otherwise stipulated. Subcontracting or waiver of a contract without prior consent of the administration results in illegality and nullity of such an act, the original contractor remains solely responsible towards the administration for the fulfillment of all its obligations, and no relationship is created between the

223 -Albadawi, M. A. (1997). General Theory of Commitment) ,Vol. 1). University of Tripoli: University of Tripoli. p . 601.

224 -Aljundi, M. A.-S. (1990). House of Arab RenaissanceContract Guarantee or Obligation in Islamic Shariah ComparativeCivil Law. Cairo: House of Arab Renaissance . p .78

administration and subcontractors or assignees. Then, the administration is entitled to prevent them from executing the contract as a commitment towards the original contractor. [225]

Should a dispute arise between the contractor and a subcontractor or an assignee, this dispute is deemed to be a dispute of individuals which should be considered by ordinary courts. The demise of the contractor is meant to be the death of that contractor if it is a normal person, insolvency of such or judicial liquidation if it is a legal entity (Article 662 of the Libyan Code of Obligations). In case of death, a public works contract is deemed to be terminated under the law unless the administration agrees on a proposal by the heirs of the deceased contractor suggesting continuation of the execution of the contract (Article 666/1 of the Libyan Code of Obligations).In case of insolvency or judicial liquidation of the legal entity if it was a party in a public works contract, the contract is deemed to be terminated legally; however, the administration may agree on the continuation of fulfilling the contractor's obligations. [226]

Originally, the administrative contract specifies the duration in which the contractor shall fulfill its obligations. This duration has very significant importance to both the contractor and the administration as it can be formed in general for the execution of all contractual obligations or for a part of the work and to related to the implementation of particular measures as agreed in the contract. [227]

The administrative contract is the contract concluded by a general legal person for the purpose of operating or organizing a public facility, showing the intention of the administration to adopt the provisions of the general law. The contract includes exceptional and unusual conditions in the special law. Conditions

225 -Albadawi, M. A. (1997). General Theory of Commitment) ,Vol. 1). University of Tripoli: University of Tripoli. p . 644 .

226 -Alqadi, A. K. Y. A. H. (1999)The theory of fraud in Egyptian and Yemeni civil law . p .321

227 -Alsanhuri., A. R. A. (1952). The mediator in Explaining The Civil Code : Publishing House of the Egyptian Universities . p . 710

of Administrative Contract: One of the parties to the contract shall be a public administrative institution. The condition of the existence of an administrative institution is a party to the contract so that this contract is an administrative contract that satisfies this condition from the rule that the rules of administrative law existed and were created to govern and regulate the activities and work of the authorities and the administrative bodies. The conditions of following the means of public law in the contract become an administrative contract, which is considered the basic condition for the administration of a contract. The officer is the absolute criterion in determining the administrative contracts by their nature. This is because the general law in its rules governing and applying to the administrative contracts includes unusual methods and conditions, private law . [228]

a. The Open Defect

That the employer's unconditional handover of the work would exempt the contractor from liability for the defects that were apparent at the time it was acquired. This is called the voluntary effect of delivery in respect of apparent defects. This means that this type of defect is not covered by ten-year guarantee. He did not make reservations about apparent defects. This means that before construction is built on what it is, this also applies in the subcontracting contract. If the construction is delivered by the original contractor without any reservation, then the subcontractor shall be exempted from liability for faults that were apparent at the time of obtaining it. The original contractor may discover them if they have been reviewed and reviewed - with their experience in this area as a contractor in the original - by the usual person of the same community. [229]

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228 -Ammar . A , Administrative Law, Administrative Activity - Part II - First Edition - University Publications Press, Algiers, 2002, p . 194 -196

229 -As a matter of fact, according to the second sentence of the first paragraph of Article 640 of the German Civil Code that regulates this issue, the business owner may refrain from receiving the work, citing only the basic deficiencies. Look at this. Frank (Hafung), p . 27. Supreme Court 15 HD. 30.11.1995, 4651/7067 numbered decision was reached in a similar conclusion. Bak Üçer, p .109.

b . The hidden defect

It does not have to be old ,at the time of the employer's acceptance. The liability deals with the old defects and also addresses the post-acceptance defects. In this case, the provisions of the contractor's liability appear to be the general rules of liability arising from the contract. If at the time of the receipt, or at least its source is at that time, it is obvious that if the defect is an emergency, it does not make sense to require that it be hidden at the time of acceptance (or extradition) because it was not present at that time, The defect was old, which is located in the building at the time of acceptance of the contractor Is not guaranteed unless it is hidden, unknown to the employer at that time, and cannot be disclosed even if the usual care of the person in the examination and inspection of the building. [230]

This is for the original contract of contract. The subcontracting contract stipulates that the defect must be present prior to delivery. The defect must be old in its inception and the defect must be related to the subcontractor's activity prior to the delivery. This contractor does not guarantee the hidden defect in his work unless It was earlier on the telecom any source due to the period of residence of the building, in the sense that the reason exists in the work when examined and approved and does not commit to guarantee the hidden defect, if it arises after delivery. Because this is what is required by the general rules applicable to the subcontractor's responsibility, in contrast to the responsibility of the original contractor towards the employer, where the legislator not only limited him to defects in their work at the time of acceptance but made them sure that such defects would arise thereafter during the period Legally defined.

It is not acceptable to achieve justice and the balance of interests between the parties to the contract and the contractor to bear the responsibility to ensure the defects may or may occur in the future for a long or open, but must be set a certain period to direct the responsibility and then becomes innocent, Contracting and

230 -Albadawi, M. A. (1997). General Theory of Commitment) ,Vol. 1). University of Tripoli: University of Tripoli. p . 650.

Construction. The law determined this provision and ended the problem of duration, and decided that if the contract of the contract is the construction of buildings or other fixed facilities, designed by the engineer and executed by the contractor under his supervision, they were jointly compensating the employer for what happens within ten years, In whole or in part in the construction, and for any defect that threatens the durability of the building and its safety if the contract does not include a longer period, even if the defect or demolition arises from a defect in the land itself or the employer is satisfied with the defect, that is, the responsibility remains within this period, To be exempted or mitigated, to the public interest. [231]

As a result, agreement or compromise can maintain liability for defects for longer than ten years from the date of delivery of the work. This is an area of tightening and prolonging liability, in the interest of the employer and the public welfare . [232]

According to LCO Article 663 to 367 The two parties to the warranty are parties to the contract of the contract to be replaced by fixed facilities. Until the guarantee can be realized, there must be a contract replaced by fixed facilities. The enterprise must therefore be located on fixed facilities, primarily buildings of any kind. It is not required that the building be built with bricks or stones, but may be

231 - In this direction: YHGK. 27.09.2000, 15”1134 / 1191: "ile lack of survey in the independent section, in other words, the deficiency of the independent section in terms of the area, which is agreed in the contract, is the“ incomplete business “and not the bölüm shame oks with its legal definition. – (Www.kazanci. com). In the same direction: YHGK. 09.12.1992, 15 değişik649 / 732: 99 genel the last article of the contract made by the contractor in the event that the independent section is made smaller than the decision, according to the general provisions (no. 126 BK) due to incomplete disclosure without the need for reservations or notification. in accordance with the fact that a 5-year statute of limitations could be sued ece esinde (www.kazanci.com.tr).

232 -Albadawi, M. A. (1997). General Theory of Commitment) ,Vol. 1). University of Tripoli: University of Tripoli. p . 670.

decorated with wood or stone. It is important that the building be stable and stable in place that cannot be moved without demolition. However, as the elevator rises and falls, it is regarded as fixed in its place, because it does not exceed a limited circle in its movement, and therefore it is considered a fixed establishment. However, the real estate by privatization is not considered a fixed establishment, since in its nature it is an immovable conveyor whose guarantee is in accordance with the general rules.

The work of whiteness, paint, or decoration is not included, as these works do not threaten the safety or durability of the building. Restructuring is necessary for the main parts of the buildings, which are the parts on which the safety and durability of buildings depend. The contract for fixed assets must be a contract. If the contract is the contract of a contract, the guarantee will be arranged, and the remuneration shall be either a lump sum or an estimate of the unit price, or the remuneration shall be determined according to the importance of the work or a fixed remuneration given to the engineer or contractor for the length of the work.

Which entails the guarantee of the architect and the contractor in the contract of the contract. The architect is not required to be technically qualified in architecture, so long as the person is an architect, he is committed to the guarantee. If there are many architects, each of them is bound by the guarantee within the limits of his work.

The contractor is entrusted with the establishment of fixed facilities. The material that the establishments have set up shall be brought by the employer or provided by the employer. In both cases he is bound by the guarantee. If multiple contractors, each committed to the limits of the work carried out by each of them within these limits. [233]

The employer who claims the guarantee in the contract of employment is the employer, and the architect or the contractor, or jointly, shall be bound by them. If

233 -Aljundi, M. A.-S. (1990). House of Arab RenaissanceContract Guarantee or Obligation in Islamic Shariah ComparativeCivil Law. Cairo: House of Arab Renaissance. p .190

the employer dies, he is replaced by the heirs. His creditors may also file an indirect claim in his name to claim security. It may also be a creditor with the successor's special guarantee, depending on the theory of succession in rights and obligations. The buyer may refer to the seller to ensure the defect, in which case the seller, the employer, in turn back the engineer or contractor with the guarantee, and may enter them guarantors in the defect claim filed by the buyer. [234]

But the employer is not a security creditor if he is an original contractor contracted with a subcontractor. The contractor does not comply with the guarantee towards the employer, since there is no contractual relationship between them. Whether the reason for the warranty is due to the building or to the design, it must be carried out in a certain period if it has expired and the reason for the guarantee is not there is no place to return the guarantee.

It is clear that the reason for the warranty due to the design shall be in place prior to delivery, but before implementation, and shall continue after implementation and delivery. Therefore, this is a reason for the guarantee without having to specify a specific time at which it is established from the outset.

As for the reason for the guarantee due to the implementation, it may exist prior to delivery and is hidden, and the employer will receive the thing without realizing the defect. Hence, the defect is positive for the guarantee, without the need to specify a specific time for it, it is present before delivery. The reason for which a specific time is required is the reason for the execution if it occurs after delivery. Due to the seriousness of the buildings and the extension of the warranty beyond delivery, the legislator has set a period of ten years from the time of delivery. Even if the defect is due to a deliberate violation of the terms and conditions agreed upon, even if the building is demolished ten years later, the third party is injured and the third is returned to the employer, the latter cannot be returned to the contractor or engineer after the expiration warranty period.

234 -Aljundi, M. A.-S. (1990). House of Arab Renaissance Contract Guarantee or Obligation in Islamic Shariah ComparativeCivil Law. Cairo: House of Arab Renaissance. p . 200.

If the defect is found during the ten-year period, the guarantee shall be secured, even if it is not disclosed until after such period. In such a case, the limitation shall not take effect three years from the date of exposure of the defect, and not from the time of its existence. The ten-year period from the time of delivery begins. If the employer refuses, it is time to excuse him. If delivery is in several batches, it is time for the final payment to be made if the facilities cannot be segmented to tie together in terms of rigidity and durability. If the enterprises can be segmented so that there is no link between one part and another, it is time to receive each part for this part. The receipt and its date may be evidenced by the delivery record, if any, or the settlement of the account between the employer and the contractor if any such document is found, or any method of proof.

2. Employer

Basically, the schedules set in the administrative contract are solely binding to the contractor. However, the contract may provide that both contactor and administration are bound to schedule, in case of no set of contract duration. Administrative judiciary affirms the necessity of considering a reasonable duration for the execution appropriate for the nature of work. This duration, then, becomes binding to administration and of its responsibility. In respect of payment of the agreed price, this price is one of the issues on which administration has no right to modify without the contractor's approval unless such right is provided in the contract or there is a law that allows either party to request such modification. (Article 671 of the Libyan Code of Obligations). [235]

There are certain situations allowing the contractor to request from the administration an additional compensation on the agreed price for additional works executed during its course of performance of the originally agreed works without prior notice to administration provided that such works are necessary or beneficial to the administration, and that the additional works imposed on the contractor and such

235 -Jamil, A.-S. (2017). General Theory of Compliance C . 2 Provisions of Obligation . p .137.

works that incur an increase in cost due to unexpected and exceptional circumstances are out of control of both parties. [236]

Corroborators that imposed on administration in cases of non-fulfillment of its contractual obligations do not include compulsory or penal sanctions but they are represented in the judge's possibility to judge against the administration upon request by the contractor either by revocation of decisions that are legally granted to administration throughout the contract duration and/or compel it to pay financial compensation to the contractor to the extent of the damage suffered and/or terminate the contract due to gross negligence against the contractor. [237]

One of the established principles is that the contractor is not entitled to direct execution against the administration nor refrain from the execution of its obligations due to the non-fulfillment of administration's obligations unless the contractor could prove inability to fulfill its obligations in case the administration suspended the execution of its obligations. [238]

The administration is obliged to respect the provisions and schedule of the administrative contract and to pay the agreed price (Article 668 of the Libyan Code of Obligations). The conclusion of an administrative contract can give rise to direct legal effects that prevent the administration from neglecting contractual obligations. This means that the administration may not use its powers for modification or termination of contract) arbitrarily without legal justification, because the only reason that may justify the use of such powers is the sound management of the public facility and the necessities of public interest. The administration is obliged to perform the correct inclusions of the contract based on the principle of good faith in performance, so it shall give all facilities that enable the contractor from executing its

236 -Alsanhuri., A. R. A. (1952). the mediator in explaining the Civil Code (pp. 880): Publishing House of the Egyptian Universities. p . 810.

237 -Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p . 46

238 -Mariah, K. (2013). Invalid Contract: Legal Event. Université Benyoucef Benkhedda Alger 1 . p .173

contract completely. The administration shall also indemnify the contractor for damages incurred due to practicing its rights by modifying or terminating the contract. [239]

The Libyan state witnessed rapid governmental disbursements leading to the achievement of high investment rates in most domestic sectors of the economy, especially in the main processing sectors, and rarely to have an instance in world states. The construction industry was the main engine for developing its national economy and one of the sectors highly funded by the state. [240]

In case the duration has not been determined in the contract, then the administrative judge in determining the contract duration will consider the intentions of the parties, their material and technical capacities and similar contracts to the disputed contract. However, there are some circumstances that justify the non-execution of the contract within its set duration, such as agreements made by the contracting parties to extend such duration, administration act (Ruler's act) and force majeure. Here, the Ruler's act means acts or decisions of the administration reflecting on contract execution within the agreed schedule. Such points are deemed to be reasons for delays(Article 654 of the Libyan Code of Obligations).

The commitment to correct execution of the provisions of this type of contracts is correlated with the principle of respecting regulations and technical instructions of such contracts. Satisfactory technical execution is based on the contractor's full commitment to contract instructions. The quality of the works and materials and technical rules shall be in accordance with the terms of the contract. Since the administration is entitled to make modifications in such type of contracts unilaterally, the contractor shall execute all oral or written instructions and requests given by the administration even if stipulated in the contract. In this case, the administration shall compensate the contractor for the value of additional works

239 -Faraj, T. H. (1997a). General Theory of Commitment, Contract Theory. Alexandria: Egyptian Bureau Modern. p .544

240 -Jamil, A.-S. (2017). General Theory of Compliance C. 2 Provisions of Obligation . p . 140

required in excess of what was agreed in the main contract. (Article 655 of the Libyan Code of Obligations). [241]

As for the financial corroborators, they are of two types, indemnification and peenalty of delay. Indemnification represents the amount of money payable by the contractor to the administration in order to indemnify the latter for damages resulted due to the non-fulfillment of the contractor's obligations. Delay penalties are the amounts of money imposed on the contractor due to its delay in the execution of works or in the provision of materials within the duration as specified in the contract or terms records even if no damage is caused to the administration. [242]

Non-financial supporters are sanctions made to urge the contractor to abide by its contractual obligations or to end contractual relationship (termination of contract) and hold the contractor responsible for consequences. These sanctions are imposed by the administration directly without reference to the administrative judiciary. Temporary sanctions are made when the administration replaces the original contractor by itself or a third party to execute the contract temporarily until corrections are made (for omission or failure by contractor). In this case, the administration (or the assigned party) becomes surrogate of the original contractor. (Article 656-657 of the Libyan Code of Obligations). [243]

Contract termination sanction' means the limitation of the contractual between the parties "Contractor and Administration" in extraordinary situations. This act is an original right of the administration whenever it sees that the public facility is at risk due to contractor's severe failure to fulfill its contractual obligations. There are two levels of termination; the first is simple bare termination, when all contractual relationshipisterminated between the administration and the contractor

241 -Alsanhuri., A. R. A. (1952). the mediator in explaining the Civil Code (pp. 880): Publishing House of the Egyptian Universities. p . 790

242 -Alshami, M. H. (1990). Wrong Corner in Civil Responsibility. (Vol 4) Cairo: Dar Al-NahdaArabic. p .510

243 -Atallah, M. F. (2010). Supervision of The Implementation of Contracts of Public Works: A comparative Study . p .85

and delay fines and compensations are applied for damages and defects caused by the contractor to the administration. This type of termination relieves the contractor from all its financial obligations that may arise by concluding a new contract to secure the continuation of the public facility. The second type of termination is to terminate the contract and make a new contract, by which the contractor bears responsibility and cost. This termination is more stressful for the original contractor because it burdens on it the financial differences that result from making a free competition to conclude a new contract with third parties. (Article 667 of the Libyan Code of Obligations). [244]

IV. THE LIBYAN AUDIT BUREAU AND ITS ROLE IN CONSTRUCTION CONTRACTS

The Audit Bureau's reviews of the measures taken by executive sectors for the purpose of concluding project contracts show that many state departments in Libya lack familiarity with the laws and regulations of contracting, thereby giving rise to some remarks, lack of study of the contracting project, non-preparation of required surveys, designs, drawings and documents required for each project within due time to estimate the financial value and, then reflecting such estiamtes in public tenders to get the best offers with lower cost. which led to the failure to fulfill the required studies because of that :

- An increase in new work provisions after contracting and commencement of execution, thus resulting in amendments in the contract by such orders and new appendices to the contract causing a rise in the contract price over the original value in some projects.
- Generating random and inaccurate indexations for some items in order to save time or due to lack of experience. This can occur in the form of invoices for unexecuted works, such as the case of the contract for maintaining the 17th February Printing House and the contract for maintaining the Office of Judicial Services in Jfara. Sometimes, actually executed quantities exceed the

244 -Alsanhuri., A. R. A. (1952). The Mediator in Explaining The Civil Code : Publishing House of the Egyptian Universities. p . 880.

quantities in the estimated indexation in some projects even over the allowed amounts under the contract, such as the project to build a 15-classroom school in Sabria – Zawiya city.

- Assigning most of the projects to companies that lack financial and technical capabilities and without checking their legal status from their previous experience in the required fields. This happens since contracts are made with such companies merely according to the documents submitted by them; whereas they usually are not able to deliver and lack the possibilities that qualify them to perform works assigned to them. They might also be burdened with several projects with several parties, possibly leading to:
- Slow execution of works and project faltering, or even suspension in many cases.
- Extension of grants of permissions to contract in the way of direct delegation in contradiction with the policy of administrative contracts; for example, all contracts of buying and renting of buildings, most contracts of local councils, in a way that leadsto:
- Non-benefiting from price advantages at the time of bedding and practicing.
- The rise of contract prices, especially with the lack of typical prices on which contracts can be based, resulting in inflation and increase of obligations for the state.
- Some companies monopolize most contracts and subcontracting with other companies, causing problems for the first party in terms of the level of execution and payment of invoices, and eventually burdening it all on the project
- The negative impact of this process on the reputation of the state and continuation of administrative corruption, such as lack of transparency and integrity, spread of meditation, nepotism, and bribery.
- Lack of proper planning in accordance with the correct scientific and practical rules and future considerations when executing some projects. For example, the natural increase of population and urban growth is not considered; there is no coordination with the Department of Urban Planning to select some project sites; and no work is done to solve problems of work

sites. An example for the latter event is the obstacles that face the execution of the temporary treatment station project with a capacity of 800 m3intended to be contracted with a Canadian company in Zawia city.

- Delays in obtaining the necessary documents for the purpose of study contracts in addition to non-response to the notes of the management by some authorities, thus causing delay in expressing the final opinion of the Audit Bureau regarding those contracts.
- The absence of a unified standard in line with contracting methods and consistent with the current status of the implementation contracts in the country, and the absence of solutions to previous contract issues. [245]

V. COMMON CAUSES OF CONTRACT DISPUTES

The origin of many a dispute can be traced back to acts or omissions that occurred before or at the time of signing a contract. One of the most important preventive measures to be taken in this regard is for the parties to fully understand the basic factors inherent in the choice of the method for contract procurement and their choice of contract conditions. Another integral and essential requirement is that the parties involved have a full understanding of the role that risk plays in a large-scale international construction project. [246]

The actual goal of the conditions of a contract is to determine the principles of allocating the risks faced by the contracting parties. A primary principle, accepted by the FIDIC and all serious actors and debaters, is that the best way of riskdistribution risk to all parties as a whole is to assign each risk to the party that is best equipped to deal with and handle that particular risk. Generally, this approach results in lowering the contract price at most.A contract dispute takes place once any party disagrees on any of the terms or definitions. To be valid, contracts need a "meeting of the minds.", implying that all parties need to have a thorough grasp of all

245 -Report of the Libyan Audit Bureau / 2015.

246 -Diekmann, J. E., & Girard, M. J. (1995). Are contract disputes predictable?. Journal of construction engineering and management, 121(4), p . 355-363.

contract terms, and must be in mutual agreement as to those terms. Otherwise, the contract cannot be legally valid and may be disputed in court. [247]

When it comes to contract law, a contract dispute often takes the form of a breach of contract; thatis, a party failing to perform an obligation or fulfill a promise agreed to in the contract. Contract formation can sometimes take long and involve much, as numerous steps need to be taken along the way. For a valid contract to be materialize, one needs: an offer, an acceptance of the offer and some form of consideration "or payment" for the goods or services at issue. Disputes may take place at any point in this process. With so many factors involved in construction, it is only evident that there disputes occur between contractors and employers, or other involved parties. The most common disagreements result from issues with the contract and, for this, it is important to know the common causes of contract disputes so one may tackle them and know for sure when litigation is necessary. [248]

In 2014, errors and omissions were the primary reason for construction disputes, according to the National Real Estate Investor of Libya . The bigger or more complicated a project is, the likelier that there will be errors. Many of the problems are due to not being specific enough in discussing the scope of work, leading to different interpretations of each party's obligations. The contract needs to be clear and detailed about expectations to ensure everyone knows and fulfills their duties properly. An attorney should review the contract to eliminate errors, omissions, and ambiguity. Also, there should be checked carefully of the design and dimensions before beginning constructions, and thoroughly document all amendments to the plans and contract.The parties do not necessarily understand or administer the contract correctly. At times, misunderstandings and noncompliance are the results of mistakes, vagueness or missing specifications in the contract. Other times, they can happen because people have different ideas and perspectives on the information.

247 -Semple, C., Hartman, F. T., & Jergeas, G. (1994). Construction claims and disputes: causes and cost/time overruns. Journal of Construction Engineering and Management, 120(4), p . 785-795 .

248 -Fenn, P., Lowe, D., & Speck, C. (1997). Conflict and dispute in construction. Construction Management & Economics, 15(6), p . 513-518.

Communication is vital in preventing conflict; for this, it should be all parties have the same understanding of the contract. [249]

Sometimes, the contract has ill-defined or incomplete cost estimates. Money is often the root of most business arguments, and it is no different in the construction industry. Costs that are unclear or incomplete lead to disputes when projects end up going over the proposed budget. Clients do not wish to spend more money than they are expected to. In bidding for a particular job, the definition of the scope of work must be precise so that the estimate will be as accurate as possible. Disputed projects are usually over budget and late, so avoiding these two problems may reduce the chance of litigation. The most ommon forms of contract disputes are: problems with drafting and reviewing, offer and acceptance, errors regarding the terms, the meaning or definition of certain technical jargon, fraud and coercion. In this way, no "meeting of the minds" can take place once a party is forced or tricked into signing a contract. [250]

VI . TERMINATION OF THE CONSTRUCTION CONTRACTS

The reasons terminating the construction contract are as follows: “the construction contract expires due to performance in the event of delivery of the building undertaken by the contractor in time in accordance with the contract free from defects and payment of the fee undertaken by the employer in time and fully. [251]

- If the estimated cost (expense, cost estimate) determined approximately with the contractor is exceeded too much without the influence of the employer,

249 -Sambasivan, M., & Soon, Y. W. (2007) Causes and effects of delays in Malaysian construction industry. International Journal of project management, 25 (5), p . 517-526.

250 -Semple, C , Hartman, F. T , & Jergeas, G. (1994). Construction claims and disputes: causes and cost/time overruns. Journal of Construction Engineering and Management, 120 (4), p . 785-795 .

251 -Köksal , T. (2013) . Uluslararası İnşaat Sözleşmelerinin Hazırlanması ve Uygulanması Süreci. TBB Dergisi, C, 109, p . 409 - 450.

the employer has the right to return from the contract both during and after the construction (TBK article 367/I and LCO article 175).

- The employer may terminate the contract unilaterally provided that the fee of the completed part is paid and all of the damage of the contractor is compensated. In this case, the employer doesn't have to rely on a just cause (TBL article 369).
- In the event that the employer doesn't fulfil the obligation to provide the material or land or to make payment, or in the event of employer doesn't receive the construction work delivered by the contractor, then the contractor may terminate the construction contract.
- If the contractor doesn't start the work in time or delays the performance of the work against the contract or is delayed to prevent the time completion of the construction despite all estimations, the employer may terminate the construction contract without waiting for the time determined for delivery (TBK article 358/I). [252]

252 -Bögli, p .178, no: 304. A similar assessment is made in American law. Accordingly, the construction must be completed to a great extent in order to ensure the delivery of the construction (substantial completion, wesentliche Fertigstellung). If the business owner can benefit from the structure created by using the contract in accordance with the intended purpose of use, it is no longer seen in the legal system that the owner asserts that the construction is not delivered. Look at this. Frank, p .110, 111. In German law, delivery is such a meaning. According to this, it is accepted that the delivery of the work is possible as soon as it is possible to use the work in accordance with the purpose of the contract. Jakobs (AcP. 1983), p.186. In the same way, it is considered sufficient to complete most of the construction for delivery in Article 48 of FIDIC standard construction rules. Look. Frank, p.179. Some of the decisions of the Supreme Court were accepted as the same. Accordingly, the Supreme Court seeks the existence of the principle of "being available for the purpose in objective measures" for submission. Look. 15. HD. 13.11.1984, 1074/3475 [Erman (Construction), p.29, dn.3]. In this direction: 15 HD, 28.01.1977, 2891/140 (YKD, 1978, p .978).

- If the construction work has heavy defects that the employer cannot use or cannot be asked to accept by the rules of equity or is against the contract, the employer can return from the contract by avoiding the acceptance of the construction work or after the acceptance of the work (TBK article 360/I).
- In event of extraordinary events that cannot be predicted, or if predicted, is not taken into consideration by both parties, and if they prevent the construction of the work or make it extremely difficult, the judge, at his discretion, may increase the agreed fee (that is, it adapts the construction contract to the changing conditions) or terminates the contract (TBK article 365/II). [253]

253 -Köksal , T. (2013). Uluslararası İnşaat Sözleşmelerinin Hazırlanması ve Uygulanması Süreci. TBB Dergisi, C, 109, p . 409-450.

CHAPTER 3

FIDIC (Fédération Internationale Des Ingénieurs-Conseils) CONTRACT

I. THE DEFINITION AND THE CONCEPT OF FIDIC CONTRACT

A. The Definition of FIDIC

The FIDIC contract is defined as a global standard for industrial consultancy, developed over 50 years, recognized and universally used by the judicial authorities, and is a reference for all types of projects. The FIDIC abbreviation is also referred to as the International Federation of Consulting Engineers (FIDIC): French Federation Internationale des Ingenieurs Conseils, where the terms of the contract were used by the General Federation of International Pharmaceutical Industries, in addition to many international conditions for construction and civil engineering, all contractors must be aware of these conditions, and the FIDIC contract contains two parts; On the general conditions, while the second part contains the special application of these conditions.

The FIDIC contract for international engineering is characterized by the existence of conditions of great importance, commitment, rights and responsibility towards the parties involved in the implementation of the contract. FIDIC's engineering consulting book has been issued since the last century, and the International Federation of Consulting Engineers has dedicated itself to the classification of management documents for all projects, The first edition of FIDIC's contract for civil engineering and construction works was issued in 1957 and was called Red Book. The second, third and fourth editions were published in 1963, 1977 and 1987, respectively. FIDIC contracts are a law regulating the engineering and construction work, where there must be at any time and place a law regulating the procedures so that all matters of life and affairs are regulated, through which legislation is enacted that defines all the rights and duties of all parties without discrimination between them and contract based on the organization of the construction work from its beginning, from A to Z.

This contract is also due to the International Federation of Investment Engineers. The headquarters of the FIDIC is located in Switzerland . The FIDIC contract provides partial details of the construction work and its outline. In particular the employer's relationship with the contractor and also with the supervisory body, which is the resident engineer. This contract or agreement is based on clarifying all terms of construction work. In addition, it defines all the forms that make the work system clear to all parties without any ambiguity. In order for this document or convention to be a reference to all parties in the work and to serve as a legal document for them, it is necessary for all to abide by and follow them. [254]. [255]

Construction projects need a tangled set of contracts to organize mutual legal obligations of contract parties. Therefore, such contracts shall be accurately and carefully drafted. Due to conflicts of interests, stakeholders try to obtain the contractor’s approval to complete the largest possible number of construction works for less compensation. The contractor executes designs that contain a clear scope of work, and it is keen to achieve profit and complete the project in the shortest possible time because time is important in construction works as any delay costs large amounts of money. All parties work to avoid the rise of any dispute and settle all disputes that may arise between them as soon possible. [256]

B. The Concept of FIDIC

In light of modern communication means, humanity is living in a new stage called ‘globalization’, which has numerous dimensions and manifestations such as financial globalization. Thereby, international financial markets are now open for

254 -Tüzemen Atik, E. (2014). Fidic Kırmızı Kitap (New Red Book) Kuralları Uyarınca İnşaat Sözleşmelerinde Müteahhidin Sorumluluğu . p . 117.

255 -Koksal, T. (2011). FIDIC Conditions of Contract as A model for An International Construction Contract'. Business and Management Review, 1(2), p . 32-55 .

256 -Hillig, J-.B., Dan-Asabe, D., Donyavi, S., Dursun, O., & Thampuratty, A. (2010). Fidic’s Red Book 1999 edition: a study review. Proceedings of the Institution of Civil Engineers-Management, Procurement and Law, 163(3), p . 129-133 .

dealers across the world 24 hours a day with technological globalization represented in immediate and fast communication between computers and satellites leading to the compression of space and time. Economic globalization relates to modern production systems which enable international companies to utilize money and business worldwide. There is a kind of trade exchange, like the exchange of merchandise and services and transference of capitals and technologies among world nations. [257]

Capital nowadays is transferred easily and activities across borders can make the highest benefits with least economic burden. International companies seek to invest their money in third-world countries due to low labor costs, low taxes and investment incentives provided in such countries. This has led to the emergence of new types of legal problems which must be addressed and solved by lawmakers. Law principles have become subject to globalization leading to the rise of typical model contracts made by specialists in all industrial, commercial and investment fields. In these types of contracts, there are benefits and solutions for many problems encountered by specialists, as they help to save power, time and money. They also provide a comprehensive view of all anticipated problems thanks to the experience of those who drafted articles and conditions of such contracts. [258]

In this respect, FIDIC (International Federation of Consultants & Engineers) contracts are examples of such model contracts concluded between contractors and stakeholders in the construction industry, civil engineering, mechanical and electrical works. There are several forms of model contracts that have their terms and conditions pre-drafted and agreed by contract parties. These model terms and conditions are very important because they constitute a common denominator and basis for agreed subjects between companies, business figures and consultants in most countries. Thereby, the European companies that seek to establish factories in, for instance, Arab countries shall contract with an Arab contractor to execute projects

257 -Bunni, N. G. (2013). The FIDIC Forms of Contract: John Wiley & Sons . Annual Report 2015, p . 565.

258 -Hillig, J-.B., Dan-Asabe, D., Donyavi, S., Dursun, O., & Thampuratty, A. (2010). Fidic's Red Book 1999 edition: a study review. Proceedings of the Institution of Civil Engineers-Management, Procurement and Law, 163(3), p . 129-133 .

in accordance with provisions stipulated in FIDIC contracts soas to have a common basis agreed upon in advance. [259]

Some international economic donors, such as the international bank and the international fund for reconstruction and development require using granted loans for particular projects in accordance with model contracts issued by FIDIC.Thus familiarity, recognition and studying of model contracts and attempts for their formation in the Libyan Law (Administrative contracts policy) has become necessary for entry to new international markets of construction and building projects and for attracting foreign capitals and dealing with other world countries, as these contracts are the language of new international market of construction and development. [260]

C. Importance of FIDIC Contracts

FIDIC contracts derive their importance from being model contracts approved by an international organization, they are the most commonly used in regulating construction deals worldwide, and their importance can be exclusive to establishing a pre-contractual framework to avoid local and international construction problems.

FIDIC contracts are used in regulating international construction works and local projects by making minor modifications to their terms with the aim to:

- Mitigate risks that face stakeholders, contractors and engineers during the execution of construction projects across borders.
- Find common and pre-contractual foundations to avoid problems arising from such contracts worldwide.
- Avoid variation of legal rules applied when there is a foreign party in the contracts, especially when parties of international construction contracts are

259 -Ndekugri, I., Smith, N., & Hughes, W. (2007). The engineer under FIDIC's conditions of contract for construction. Construction Management and Economics, 25(7), p . 791-799 .

260 -Totterdill, B. W. (2006) FIDIC users' guide: a practical guide to the 1999 Red and Yellow Books: Thomas Telford. p .10.

keen on using their local private contractual documents at work, although they do not share the same technical, contractual and lingual culture and laws. [261]

Model FIDIC contracts are effective means for organizing construction works as they are well-prepared, and have a fair distribution of risks and complete detailed structures. They include very detailed provisions related to the determination of rights and obligations of contract parties and the way of their implementation. They play an important role in organizing relationshipsamong all participants in a project; avoid wasting of time in solving contractual problems caused by incomprehensible documents or ambiguous provisions in the contract; they also aim to facilitate missions of the parties and provide a structure which is easy to recognize in the future. All the foregoing provides legal security for international contractors who have technical capacities to execute large-scale projects in developing countries and hold them non-worried about the applicability of national laws when concluding and executing contracts. [262]

FIDIC contracts organize civil engineering works in a more diverse and precise way than traditional contracting, as they facilitate drafting of international contracts related to execution, provision and installation of industrial facilities, building, and civil engineering which constitute an important element of economic and technical cooperation. Therefore, the International Bbank adopted the general conditions stipulated in model FIDIC contracts to be among the documents of construction projects funded by the bank around the world. It is the same path followed by many international creditors and the International Chamber of Commerce.

Despite the importance of FIDIC contracts, they lack a unified legislative organization in Arab countries as certain general rules in the civil law became unable to cope with some modern developments in the construction sector and appeared

261- Abraham, W., & Alvarenga, M. I. D. A. (2005). FIDIC: An analysis of International Construction Contracts. Kluwer Law International BV. p . 11.

262 -Abraham, W., & Alvarenga, M. I. D. A. (2005). p . 17

inconsistent with the complicated nature of the large construction projects and the different logic and legal structure of FIDIC contracts. [263]

II. STANDARD FORMS FOR DRAFTING FIDIC CONTRACTS

FIDIC contracts have been issued in standard forms in terms of legal philosophy, language, drafting, and technical layout. These forms include standard, fair and balanced rules that can be consistent with the common will of the contracting parties and can be partly modified in accordance with applicable laws.

Drafting of FIDIC contracts in a standard form and clear way leads to smooth and disciplined implementation of projectsconsistent with the requirements of stakeholder and maintains the rights of the contractor; otherwise, disputes may arise about the interpretation of provisions. Therefore, contracting parties shall endeavor to avoid problems and ambiguities during the stage of drafting these contracts and to set proper solutions for potential disputes that may arise throughout the term of the project.)(264 FIDIC the International Federation of National Associations of Independent Consulting Engineers, or Federation Internationale des Ingenieurs Conseils (FIDIC)\ was formed in 1913 by the national associations of three European nations, currently having 60 countries as members. Most developments outside Europe took place after WWII joined by developing countries in particular.[265]

Today, FIDIC accounts for a majority of private practice consulting engineers worldwide complying with ethical priinciples to guide their standardsin the profession. In general terms, standard contracts are in place everywhere no matter the place with the intention to create an even balance between the rights and obligations of the employer and the contractor.

263 -Glover, J., & Hughes, S. (2011). Understanding the FIDIC Red Book: A Clause by Clause Commentary: Sweet & Maxwell. p .63

264 -Abraham, W. 2005 . FIDIC: An analysis of International Construction Contracts: Kluwer Law International. p . 28.

265 -Bunni, N. G. (2013). The FIDIC forms of contract: John Wiley & Sons .Annual Report 2015, p . 565

Conventionally, FIDIC contracts are based on equal risk-sharing and, hence, are commonly accepted by both employers and contractorsas a sound instrument. Another benefit is the presence of commentaries and literature for novice users and also arbitration awards offering specific legal interpretations. Such commentaries are beneficial in minimizing the occurrence of 12 disputes once a contract was signed as they allow the parties to know how a certain contract clause would be interpreted by a reasonable, independent person. Finally, due to standard risk allocation, the contractor can assess what risks to include in his price and improve his calculations at the tender stage. [266]

A. The FIDIC Suite of Contracts

Contract forms are drafted for use in a large array of project types, maily differentiated by the color of their covers. The choice of form relies on the nature of project in focus. Briefly, these are: straightforward, quick or cheap projects - Green Book; employer design or traditional projects - Red Book; employer design with Multilateral Development Banks providing finance - Pink Book; contractor design or traditional projects - Yellow Book; EPC/Turnkey project - Silver Book; and design, build, operate projects - Gold Book.In what follows, each will be discussed in detail.

1. The Green Book – (Short Form of Contract)

It serves as FIDIC's recommended form of contract to be applied in engineering and building works of rather small investment value or when construction time is limited. FIDIC offers guidance applying to contracts of less than US $500,000 or a construction time less than six months. Still, the Green Book can be applied to simple or repetitive works as well. Though these types of arrangements require the contractor to construct the works based on the employer's design, there is no difference whether such design is prepared by the employer or the contractor. Also, no engineers are present and payments are made on a monthly basis.

266 - Osinski, C. (2002). Delivering Infrastructure: International Best Practice-FIDIC Contracts: A Contractor View. Society of Construction Law . p . 134.

2. The Red Book

In 1956, the first edition of the original form of the Red Book was published and later, updated and amended in four editions.Afterwards, in 1999 FIDIC offered a compeletely different set of standard forms that comprised a brand new version of the Red Book and replaced the first version. The Red Book is FIDIC's suggested form of contract to build or engineer works where the employer is responsible for almost all designs. as a matter of fact, it is claimed by FIDIC that the Red Book is the most commonly applied international construction contract with most works designed by the employer alone.One main element in this book is payments made as per the bills of quantities – in other words, a document in which materials,plans and labor (and their costs) are listed – despite that payments can also be made based on negotiated lump sumsfor items of work.

The Red Book is applied by the engineer (a third party) and not the contractor or the employer. He or she is also in charge of monitoring the construction workwhile keeping the employer thoroughly posted so as to make changes and approve the payments. [267]

3. The Pink Book – (MDB Harmonised Edition)

A variation of the Red Book, the Pink Book is prepared for projects financed by specific Multilateral Development Banks('MDBs') as supranational establishments, for example the World Bank, and in case the Red Book would otherwise have beenin use. Once a project is financed by an MDB but the employer is not accountable for the design, the parties should notuse the Pink Book, and instead apply or amend other FIDIC forms of contract.Before publishing the Red Book, whenever MDBs had originally adopted the Red Book for the projects funded by them, they modified the FIDIC General Conditions. Due to negotiations between FIDIC and the MDBs, the PinkBook was released to include all the amendments commonly added by the MDBs.

267 -Bennani, A. (2015). Les contrats FIDIC (Doctoral dissertation, Université Montpellier) p .158 .

4. The Yellow Book

This kind of contract is devised for projects where the contractor undertakes most of the design; that is, he performs the detailed design of the project in order to fulfill the outline or performance specification devised by the employer. For this reason, the Yellow Book is commonly applied to provide building plans or engineeringworks in accordance to such plans.

The Yellow Book is based on lump sum price with payments as per completed sections an approved by the engineer. Similar to the Red Book, the engineer is in charge of implementing the contract, which is at the same time subject to afitness-for-purpose undertaking regarding the completed project.

5. The Silver Book

The Silver Book is intended for EPC (Engineer, Procure, and Construct) projects, which demand thecontractor to supply a completed facility to the employer ready for operation at the so-called 'turn of a key'. Such contracts, hence, put the general duty of designing and construction on the contractor.This book is applied in cases that the definite value and completion date are crucial or decisive, allowing the employerin this way more certainty concerning the project's cost since the contractor takes more time and cost risks compared to the conditions in the Yellow Book.The Silver Book can, at the same time, be applied for privately funded BOTs (Build, Operate, Transfer) – those projects wherethe employer full charge of the design, construction, maintenance, and operation and intends to transfer the responsibility for construction the contractor. [268]

No engineer is in place under the Silver Book as his duties are taken up by the employer. Like the Yellow Book,the contractor is in the meantime subject to a fitness-for-purpose obligation concerning the completed project.

6. The Gold Book

According to FIDIC, the Gold Book is devised to decrease the risk of fast deteriorationpost-delivery of a project stemming from poor design, workmanship or materials. Hence, this book fits where a long-term operation and maintenance

268 -Bennani, A. (2015). Les contrats FIDIC (Doctoral dissertation, Université Montpellier). p .151 .

undertaking is needed together with design and build undertakings. The contractor needs to operate and maintain the completed project for the employer throughout a span of commonly 20 years as of the Commissioning Certificate date, which is issued upon completing the construction. Throughout this period, the contractor is bound to meet specific goals and, upon the termination of the said period, the project is to be handed back to the employer as per an agreed condition.

All along the said duration, plant ownership remains with the employer with the contractor operating it it at the contractor's own risk. Yet, the latter bears no responsibility for project funding or guaranteeing long-term achievement.

7. The Blue Book

Based on FIDIC, this book is best for any kind of reclamation and dredging projects together with ancillary construction projects.Commonly, in these kinds of contract the contractor builds based on the employer's design, but the contract form can still be adjusted so as to contain partly or entirely contractor-designed works. [269]

8. The White Book

This form is not intended for construction and engineering works and is used to delegate consultants to offer services to the employer such asfeasibility studies, design, contract administration and project management. Conventionally, the White Book establishes the foundations for agreement between the consultant and the employer once the construction and engineering works are being carried out based on a FIDIC contract.

Dissimilar to the previous forms of FIDIC contract, no color is assigned to this form as it is suggested for use alongside the Red, Yellow, Silver and Gold books. [270] The General and Special Conditions of FIDIC Contract for Works of Civil Engineering Construction General Conditions, among the vital factors in a construction contract, set out the conditions of the contract related to legal issues while the engineering documents such as plans and specifications deal with the

269 -Bennani, A. (2015). Les contrats FIDIC (Doctoral dissertation, Université Montpellier) p .168 .

270 -Khalaf, D. (2002). New developments in FIDIC model contracts. Engineering Conference(1), p . 14 .

technical issues in a project. In practice, general contract conditions are of utmost importance as well as of highest contradictory nature in all contract documents.

Once written regardless of the contractor's views. contract conditions may turn one-sided and concentrate overtly on the owner's benefits. For instance, they can pass certain risks not under the contractors' control to them - site access and necessary right-of-way, changes brought about by the owner, and unpredictable and undisclosed conditions, to mention a few – in order to prevent potential claims and disagreements. To avoid such events, many independent organizations have drafted a series of standard general conditions to protect both the contractor's and the owner's interests. [271] Example wordings can be found in:FIDIC 6.1 through 6.5, 7.1 through 7.3, 8.1 and 8.2, 36.1 through 36.5, 37.1 through 37.5, 38.1, 38.2, 39.1 and 39.2 for “construction” contracts.

B. The Responsibility of The Parties in FIDIC Contracts

1. Contractor

The contractor is the person named in the tender offer appendix, as well as his successors And therefore the employer is the owner of the contract who declares his desire to contract with the contractor to complete the construction and construction work at the facility. The employer may be a natural or legal person, and the employer is the principal party to the FIDIC contract, as he is the party to whom all the effects of the contract are vested. the contractor in FIDIC conditions right and obligation in clause 4 is the longest sub-condition and covers the Contractor's general commitments additionally containing the necessity that as to Contractor-structured works "it will, when the works are finished, be fit for such purposes for which the part is planned as are determined in the Contract."

Also, Sub-proviso 4.2 states that the Contractor will give a Performance Security where the sum has been indicated in the Appendix to Tender, and the sub-condition proceeds with arrangements for broadening the security. Some insurance is

271 -Charoenngam, C., & Yeh, C.-Y. (1999). Contractual risk and liability sharing in hydropower construction. International Journal of project management, 17(1), p . 29-37 .

stood to the Contractor as the sub-proviso requires the Employer to give a repayment to the Contractor against harm, misfortune, and cost coming about because of a case under the execution security: “To the extent to which the Employer was not entitled to make the claim”. Clauses 6 and 7 are related to personnel, plant, materials, and workmanship. Clause 6 is specifically paramount related to employees as the Contractor shall not only engage labor and staff, but shall also provide for proper welfare for them.

Clause 8 deals with Commencement, Delay, and Suspension. Sub-clause 8.3 deetermines the way the Contractor should supply plans related to work execution. For instance, such schedules have to be supplied alongside a report defining the methods applied by the Contractor. The extension of time provisions is made evident as per sub-clause 8.4: “The Contractor shall be entitled ...to an extension of the Time for Completion if and to the extent that completion ... is or will be delayed by any of the following causes”

Clause 4.21 offers details of the information necessary for insertion by the Contractor in the Progress Reports as a condition of payment. As per clause 14.3, payment is only possible within 28 days of receiving the application for payment and the supporting documents, one being this Progress Report.

Measurement is a key element in Clause 12 and a foundation based on which payment to the Contractor is calculated. Often referred to as a “measure and value” form of contract, the provisions in the FIDIC form operate in accordance to Works to be measured by the Engineer, and those quantities and measured amounts of work are later to be paid for alternatively at the rates and prices in the Contract, or otherwise based on adjusted rates, or completely new rates "if there is no basis for using or altering Contract rates for the work".

Clause 13 refers to alternatives and considers adjustments for modifications in legislation and in cost; though should the Contractor declare inability to procure necessary goods, an alternative or variation is not binding, or is it so in in the case of contractor design if the proposed variation having a counter effect on safety, suitability or coverage of performance criteria as indicated in the contract.

The amount and due date of payment the Contractor are crucial to both Contractor and Employer, and the method of payment commonly relies on the exact wording of the contract.

Sub-clause 2.5. Because it is designed to prevent an Employer from summarily withholding payment or unilaterally extending the Defects Notification Period. One specially concerning feature appears in the final paragraph, particularly reaffirming that the Employer bears no general right of set-off any longer, and that he can only set-off sums after the Engineer has agreed or verified any sums owed to the Contractor after a claim has been made.

To make a claim according to the FIDIC form - Sub-clause 20.121 states that: If the Contractor considers himself to be entitled to any extension to the Time for Completion and/or any additional payment, under any Clause of these Conditions or 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. [272]

"If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply."

The main elements within sub-clause 20.1:

- The Contractor has to notify the Engineer regading time or money claims, immediately once practicable and not any later than 28 days after the date

272 -Clause 20.1 is identical in the Red, Yellow and Silver Books, except that in the Silver Book, the Employer performs the role of the Engineer. p .418.

of the Contractor becoming aware, or should have become aware, of the realted event or situation.

- Any claim to time or money will be lost without notice within the stated period of time.
- Supporting details have to be supplied by the Contractor and he also has to keep current records in case required to file claims.
- The Contractor has to present a thorough and detailed claim after 42 days.
- The Engineer is bound to answer, at least in principle, within a 42-day period.
- Such claim shall be of interim nature and additional interim updated claims need to be submitted each month. A final claim has to be submitted unless there is agreement with other conditions, within 28 days after the end of the claim event. [273]
- Payment Certificates should include any amount stated regarding the submitted claims.
- unlike the previous FIDIC Books, the notice to be submitted as per sub-clause 20.1 is about those claims for time extension and claims for additional payment.

This deadline of 28 days may not in essence begin on the date of the claim event but on the date the Contractor should have reasonably become aware of that event. Whereas it is somehow easy to determine the claim event if it is just one and realted to, for example, issuing the instructions of engineers or receiving borehole tests with unpredictable soil conditions, if the claim event is of continuous nature, for instance persistent weather patterns over a certain time span, it can become a challenge to precisely determine the beginning of the 28-day period. Also, the Contractor has to remember when the effects of a particular event are continuous and

273 -In the Orange Book (1995), sub-clause 20.1 only sets a notification deadline in respect of claims for additional payment. However, similar provisions in respect of time-related claims can be found at sub-clause 8.6. p . 611.

uncommon, the Contractor is in particular required to continue submitting notices on a monthly basis.[274]

Clause 3 addresses the position of the Engineer, and there is major change from the 1987 edition, where specific reference his impartiality has gone. Unless otherwise stated:

"Whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer. "

The conditions require that the Engineer act with reference to sub-clause 3.5 to agree or determine any matter, as follows:

"…The Engineer shall consult with each Party in an endeavor to reach an agreement. If an agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. "

In this way, unless one can come to anagreement with the employer , whatever the jurisdiction it is better to serve the notice in time. Compliance with the notice provisions is intended to be a condition precedent to recovery of time and/or money and, without notices, the employer has no liability to the contractor. Certainly, it can be said that the parties should treat the sub-clause in this way.

Despite the presence of major differences in the approach from common law and civil law in order to analyze time bar clauses and in decide if these clauses deserve giving effect, the contractor is constantly faced with a hard task to convince a judge or arbitral tribunal to disregard clearly stated words in the contract. Regardless of the law applicable to that contract, the contractor's needs to jusatify its failure to serve a notice in time and/or prove that given the specific conditions of the case, it would be unfair, inequitable or not in line with the enforcible rules of law to deprive it of its right to claim additional time and /or money.

274 -Rahman, M. A., Islam, M. M., & Abedin, M. Z .(2011) .Rights & Obligations of Contracting Parties in Engineering Contracts in Bangladesh . p .189.

In order to prevent the need to present complex legal arguments, the prudent contractor should never assume that disputes can be settled informally, and rather be ready all the time to follow the timescales as per sub-clause 20.1 and present the necessary notice within the stated 28-day period.

The logic behind such a difference in dealing with the employer and contractor is that presumably in most, if not all of, situations, the contractor will be (or should be) in a better position to know what is taking place on site and, in this way, will be much better placed to know whether a claim is possible to take place when compared to an employer. Still, sub-clause 2.5 is a sound move forward for the contractor compared to the 1987 version since one of the reasons to introduce the clause was to prevent an employer from unilaterally refusing to make payment.[275]

2. Employer

Clause 2 deal with the function of the Employer. There are two especially curious sub-clauses: one is sub-clause 2.4 obliging the Employer upon request from the Contractor to present:

"reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the contract price punctually" and "Before the Employer makes any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars."

In case of the Employer's failure to provide as such, the Contractor may suspend work," or reduce the rate of work", unless or until the Contractor is in effect provided with the reasonable evidence. This is a completely new provision to the 1999 FIDIC form, offering a way by which the Contractor can receive approval that enough financing conditions are in place so as for him to get paid, including if there is a major change in terms of the project scale in the course of constructioniteself.

275 -Glover, J. (2007). FIDIC: An Overview. The Latest Developments, Comparisons, Claims and Force Majeure. p .76.

An Employer has to determine the form of the performance security during the finalization of tender documentation. Whereas the previous edition was morein favor of Bonds under conditional terms, payable upon default, a common shift is witnessed in favor using first or on-demand bonds, as it appears in the 1999 version. Accordingly, performance guarantees are in an on-demand guarantee form and payable after the beneficiary has submitted the necessary prrof.Though, one hasto clarify in what respect the Contractor has failed in his obligations. This is in line with the purpose of FIDIC to reach a certain level of uniformity and thereby clarity that the securities are determined by the Uniform Rules of the International Chamber of Commerce. [276]

Second, sub-clause 2.5 requires the Employer to notify with particulars the Contractor: " if the Employer considers himself to be entitled to any payment under any clause of these conditions or otherwise in connection with the Contract. "

An Employer will need precise details as to the possible date of completion as well as the costs, as this can influence his pre-commencement preparation and costs of financing. Whatever change to the possible date of completion would give an Employer the opportunity to change theoperational dates. As Judge Wilcox concludes in this respect:

" Where a completion date was subject to change the competent Construction Manager had a clear obligation to accurately report any change from the original Projected completion date, and the effect on costs ". [277] Sub-clause 8.7 is related to delay or liquidated damage, to levywhich the Employer has to apply – in essence, to make a claim – in line with with sub-clause 2.5.

To make such a case as per the FIDIC Form and under any agreement has alwaysbeen a field requiring careful arranging. Under the FIDIC frame, the

276 - Lloyd, H. (2007). Understanding the New FIDIC Red Book: A Clause-by-Clause Commentary. By Jeremy Glover and Simon Hughes. INTERNATIONAL CONSTRUCTION LAW REVIEW, 24(4), p . 503.

277 - Speaight, A. (Ed.). (2010). Architect's Legal Handbook. Routledge. p .236.

Employer and Contractor get distinctive treatments.Sub-proviso 2.5 of the FIDIC Conditions of Contract for Construction20:If the Employer esteems himself qualified for any installment as per any Clause inside these Conditions or generally in understanding to the Contract, as well as to any augmentation of the Defects Notification Period, the Employer or the Engineer will pull out and particulars to the contractual worker. In any case, no notice is required for installments due under Sub-Clause 4.19 "Power, Water, and Gas", under Sub-Clause 4.20 "Boss' Equipment and Free-Issue Material", or for different administrations asked for by the Contractor.

Such notice must be given as quickly as time permits after the Employer ends up mindful of the occasion or conditions bringing about the case. A notice as to broadening the Defects Notification Period will be given before end of such period.

The particulars will demonstrate the Clause or different bases of the case, and will incorporate substantiation of the sum as well as expansion to which the Employer views himself as entitled according to the Contract. At that point, the Engineer must continue in accordance with Sub-Clause 3.5 "Conclusions" to concur or compute (a) the aggregate "assuming any" which the Employer is qualified for be paid by the Contractor, as well as (b) the expansion "assuming any" of the Defects Notification Period as per Sub-Clause 11.3 "Augmentation of Defects Notification Period".

Such amount can considered as a reduction in the Contract Price and Payment Certificates. The Employer will only be entitled to set off against or make any deduction from an amount approved in a Payment Certificate or to otherwise claim against the Contractor, in line with this Sub-Clause. [278]

The last paragraph of the conditions for EPC / Turnkey projects states slightly differently as follows: The Employer may deduct this sum from any cash due, or to end up due, to the Contractor. The Employer will just be qualified for set-off against or make any finding from a sum because of the Contractor, or to generally guarantee

278 -Ndekugri, I., Smith, N., & Hughes, W. (2007). The engineer under FIDIC's conditions of contract for construction. Construction Management and Economics, 25(7), p . 791-799.

against the Contractor, as per this Sub-Clause or with sub-section (an) as well as (b) or Sub-Clause 14.6"interim payments".

The main elements within this sub-clause:

- Should the Employer consider himself entitled to either any payment or an extension of the period related to the Defects Notification as stated in the Contract, the Employer or Engineer must notify the Contractor and provide particulars.
- The notice as to payment is to be made once practicable after the Employer has become aware of the event or circumstance which causing the claim. . [279]
- Any notice as to the extension of the Defects Notification Period has to be given prior to termination of that period.
- The Employer shall also supply substantiation indicating the grounds for the claim along with the particulars asto the remedy requested. Once the notice has been given, the Engineer must make a determination based on sub-clause 3.5.
- Any payable sum as per sub-clause 2.5 may be included as a reduction in the Contract Price and Payment Certificates.
- The Employer cannot make any deduction inth form of set-off or any other claim unless in line with the Engineer's determination.
- No notice is necessary for payments due to the Employer for services under sub-clause 14.19 or equipment under sub-clause 4.20.

The Employer has to bear in mind that with regard to sub-clause 14.7, he has to pay any sum as certified, despite disagreeing with the Engineer's determination. Based on sub-clause 14.8, if the Dispute Adjudication Board determines that the Employer has failed to pay the due sum, the Contractor will be entitled to finance charges.

279 - Ndekugri, I., Smith, N., & Hughes, W. (2007). p . 791-799.

Sub-clause 2.5 requires a special process for notification on any Employer regarding itself entitled to claims against the Contractor. Not following this process disqualifies the Employer from withholding or deducting any amounts due to be paid to the Contractor. Such notice has to be written and handed over as instructed in sub-clause 1.3. It is not definite if details are needed therein within the notice being to be delivered, and the sub-clause does not require such particulars at the same time since there is no time limit or period is set on either.

The Employer isobliged to provide notice “as soon as practicable” concerning his awareness of a situation likely to qualify payment to him. Hence, different from sub-clause 20.1 allowing 28 days to do so by the Contractor, no definitive time limits exist for an Employer to state his claim. Still, any notice regarding the extension of the Defects Notification Period shall, obviously, be made prior to the current expiry of that period. Furthermore, the Applicable Law might just impose some kind of limit should it be necessary. [280]

There may have been assumptions such as the Employer has to be obliged by the same 28-day limit as the Contractoris; rather, sub-clause 2.5 states an easier claims system without time limits. Despite that, the logic behind the difference in the treatment is possibly that in most – perhaps even all – settings the Contractor will be (or should be) in a more advantageous position to know what is happening on site and, for this reason, will be much better placed compared to an Employer to know whether conditions are suitable for claims to materialize.

The specifics to be supplied by the Employer address thedetails of the clause (or basis) upon which the claim is made, and along with the money particualrs come the time such relief is expected. Such particulars in any notice delivered by the Employer are at the same time needed as per sub-clause 4.21(f) to form part of the ordinary progress reports.

According to sub-clause 3.5 of the Construction and Design-Build Conditions, the Engineer first has to make an effort and agree to the claim. Based on the EPC/Turnkey Conditions, the initial onus to agree or decide on any claims remains

280 -Seppala, C. R. (1995). The new FIDIC International Civil Engineering Subcontract. Constr. Law., 15, p . 25 .

with the Employer. Should either party be dissatistifed with the decision of the Engineer under sub-clause 3.5, such disagreement may be taken to the Dispute Adjudication Board as set in clause 20. Henceforth, an Employer would be suggested to not decrease the sum to which he holds himself entitled until determination is made by the Dispute Adjudication Board, otherwise the Employer could be held liable to a claim from the Contractor. [281].

C. The Language Problems of FIDIC Contracts

Language has significant importance in FIDIC contracts as it can cause problems for parties in terms of the approved language and risks of translation as described below:

FIDIC contracts were first draftedin the English language; as such translation and execution shall be officially considered in this language as it is the prevailing language in contracts and international trading deals. Using the English language in contracts made with foreign parties is natural, but nothing prevents using other languages. If some contract provisions were drafted in more than one language, then the language that was specified in the bidding offer will be the approved language. The language of communication and correspondences between parties shall also be specified in the appendix of the tender, and in case not specified the language in which the contract or most of it was written shall be adopted. Due to importance of language in legal provisions and contracts, Egypt and UAE were assiduous in protecting Arabic language; they have it as the official recognized language before courts and as the language in which contracts are edited accompanied with translation to foreign language. In case of conflict between the two copies, the Arabic copy shall prevail. [282]

281 -Zhang, S., Zhang, L., & Gao, W. (2006). Risk allocations in construction contracts: A Comparison of China's Standard Form of Construction Contract and FIDIC Conditions of Contract forConstruction. Surveyors Times, 15(5), p . 35-41 .

282 -Al-Menshawi, A.-H. (2014). International and Internal Arbitration in Civil, Commercial and Administrative Law. Alexandria: New University Publishing House. p . 328.

The legal language of FIDIC contracts shall be accurate, clear and understandable, because one of the important aspects in construction contracts is the clear understanding by contract parties of their rights and obligations arising from the contract. There is a major risk caused by language errors that occur as a result of basic differences between the English law and the other law systems. Translating FIDIC contracts is considered to be a hard undertaking because it requires sufficient knowledge about the English law and the other comparative laws. [283]

III. THE FORCE MAJEURE SITUATIONS IN LIBYAN CONTRACT LAW AND FIDIC CONTRACTS

The term "Force Majeure" originates from the French Code Napoleon (now the Code Civil) which states "There is no place for any damages when, as a result of Force Majeure… the debtor has been prevented from... doing that to which he was obliged."However, "Force Majeure" has not been recognized as having a precise meaning in the English law. Without a clear definition and provisions that effectively set out the parties' rights and remedies, contracting parties will be at the mercy of the rigid English. [284]

Conceptually and in terms of consequences as organized by the Libyan Civil Law on the one hand, and as stipulated in FIDIC contracts on the other, it is not a comparison between the two law systems, but rather between dealing with issues recognizably and considering aspects that need reviewing. [285]

Opening the space for any agreements between contracting parties including FIDIC contracts leads us to describe the Libyan legislator’s consideration of Force

283 - Marad Mahmoud Al-Muwajdeh, Arbitration in State Contracts of an International Character - Comparative Study 1. , Dar al-Thaqafa for Publishing and Distribution, Jordan, p . 366.

284 -Glover, J. (2007). FIDIC: An Overview. The Latest Developments, Comparisons, Claims and Force Majeure: Construction Law Summer School . p .116

285 -Salama, A. A. (1989b). Theory of the International Free Contract Cairo,: Dar Al-NahdaArabic. p .122.

Majeure and to show implications of obligations of contracting parties towards each other.However, we have to note that the scope of applicability of these contracts or other state contracts governed by administrative contracts policy – in Libya, for instance - may narrow not because it prevents that explicitly but because it draws a specific path in which state contracts are concluded. [286]

A. The Concept of Force Majeure in FIDIC Contracts

The concept of force majeure in FIDIC terms is that force majeure had a greater concern: TheSilver Book in Article (19,9) of Construction Contracts in 1999 considered the concept, andthe first Clause of Article 19 defined force majeure as: "in this article force majeure means" emergency incident or circumstance which:

- Out of either party's control.
- Cannot be reasonably prevented by the affected party before entering the contract.
- Following its occurrence, the affected party couldn't reasonably prevent or avoid it.
- May not be attributed to the other party. [287]

It is clear that this part of Clause (1) of Article (19) describes how a given situation is declared as force majeure; this is subject to the existence of the four conditions. It is notable that the conditions related to impossibility of executing an obligation due to such circumstances was not stated, but it had to be mentioned because the force majeure incident is what prevented the party from executing its obligation. Non-inclusion of the reason makes the distinguishing between force majeure and emergency situations not clear, while they could have been made equal as the difference between them is that force majeure makes the fulfillment of obligations impossible (absolutely or relatively) while emergency situation makes the

286 -Jamil, A.-S. (2017). General Theory of Compliance C. 2 Provisions of Obligation . p .64.

287 -Glover, J., & Hughes, S. (2011). Understanding the FIDIC Red Book: A Clause by Clause Commentary: Sweet & Maxwell. p . 109.

fulfillment of obligations financially burdensome to contractor and they are equal in otherwise. [288]

One might not find an explanation for non-inclusion of an impossibility condition among the pillars of force majeure in article (19), save that the makers of the condition thought only about the temporary case of force majeure which does not last long and contractors reactivate their contract after such case is over. Even in this case, it is worth mentioning the temporary impossibility which only delays execution of the obligation and has important effects as we will see. Furthermore, what is stated in (a, d) seems to be a repetition; while clause (a) states that circumstances that lead to force majeure shall be out of either party's control, clause (b) states "may not be attributed to the other party", which means that it is possible to combine them together in one clause and say "out of parties control" which means that it is a "foreign reason", which is stated in more than one provision of the Libyan Civil Law. [289]

It has to be stated that the drafting of Article (19) remains subject to one party's ability to attribute such circumstances to the other party; thus, the latter will bear responsibility and all damages occurred even though this article has organized risks and consequences strictly. Clause 1 of Article 19 did not simply specify the conditions of occurrence of force majeure, but it gave the following examples of it without limitation as long as the afore-mentioned conditions are met: 1) War, hostilities (whether declared or not), invasion, foreign enemy hostile acts. 2) Riot, terrorism, revolution, chaos, acts of war or invasive authority or civil war. 3) Rebellion, disorder, closure not by contractor's or sub-contractors' persons. 4) Munitions of war, explosives, ionic radiation, pollution by Radium unless are used

288 -Al-Sanhuri., A. R. A. (1952). The Mediator in Explaining the Civil Code (Vol. 1): Publishing House of the Egyptian Universities. p .789.

289 -Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p . 68.

by contractor. 5) Natural disasters such as earthquakes, hurricanes, storms or volcanic activities. [290]

This counting ofreasons mentions most abnormal circumstances that can be faced at any time. Including them in any contract will definitely reduce the chances of rising disputes about whether such an incident shall be considered as force majeure or not. The benefit achieved here is facilitation of evidencing of occurrence of force majeure. In addition to the definition of force majeure in Clause 1 of Article 19, Clause 2 of the same article has mentioned the procedural obligations that shall be considered with the occurrence of force majeure, as the party who is affected by force majeure is obliged to serve notice to the other party of such occurrence and to determine its obligations and deliverables that it could not fulfill. The clause sets a deadline for the notice as 14 days from the date on which it noticed the occurrence or it should have been noticed. By such served notice, the affected party is relieved from its obligations as long as force majeure is preventing fulfillment of such. It is notable here that Clause 2 of Article 19 only mentioned the notice without describing a particular form; thus, it is conceivable that it should be served whether in written or verbal form and by any means, but during such time of challenges it is more appropriate for it to bea written notice. [291]

It is useful to ask about the penalty for not serving such notice in time of force majeure, especially as Clause (f) of Article (19) does not include this penalty, but it is possible to say that mentioning the notice after defining the force majeure and its conditions makes it part of the subject especially with the precise determination of the time limit in which the notice shall be served, showing that failure of serving the notice within the limited time prevents the possibility of being claimed as force majeure; otherwise, the notice will lose its usefulness. It has been previously noticed that the Libyan Civil Law does not mention the term of “the notice”.

290 -Faraj, T. H. (1997a). General Theory of Commitment, Contract Theory. Alexandria: Egyptian Bureau Modern. p . 350.

291 -Alshami, M. H. (1990). Wrong Corner in Civil Responsibility. (Vol) 4. Cairo: Dar Al-NahdaArabic. p .390

Article (19) in Clause (3) addsan obligation on the contracting parties with which each party has to use all reasonable means in order to reduce any delay in the execution of the contract. Such an obligation has not been mentioned explicitly in the Libyan Civil Law although we may find a foundation for it in Clause (a) of Article 148, which requires the execution of the contract in accordance to its inclusions and in a way consistent with good faith. [292]

B. The effects of Force Majeure in Libyan Law

The Libya legislator hasonly stipulated some rules and principles regarding the effects of force majeure and left the option open for agreeing on organizing the effects in different ways. Therefore, FIDIC conditions have comewith more details and disclosure about those effects as if they use the general authorization given by the legislator to the contracting parties to agree on what they deem appropriate in any contract. [293]

It shows in the previous clause how the Libyan Civil Law determinesthe concept of force majeure and how it requires the impossibility of fulfilling obligations as a condition for it to be a force majeure. However, this impossibility might be relative as if it is absolute; which means that it continuesfor certain period of time then it ends; thus, the important effect considered by the legislator in case of the confirmed state of force majeure is the expiration of obligation when the impossibility is absolute, and the execution of the contract is suspended when possibility is relative, then revocation of responsibility and the right for indemnification. [294]

Article 360 of Libyan Civil Law states the following: “the obligation expires if the obliged party has proved that fulfillment has become impossible due to foreign

292 -Alshami, M. H. (1990). Wrong Corner in Civil Responsibility. (Vol) 4 .Cairo: Dar Al-NahdaArabic. p . 410

293 -Albashkar, A. M. (2003a). The concept of force majeure (Master Thesis), Faculty of Law Tripoli University, Tripoli. p . 84

294 -Salama, A. A. (1989a). , Theory of the International Free Contract Cairo: Dar al-Nahda Arabic. p . 315.

reason out of its control". [295]It is worth mentioning that the Libyan legislator considers force majeure as a foreign reason out of the contractor's control; as such, the contractor who proves a state of force majeure in this case is relieved from its obligations and the logical result of such absolute impossibility due to force majeure is the termination of the contract and enforced by law without the need for judicial authorities to consider it as the text of the Article explicitly states the expiration of the obligations.[296]

However, in this regard it has to be notices that the existence of force majeure is subject to proving it by the party who is alleging it, as described in the text. Thus, arguing it may lead to submitting the case to the judiciary, which shall order to terminate the contract if the impossibility is absolute. In this respect the judiciary does not practice a discretionary authority and only applies what is stipulated in the provision. In the case of relative impossibility arising from force majeure, obligations do not expire and the contract shall not be terminated but suspended for the duration of the abnormal circumstance that led to a state of force majeure. Once such circumstances are over, then each contractor shall resume fulfilling its obligation of the contract. It is worth saying here thatin case of construction contracts and all other contracts that need years not months for execution, the impossibility caused by force majeure is relative most of the time, suspension of contracts is practiced and not termination. Furthermore, in this case, an important part of the subject of the contract could have been initiated before the occurrence of force majeure and shall be completed, so no benefit from terminating the contract. [297]

Nothing in the Libyan law considers the state of suspension, neither in term nor in obligations. Therefore, it is a status of waiting which may be prolonged or shortened. The Libyan legislator does not evenconsider what should be done after the

295 -Salama, A. A. (1989a). , Theory of the International Free Contract .Cairo: Dar al-Nahda Arabic. p . 315.

296 -Faraj, T. H. (1997a). General Theory of Commitment, Contract Theory. Alexandria: Egyptian Bureau Modern. p .355.

297- Al-Sanhuri., A. R. A. (1952). The mediator in explaining the Civil Code (Vol. 1): Publishing House of the Egyptian Universities. p . 502 .

elimination of force majeure state and the mechanism in which the contract will be reactivated. Still, it is useful to mention what the Libyan government did following the 17th February revolution as it formed an advisory committee comprising experts to assume studying of the Libyan caseand give recommendation about the mechanism in which contracts can be reactivated after their suspension during the revolution. [298]

The law lacks a certain mechanism which can be applied to all cases at any time. Contracts concluded through negotiations and then suspended due to reasons out of both parties controlcan be resumed again through negotiations, which must be based on the original contract and its complementary provisions – in other words, a resumption of the original contract and not a new contract. Negotiation may find its base in the clause related to the execution contracts in good faith and by the wish of both parties to resume the contract.

An important question is whether any party can order a termination due to force majeure in case of relative impossibility. This is hard to answer as there are no provisions related to force majeure as considered by the Libyan legislator, but as a general rule, each party may resort to justice to terminate the contract. However, the termination procedure which is a penalty for non-fulfillment of obligations is also hard to be decided as such non-fulfillment is attributed to a reason which is out of the control of both parties and such termination by force majeure might result in failure of payment of compensations . Therefore, ordering termination in the case of relative impossibility may lead to severe damage to either party. Due to lack of precise reference to this issue by the law, we tend possibility of ordering termination in case of suspension of the contract to leave the option for contracting parties to decide resumption or termination of contract as they deem appropriate. [299]

The important result considered by the Libyan legislator from non-execution of obligations because of force majeure is a disclaimer by the obliged party as the

298 - Alqadi, A. K. Y. A. H. 19 99 The theory of Fraud in Egyptian and Yemeni civil law . p . 144

299- Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p .42

pillars of responsibility namely: fault, damage and the causal relationship do not exist here. Disclaimer is different from relief, as relief does not rule out responsibility, but disclaimer means that responsibility has not been originated. In our opinion, disclaimer is mainly referenced to the lack of causal links between faulting by non-fulfillment of the contractual obligation and the damage incurred, as such damage cannot be attributed to the obliged party as long as it is impossible to fulfill due to force majeure. A disclaimer might lead to an important result, that is non-compliance with compensation for damage caused by non-implementation. [300]

Article 168 of the Libyan Civil Law is explicit in this regard stating: “If the person has proved that the damage was caused by foreign reason out of its will, as a sudden incident, force majeure, omission by affected party or a fault by third party, then it is not obliged to compensate the damages in case of no provision or agreement stated otherwise.” The first notable thing about this provision is that it is one of the complementary rules that allow individuals to agree differently from what was included. Thus, at time of concluding the contract, they may agree on the party who will bear or share compensations in this case (Article 220). In case of absence of such agreement, this provision becomes binding and there will be no compensation in case of force majeure and the damage is, as they say, “buried” where it falls. This provision is applied to every party that holds force majeure to face the other party, and does not oblige it to pay compensations for any damage. [301]

The Libyan legislator goes further, in article 664/1 of the Libyan Civil Law regarding construction contracts, as the owner does not fulfill payments for the executed works or contractor’s expenditures if such works have been destructedbecause of the force majeure which is expressed as the sudden incident. That article states: "if something has been destroyed by a sudden incident before it is delivered to the owner, the contractor is not entitled to claim any compensation neither for works nor for expenses, the loss of materials will be borne by supplying

300 -Aljundi, M. A.-S. (1990). House of Arab RenaissanceContract Guarantee or Obligation in Islamic Shariah ComparativeCivil Law. Cairo: House of Arab Renaissance. p . 90.

301 -Jbouda, H. (2004). p . 44

party." A disclaimer, which leads to non-compensation in the state of force majeure as it is in case of absolute impossibility, is the same in case of relative impossibility in which damages occur due to delay in fulfilling obligations (Article 218, Libyan Civil Law). One of the legal consequences of a disclaimer is “no need to excuse”, which is ordering the obliged party to fulfill its obligations as execution becomes impossible. This is whatis stated in Article 223. An excuse is a condition for entitlement to compensation (Article 221). It is different from the notice that must be served at the occurrence of force majeure, as it may be used as a pretext as seen among terms of FIDIC contracts. [302]

C. The effects of Force Majeure in FIDIC Contracts

FIDIC contracts pay a lot of attention to the consequences of force majeure because they are contractual terms and should be more detailed than the abstract rules set by the legislator in a form of legal rules. Henceforth, the consequences in FIDIC contract terms are beyond the subject of responsibility and follow that such extraordinary causes of force majeure must be avoided by pre-set measures. The perception that overshadows the making of FIDIC terms for contracts regarding force majeure, as a general rule, is the case in which force majeure does not continue for a pre-determined period. Subsequently, we take into consideration the limit of the contract and the conditions related to bearing consequences. [303]

The contracts considered by FIDIC are long-term contracts. Thus, they are concerned with passing such time avoiding abnormal circumstances or force majeure. For this, we cannot find the rule of the Libyan legislator who made the revocation of obligations is the consequence of force majeure. Therefore, Clause (4) of the above-mentioned Article (19) of the Silver Book considers the delay in execution of obligations and expenditure incurred by contractor, and if the noticeis served as mentioned in Clause 2 of Article 19, it will be entitled for the following:

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302 -Faraj, T. H. (1997b). General theory of commitment, theory of contract. Alexandria: the Egyptian BureauModern . p . 226

303 -Salama, A. A. (1989b). Theory of the International Free Contract Cairo,: Dar Al-NahdaArabic . p . 83

- Extension for the time delay occurred.
- Compensation for costs incurred due to force majeure.

Itdoes not show the mechanism in which contracts can be resumed, but it is understood from the context that once the contractor obtains those claims and the force majeure state is over, the contract can be resumed. If time extension does not make a major problem, then costs might need a special mechanism. [304]

Also, it does not mention negotiations and the possibility for the contractor to get a pledge to pay instead of actual payment. What if payment of full expenses is refused? Thereafter, Clause (6) of Article (19) comes to face another hypothesis which allows each party to terminate the contract in case that force majeure continues: if substantial parts of all running works have been suspended for a period of 84 subsequent days because of force majeure and subject to a notice served under sub-clause 2/19 or for multiple periods forming together (140) days due to reported force majeure, then,each party has the right to serve a termination notice to the otherparty. [305]

In this case, termination is executed after 7 days of the date of such notice, and the contractor continues under sub-clause 16/3 suspension of works and transfer of equipment. This term is faced by the case when force majeure continues giving each party the option to terminate the contract according to what it sees beneficial provided that limited terms are met and the required notice is served. Such measure has not been mentioned by the Libyan legislator, but the latter left the option open for individuals to agree on that in the contract. Sub-clause 19/7 of the Silver Book deals with the case in which fulfillment of obligations is impossible due to force majeure, notwithstanding any periods. Here, the parties are relieved from their

304 -Aljundi, M. A. S. (1990). House of Arab RenaissanceContract Guarantee or Obligation in Islamic Shariah ComparativeCivil Law. Cairo: House of Arab Renaissanc. p .100

305 -Albashkar, A .M. (2003b). The concept of force majeure (Master Thesis, ,) Faculty of Law Tripoli University, Tripoli. p .126

obligations, which is consistent with the general ruling that was set by the Libyan legislator in case of impossibility of fulfillment due to force majeure. [306]

Circumstances that constitute force majeure vary in their severity; thus, damages and losses are expected to happen in this side or that by either party. Even thoughthe Libyan legislator revokes responsibility in this case and with no reason for compensation, FIDIC contracts challenge the subject and determine the types of risks and the party who will bear consequences. Such determination would reduce arguments between parties and save time and money that might be spent on litigation, and support relations that arise through negotiation and mutual consent. Article 17/3 of the Silver Book shows risks that have their consequences to the owner and the once by the contractor and the owner:

- Wars, whether declared or not, hostile acts and foreign invasion.
- Uprisings, revolutions, armed strikes and civil wars.
- Ionic radiations, pollution caused by radioactivity of atomic fuel or residues of such fuel, radioactivity, toxics, explosives or any other risks caused by any explosive atomic compounds or their components.
- Pressure waves caused by space ships or air machines that move in sound speed or higher.
- Riot, political unrest, disruption of system unless it was limited to contractor's employees, its sub-contractors as a result of managing business.
- Losses and damages caused by using or taking over by the owner any part of the works except for precautionary measures allowed to the owner under the contract. [307]

306 -Salama, A. A. (1989c) Theory of the International Free Contract,, Cairo, 1989, Cairo: Dar al-Nahda Arabic. p . 315.

307 -Abdullah, A. A. (2010). Adaptation of The Contract in The Civil Code. Tikrit University Journal of Legal Sciences , 2(6), p . 160-179.

Except for the risks born by the owner, the contractor bares the remaining risks up to the time for official delivery of the finished works; then, all risks and their consequences are born by the owner. It is notable that most risks arising due to force majeure are born by the owner. This makes countries in which development projects are planned avoid such kind of contracts as subject those countries to bearing responsibility in case of force majeure whereas they are relieved from it according to their laws. As a result, this might reduce the chance to adopt such kind of contracts widely. For saving contractor's interests, FIDIC contracts determine the amounts payable by the owner to the contractor in case of termination of the contract due to force majeure whether by impossibility of execution or by the served notice based on84consecutive days or 40 intermittent days of force majeure. Those amounts are determined :

- All amounts generated against value of works that were executed before termination of contract.
- The costs for materials and goods required for execution of works and have been handed over to the contractor or the latter was legally responsible to receive them as they are properties of the owner and the contractor bears responsibility for their loss, this is if the contractor procured them on its own account.
- Any other expenses incurred by the contractor in reasonable conditions through its expectations for completing work requirements.
- The reasonable costs for transport of contractor's equipment from the work site to its country or to any other place not requiring higher cost as well as the reasonable costs for returning contractor's employees and workers involved directly in contract works at time of termination of the contract. [308] [309]

308 - Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6) . p . 88.

309 -Albadawi, M. A. (1997). General Theory of Commitment ,(Vol. 1). University of Tripoli: University of Tripoli . p .310.

Furthermore, organizing force majeure by FIDIC contracts misses the required balance as it is biased toward the contractor in determining risks and bearing the consequences, thus possibly affecting the acceptance of such contracts broadly. We conclude by saying that besides the need for a review, neither the Libyan Civil Law nor FIDIC contracts address the principles of negotiation by which to overcome many obstacles; as most of the state contracts are development contracts and the stateanxiously needs them to be completed in the same way as resumption of actovites is for contractors in normal situations. This mutual concern would allow for the creation of an enabling environment to implementcontracts at the end of the force majeure. [310]

IV. POSITIONS OF IMBALANCE IN OBLIGATIONS BETWEEN THE PARTIES TO CONSTRUCTION CONTRACTS AND EXPERIENCES OF FIDIC CONTRACTS IN ARAB COUNTRIES (IRAQ - SUDAN)

A. Positions of imbalance in obligations between parties to construction contracts

The main idea of administrative contracts theory in Libyan law is based on inequality between public authorities or state and normal individuals, necessitating a group of other regulations to protect individuals; therefore, there is distinguishing made between administrative contracts concluded by a government or and administrative authority as one party and contracts that are made between individuals. Administrative contracts give the government through unfair articles unreasonable powers to private sector. The most important of those powers is the government's power in modification of contract by one side for the benefit of

310- Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6) . p . 83

relevant facility or public service provided that it is compensated for incurred damages. [311]

It is clear that administrative contracts give the owner "Government" a special power through using uncommon conditions in construction contracts claiming that the target is to achieve public interest. In fact, the reality of the situation and the actual performance of the construction industry in Libya is indicative of this misunderstood concept or damage to public interest. Due to the imbalance of obligations and misdistribution of risks between the contract parties, many disputes arose caused by this classic model in construction projects and resulted in losses such as termination and delay of execution or rising cost of projects as well as legal claims. [312]

In respect of drawings and designs for example, article 7 of the Public Contract Form states that: " in case of" "each fault or omission in any specification or design or drawing committed by the first party "The owner" can be remedied at any time and the second party "The contractor" shall independently confirm validity of specifications, designs or drawings provided to it and shall inform the first party in good time about any notes about them, in case of approval, it becomes responsible for them as if they were given by it". [313]

Forming this view entails contractor's responsibility to check and validate the drawings submitted to it and report any notes. The final responsibility about defects and omissions in drawings, designs or specifications usually being a source of ambiguity in construction industry, as in many cases the contractor claims compensation for modifications or delays caused by defects or faults in designs while the owner responds to such claims by alleging that the contractor is responsible for costs that arose by such faults and defects as one of the contractor's contractual

311 -Mzghish, B. A. A. A. (2014). Legal system of the book of conditions in administrative contracts . p .244

312 -Salam, A. W. A. (2016). The authority of the administration to impose penalties on its contractor in public works contracts . p . 144.

313 -Salam, A. W. A. (2016). p . 161.

responsibilities is to review and check designs and drawings and specifications for suitability. [314]

The most negative impact that faced by the owner or its designer is the lack of seriousness in the preparation of project designs in complete, accurate and applicable form claiming that it is the contractor's responsibility to check and review the designs and drawings and report defects according to their understanding of this article, this situation on which many problems and claims by the contractor. In addition to the direct expenses incurred by the contractor in correcting errors of the design, the contractor also incurs additional expenses whether by accelerating work to meet schedule or by administrative expenses in case of any time delay spent waiting for making corrections to the design. On other hand, it is important to realize that the contractor's responsibility is limited to reviewing designs and drawings and confirming their suitability and applicability for the project, but it is not responsible for detecting faults and defects except for apparent and evident ones that can be detected by a professional contractor. [315]

There is a risky general weakness in the current systems of planning and assignment of projects as all operations are organized by one method of contracting, which is the classic method and based on separation between design and execution. Hence, it becomes necessary to follow a scientific method in making decisions regarding appropriate contracting policies. [316]

Also, contract documents must be clear and understandable by contract parties, thus requiring a review of administrative contracts policy as it is the policy that regulates contracting methods and sets the basics of contract terms and

314 -Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p . 44

315 -Salam, A. W. A. (2016). The authority of the administration to impose penalties on its contractor in public works contracts. p . 320.

316 -Shukri, I. T. M. (2011) The Binding Force of The Unilateral Terms of Liberalization in The Contract. p .580

conditions in order to achieve the target on which it was prepared. [317]It is necessary to review, modify and reorganize some articles within the government procurement system and its executive regulation that relates to public works contracts in order to increase the effectiveness of their scientific application to be compatible with the present and future stages of project development. Public works contracts shall include articles related to quality control systems, construction safety plans, incentives for using value in large projects, delay payment of contractors' receivables in case of shortage in regulative complementary documents of payment procedures instead of delaying full payments due and compensate contractors affected by unreasonable retention of their receivables. [318]

In the meantime, it is important to work on establishing a program for public works contracts organized by concerned governmental authorities. Such programs aim to discuss and explain administrative, financial and technical procedures during the execution of the contract, and establish a body to monitor the safety of construction works. This body would be assigned to perform inspections on contractors of governmental authorities and to form a single administration to ensure full coordination between construction-concerned departments during the execution of contracts. This leads us to suggest some solutions that may minimize those problems and accelerate the execution of projects that are part of the development plans in the state. This can be achieved using FIDIC contracts offering new and different forms suitable for all types of projects and provide fair distribution of risks and obligations on contract parties and correct previous deficiencies and mistakes in the classic contracts (such as public works contracts). [319]

As for the force majeure and the reasons for its start and termination, there is Nothing in the Libyan law considers the state of suspension, neither in term nor in obligations. Therefore, it is a status of waiting which may be prolonged or shortened.

317 -Jbouda, H. (2004). The impact of French law on the Libyan civil law on the subject of possession Faculty of Law -University of April 7 - University Journal (6). p . 46.

318 -Salama, A. A. (1989b). Theory of the International Free Contract Cairo,: Dar Al-Nahda Arabic . p . 410

319 -Sultan, A. (1996). Summarized in The Sources of Commitment . Alexandria: knowledge facility. p . 630.

The Libyan legislator does not even consider what should be done after the elimination of force majeure state and the mechanism in which the contract will be reactivated. Still, it is useful to mention what the Libyan government did following the 17th February revolution as it formed an advisory committee comprising experts to assume studying of the Libyan case and give recommendation about the mechanism in which contracts can be reactivated after their suspension during the revolution.

Article 168 of the Libyan Civil Law is explicit in this regard stating: “If the person has proved that the damage was caused by foreign reason out of its will, as a sudden incident, force majeure, omission by affected party or a fault by the third party, then it is not obliged to compensate the damages in case of no provision or agreement stated otherwise.” The first notable thing about this provision is that it is one of the complementary rules that allow individuals to agree differently from what was included. Thus, at the time of concluding the contract, they may agree on the party who will bear or share compensations in this case (Article 220).

In case of absence of such agreement, this provision becomes binding and there will be no compensation in case of force majeure and the damage is, as they say, “buried” where it falls. This provision is applied to every party that holds force majeure to face the other party and does not oblige it to pay compensations for any damage.

The Libyan legislator goes further, in article 664/1 of the Libyan Civil Law regarding construction contracts, as the owner does not fulfill payments for the executed works or contractor’s expenditures if such works have been destructed because of the force majeure which is expressed as the sudden incident. That article states: “if something has been destroyed by a sudden incident before it is delivered to the owner, the contractor is not entitled to claim any compensation neither for works nor for expenses.

The contracts considered by FIDIC are long-term contracts. Thus, they are concerned with passing such time avoiding abnormal circumstances or force majeure.

Thereafter, Clause (6) of Article (19) comes to face another hypothesis which allows each party to terminate the contract in case that force majeure continues: “if substantial parts of all running works have been suspended for a period of 84 subsequent days because of force majeure and subject to a notice served under sub-clause 2/19 or for multiple periods forming together (140) days due to reported force majeure, then, each party has the right to serve a termination notice to the other party.

In this case, termination is executed after 7 days of the date of such notice, and the contractor continues under sub-clause 16/3 suspension of works and transfer of equipment.

This term is faced by the case when force majeure continues giving each party the option to terminate the contract according to what it sees beneficial provided that limited terms are met and the required notice is served. Such measure has not been mentioned by the Libyan legislator, but the latter left the option open for individuals to agree on that in the contract. Sub-clause 19/7 of the Silver Book deals with the case in which fulfillment of obligations is impossible due to force majeure, notwithstanding any periods. Here, the parties are relieved from their obligations.

It is notable that most risks arising due to force majeure are born by the owner. This makes countries in which development projects are planned avoid such kind of contracts as subject those countries to bearing responsibility in case of force majeure whereas they are relieved from it according to their laws. As a result, this might reduce the chance to adopt such kind of contracts widely. For saving contractor’s interests, FIDIC contracts determine the amounts payable by the owner to the contractor in case of termination of the contract due to force majeure whether by impossibility of execution or by the served notice based on 84 consecutive days or 40 intermittent days of force majeure.

Furthermore, organizing force majeure by FIDIC contracts misses the required balance as it is biased toward the contractor in determining risks and bearing the consequences, thus possibly affecting the acceptance of such contracts broadly. We conclude by saying that besides the need for a review, neither the Libyan Civil Law nor FIDIC contracts address the principles of negotiation by which to overcome many obstacles; as most of the state contracts are development contracts and the state anxiously needs them to be completed in the same way as resumption of activities is for contractors in normal situations. This mutual concern would allow for the creation of an enabling environment to implementcontracts at the end of the force majeure.

Therefore, we believe that the deficiency or deficiency in this statement can be a cause obligation not agreed upon in the contract and may result in a future dispute. Therefore, there is a distinction between Compensation Events (where authority takes responsibility and contractor is compensated), Relief Events (which relieve the contractor from termination for failure to perform but not of the financial effects of delays) and Force Majeure Events (which relieve the affected party from liability for breach and where the parties share the financial effects of delays)

Force majeure in Clause 1 of Article 19 of the FIDIC Silver Book and Clause 2 of the same article has been addressed with the procedural obligations that shall be considered with the occurrence of force majeure as the party who is affected by force majeure is obliged to serve notice to the other party of such occurrence and to determine its obligations and deliverables that it could not fulfill. The clause sets a deadline for the notice as 14 days from the date on which it notices the occurrence or it should have noticed. By such served notice, the affected party is relieved from its obligations as long as force majeure is preventing the fulfillment of such obligation. It was previously noticed that the Libyan Civil Law does not mention the term “the notice”.Article (19) in Clause (3) adds an obligation on the contracting parties with which each party has to use all reasonable means in order to reduce any delay in the execution of the contract. However, such an obligation is not mentioned explicitly in the Libyan Civil Law.

The Libyan legislator only stipulates some rules and principles regarding the effects of force majeure, leaving the option open to agreement on organizing the effects in a different way. On the other hand, FIDIC conditions come with more details and elaborations about those effects in that they use the general authorization given by the legislator to the contracting parties to agree on what they deem appropriate in any contract.

Nothing in the Libyan law considers the state of suspension, neither in terms nor in obligations; hence, it is a status of waiting which may be prolonged or shortened. The Libyan legislator does not even consider what should be done after the elimination of force majeure state and the mechanism in which the contract will be reactivated. However, it is useful to mention what the Libyan government did following 17th February revolution as it formed an advisory committee consisting of experts to examine the Libyan case and give recommendations about the mechanism in which contracts can be reactivated after their suspension during the revolution.

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The issues of resolving disputes by alternative means, such as arbitration, were observed that the number of cases filed by foreign companies against the Libyan

state has increased in international arbitration courts, the main reason for which is the mutual agreements made between the Libyan state and several others referring to arbitration in case of disputes but without considering interests of the Libyan side and without sufficient background about the rules and the laws that specify arbitration procedures and without existence of laws that organize arbitration in the state.

The Libyan legislation is still missing a special arbitration law which determines rules and conditions of arbitration and is limited to the general rules of the procedures law. Despite the Libyan jurists' call on the legislator to enact this system along the lines of the arbitration law in Egypt and Tunisia, such action is still rejected.

As international arbitration is an important concept which needs to be focused on, this requires establishing training courses for the legal departments in Libya in order to identify international arbitration rules and the know-how to make administrative contracts and review evolutions developments in the field of international arbitration. This will help prevent losses to the state given the number of contracts made with third parties and inherited from the previous regime as they constitute risks to the national economy. All has to be brough under international direction to arbitration to save the time wasted in lawsuits before ordinary courts.

B. Experiences of FIDIC contracts in Arab countries (Iraq - Sudan)

1. Iraq

The regulations and laws governing the terms of the contract in the State of Iraq, whether for civil engineering works, or for the work of electrical, mechanical and chemical engineering, have become old, because they were developed at a time when the system in Iraq is completely different from now, and thus the philosophy of blogging on which these conditions are based Valid in many time for implementation in current reconstruction projects.

It is worth mentioning here that the conditions of the Iraqi contract have been organized and built on the basis of project types. However, Iraq's need to use new implementation systems, such as design / construction and handover of keys, makes

it impossible to apply these conditions to projects implemented in accordance with modern implementation methods.

The terms of the FIDIC contract models were updated in 1999 to apply to different implementation systems, rather than project types, and thus extend FIDIC's terms of reference for their new versions. The terms of the contract in Iraqi law were biased to the employer, which is usually the government. On the contrary, FIDIC's terms guarantee fair and equitable distribution of risks to the principal parties to the contract, the employer and the contractor. Where the terms of the contract in Iraqi law were not flexible enough to make them suitable and applicable to a wide range of reconstruction projects, unlike FIDIC's terms, designed to give them sufficient flexibility to apply not only to different types of projects but also internationally and locally.

FIDIC terms have a better arrangement and structure than many of the terms of the Iraqi contract, making them easy to use, refer to, and quickly concluded in different types of contracts and projects. FIDIC's terms and conditions include tracking, standard model packages, clear details and time frames that make it more effective and comprehensive than the requirements of the Iraqi contract. FIDIC terms are more clear and detailed than the terms of the Iraqi contract in determining the powers, obligations, duties and responsibilities of the parties involved in construction contracts.

The terms of the Iraqi contract must change radically in terms of the philosophy of blogging, structure and detail, to make it commensurate with the requirements of reconstruction projects in Iraq at the moment. The survival of the terms of the Iraqi contract to its current status will not only impede the progress of the reconstruction process in Iraq, but also waste large sums of money as a result of the delay in the completion of these projects and orders change resulting from the indiscriminate application of those conditions on projects implemented in accordance with the implementation regulations other than design / / Building. In addition to limiting the

possibility of effective follow-up to the completion of reconstruction projects, and the consequences resulting from these projects . [320]

2. Sudan

- FIDIC contracts are published by the FIDIC consortium for the management and implementation of industrial and electrical construction projects and have been designed according to flexible conditions that can be modified by the parties according to their will and approval. FIDIC contracts have been modified frequently to keep pace with international variables in project implementation.It is worth mentioning that the conditions of construction and construction in the Sudanese law are very few and lack the legislative organization and the unified law of the whole Sudan, which causes great problems.
- FIDIC's legal responsibility is governed by the local laws of the country in which the projects are implemented. The FIDIC rules stipulate that all local laws relating to the State of implementation of the project must be known.
- The Civil Transactions Act of 1984 failed to regulate the building law in the state of Khartoum in 2008 in accordance with the rules and conditions of FIDIC and neglect the detailed aspects of the obligations of the parties and not included in any tender. As well as texts in tenders for international projects.
- The Sudanese conditions for the engineering contract included good provisions relating to the obligations of the parties to the construction contract, so that the relevant laws can be used and included in any future amendment.
- It is worth mentioning that the FIDIC contracts exceeded the Civil Transactions Act of 1984 and the Arab legislations, as well as the quality of the work. The contractor was obliged to submit samples of the used materials and all the work related information which has already been reviewed and

320 -Mustafa , Z. J. M. A. N. (2012). Comparison Study between Iraqi Conditions of Contract and FIDIC Conditions- The Red Book. . Journal of Engineering, p . 183.

approved by the consultant engineer. The terms of FIDIC in the Red Book stipulate that the Contractor undertook to review the work, conduct tests and repair the defects of the building under the supervision of the Consultant Engineer and submit certified reports to the Engineer.

- The Sudanese Civil Transactions Act of 1984 created a huge vacuum in the choice of liability for the contractor and engineers compared to the provisions of the contracts Videik, and did not provide a text under the name of force majeure or a sudden or exceptional circumstances, and did not care to distinguish them, but only by drafting the text under the name Exceptional circumstances mentioned in Article 1/117.
- The FIDIC model deals with the issue of force majeure and emergency conditions and their effects in an adequate manner and surpassed our Arab and local legislations, which have simply dealt with this and created a great legislative vacuum.
- The absence of liability for the contractor and the engineer because of the employer's fault is conditional on proving that they are not related to the damage caused or not caused by any act of negligence, in addition to proving that the employer caused the damage.
- The interpretation of the general principle in a way that explains that the special responsibility of the engineer and the contractor has been imposed on the basis of the protection of the employer, when it is proved to them that they can not be relieved or relieved. They exceed the contractual requirements between the contractor, the employer and the engineer and relate to public order which is worthy of consideration.
- FIDIC contract models did not explain and clarify the liability of the consultant engineer and the legal contractor because of the fault of others.
- FIDIC contract models have given disputes arising from implementation significant attention to the fact that they may affect the completion of work.
- Consultant Engineer in FIDIC contracts has a wide role in resolving contract disputes. He has the expertise, experience and technical knowledge to resolve the dispute by virtue of his position, but he is also in a position of great conflict of interest by virtue of the fact that the Engineer is the employer's

employer's employer's rights, his role in resolving the dispute makes him the opponent and the referee himself.

- The Consultant Engineer in FIDIC contracts has a wide role in resolving contract disputes. By virtue of his knowledge of the business, he has the technical know-how, experience and know-how to resolve the dispute by virtue of his position, but he is also in a position of great conflict of interest by virtue of the fact that the Engineer is a representative of the employer The rights of the employer, his role in resolving the dispute makes him the opponent and the ruling at the same time. [321]

321 -Ahmed, M. o. O. M. (2018). Legal Liability of Contractor and Consultant Engineer in FIDIC Contracts Comparative Study College of Graduate Studies - University of El Nilain, Sudan. p . 163

CONCLUSION

An appropriate contract form is just as vital as the other important aspects of a project. A contract form is important as it affects the progress of a project by placing it in the right direction, in which a suitable strategy is applied. In this way, supply management is improved in order to deliver maximum value at minimum cost. In other words, the purpose of the thesis is to compare the form and conditions of the contract in accordance to the Libyan and Turkish Code of Obligations in order to highlight the areas of weakness in the formulation of Libyan law contracts based on the related Turkish laws, such as FIDIC contract models so as to minimize conflicts and disputes and make the most of the Turkish experiences in the construction sector, one which has been highly active in the past decade. During this comparison, it is observed that there is an imbalance in the obligations of the parties in the terms of the contract relating to the force majeure condition and the arbitration clause in addition to the risk allocation. Its believe these are the main reasons behind the problems to be challenged every day in Libya unless corrected and reformulated in line with the development of international contracts that :

Force Majeure clause conceptually and in terms of consequences as organized by the Libyan Civil Law on the one hand, and as stipulated in FIDIC contracts on the other. It is not a comparison between two legal systems, but one between dealing with issues comrephensively and considering aspects that need reviewing.

A Force Majeure condition is an agreement arrangement that enables a gathering to suspend or end the execution of its commitments when certain conditions outside their ability to control emerge, making execution ill-advised, monetarily impracticable, unlawful, or unthinkable. The arrangement may express that the agreement is incidentally suspended, or that it is ended if the occasion of power majeure proceeds for an endorsed timeframe.

The rundown of occasions to be incorporated involves the transaction between the gatherings. A run of the mill rundown of power majeure occasions may incorporate war, riots, fire, surge, sea tempest, tropical storm, seismic tremor,

lightning, blast, strikes, lockouts, stoppages, delayed deficiency of vitality supplies, and demonstrations of state or legislative activity forbidding or blocking any gathering from playing out its individual commitments under the agreement.The provisions of the Libyan Civil Law state that force majeure is a foreign reason out of parties' control, making the execution of obligation impossible. Impossibility here means that contract parties cannot avoid or overcome that reason. Regarding the condition of impossibility of execution, the legislator does not require this impossibility to be absolutein the case in which force majeure is continued, but some kind of force majeure may occur and lead to impossibility of execution or delay (Article 218 LCO),

This law does not include a definition for force majeure; nor does it even use a specific term in its regard. Sometimes, it considers it under the term "foreign reason" as in Article 168; in others, it is counted under a sudden accident or just a foreign reason without mentioning force majeure as in Articles 218 and 360. Also, in some cases it is stipulated individually as Article 1/672 TBK .

Thereby, it is understood that the Libyan legislator takes into consideration the force majeure and burdens its consequences on the obligations of contracting parties, but it does not give it a specific definitio.

From the procedural aspect, the Libyan Civil Law does not set the conditions for necessity of notices or reporting by any party when it is possible to invoke force majeure, and leaves that to contractual will.The Libyan legislator does not specify the duration for continuity of force majeure in which obligation shall be revoked, leaving it to the conclusions of agreements (if any) or to outcomes of negotiations. Nor does it mention any obligation abiding any party during the period of force majeure. Therefore, we believe that the deficiency or deficiency in this statement can be a cause obligation not agreed upon in the contract and may result in a future dispute. Therefore, there is a distinction between Compensation Events (where authority takes responsibility and contractor is compensated), Relief Events (which relieve the contractor from termination for failure to perform but not of the financial effects of delays) and Force Majeure Events (which relieve the affected party from liability for breach and where the parties share the financial effects of delays)

Force majeure in Clause 1 of Article 19 of the FIDIC Silver Book and Clause 2 of the same article has been addressed with the procedural obligations that shall be considered with the occurrence of force majeure as the party who is affected by force majeure is obliged to serve notice to the other party of such occurrence and to determine its obligations and deliverables that it could not fulfill. The clause sets a deadline for the notice as 14 days from the date on which it notices the occurrence or it should have noticed. By such served notice, the affected party is relieved from its obligations as long as force majeure is preventing the fulfillment of such obligation. It was previously noticed that the Libyan Civil Law does not mention the term “the notice”.Article (19) in Clause (3) adds an obligation on the contracting parties with which each party has to use all reasonable means in order to reduce any delay in the execution of the contract. However, such an obligation is not mentioned explicitly in the Libyan Civil Law.

The Libyan legislator only stipulates some rules and principles regarding the effects of force majeure, leaving the option open to agreement on organizing the effects in a different way. On the other hand, FIDIC conditions come with more details and elaborations about those effects in that they use the general authorization given by the legislator to the contracting parties to agree on what they deem appropriate in any contract.

Nothing in the Libyan law considers the state of suspension, neither in terms nor in obligations; hence, it is a status of waiting which may be prolonged or shortened. The Libyan legislator does not even consider what should be done after the elimination of force majeure state and the mechanism in which the contract will be reactivated. However, it is useful to mention what the Libyan government did following 17th February revolution as it formed an advisory committee consisting of experts to examine the Libyan case and give recommendations about the mechanism in which contracts can be reactivated after their suspension during the revolution.

The important result considered by the Libyan legislator from non-execution of obligations because of force majeure is a disclaimer by the obliged party as the pillars of responsibility, namelyfault and damage, whereas the causal relationship does not exist here. A disclaimer is different from relief, as relief does not rule out

responsibility, but disclaimer means that responsibility has not been originated. In our opinion, the disclaimer is mainly referenced to the lack of causal links between faulting by non-fulfillment of the contractual obligation and the damage incurred. In this way, damage cannot be attributed to the obliged party as long as it is impossible to fulfill due to force majeure. The disclaimer might lead to an important result, which is non-compliance with compensation for damage caused by non-implementation.

Article 168 of the Libyan Civil Law is explicit in this regard, stating: “If the person has proved that the damage was caused by foreign reason out of its will, as a sudden incident, force majeure, omission by affected party or a fault by the third party, then it is not obliged to compensate the damages in case of no provision or agreement stated otherwise.” The first notable point about this provision is that it is one of the complementary rules that allow individuals to agree differently from what was included. Thus, at time of concluding the contract, they may agree on the party who will bear or share compensations in this case (Article 220). In case of absence of such agreement, this provision becomes binding, and there will be no compensation in case of force majeure.

FIDIC contracts pay marticulous attention to consequences of force majeure because they are contractual terms and should be more detailed than the abstract rules set by the legislator in the form of legal rules. Consequently, considering the consequences in FIDIC contract terms is beyond the subject of responsibility and follows that such extraordinary causes of force majeure must be avoided by pre-set measures.

As stated before, the contracts considered by FIDIC are of long-term nature, hence the concern about avoiding abnormal circumstances or force majeure. Accordingly, we cannot find the rule of the Libyan legislator who made the revocation of obligations is the consequence of force majeure. Therefore, Clause 4 of the above mentioned Article (19) of the Silver Book considers the delay in execution of obligations and expenditure incurred by contractor, and if it serves the notice mentioned in Clause 2 of the same article, then it will be entitled for the following:

- Extension for the time delay occurred.
- Compensation for costs incurred due to force majeure.

Thereafter, Clause 6 of Article 19 comes to address another hypothesis, which allows each party to terminate the contract in case that force majeure continued: “if substantial parts of all running works have been suspended for a period of 84 subsequent days because of force majeure and subject to a notice served under sub-clause 2/19 or for multiple periods forming together (140) days due to reported force majeure, then, each party has the right to serve a termination notice to the other party. In this case, termination is executed after 7 days of the date of such notice, contractor continues under sub-clause (16/3) suspension of works and transfer of equipment. This term is faced by the case when force majeure continues giving each party the option to terminate the contract according to what it sees beneficial provided that limited terms are met and the required notice is served. Such measure has not been mentioned by the Libyan legislator.

In Sub-clause 19/7 of the Silver Book the case is addressed in which fulfillment of obligations is impossible due to force majeure, notwithstanding any periods. Here, the parties are relieved from their obligations, which is consistent with the general ruling set by the Libyan legislator in case of impossibility of fulfillment due to force majeure.

Another aspect is that the circumstances that constitute force majeure vary in their severity; thus, damages and losses are expected to happen on either side. Even though it is seen that the Libyan legislator revokes responsibility in this case and no reason for compensation, FIDIC contracts challenge the subject and determine the types of risks and the party who will bear the consequences. Such determination would reduce arguments between parties and save their time and money that might otherwise be spent on litigation, and support relations that arise through negotiation and mutual consent. Article 17/3 of the Silver Book deal with risks that have their consequences to the owner and the once by the contractor.

Except for the risks born by the owner, contractor bears the remaining risks up to the time for official delivery of finished works, then all risks and their

consequences are born by the owner. It is notable that most risks arising by force majeure are born by the owner, making countries in which development projects are planned avoid such kind of contracts because of the responsibility in case of force majeure while they are relieved from it according to their own laws. As a consequence, this might reduce the chance to adopt such kind of contracts widely. For saving the contractor's interests, FIDIC contracts determine the amounts payable by the owner to the contractor in case of termination of the contract due to force majeure whether by impossibility of execution or by the served notice which is based on (84) consecutive days or (40) intermittent days of force majeure.

Furthermore, organizing force majeure by FIDIC contracts misses the required balance as it is biased toward the contractor in determining risks and bearing consequences, possibly affecting the acceptance of such contracts broadly. We conclude by saying that besides the need for a review, neither the Libyan Civil Law nor FIDIC contracts mention the principles of negotiation by which it is possible to overcome many obstacles. As stated before, since most state contracts are development contracts, the state often needs them to be completed as same as resumption of contractors' activities in normal situations. This mutual concern would allow for the creation of an enabling environment for the implementation of contracts at the end of the force majeure.

The idea of arbitration is as old as the Republic of Turkey. The system of arbitration was controlled by the Statute of Procedural Law in 1927. There are likewise techniques and directions that manage universal private law. Notwithstanding these procedural directions, Turkey marked all-significant worldwide concurrences on the global business arbitration. These understandings are to be specific Geneva Convention on the Execution of Foreign Arbitral Awards, New York Convention on the Enforcement of the Arbitral Awards and the Washington Convention (International Center for the Settlement of Investment Disputes). Turkey likewise perceived the strategy of intervention in some Bilateral Investment Treaties (BITs) with different states if there should be an occurrence of a question between the Turkish state and remote private people.

From a universal point of view, Turkey is a nation that has perceived the idea of worldwide business arbitration in the early long stretches of the Republic and consented to the significant arrangements that perceive the implementation of the global arbitral honors. In spite of the fact that Turkey has consented to all these global arrangements, in regard to the all inclusive ethic of worldwide law that is pacta sunt servanda , Ankara did not approve these universal understandings until the ahead of schedule of 1990s. As indicated by Article 90 of the Turkish Constitution in power since 1982, the authorization of a worldwide assention can be acknowledged by endorsement of the Turkish Grand National Assembly ordering it into law.

A similar article of the Turkish Constitution likewise decides the comprehension of the contention of laws. With a similar reference in the Constitution, every single universal arbitration are equivalent to the next national laws if the global understanding is sanctioned by the system depicted in article 90 of the Turkish Constitution. The acknowledgment of outside arbitral honors and tolerating authorization of these honors was acknowledged through two particular laws. The International Private (Law No. 2675) which empowered the implementation in Turkey of remote arbitral honors in 1982. Notwithstanding this law, Turkey sanctioned the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by Law No. 3731 out of 1991.

Despite the fact that there was not an obstruction for the act of worldwide business intervention after the confirmation of global concurrences based on the Turkish Constitution, there were repudiating protected articles that incapacitated universal assertion in concession understandings that identify with open administrations. These negating articles, to be specific Artilces 125 and 155, were changed in 1999 to empower the Hukuk Usulü Muhakemeleri Kanunu (Statute on the Procedural Law) and Milletlerarası Özel Hukuk ve Usul Hukuku Kanunu (The Statute on The InternationalPrivate and Procedural Law) to be the material law to global mediation notwithstanding for concession agreements.In Libya, the status is different as it is known that ordinary judiciary in the modern states has the general authorization and competency in settling all disputes of any subject that may arise within the state region unless otherwise stipulated in a special provision. The state of

Libya, like other modern states, considers judiciary as primary in settling disputes and crimes, Article 3 of the Procedures Law states that: “Competency in cases filed against foreign parties: Libyan judiciary is the authority specialized in considering cases that are filed against a foreign party.

In the following cases: 1- If that foreign party resides legally in the country, has a registered address, has a representative who is authorized to appear before courts or has accepted ruling of Libyan judiciary unless the case is related to a property outside Libya. 2- If the case relates to funds located abroad or heritage of a Libyan citizen or a heritage or insolvency established in Libya or the case is based on a contract made, has been executed, or has been required to be executed in Libya, or the case is based on an incident occurred in Libya. 3- If the claim relates to a case already filed at Libyan judiciary or to precautionary measures applicable in Libya or to affairs in which Libyan judiciary is competent. 4- Cases filed against Libyan and in which foreign judiciary is competent just for reciprocity.

However, at the same time, other dispute settlement methods are recognized as the Libyan Procedures Law addresses the issue of organized arbitration as a method to settle disputes in a dedicated unit composed of 39 articles; the first chapter of this unit is dedicated to the general rules of arbitration, and the second chapter for arbitration between spouses. The law authorizes arbitration by judiciary or reconciliation or recourse to arbitration under arbitration conditions. It also shows arbitration procedures, issuance, and execution of arbitration award and the possibility of being challenged. The law excludes from arbitration procedures some issues related to the public system, work injuries, social security, nationality and personal statusin addition to some restriction imposed on arbitrators’ powers with the exclusion of their competency regarding some issues.

It should be noted that this arbitration does not include the disputes of public legal persons such as state-owned authorities, institutions and general companies in which ordinary judiciary is competent. The Libyan legislator does not prevent Libyan parties from recourse to foreign or international arbitration. In administrative contracts, despite the applicable policy of such contracts made in 1980 makes it fundamental that settling disputes related to such contracts the competency of the

national jurisdiction mentioned policy in cases of contracting with foreign companies and if necessary allowing recourse to arbitration, in this case the contract shall specify which disputes are to be referred to arbitration, arbitration procedures, and the rules of choosing arbitrators ensuring that Libyan side has equal opportunities to choose them and the extent of authorities andpowers given to arbitrators with prohibition of agreeing on insolvency established in Libya or the case is based on a contract made, has been executed.

It is noteworthy that the number of cases filed by foreign companies against the Libyan state has increased in international arbitration courts, the main reason for which is the mutual agreements made between the Libyan state and several others referring to arbitration in case of disputes but without considering interests of the Libyan side and without sufficient background about the rules and the laws that specify arbitration procedures and without existence of laws that organize arbitration in the state.

The Libyan legislation is still missing a special arbitration law which determines rules and conditions of arbitration and is limited to the general rules of the procedures law. Despite the Libyan jurists' call on the legislator to enact this system along the lines of the arbitration law in Egypt and Tunisia, such action is still rejected.

As international arbitration is an important concept which needs to be focused on, this requires establishing training courses for the legal departments in Libya in order to identify international arbitration rules and the know-how to make administrative contracts and review evolutionsdevelopments in the field of international arbitration. This will help prevent losses to the state given the number of contracts made with third parties and inherited from the previous regime as they constitute risks to the national economy. All has to be brough under international direction to arbitration to save the time wasted in lawsuits before ordinary courts. Doing so requires the following:

All agreements made between the ministry of finance and foreign companies to manage governmental cases the office to be studied and verify validity of awards.

It has to be confirmed that the made agreements include explicit legal provisions that secure the rights of the state and not to file lawsuits in the same subject of agreement inside or outside. Assurance is needed that all municipalities and municipal councils do not conclude any administrative contracts that may lead to financial obligation contrary to the law of general budget of the state, and the legal responsibility shall be borne by the undersigned. Work is needed in coordination with the state cases management the office with the approval of the Council of Ministers about any violation against which a final award was issued. Finally, reviewis required over the objective causes and the responsible bodies of such award vague in preparation for taking legal actions against the violators.

And it should work in coordination with the state cases management office to study and identify the weak points and the legal gaps in the legislations and laws that organize the work of the administrative body of the state; studies are to be conducted over the nature of failure derived from awards issued against the Libyan state in order to activate the consultative role of the government. Work and coordination between Information and Documentation Center of the Ministry of Justice and case management department as well as courts can establish a system for documentation of all cases filed against the Libyan state under aunified code for each case. Such information shall include all personal data of the claimants and the defendants whether natural or legal person, and the statement of the case shall bemade for all litigation levels in order to prevent repetition of the subject of the lawsuit.

It should oblige all sectors and government case management department to form a common defense team in case there is a lawsuit with a special technical nature which needs specialized bodies. Support has to be lent to the government case management department with personnel qualified in the field of international commercial law and international law and work to train other legal and professional cadres on international laws and rules that organize the international arbitration in order to challenge the large number of disputes. Work has to be allocated to update the Law No.87 of 1971 regarding establishment of government case management department in a way consistent with the developed style of local and international judicial work, and propose a law which organizes arbitration, rules and procedures to

be enforced inside Libya in coordination with the Government Case Management and law management at the Ministry of Justice. The Ministry of Finance and Governmental Case Management are to be tasked with desiging a system through which both can be linked for corresponding electronically. Pursuant to article 172 of Budget Accounts and Stores Policy, the Audit Bureau can also be connected to follow up in accordance to law to prevent fraud and to correspond letters and awards. The Ministry of Finance shall document the incoming awards to be distributed through an electronic system; archive all documents of the award and categorize them according to the subject of the award and determine all data of execution and identify beneficiaries of the award in order to prevent the repetition of the same subject.

The plan of certain extraordinary arrangements is conceivable where the hazard designation ought to be tended to between the undertaking proprietor, the structure/development contractual worker and the administrator of the activity and support, to mirror the dialect of the understanding between the venture proprietor and the task organization. The down to earth answer for the potential equivocalness between various contracts is to utilize the dialect "if and when" in the development/configuration contract, for instance, demonstrating that the plan/development temporary worker has the privilege to expand the time under specific conditions "if and when" Concession concurrence with the proprietor. The undertaking organization may likewise wish to see a solid statement in the plan/development contract so the structure/development temporary worker is obliged to actualize with the goal that the venture organization does not abstain from satisfying its commitments under the assention. Hazard will be a factor for all key task members in plan, development and danger segments, and additionally other leftover dangers. A few gatherings as a rule bear the best level of hazard, specifically, the structure/development temporary worker.

Finally, the choices made by the task proprietor and his specialists, regardless of whether architects, designers or venture supervisors in the beginning times of authoritative offering, will have a critical effect in deciding the tone of things to come development connection between the gatherings. While value that value and

value standards ought to be connected while allotting dangers in contracts, the insignificant dispersion of hazard to the weaker party, which is less inclined to give a solid haggling position in the transaction procedure, would prompt a pointless acceleration in the expense of the task. The supposed weaker gathering will consider venture chances as bulky and will incorporate such dangers with its very own expense of-benefit projections.

Unequal or overwhelmingly uneven contracts, tossing the majority of the significant dangers on to the Contractor, can result in a breakdown of connections throughout a task, as opposed to making for a smooth helpful process all through the term of development. This will eventually convert into rancor, cases, and trouble in accomplishing a by and large fruitful venture, as one gathering or alternate sees that it is being exploited and that it has marked a not exactly fortuitous contract.

The application of these provisions to contracts executed in Libya find with respect to drawings and design, article 7 of the Public Works Contract Model stipulates that: "Any error or omission in any description, design or fee made by the First Party (the Owner) may be rectified at any time and the Second Party (Contractor) shall investigate the validity of the specifications, designs and drawings submitted to it and shall inform the First Party in due course of its observations and in the case of acceptance of them shall be responsible for them as if they were submitted by him. " The formulation of this article includes the responsibility of the contractor to inspect the drawings submitted to him, to check their validity and to report any observations. Final liability for faults or errors in drawings, designs or specifications is often a source of ambiguity in the construction industry. In many cases, the contractor seeks compensation for the changes or Delay due to errors or defects in design, while the landlord responds to those claims that the contractor is responsible for the costs associated with these errors as it is the contractor's responsibility to review designs and drawings and specifications and discover their suitability.

The most important negative effects is the lack of seriousness of the owner (or designer) in the preparation of project designs in a complete, accurate and enforceable manner on the basis that it is the responsibility of the contractor to

review drawings and designs as they understand this article and the detection of any errors or defects and reportingIn addition to the direct costs incurred by the contractor in handling the design errors, he also incurs additional expenses either because of the acceleration of the work to comply with the schedule or because of the administrative expenses in the case of delay of the project pending the correction of errors in design.

On the other hand, it is important to realize that the contractor's responsibility is limited to reviewing the designs and drawings and ensuring that the design is suitable and valid for execution and not responsible for the detection of errors or defects except for obvious or obvious defects or errors that any experienced contractor can discover.The natural and proper situation to address this risk should be based on the following principles:

- The responsibility of the designer is supposed to be in place until the completion of the implementation of the project, and during this period review designs and repair any defects or errors as shown during the implementation in accordance with observations received from either the contractor or the supervisor.
- The contractor has to be given the right to extend the period of implementation of the project and compensation for the damages resulting from these errors and the period it takes the designer to repair and correct the drawings.
- There should be compatibility between the terms of the design contract between the owner and designer and the terms of the contract of implementation between the owner and the contractor to deal with the problems of design, and the designer's commitment to repair and liability for damages that may be suffered by the project as a result of that, either to the contractor or the owner.

This type of risk or problem is expected to continue unless necessary administrative measures are taken under control and the exact causes are determined. Public institutions need to be aware of the need for good practice at the level of planning, coordination and change of control and control methods.

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Summary of The Thesis in Turkish

Uygun bir sözleşme formu seçmek, bir projenin diğer önemli yönleri kadar önemlidir. Bir sözleşme formu, projenin ilerlemesini, uygun bir stratejinin uygulandığı doğru yöne yerleştirerek etkilediği için önemlidir. Bu şekilde, minimum maliyetle maksimum değeri sağlamak için tedarik yönetimi iyileştirilir. Dahası, sözleşmeleri yönetmek için en iyi uygulama sürecinin nasıl geliştirileceği ve uygulanacağı konusu da var. Bu bağlamda, Bower sözleşme formunu "sözleşme oluşumunun zaman çizelgesi ve nihai maliyet üzerinde büyük bir etkisi var" Projenin sonuçlarına göre ", uygun olmayan sözleşme formunu seçerek ortaya çıkan proje sonuçları üzerindeki olumsuz etkilerin altını çizer ve yanlış bir sözleşme formu seçildikten sonra bütçe giderlerini kolayca oluşturabileceğini ve tamamlanma süresini geciktirebileceğini belirtir.

Bir sözleşme için uygun bir form belirlemek ve seçmek, farklı kullanıcıları çözmek için en iyi yolu seçerek, son kullanıcıların mal ve hizmet hizmetleriyle ilgili taleplerini en iyi şekilde sunmak için rekabetçi bir süreçte uygun fiyat ve sözleşme koşullarını belirleyerek karşılamak zorundadır. zamanında.

Genel olarak, bir sözleşme oluşturmak için bir teklif, kabul, dikkate ve mevcut olmak üzere karşılıklı bir niyet çağrısında bulunulur. Günümüzün inşaat faaliyetleri iki ana karara dayanmaktadır: uygun bir sözleşme formu seçmek ve taraflar arasında hak ve yükümlülükleri tahsis etmek. Bunlar, hedeflerine ulaşmak için öncelikle karşılaştırmalı bir yasal araştırma yöntemi kullanan mevcut tezin ana konularıdır. Başka bir deyişle, amaç, ilgili Türk yasalarına dayanan Libya yasa sözleşmelerinin oluşturulmasındaki zayıflık alanlarını vurgulamak için Libya ve Türk Borçlar Kanunu uyarınca sözleşmenin biçimini ve koşullarını karşılaştırmaktır. FIDIC sözleşme modelleri, çatışma ve anlaşmazlıkların en aza indirgenmesi ve son on yılda oldukça aktif olan inşaat sektöründeki Türk deneyimlerinden en iyi şekilde yararlanılması için modeller.

Bugünlerde inşaat sektörü aktif; Yine de, sayısız meseleler hala ele alınmaya devam etmektedir, bu yüzden hızlı gelişimi tehlikeye atar. Bunlar arasında maliyet ve zaman bakımından genel giderler var - Libya bağlamında oldukça yaygın bir olgu.

Tez, Libya'da kullanılan sözleşmeler için modellerin geliştirilmesine ve modern yöntemlere göre Türkiye'deki uygulamalarla karşılaştırılmasına dayanmaktadır. Bu, Türkiye Devleti'ndeki kalkınmaya ve hem şirketler düzeyinde inşaat faaliyetlerinin refahına hem de sözleşmelerin doğruluğuna ve bunların modernite gerekliliklerıyle uyumluluğuna önemli katkılar sağladığı için yapılmaktadır. İnşaat sözleşmeleri (FIDIC) önemini uluslararası kuruluş tarafından onaylanan model sözleşmelerden almaktadır. Bu bakımdan, dünya çapındaki inşaat anlaşmalarını düzenlemek için en yaygın kullanılan formlardır ve yerel ve uluslararası inşaat sorunlarından kaçınmak için sözleşme öncesi bir çerçeve oluşturmak için hayati öneme sahiptir.

FIDIC Sözleşmeleri, yurtdışındaki projeler boyunca paydaşların, yüklenicilerin ve mühendislerin karşı karşıya kaldığı riskleri azaltmayı ve bu tür dünya çapındaki sözleşmelerden kaynaklanan sorunlardan kaçınmanın yanı sıra çok çeşitli yasal kuralların gerekmemesi gerekliliğinin önlenmesi için ortak ve ön temeller oluşturmayı amaçlamaktadır. Özellikle, farklı teknik, sözleşmeli ve dilsel kültür ve yasalara sahip olmasına rağmen, yerel özel sözleşmeleri kullanan uluslararası inşaat sözleşmeleri söz konusu olduğunda, yerel partiler katılmaktadır. Bu tez esas olarak, burada belirtilen amaçlara ulaşmak için kara harf yaklaşımı ve karşılaştırmalı yasal araştırma yöntemlerini kullanmaktadır. Yaklaşım, Libya ve Türk Medeni Kanunu bağlamında sözleşmelerin şekli ve koşullarını karşılaştırmak amacıyla yapılan araştırma sorularına göre seçilmiştir. Tez üç bölümden oluşmaktadır.

Bölüm 1, konunun Türkiye ve Libya hukukuna ana girişini ve bunların ilişkilerini ve Türkiye'nin Afrika'daki üçüncü en büyük ticaret ortağı olarak Libya hukuk sistemine genel bir bakış içermektedir.

Sözleşmenin tanımı, sözleşmelerin serbestliği ve limitler (teklif ve kabul) gibi sözleşmelerin oluşumuyla ilgili temel bilgilere genel bir bakış. Borçlar yasalarındaki resmi şartlara ek olarak (yasadışılık ve ahlaksızlık) açıklanacaktır. İkinci bölüm, inşaat sözleşmelerinde kullanılan terminolojiden, sözleşme koşullarındaki modifikasyonlardan ve niyetin mahkeme kuralları tarafından belirlenen veya sınırlandırılmaya çalışıldığı dilin çalışmasına göre sözleşme şartlarındaki değişikliklerden veya kısıtlamalardan oluşmaktadır. gerçekte sözleşmenin bir parçası değildir. Bu kavramlar, "açık koşullar" ve yasada belirtilen şartlar ve Türk ve Libya

Borçlar Kanunu'ndaki İnşaat sözleşmelerinin gözden geçirilmesi koşullarında ortaya çıkmaktadır. İnşaat sözleşmesi doğası gereği anlık bir performans sözleşmesidir ve bazı yönlerden sürekli sözleşmelere benzer Uzun vadeli inşaat sözleşmelerinde, yüklenicinin üstlendiği performans sürekli performanslara benzer.

Taraflarca kararlaştırılan tüm şartları ve koşulları içerecek şekilde "bireysel sözleşme" şeklinde bir inşaat sözleşmesi düzenlenir. Bununla birlikte, büyük ölçekli çalışmalarla ilgili bu anlaşmalarda, sözleşme ayrıca FIDICType Sözleşmeleri ve Spesifikasyonları gibi genel işlem koşullarını da içerir.

Üçüncü bölümde, bir inşaat sözleşmesi olarak FIDIC (Uluslararası Danışmanlar ve Mühendisler Federasyonu), inşaat sektöründeki müteahhitler ve paydaşlar arasında yapılan inşaat sözleşmeleri, inşaat mühendisliği, mekanik ve elektrik işleri gibi örnek sözleşmelerin tasvir edildiğini açıklamaktadır. Sözleşme taraflarca önceden hazırlanmış ve kararlaştırılmış belirli şartlar ve koşullar ile elverişli olan çok sayıda model sözleşmesi vardır. Burada, FIDIC sözleşmelerinde çeviri sorununu ve uluslararası düzeyde önemini de içerecek şekilde FIDIC sözleşmelerinde kabul edilen sözleşmelerin neden olduğu yasal sorunları da ele alacağız.

Üçüncü bölümde ayrıca, Libya yasalarındaki mücbir sebepler ile FIDIC sözleşmeleri arasında korelasyon bulunan sözleşmelerdeki mücbir sebep durumuna genel bir bakış sunulmaktadır. Mücbir Sebep hükmü, bir toplantının, kontrolü dışında belirli koşullar ortaya çıktığında, kararsız, endüstriyel olarak uygulanamaz, yasadışı veya tuhaf bir şekilde uygulama yapıldığında taahhütlerinin yerine getirilmesini askıya alma veya sona erdirme izni veren bir terimdir. Bu düzenlemenin ışığında, sözleşme kısa bir süre için askıya alınabilir veya mücbir sebep halinin belirli bir süre boyunca devam etmesi durumunda sona erebilir. Dahil edilecek bu tür olayların özetlenmesi, toplantılar arasında değiş tokuş yapılması gereken bir konudur.

Bu tezde ele alınan bir diğer nokta, her yerde bulunan ve derin olan hakemlik hükümlerinin, tarafların kendilerini içeren anlaşmalar üzerindeki haklarını değiştirmesidir. Çoğunlukla, yine de, taraflar ve onların danışmanları, bu maddelerin gerçek bir anlaşmazlık ortaya çıktığında ne kadar önemli olduğunu fark etmeye başlar, bir çıkış yolu sunmak ve anlaşmazlıkların ele alındığı gibi beklentileri

şekillendirmeye yardımcı olmak için iyi hazırlanmış bir tahkim anlaşması yapılmasını ister. Atanan idari organ da dahil olmak üzere farklı konularla ilgilenen bir dille, hakemlerin sınırlandırılmış yetkileri, keşif sınırları ve diğer hususlar, bu tahkim maddeleri, anlaşmazlıkları çözme yöntemlerinin genel bir görünümünü tasarlamaya yardımcı olur. Bu görüş ile ilgili olarak, her bir maddenin, uygun tahkim mekanizmasını, idari organı ve bireysel hakemleri seçmek, tahkim için ihtilafların kapsamını çerçevelemek, oturumu ve yeri seçmek gibi herhangi bir özel konu için uygun bir anlaşmaya varması için, belirli koşullara ilişkin düşüncelerdir. Duruşmaların ve nihayetinde kanunun seçimi, gizlilik ve ticari sırlarla ilgili hususlar.

Bu tezde ele alınan bir diğer sözleşme özelliği, ticaretin doğal bir gerçeği olan ve kaçınılması mümkün olmayan bir konu olan inşaat sözleşmelerinde risklerin nasıl tahsis edildiğidir. Potansiyel olarak, her türlü taahhüt kendi içinde bir risk seviyesi içerir, çünkü her kararda her zaman belirli bir belirsizlik derecesi vardır. Risk, "... belirsizlik sonucu proje hedeflerini olumsuz yönde veya olumlu yönde etkileyen olayların ortaya çıkma şansına maruz kalma" olarak tanımlanabilir. Bundan dolayı, inşaat sözleşmesi seviyesine inen bir tür risk almaktır, ancak ticaretin niteliği, projelerin birbirinden bir dereceye kadar değişmesine neden olur. Dolayısıyla, risk inşaat sektöründe iş yapma sürecinin doğal bir parçasıdır.

Bu tez, Libya ve Türk hukuk sistemini çeşitli alanlardaki güçlü ilişkileri nedeniyle karşılaştırmaktadır. Libya medeni kanunu 28 Kasım 1953'te yayınlandığında, bunlardan biri - daha önce belirtildiği gibi - Mısır medeni kanunu çıkarılmadan önce uygulanan İtalyan medeni kanunu olan - diğer hukuk sistemlerinde tarihsel geçmişi olan hükümler içeriyordu.

Tarihsel olarak, Libya medeni kanununun çıkarılmasından önceki dönem, Osmanlı Devleti'nin idaresinde, Adalet hükümleri dergisi'nin adalet hükümleri dergisi (Adalet hükümleri dergisi) ile başlayan birden fazla hukuk sisteminin kurulmasına tanık olmuştur. devlet ve Hanafi hukukundan alındı. Kod, 1911'deki işgal sırasında İtalyan sivil hukuk kuvveti kapsamına girmeyenler için kullanılmaya devam etti.

Tarih söz konusu olduğunda, Türkler ve Libyalılar kültürel terimlerle yakından bağlantılıdır. Libya, 1551-1911 yılları arasında Osmanlı egemenliğine girdi ve 1911-1912 savaşı sırasında İtalya'ya geçti. Avrupa hakimiyetinden (libya topraklarının) sonra, Türkiye ile Libya arasındaki ilişkiler, yalnızca 1969'da geri dönmek için düşük seviyeli kaldı.

Aslında, Türkiye'nin Libya ile dostane bağlarının kökleri ilk olarak ABD silah ambargosu sırasında yayıldı (1974'te Kıbrıs'a müdahaleden sonra Türkiye'de. Bundan sonra, Türk inşaat müteahhitleri, yabancı katılımların bir parçası olarak Libya'da yaygınlaştı. Türkiye'nin Afrika'daki üçüncü en büyük ticaret ortağı ve ikisi, iki taraflı yasal çerçevenin oluşturulması için başta Ekonomik ve Teknik İşbirliğinin Geliştirilmesi (1975) ve İkili Yatırım ve Koruma Sözleşmesi (2009) hakkında bir dizi anlaşma imzaladı. Ticari ve ekonomik bağlar Her iki tarafın da Serbest Ticaret Anlaşması kurma girişimleri önümüzdeki yıllarda yapılmaktadır.

Türkiye, Libya'daki 20 milyar dolar değerindeki inşaat sözleşmesini aşan projeleriyle Libya'daki ana yatırımcılar arasında yer almaktadır. Yurtdışındaki Türk müteahhitleri için Libya, Rusya'yı takip ediyor ve iş hacmi açısından ikinci sırada.

1973'ten bu yana Libya'daki Türk müteahhitleri 56 milyar dolar değerinde 565 proje imzaladı. 2011'in Arap Baharı'ndan iki yıl önce, Libya'ya 8 milyar dolar değerinde 124 mühendislik projesi verildi. Libya'daki Türk kurumlarının, fonlarının ve bekleme geri ödemelerinin varlıklarının 2,5 milyar dolar, vadesi fazla 1,4 milyar dolar olduğu tahmin ediliyor. Libya bankası 2011 yılında yaklaşık 100 milyon dolar tuttu ve Libya'nın o günlerde petrol gelirlerinde elde ettiği yüksek kazancı göz önüne alındığında, yurtdışında 100 milyar dolarlık bir yatırımın açıklanmasının Türk müteahhitlerin hayal gücünü canlandırması bekleniyordu.

Türkiye'nin oryantasyonu da Libya ile olan ilişkilerinde kendini gösteriyor. İki ülke arasındaki ticaret hacmi 2010 yılında 9,8 milyar dolara yükseldi, ardından Libya'nın 2013 yılına kadar Türk şirketlerine 100 milyar dolar yatırım yapacağı açıklandı. Türk inşaat şirketlerine ve 2010'dan bu yana Türkiye'deki 160 Türk yatırım projesine 15 milyar dolar yatırım yapıldı. Libya operasyonda oldu.

1980’ler, Türkiye ekonomisinin yeniden yapılandırılmasında önemli bir on yıldı. Batı ülkelerine paralel olarak, 1983’te başlayan Türkiye, 1970’lerin kapalı ekonomisinden pazar ekonomisine dönüşme yönünde büyük bir dönüşüm yaşadı. Konut geliştirme ve kamu ortaklıkları gibi yeni ajanslar, Türk para biriminin dönüştürülebilirliği haline geldi.

Bu bağlamda, yönetim yürürlüğe girdi ve özelleştirme ve ekonominin serbestleşmesi gibi diğer kavramlar getirildi. Bu arada, Türkiye'de büyük altyapı yatırımları başladı ve Libya’daki Türk yatırımlarının ortalama miktarında nispi bir düşüş yaşanmış olsa da, dış ticaretin çoğu% 52,3 ile ikisi ve% 23,4 ile ikisi arasında devam etti. ve Irak (% 11.5) önümüzdeki yıllar boyunca. Sovyetler Birliği'nin dağılması ve Rusya Federasyonu dışındaki yeni Orta Asya cumhuriyetlerinin şafağı (% 3.8) bu dönemde yeni gelişmelerdi. Konut (% 36,7) ve kentsel temel girişimleri (% 17,2), sokak / bağlantı / yuva (% 7) ve su sistemi girişimleri (% 5,4) tarafından takip edilen, yükselmeye devam etti. 2000-2009 döneminde dış sözleşmelerin çoğu Rusya Federasyonu (% 15,5), Libya (% 12,4), Türkmenistan (% 11,4), Kazakistan (% 7,2) ve Irak (% 6) ile işaretlenmiştir. 1972-2016 / 3 ay). Türk müteahhitlerin üstlendiği uluslararası projeler açısından Mart 1972 ile 2016 yılları arasında Rusya,% 19,9 ile Türkmenistan (% 14,8) ve Libya (% 9,0) tarafından takip edilen ilk sırada yer aldı. Türk Uluslararası Müteahhitlik Hizmetleri (1972– 2016/3 ay) Bu geçici dönemde, Türk geçici işçilerin kucakladığı küresel eserlerin uluslar arası dolaşımına göre, Rusya Federasyonu, Türkmenistan tarafından izlenen% 19.9 teklifiyle ana pazar olmuştur (% 14.8) ve Libya (% 9.0).

- **Sonuç olarak**

Uygun bir sözleşme formu, bir projenin diğer önemli yönleri kadar önemlidir. Bir sözleşme formu, projenin ilerlemesini, uygun bir stratejinin uygulandığı doğru yöne yerleştirerek etkilediği için önemlidir. Bu şekilde, minimum maliyetle maksimum değeri sağlamak için tedarik yönetimi iyileştirilir. Diğer bir deyişle, tezin amacı, ilgili Türk yasalarına dayanarak Libya yasa sözleşmelerinin formülasyonundaki zayıflık alanlarını vurgulamak için sözleşmenin biçimini ve koşullarını Libya ve Türk Borçlar Kanunu'na göre karşılaştırmaktır. Örneğin, FIDIC sözleşme modelleri gibi, çatışmaları ve anlaşmazlıkları en aza indirmek ve inşaat sektöründe, son on

yılda oldukça aktif olan Türk deneyimlerinden en iyi şekilde yararlanmak için. Bu karşılaştırma sırasında, tarafların yükümlülüklerinin mücbir sebep haline ilişkin sözleşmeler ve risk tahsisine ek olarak tahkim maddesiyle ilgili yükümlülüklerinde bir dengesizlik olduğu görülmüştür. Bunların, uluslararası sözleşmelerin geliştirilmesiyle uyumlu olarak düzeltilmediği ve düzeltilmediği sürece, Libya'da her gün zorlanacak sorunların arkasındaki ana nedenler olduğuna inanıyor:

Mücbir Sebep, kavramsal olarak ve bir yandan Libya Medeni Kanunu tarafından düzenlenen ve diğer yandan FIDIC sözleşmelerinde öngörüldüğü şekilde İki yasal sistem arasındaki bir karşılaştırma değil, bir sorunla başa çıkmak ile gözden geçirilmesi gereken hususları ele almak arasındadır.

Mücbir Sebep koşulu, bir araya gelme, kontrol etme kabiliyeti dışındaki bazı koşullar ortaya çıktığında, yürütmenin kötü tavsiye edildiğinde, parasal olarak uygulanamaz, yasadışı veya düşünülemez hale geldiğinde, taahhütlerinin yerine getirilmesini askıya alma veya sona erdirme olanağı sağlayan bir anlaşma düzenlemesidir. Anlaşma, anlaşmanın tesadüfen askıya alındığını ya da mücbir sebep halinin onaylanmış bir zaman dilimi için ilerlemesi halinde sona erdiğini ifade edebilir.

Dahil edilecek fırsatların özetlenmesi toplantılar arasındaki işlemi içerir. Mücbir sebep halindeki durumun mahsup edilme durumundaki bir savaş, savaş, isyanlar, yangın, dalgalanma, deniz fırtınası, tropikal fırtına, sismik titreme, yıldırım, patlama, grevler, lokavtlar, duruşlar, canlılık arzında gecikme eksikliği ve devlet veya herhangi bir toplanmanın sözleşmedeki kendi taahhütlerini yerine getirmesini yasaklayan veya engelleyen yasama faaliyeti. Libya Medeni Kanunu hükümleri, mücbir sebeplerin tarafların kontrolü dışındaki yabancı bir sebep olduğunu ve yükümlülüğün yerine getirilmesini imkansız kıldığını belirtir. Buradaki imkansızlık, sözleşme taraflarının bu sebeple önleyemeyecekleri veya üstesinden gelemeyecekleri anlamına gelir. İnfazın imkansızlığının durumuna ilişkin olarak, yasa koyucu, bu imkansızlığın, mücbir sebeplerin devam ettiği durumda mutlak olmasını gerektirmez, ancak bir çeşit mücbir sebep meydana gelebilir ve infaz veya gecikmenin imkansızlığına neden olabilir (Madde 218 LCO),

Bu yasa mücbir sebep tanımı içermemektedir; ne de belirli bir terimi kullanmıyor. Bazen onu, 168. maddede olduğu gibi "dış sebep" teriminde değerlendirir; Diğerlerinde ise, ani bir kaza ya da sadece yabancı bir sebeple, 218 ve 360. maddelerde olduğu gibi mücbir sebep belirtilmeden sayılır. Ayrıca, bazı durumlarda, 1/672 TBK maddesi olarak ayrı ayrı düzenlenmiştir.

Dolayısıyla, Libya yasa koyucusunun mücbir sebep halini dikkate aldığı ve tarafların sözleşme taraflarının yükümlülükleri üzerindeki sonuçlarını yüklediği ancak belirli bir tanım getirmediği anlaşılmaktadır.

Usul yönünden, Libya Medeni Kanunu, mücbir sebep çağrısı yapmak mümkün olduğunda herhangi bir tarafça bildirilmesi veya bildirilmesi gereklilik koşullarını koymaz ve sözleşmeyi iradesine bırakır. Libya yasama organı sürekliliği için süreyi belirtmez. yükümlülüğün iptal edileceği mücbir sebepler, sözleşmenin sonuçlanmasına (varsa) veya müzakere sonuçlarına bırakılır. Mücbir sebep döneminde herhangi bir partiye uyma yükümlülüğü de yoktur. Bu nedenle, bu beyandaki eksikliğin veya eksikliğin sözleşmede kararlaştırılmayan bir zorunluluk olabileceğine ve gelecekteki bir anlaşmazlıklara yol açabileceğine inanıyoruz. Bu nedenle, Tazminat Olayları (yetkili makamın sorumluluk aldığı ve yüklenicinin tazmin ettiği durumlarda), Yardım Yüklenicileri (yükleniciyi gecikmelerin mali etkilerini yapmamak için feshedilmemesi için serbest bırakan) ve Mücbir Sebep Olayları (Mücadele Faaliyetleri) arasında bir ayrım vardır. Etkilenen tarafın ihlal yükümlülüğünden ve tarafların gecikmelerin finansal etkilerini paylaştığı yerler)

FIDIC Gümüş Kitabının 19. Maddesinin 1. Maddesinde ve aynı maddenin 2. Maddesinde mücbir sebepler, mücbir sebeplerden etkilenen taraf olarak mücbir sebeplerin ortaya çıkması durumunda göz önünde bulundurulacak usule ilişkin yükümlülüklerle ele alınmıştır. böyle bir olayın diğer tarafına bildirilmesi ve yerine getiremeyeceği yükümlülük ve teslimlerin belirlenmesi. Madde, bildirimin gerçekleştiği tarihten ya da fark etmesi gereken tarihten 14 gün sonra bir son tarih belirlemektedir. Bu tebligatla, etkilenen taraf, mücbir sebepler zorunluluğun yerine getirilmesini önlediği sürece yükümlülüklerinden kurtulur. Libya Medeni Kanununun "ihbar" teriminden bahsetmediği daha önce fark edilmişti. Madde (3) 'de yer alan madde (19), tarafların herhangi birini azaltmak için makul olan her yolu

kullanması gereken taraflara bir zorunluluk getirmiştir. sözleşmenin yürütülmesinde gecikme. Bununla birlikte, böyle bir yükümlülük, Libya Medeni Kanununda açıkça belirtilmemiştir.

Libya milletvekili, mücbir sebeplerin etkileriyle ilgili bazı kurallar ve ilkeler öngörmekte ve bu, etkilerin farklı bir şekilde düzenlenmesi konusunda anlaşmaya açık bir seçenek bırakmaktadır. Öte yandan, FIDIC koşulları, yasa koyucu tarafından herhangi bir sözleşmede neyin uygun olduğuna karar vermeleri konusunda anlaşmak üzere taraflara verilen genel izinleri kullanmalarıyla ilgili olarak daha fazla ayrıntı ve ayrıntılarla birlikte gelir.

Libya yasalarındaki hiçbir şey, ne devlet ne de yükümlülük olarak askıya alınma durumunu dikkate almaz; bu nedenle, uzatılabilecek veya kısaltılabilecek bir bekleme durumu. Libya milletvekili, mücbir sebep halinin ortadan kaldırılmasından sonra ne yapılması gerektiğini ve sözleşmenin yeniden yürürlüğe gireceği mekanizmayı bile düşünmüyor. Ancak, Libya hükümetinin 17 Şubat devrimi sonrasında yaptıkları ve Libya davasını incelemek için uzmanlardan oluşan bir danışma komitesi oluşturduğu ve sözleşmelerde devrim sırasında askıya alınmalarından sonra sözleşmelerin yeniden etkinleştirilebileceği konusunda tavsiyelerde bulunacaklarından bahsetmek yararlı olacaktır.

Libya milletvekilinin, mücbir sebep nedeniyle yükümlülüklerin yerine getirilmemesi nedeniyle göz önünde bulundurduğu önemli sonuç, nedensel ilişkinin burada bulunmamasına karşın, sorumluluk sahibi tarafın sorumluluk ayağı, yani kusur ve hasar olarak reddetmesidir. Bir sorumluluk reddi kabartmadan farklıdır, çünkü sorumluluk sorumluluk dışlamaz, ancak sorumluluk reddedilmediği anlamına gelir. Kanımızca, feragatnameye, esas olarak, sözleşmeden doğan yükümlülüğün yerine getirilmemesi ile feragat etme ile meydana gelen zarar arasındaki faylanma arasındaki nedensel bağların bulunmaması denmektedir. Bu şekilde, mücbir sebepler nedeniyle yerine getirilmesi imkansız olduğu sürece, hasar veren tarafa verilemez. Feragatname, uygulanmamasından kaynaklanan hasarın tazminatına uygun olmayan önemli bir sonuca yol açabilir.

Libya Medeni Kanunu'nun 168. Maddesi bu hususta açıkça belirtilmiştir: “Eğer kişi, haksızlıktan dolayı dış sebeplerden kaynaklandığını ispatladıysa, ani bir olay olarak, mücbir sebep, etkilenen tarafın ihmali veya bir kusur üçüncü taraf, daha sonra aksi belirtilmediği takdirde, herhangi bir hükme veya mutabakata varılmadığı takdirde tazminat ödemekle yükümlü değildir. ”Bu hükmün ilk kayda değer noktası, bireylerin dahil edilenden farklı bir şekilde anlaşmaya varmasını sağlayan tamamlayıcı kurallardan biri olmasıdır. . Bu nedenle, sözleşmenin imzalandığı tarihte, bu durumda tazminat alacak veya paylaşacak taraf üzerinde anlaşabilirler (Madde 220). Bu tür bir anlaşmanın olmaması durumunda, bu hüküm bağlayıcı hale gelir ve mücbir sebep halinde tazminat ödenmez.

FIDIC sözleşmeleri, mücbir sebeplerin sonuçlarına keskin bir şekilde dikkat eder, çünkü bunlar sözleşme şartlarıdır ve yasa koyucu tarafından yasal kurallar şeklinde belirlenen soyut kurallardan daha ayrıntılı olması gerekir. Sonuç olarak, FIDIC sözleşmesi şartlarındaki sonuçların dikkate alınması sorumluluk konusu değildir ve bu olağanüstü mücbir sebep sebeplerinin önceden belirlenmiş önlemlerle kaçınılması gerektiğini izler.

Daha önce de belirtildiği gibi, FIDIC tarafından kabul edilen sözleşmeler uzun vadeli niteliktedir, bu nedenle anormal durumlardan kaçınma veya mücbir sebep olma endişesi vardır. Buna göre, yükümlülüklerin iptali yapan Libya milletvekilinin kuralını, mücbir sebeplerin sonucudur. Bu nedenle, Gümüş Kitabın yukarıda belirtilen Maddesinin 4. maddesi (19), yüklenici tarafından yapılan yükümlülüklerin ve harcamaların gecikmesindeki gecikmeyi dikkate alır ve aynı maddenin 2. maddesinde belirtilen ihbarda bulunursa, o zaman devamındaki:

• Gecikme süresi uzadı.

• Mücbir sebepler nedeniyle yapılan masraflar için tazminat.

Daha sonra, 19. Maddenin 6. Maddesi, mücbir sebeplerin devam etmesi durumunda, her bir tarafın sözleşmeyi feshetmesine izin veren başka bir hipotezi ele almaktadır: “tüm işlerin önemli bölümleri, mücbir sebep nedeniyle takip eden 84 gün boyunca askıya alınmışsa ve 2/19 fıkrası uyarınca veya bildirilen mücbir sebepler nedeniyle bir araya (140) gün oluşan birden fazla süreye bağlı olarak, her bir taraf

diğer tarafa bir fesih bildirimi verme hakkına sahiptir. Bu durumda fesih, ihbarın yapıldığı tarihten itibaren 7 gün sonra yapılır, yüklenici, alt fıkra (16/3) kapsamında işlerin askıya alınması ve ekipman devri kapsamında devam eder. Bu süre, mücbir sebeplerin, her bir tarafa, sınırlı şartların yerine getirilmesi ve gerekli bildirimin yapılması şartıyla, sözleşmeyi feshetme seçeneğini yararlı gördüğü şekilde sona erdirme seçeneği vermesi durumunda ortaya çıkmaktadır. Bu tür bir önlem Libya milletvekili tarafından belirtilmemiştir.

Gümüş Kitabın 19/7 Fıkrasındaki davada, herhangi bir süreye rağmen mücbir sebep nedeniyle yükümlülüklerin yerine getirilmesinin imkansız olduğu dava ele alınmıştır. Burada, taraflar, mücbir sebepler nedeniyle yerine getirilmesinin imkansızlığı durumunda, Libya milletvekili tarafından belirlenen genel kararla tutarlı olan yükümlülüklerinden kurtulurlar.

Başka bir yönü, mücbir sebep teşkil eden koşulların ciddiyetlerinde farklılık göstermesidir; bu nedenle, her iki tarafta da zarar ve ziyanın olması bekleniyor. Libya yasa koyucusunun bu durumda sorumluluğunu iptal ettiği ve tazminat gerekmediği görülmesine rağmen, FIDIC sözleşmeleri konuya meydan okumakta ve sonuçlanacak risk türlerini ve risk türlerini belirlemektedir. Bu karar, taraflar arasındaki argümanları azaltıp, aksi takdirde davaya harcanabilecek zamandan ve paradan tasarruf sağlayacak ve müzakere ve karşılıklı rıza yoluyla ortaya çıkan ilişkileri destekleyecektir. Gümüş Kitap'ın 17/3. Maddesi, mal sahibine ve bir kez müteahhit tarafından bir sonucu olan risklerle ilgilidir.

Yüklenici, sahibi tarafından doğan riskler haricinde, kalan işlerin resmi teslimi için kalan zamana kadar kalan riskleri üstlenir, daha sonra tüm riskler ve sonuçları sahiplerine aittir. Mücbir sebeplerden kaynaklanan risklerin çoğunun mal sahibi tarafından doğması, kalkınma projelerinin planlandığı ülkelerin kendi yasalarına göre serbest bırakılırken mücbir sebep halindeki sorumluluk nedeniyle bu tür sözleşmelerden kaçınmaları dikkat çekicidir. Sonuç olarak, bu tür sözleşmelerin geniş çapta kabul edilme şansını azaltabilir. Yüklenicinin çıkarlarını korumak için FIDIC sözleşmeleri, mal sahibinin yükleniciye yapacağı sözleşmeyi feshetmesi halinde sözleşmenin feshi halinde veya müteakip günlerde (84) esaslı veya (84)

dayanaklı hizmet bildirimi ile müteahhit tarafından ödenecek tutarları belirler. 40) kesintili mücbir sebep günleri.

Dahası, FIDIC sözleşmeleri ile mücbir sebepler örgütlenmesi, yükleniciye riskleri belirleme ve sonuçları doğurmada, muhtemelen bu tür sözleşmelerin kabulünü geniş bir şekilde etkilemede muhtemel olduğu için gerekli dengeyi kaçırmaktadır. Gözden geçirme gereğinin yanı sıra, ne Libya Medeni Kanunu, ne de FIDIC sözleşmelerinin birçok engelin üstesinden gelmenin mümkün olduğu müzakere ilkelerinden bahsetmediğini söylüyoruz. Daha önce de belirtildiği gibi, çoğu devlet sözleşmesi kalkınma sözleşmesi olduğundan, devletin genellikle müteahhitlerin normal durumlarda faaliyetlerine yeniden başlamasıyla aynı şekilde tamamlanması gerekir. Bu karşılıklı endişe, mücbir sebepler sonunda sözleşmelerin uygulanması için uygun bir ortamın oluşturulmasını sağlayacaktır.

Tahkim fikri, Türkiye Cumhuriyeti kadar eskidir. Tahkim sistemi 1927'de (HUMK / HMK - Usul Hukuku Yasası) tarafından kontrol edilmiştir. Aynı şekilde evrensel özel hukuku yöneten teknikler ve talimatlar vardır. Bu usule ilişkin talimatlara rağmen, Türkiye, küresel ticari tahkim konusundaki dünya çapında çok önemli anlaşmaları işaretlemiştir. Bu anlayışlar, Yabancı Tahkim Ödüllerinin Yürütülmesine İlişkin Cenevre Sözleşmesi, Tahkim Ödüllerinin Yürütülmesine İlişkin New York Sözleşmesi ve Washington Sözleşmesi (Uluslararası Yatırım Uyuşmazlıklarının Çözümü Merkezi) olacaktır. Türkiye, Türkiye devleti ile uzak özel insanlar arasında bir sorunun olması durumunda, farklı ülkelerle yapılan bazı İkili Yatırım Anlaşmalarına (BIT'ler) müdahale stratejisini de algıladı.

Evrensel bir bakış açısına göre, Türkiye, Cumhuriyetin başlarında uzun vadede dünya çapında iş tahkimi fikrini algılayan ve küresel tahkim onurunun uygulanmasını algılayan önemli düzenlemelere razı olan bir millettir. Türkiye'nin tüm bu küresel düzenlemelere razı olmasına rağmen, pacta sunt servanda olan dünya çapındaki hukukun her şey dahil etiği ile ilgili olarak Ankara, bu evrensel anlayışları 1990'ların programına kadar onaylamadı. 1982'den bu yana yürürlükte olan Anayasanın 90. Maddesinde belirtildiği gibi, dünya çapındaki bir teminatın onaylanması, Türkiye Büyük Millet Meclisi'nin yasaya uygun şekilde onaylanmasıyla onaylanabilir.

Türk Anayasası'nın benzer bir maddesi de aynı şekilde yasaların ihtilafının anlaşıldığına karar verir. Anayasada da benzer bir referansla, küresel anlayış Türkiye Anayasasının 90. maddesinde belirtilen sistem tarafından onaylanırsa, her bir evrensel tahkim, sonraki ulusal yasalara eşdeğerdir. Dış tahkim onurlarının kabulü ve bu onurların yetkilendirilmesine tolerans gösterilmesi iki özel yasa ile kabul edildi. 1982'de uzaktan tahkim onurlarının Türkiye'de uygulanmasını güçlendiren Uluslararası Özel (2675 sayılı Kanun). Bu yasaya rağmen, Türkiye, New York'un 1991'de 3731 sayılı Kanunla Yabancı Tahkim Ödüllerinin Kabul Edilmesi ve Uygulanmasına İlişkin Sözleşme'yi onaylamıştır.

Türkiye Anayasasına dayanan küresel anlaşmazlıklar onaylandıktan sonra dünya çapında iş müdahalesi eyleminde bir engel olmamasına rağmen, açık idarelerle özdeşleşen imtiyaz anlayışlarında evrensel iddiayı onaylamayan korunan makaleler reddedildi. 125. ve 155. Maddelere itiraz eden bu ihmal edici maddeler 1999 yılında Hukuk Usulü Muhakemeleri Kanunu (Usul Kanunu Hakkında) ve Milletlerarası Özel Hukuk ve Usul Hukuku Kanunu'nun (Uluslararası Özel ve Usul Hukuku Kanunu) güçlendirilmesi amacıyla değiştirildi. İmtiyaz sözleşmelerine rağmen küresel arabuluculuğa yönelik maddi kanun. Libya'da durum, modern devletlerdeki sıradan yargının, devlet bölgesi dahilinde ortaya çıkabilecek herhangi bir konuyla ilgili tüm ihtilafları çözme konusunda genel yetki ve yetkinliğe sahip olduğu bilindiğinden farklıdır. aksi takdirde özel bir hüküm ile belirtilmiştir. Diğer modern devletler gibi, Libya devleti de yargıyı ihtilaf ve suçların çözümünde birincil olarak görüyor, Usuller Kanunu'nun 3. Maddesi şunları ifade ediyor: "Yabancı partilere açılan davalarda yetkinlik: Libya yargısı dava açılmış davaların dikkate alınmasında uzmanlaşmış otoritedir yabancı bir partiye karşı.

Aşağıdaki durumlarda:

1- Söz konusu yabancı partinin yasal olarak ülkede ikamet etmesi, tescilli bir adresi olması, mahkemeye çıkması için yetkilendirilmiş bir temsilcisi varsa veya dava Libya dışındaki bir mülkle ilgili olmadığı sürece Libya yargısının kararını kabul etmiştir.

2- Davanın yurtdışında bulunan veya bir Libya vatandaşının mirası veya Libya'da kurulmuş bir miras veya iflas durumu ile ilgili olması durumunda veya söz konusu dava Libya'da yapılmış olup, Libya'da veya dava Libya'da meydana gelen bir olaya dayanıyor.

3- Talebin daha önce Libya yargısında açılan bir davaya veya Libya'da uygulanan ihtiyati tedbirlere veya Libya yargısının yetkili olduğu işlere ilişkin olması durumunda.

4- Libyalı aleyhine açılan ve yabancı yargının sadece karşılıklılık için yetkin olduğu davalar.

Bununla birlikte, aynı zamanda, diğer uyuşmazlık çözüm yöntemleri, Libya Usulleri Kanunu'nun 39 maddeden oluşan özel bir birime uyuşmazlıkların çözümünde bir yöntem olarak organize tahkim konusunu ele aldığından; Bu birimin ilk bölümü genel tahkim kurallarına ve eşleri arasında tahkim için ikinci bölüme ayrılmıştır. Kanun, yargı veya uzlaşma yoluyla tahkim veya tahkim şartlarında tahkim için ricada bulunma yetkisine sahiptir. Ayrıca tahkim prosedürlerini, ihracını ve tahkim kararının yerine getirilmesini ve itiraz edilme ihtimalini gösterir. Kanun, tahkim prosedürlerinden, kamu sistemi, iş kazası, sosyal güvenlik, milliyet ve kişisel statü ile ilgili bazı hususları hariç tutmaktadır ve hakemlerin bazı konulardaki yetkinliklerinin dışlanması ile getirilen bazı kısıtlamalara ek olarak bazı kısıtlamalar getirmektedir.

Bu tahkimin, devlete ait otoriteler, kurumlar ve sıradan yargının yetkili olduğu genel şirketler gibi kamu tüzel kişiliğine ilişkin ihtilafları içermediği belirtilmelidir. Libya milletvekili, Libyalı partilerin yabancı veya uluslararası tahkim başvurusunda bulunmalarını engellemez. İdari sözleşmelerde, 1980 yılında yapılan bu sözleşmelerin uygulanabilir politikasına rağmen, bu tür sözleşmelerle ilgili ihtilafların çözümünün, yabancı şirketlerle sözleşme yapılması durumunda ve gerektiğinde tahkime izin verilmesi durumunda, söz konusu ulusal yargı yetkinliği Sözleşme, hangi uyuşmazlıkların tahkim, tahkim usulleri ve hakemlerin seçim kurallarının Libya tarafının onları seçmek için eşit fırsatlara sahip olmasını sağlayacak ve Libya'da kurulan iflasın kabul edilmemesiyle hakemlere verilen

makamların ve yetkilerin kapsamını belirleyecektir. ya da dava yapılan bir sözleşmeye dayanarak yürütülmüş.

Yabancı şirketler tarafından Libya devletine karşı açılan dava sayısının uluslararası tahkim mahkemelerinde artmış olması dikkat çekmektedir, bunun nedeni, Libya devleti ile diğerleri arasında yapılan anlaşmazlıklarda anlaşmazlık durumunda ancak anlaşmaya varmadan yapılan karşılıklı anlaşmalardır. Libya tarafının çıkarları ve tahkim prosedürlerini belirleyen kurallar ve yasalar hakkında yeterli arka plan olmadan ve devlette tahkim düzenleyen yasaların bulunmaması.

Libya mevzuatı tahkim kurallarını ve koşullarını belirleyen ve usul hukukunun genel kuralları ile sınırlı olan özel bir tahkim yasasını hala kaçırmaktadır. Libyalı hukukçuların, bu sistemi Mısır ve Tunus'ta tahkim yasası çerçevesinde bu sistemi uygulamaya koyma çağrısına rağmen, bu tür bir eylem hala reddedildi.

Uluslararası tahkim odaklanılması gereken önemli bir kavram olduğundan, uluslararası tahkim kurallarını ve idari sözleşmelerin yapılması konusundaki teknik bilgileri belirlemek ve uluslararası tahkim alanındaki gelişmeleri gözden geçirmek için Libya'daki hukuk bölümleri için eğitim kursları oluşturulmasını gerektirir. . Bu, üçüncü taraflarla yapılan sözleşmelerin sayısı ve ulusal ekonomiye risk teşkil ettiği için önceki rejimden devralınan sözleşme sayıları dikkate alındığında devlete olan zararların önlenmesine yardımcı olacaktır. Olağan mahkemeler nezdindeki davalarda harcanan zamandan tasarruf etmek için, herkes uluslararası tahkim altında olmalıdır. Bunu yapmak aşağıdakileri gerektirir:

Maliye bakanlığı ile dış şirketler arasında yapılan ve devlet davalarını yönetmek için yapılan tüm anlaşmalar çalışılacak ofise ve ödüllerin geçerliliğini doğrulamak. Yapılan anlaşmaların, devletin haklarını güvence altına alan ve aynı sözleşmenin içinde veya dışında dava açmamalarını sağlayan açık yasal hükümler içerdiği doğrulanmalıdır. Tüm belediyelerin ve belediye meclislerinin, devletin genel bütçesi yasasına aykırı olarak finansal zorunluluk getirebilecek idari sözleşmeleri imzalamadığına ve hukuki sorumluluğa imza atacağına dair güvence altına alınması gerekmektedir. Nihai bir kararın verildiği herhangi bir ihlal hakkında, Bakanlar Kurulunun onayı ile ofisi idare eden devlet davaları ile koordineli olarak çalışmaya

ihtiyaç vardır. Son olarak, hak ihlallerine karşı yasal işlem yapma hazırlıklarında objektif nedenler ve bu ödülün sorumlu organları üzerinde inceleme yapılması istenmiştir.

Ve devletin idari organının çalışmalarını düzenleyen mevzuat ve yasalardaki zayıf noktaları ve yasal boşlukları incelemek ve tanımlamak için devlet davaları yönetim ofisi ile koordineli olarak çalışmalıdır; hükümetin danışma rolünü harekete geçirmek için Libya devletine verilen ödüllerden kaynaklanan başarısızlığın niteliği üzerine çalışmalar yapılacaktır. Adalet Bakanlığı Bilgi ve Belge Merkezi ile dava yönetimi dairesi ve mahkemeler arasındaki iş ve eşgüdümler, Libya devletine karşı açılan tüm davaların her dava için ek bir kodla belgelenmesi için bir sistem kurabilir. Bu bilgiler, gerçek veya tüzel kişi olup olmadığını iddia eden ve sanıkların tüm kişisel verilerini içerecek ve davanın konusunun tekrarlanmasını önlemek için dava açılışı tüm dava seviyeleri için hazırlanacaktır.

Ayrıca. Özel sektöre ihtiyaç duyan özel bir teknik nitelikteki bir dava olması durumunda, tüm sektörleri ve devlet dava yönetimi departmanını ortak bir savunma ekibi oluşturmak zorunda bırakmalıdır. Uluslararası ticaret hukuku ve uluslararası hukuk alanında kalifiye personel ile devlet vakası yönetim departmanına destek verilmelidir ve diğer yasal ve profesyonel kadroları uluslararası tahkimi düzenleyen uluslararası hukuka ve kurallar konusunda eğitmek için çalışmalıdır. anlaşmazlıklar Kamu davası yönetim biriminin kurulmasına ilişkin olarak 1971 tarihli ve 1871 sayılı Kanun'un, yerel ve uluslararası yargı işinin gelişmiş tarzına uygun bir şekilde güncellenmesi ve tahkim, tahkim edilecek kural ve usullerin düzenlenmesi için bir yasa önerilmesi için çalışma yapılması gerekmektedir. Libya'da, Adalet Bakanlığında Hükümet Dava Yönetimi ve hukuk yönetimi ile koordineli olarak yürütülmektedir. Maliye Bakanlığı ve Devlet Dava Yönetimi, her ikisinin de elektronik olarak karşılık gelebileceği bir sistem önermekle görevlendirilecektir. Bütçe Hesapları ve Mağazalar Politikası'nın 172. maddesi uyarınca, Denetim Bürosu, dolandırıcılığı önlemek ve mektup ve ödüllere tekabül etmek için kanuna göre takip etmekle de bağlantılı olabilir. Maliye Bakanlığı, elektronik bir sistem aracılığıyla dağıtılacak gelen ödülleri belgeleyecektir; ödülün tüm belgelerini arşivleyin ve ödülün konusuna göre

kategorilere ayırın ve tüm uygulama verilerini belirleyin ve aynı konunun tekrarlanmasını önlemek için ödülün faydalanıcılarını belirleyin.

Belirli olağanüstü düzenlemelerin planı, risk atamasının işletme sahibi ile yapı sahibi / geliştirici sözleşmeli işçi ile faaliyet sahibi ve destek yöneticisi arasında yapılması gereken yerlerde, girişim sahibi ile girişimci arasındaki anlayış lehçesini yansıtmak için düşünülebilir. görev organizasyonu. Çeşitli sözleşmeler arasındaki potansiyel eşdeğerlik için dünyaya verilen cevap, örneğin / planlanan / değiştirilen sözleşmedeki "eğer ve ne zaman" lehçesini, plan / geliştirme geçici işçisinin belirli koşullar altında zamanı genişletme ayrıcalığına sahip olduğunu gösterme lehçesini kullanmaktır. "eğer ve ne zaman" mal sahibiyle imtiyaz. Taahhüt eden kuruluş da benzer şekilde plan / geliştirme sözleşmesinde sağlam bir ifade görmek isteyebilir, böylece yapı / geliştirme geçici çalışanı, girişim kuruluşunun bu güvence altındaki taahhütlerini yerine getirmekten vazgeçmediği bir amacı gerçekleştirmek zorundadır. Tehlike, plan, geliştirme ve tehlike bölümlerinde ve ayrıca diğer artık tehlikelerdeki tüm kilit görev üyeleri için bir faktör olacaktır. Kural olarak yapılan birkaç toplantı, özellikle yapı / geliştirme geçici işçisinin en iyi tehlike seviyesini taşır.

Son olarak, görev sahibi ve uzmanları tarafından, yetkili teklifin başlangıç zamanlarında mimarların, tasarımcıların veya girişim amirlerinin ne olduğuna bakılmaksızın yapılan seçimler, toplantılar arasında gelişme bağlantısı kurulacak şeylerin tonuna karar vermede kritik bir etkiye sahip olacaktır. Sözleşmelerdeki tehlikelerin tahsis edilmesi sırasında değer ve değer standartlarının bağlanması gerekmekle birlikte, tehlikenin, işlem prosedüründe sağlam bir pazarlık pozisyonu vermeye daha az eğilimli olan daha zayıf tarafa önemsiz bir şekilde dağılması, masrafta anlamsız bir hızlanmaya neden olacaktır. Görev Sözde daha zayıf toplama girişim risklerini hantal olarak değerlendirecek ve bu gibi tehlikeleri kendi çıkarları için öngörülen harcamalarla birleştirecektir.

Yükleniciye olan önemli tehlikelerin çoğunu üstlenerek, eşitsiz veya ezici şekilde dengesiz sözleşmeler, tüm gelişim süreci boyunca sorunsuz ve yararlı bir süreç yapmak yerine, görev boyunca bağlantıların kopmasına neden olabilir. Bu sonuçta, bir toplama veya alternatif, istismar edildiğini ve tam olarak tesadüfi olmayan bir

kontratı işaretlediğini gördüğü için, büyük ve verimli bir girişimin gerçekleştirilmesinde rancor, vakalar ve sıkıntıya dönüşecektir.

Bu hükümlerin Libya'da yürütülen sözleşmelere uygulanması, çizimler ve tasarıma ilişkin olarak bulunmasını, Bayındırlık Sözleşmesi Modelinin 7. Maddesinde aşağıdakileri öngörmektedir: "Birinci Şahıs (Sahip) tarafından yapılan herhangi bir açıklama, tasarım veya ücretteki herhangi bir hata veya ihmal; herhangi bir zamanda düzeltilebilir ve İkinci Taraf (Yüklenici) kendisine sunulan şartnamelerin, tasarımların ve çizimlerin geçerliliğini araştıracak ve gözlemleri nedeniyle Birinci Tarafı bilgilendirecek ve kabul etmesi durumunda sorumlu olacaktır. onlar tarafından teslim edilmiş gibi görünüyorlar. ”Bu makalenin formülasyonu, yüklenicinin kendisine sunulan çizimleri denetleme, geçerliliğini kontrol etme ve gözlemleri rapor etme sorumluluğunu içerir. Çizimlerdeki, tasarımlardaki veya spesifikasyonlardaki hatalar veya hatalar için nihai sorumluluk genellikle inşaat sektöründe bir belirsizlik kaynağıdır. Yüklenici, çoğu durumda, tasarımdaki hatalar veya kusurlardan dolayı meydana gelen değişiklikler veya Gecikmeler için tazminat talep ederken, ev sahibi, Yüklenicinin bu hatalarla ilgili maliyetlerden sorumlu olduğunu iddia eder. çizimler ve spesifikasyonlar ile uygunluklarını keşfedin.

En önemli olumsuz etkiler, proje tasarımlarının hazırlanmasında mal sahibinin (veya tasarımcının) ciddiyetinin eksikliği, çizimleri ve tasarımları anladıkları gibi gözden geçirmeleri sorumluluğundadır. bu madde ve herhangi bir hata veya kusurun tespiti ve raporlama Yüklenici tarafından tasarım hatalarının ele alınmasında doğacak doğrudan maliyetlerin yanı sıra, işin programa uyması veya idareden dolayı işlerin hızlandırılması nedeniyle ek masraflar da vardır. Projenin gecikmesi durumunda giderler tasarımdaki hataların düzeltilmesini beklemektedir.

Öte yandan, yüklenicinin sorumluluğunun tasarımları ve çizimleri gözden geçirmek ve tasarımın uygulama için uygun ve geçerli olmasını sağlamakla sınırlı olduğunu ve açık veya açık kusurlar dışında hataların veya kusurların tespitinden sorumlu olmadığını anlamak önemlidir. deneyimli bir yüklenicinin tespit edebileceği hatalar. Bu riski ele almak için doğal ve uygun durum aşağıdaki ilkelere dayanmalıdır:

• Projenin uygulanmasının tamamlanmasına kadar tasarımcının sorumluluğunun yerinde olması beklenir ve bu süre zarfında, yüklenici ya da müteahhit tarafından alınan gözlemlere uygun olarak uygulama sırasında gösterilen tüm hataları veya hataları tasarlar ve onarır. süpervizörü.

• Yükleniciye, projenin uygulama süresini uzatma ve bu hatalardan kaynaklanan zararları tazmin etme hakkı ve tasarımcının çizimleri tamir etmesi ve düzeltmesi için harcadığı süre tanınmalıdır.

• Tasarım sahibinin ve tasarımcının tasarım sözleşmesinin şartları ile tasarım sorunlarının üstesinden gelmek için mal sahibiyle yüklenici arasındaki uygulama sözleşmesinin şartları ile tasarımcının zararları için tamir ve sorumluluk taahhütleri arasında uyumluluk olmalıdır. bunun sonucunda proje yükleniciye veya mal sahibine zarar verebilir.

Bu tür bir risk veya sorunun, gerekli idari önlemler kontrol altına alınmadan ve kesin sebepler belirlenmeden devam etmesi beklenmektedir. Kamu kurumlarının planlama, koordinasyon ve kontrol ve kontrol yöntemlerinin değişimi düzeyinde iyi uygulamalara duyulan ihtiyacın farkında olmaları gerekir.

CV



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Education :

- Graduation from Law school - University of Sirte - Libya – 2001
- Master of International Commercial Legal and Logistics Transactions - Institute of International Transport and Logistics - League of Arab States - Egypt – 2001.
- Ph.D. candidate student in Private Law department at Yildirim Beyazit University- 2019.

Experience:

- Experience in the field of administrative work and legal consultation for 15 years.
- Work as Lawyer from 2002

- Associate Lawyer at Tumi Law firm – Tripoli
- Associate lecturer in Law Department at University of Sabha - 2008-2009
- Head of the Libyan delegation and translator of the delegation at the International Women's Conference held in Turkey – Ankara
- Translator for the delegation of the Libyan civil society organizations- Ankara - Istanbul / Turkey

Courses and Qualification:

- In the field of diplomacy and foreign policy at the American University of Washington DC
- A course in arbitration and drafting of international contracts in Arabic language - Cairo University
- A course in skills of negotiations and persuasion in the stock market disputes and Investment - Egyptian Journalists Syndicate.
- A 32- hour training course in the Turkish Parliament to work on parliamentary legislation and auditing.

Languages:

Turkish / English / Arabic

Appendix