

**THE ENFORCEABILITY OF TIME BAR
CLAUSES IN CONSTRUCTION
CONTRACTS: A COMPARATIVE
ANALYSIS BETWEEN THE EGYPTIAN
CIVIL CODE AND THE ENGLISH AND
WELSH COMMON LAW
JURISDICTIONS**

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ABSTRACT

Construction claims are a fact of life on all projects across the world. In an attempt to safeguard themselves against the risk of claims, employers utilise time bar clauses in construction contracts to waive the contractor's entitlement to any additional costs or time if a notice of claim is not served by the contractor within a specific period of time. The reality of whether such a time bar is enforceable depends on the law governing the contract. Therefore, it is incumbent upon professionals contracting across different regions of the world and using standard form construction contracts that were prepared under a different jurisdictional setting than their own to be aware and acquainted with the extent to which these time bar clauses are enforceable under the law governing the contract in question. This research provides an in-depth insight regarding the enforceability of time bar clauses in English law and the Civil Code jurisdiction of Egypt, using the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book as the basis for comparison. The results of this research do not solely apply to the time bar clause in the FIDIC 1999 Red Book, but also to any time bar clause in a bespoke form of contract that acts as a condition precedent. The need for this research and its uniqueness stem from the fact that it aims to fill a critical gap in the construction law literature as, while there is an abundance of literature on the enforceability of time bar

clauses under English law, there is scarcely any sizeable research dedicated to the same topic under the Egyptian Civil Code. The research utilises a comparative law methodology to compare the enforceability of the FIDIC time bar across the two jurisdictions utilising three key concepts as the basis for comparison, namely statutory limitation, good faith and the prevention principle. As part of this methodology, the research takes a step beyond the subject of the research and delves into the historical origin of the similarities and differences highlighted. In doing so, the research concludes with two key premises for the causes of the similarities and differences highlighted in the research, namely the principle of freedom of contract under English law and the effect of the French Civil Code on the formation of the Egyptian Civil Code. This, in turn, results in historical elaborations of both premises.

I. INTRODUCTION

A. Problem Statement

Substantial research has been produced worldwide on the subject of construction claims. Naturally, the results of such research vary with the region and the jurisdiction governing the contract from which these claims originate. One of the mechanisms used in construction contracts to regulate claims are clauses that stipulate the period of time within which a notice for a claim should be presented. It is common in some international forms of construction contracts that such clauses contain a provision barring the contractor from entitlement to time and/or monetary compensation if the notice is not served within a specified time. This, at times, creates conflict when the employer relies on the time bar clause to reject a claim which the contractor submitted late, but which originated from a default of the employer. Although the same international contract may be used throughout the world, the jurisdictions under which it operates are different and, consequently, the enforceability of such time bar clauses may differ. This, in turn, creates possible conflicts between the international contract used and the governing jurisdiction, which necessitates research to alert construction practitioners against the trend of blindly relying on such clauses that may be rendered

unenforceable under the applicable jurisdictions. Two of these jurisdictions are English law and the Civil Code jurisdiction of Egypt. Since there are no relevant differences between the English and Welsh law in respect of time bar clauses enforceability, English law will be collectively referred to in this research as English law.

This research demonstrates that, while there is extensive research in place regarding the enforceability of time bar clauses in English law, there is scarcely any literature discussing the enforceability of time bar clauses under the Egyptian Civil Code jurisdiction. International businesses mandating the execution of miscellaneous commercial contracts across the two countries necessitates that this gap in the literature be filled. It is vital for someone with a background of English and Welsh common law undertaking business in Egypt to understand that the principles set by English case law over the centuries may not be applicable in Egypt and that certain express contractual terms may be overruled by mandatory provisions in the Civil Code. It is equally vital for someone with a background of Egyptian Civil Code undertaking business in England and Wales to understand that the mandatory provisions in the Civil Code are not enforced in England and Wales and that there is a wealth of case law regarding the enforceability of time bar clauses. Without this clear understanding, both sides would be entering into their

respective contracts with a distorted understanding of the risks involved and their expectations regarding the enforceability of the contract provisions in arbitration or in courts would be inaccurate. The importance of bridging this gap in knowledge is also compounded by the fact that, as demonstrated in this research, the FIDIC form of contract is extensively used in Egypt and the Middle East. Since it is drafted with a common law background, many construction practitioners and contract users in Egypt and the Middle East may be misled to believe that all the provisions in the FIDIC contract are enforceable in their respective Civil Code jurisdictions. Of particular importance in this research is the time bar clause in sub-clause 20.1 of the FIDIC 1999 Red Book, which is one of the main features of the FIDIC 1999 suite of contracts, which waives the contractor's entitlement to any claim for additional time or cost and absolves the employer from any liability if a notice is not served within 28 days from the contractor's awareness (i.e., when the contractor was actually aware or should have been aware) of the event giving rise to the claim. Since the ramifications of this provision can be substantial on contractors doing business in Egypt, it is important to understand the extent of the enforceability of this provision in Egypt in comparison to its enforceability in England and Wales. It is important to note, though, that the FIDIC time bar clause is used as a benchmark to examine how time bar clauses are enforced under the English and Egyptian laws. The scope of this research

is intended to encompass a time bar clause of any bespoke construction contract form that resembles the content of the FIDIC time bar clause.

While it may be well known to contracts and commercial practitioners in the construction industry worldwide that time bar clauses in construction contracts under English law are enforced differently from those under Egyptian law, it is common for construction employers and developers in Egypt to consider the FIDIC conditions as completely enforceable within their jurisdiction and to even take a step further by modifying the FIDIC terms so that they are more “airtight”, providing a seemingly false sense of protection from contractors’ claims. Meanwhile, it is also common for Egyptian lawyers and arbitrators practising in Egypt, who are not construction practitioners, to rely on the Civil Code as the ultimate source of obligations on the contracting parties, totally disregarding the terms and conditions of the FIDIC contract. In the first instance, the employer or developer may feel that the time bar in sub-clause 20.1 of the FIDIC 1999 contract (as well as any modifications made to the sub-clause to make it more exculpatory) is enforceable. In the second instance, the lawyer or arbitrator may feel that the time bar is not enforceable due to its contravening the limitation periods within the Civil Code and/or the principles of good faith (discussed in detail in this research). Hence, despite the common understanding at the onset among contracts and commercial

practitioners that the two jurisdictions may yield different outcomes with respect to the enforceability of the FIDIC time bar, it is essential that non-specialised practitioners (e.g., employers, developers, lawyers/arbitrators/judges not specialised in construction, etc.) clearly understand these different outcomes so that time bar clauses within construction contracts are dealt with in a more realistic fashion. In addition to understanding matters of enforceability, it is beneficial (and in fact, as this research presents, an important parameter of comparative law research) to understand the underlying causes of these enforceability issues. In other words, it is necessary to go beyond matters of law and delve deeper into the historical factors which affected the formation of such laws of enforceability. This comprehensive consideration of the underpinnings of the time bar clauses in international construction contracts is expected to benefit not only construction practitioners contracting across English law and the Civil Code jurisdiction of Egypt, but also to extend beyond that to researchers specialised in comparative law between these two countries.

B. Research Aim and Objectives

The aim of this research is as follows:

"To compare the extent and nature of, and rationale for, enforceability of time-bar claim notice provisions in construction contracts under the Egyptian Civil Code as against the position under the law of England and Wales."

It is apparent from this aim that this is a comparative law research, as it compares a legal concept (i.e., enforceability of time bar clauses in construction contracts) across two legal jurisdictions. Therefore, the objectives to accomplish this aim follow a procedure that is typically undertaken for comparative law research. Details regarding the rationale and logic of this procedure are provided in the Research Methodology chapter. However, for the purpose of this section, the objectives are listed herein as follows:

1. Identify, for the purpose of later comparison, the legal principles in each of the two selected jurisdictions which relate to the enforceability of time bar claim notice provisions.
2. Identify and describe principal time-bar claim notice provisions in standard form construction contracts in each of the selected jurisdictions

and make a justified selection of one of these for further comparative analysis.

3. Analyse the enforceability issues pertaining to the key comparison points identified in Objective 1 for the two jurisdictions, taking into account the claim notice provision under the construction contract selected pursuant to Objective 2.
4. Classify the similarities and differences between the two jurisdictions in light of the results of Objective 3.
5. Examine and evaluate the underlying causes for the similarities and differences identified in Objective 4.

II. LITERATURE REVIEW

A. Introduction

As stated in the Problem Statement (Section I.A), this research aims to address the enforceability issues surrounding the time bar clauses in construction contracts in English law and the Civil Code jurisdiction of Egypt. Awareness of these issues will, in turn, fill in the gap in the literature and alert construction practitioners contracting in these jurisdictions against blindly relying on clauses that may be rendered unenforceable under the applicable jurisdictions. The composition of the literature review, as shown below, is structured so that this gap is properly identified so as to enable the achievement of the research aim and objectives.

- (a) An introduction to the topic of time bar clauses in construction contracts:

The discussion under this section addresses general topics in the literature regarding time bar clauses in construction contracts with respect to the claim notifications put forward by the contractor to the employer. The topics of discussion include the definition of a time bar and general opinions on its enforceability from construction practitioners around the world.

(b) Time bar clauses in standard construction contracts:

It is important to identify a time bar clause in a standard construction contract as the base and reference point for the comparative law comparison undertaken in this research. The term “standard” here refers to a construction contract that has been put into commercial use internationally. Therefore, the discussion transitions from the general topic of time bar clauses in construction contracts to the more specific topic of time bar clauses in standard construction contracts. This section identifies several standard construction contracts, quotes the wording of the time bar clauses in these contracts and discusses commentaries made in the literature on the same.

(c) Background regarding standard contract form for use in this research:

This section provides the background for the standard form contracts identified in the previous section that contain time bar clause and are, consequently, suitable for this research as a base for the research comparison.

It is important to note that points (b) and (c), although an integral part of the literature review, serve to accomplish Objective 2. Also,

this section provides the necessary background regarding the standard contract forms being considered, while the actual selection of the contract form (and, hence, the achievement of Objective 2) is addressed after the Research Methodology section.

- (d) Legal issues regarding the selected time bar under the Egyptian Civil Code and the English/Welsh Common Law and identification of the literature gap

The literature produced on the selected time bar clause vis-à-vis each jurisdiction is then discussed. This section is a critical component of the literature review, as it demonstrates clearly the gap in the literature that this research aims to fill.

- (e) Conclusion

The literature review concludes with a summary of the key points addressed therein, thereby paving the way to the identification of the points to be used as the basis for comparison and, accordingly, the achievement of the first objective.

B. Time bar clauses in Construction Contracts

Substantial research has been produced worldwide on the subject of construction claims. One of the commonly discussed topics within construction claims is what is termed as a “condition precedent” , “time-bar” or “time stipulation” claim notice clause (referred to in this research as ‘time bar’), which is reported to have become a common trend in construction contracts (Peters, 2008; Lal, 2007; Glover and Tolson, 2008). A time bar clause in construction contracts is one that requires a certain action (usually from the contractor) within a specific timeframe as a condition precedent to entitlement for additional cost or time. This research specifically addresses the time bar associated with a contractor’s serving the employer or engineer a notice to claim any additional cost or time with respect to a specific event or circumstance giving rise to the claim. Typically, the time bar clause would state that the contractor must serve the notice within a specific period from the event in question and that, if the contractor fails to serve this notice within the specific period, then the contractor is considered to have waived his right for any additional cost and/or time associated with this claim. Clayton (2005, p.343) defines a time bar clause as “the imposition of time limits on a

contractor for the submission of notices or claims” and that such clauses “operate as a condition precedent to an entitlement—that is, as a time bar—in the sense that, if the contractor fails to provide notice or make a claim within the time limit, then it is not entitled to recover in respect of the relevant event or occurrence.”

Time bar clauses have generated worldwide debate. For example, the time bar in the FIDIC 1999 Red Book contract (discussed more in the coming section) has been described as “draconian” (Champion, 2008, p. 216) and was criticised as being a “doubtful feature” that may result in the appearance of claims managers at the early stages of projects (Corbett, 2002, p.3). Similarly, the sub-clause was criticised as being “the most blatant as regards unequal treatment between the employer and contractor” and “outside the range of balance of fairness”(Osinski, 2002, p.3,4). Bunni (2007, p.24) describes the notice and claim procedure as one that promotes a ‘claims culture’ that stifles the productivity of managerial resources and inhibits the working relations between the contractor, engineer and employer. On the other hand, it has been considered as an early claim notification mechanism which would result in an early resolution (Seppälä, 2005) and an integral part of the doctrine of freedom of contract, which must be enforced (Lal, 2007). Gould (2008, p.3) opines that such time bar notices must be welcomed when considering delay and additional costs during the course of a project, for they

are a tool for problems not to fester until the end of the project and are a means of progressing matters to conclusion during the course of the project as opposed to waiting until the project's conclusion.

The issue of the enforceability of time-bar clauses has been given attention in construction law literature worldwide. Addressing the issue from a common law perspective, Tweeddale (2006) cites case law in Australia, Hong Kong and Scotland to demonstrate that common law courts uphold time-bar provisions even if the contractor is prevented from on-time completion because of the employer's default. Hill (2009) reaches a similar conclusion in the Republic of Ireland and cautions contractors working on Irish public works to strictly comply with the time bar notice requirements and not to rely on vague complaints of delay made retrospectively. Clayton (2005) discusses time bar clauses from the Australian viewpoint and concludes that contractors who choose not to comply with the contractual time bar clauses do so at their own peril. From a United States standpoint, Ansley, Kelleher and Lehman (2001) state that a formal notice may be unnecessary when the owner has knowledge of the problem or when the interest of the owner is not prejudiced if it is not provided, even so, they caution that contractors should never rely on this and forgo providing the notice, because some courts (in the United States) consider such notices a condition precedent to entitlement. By contrast, Levin

(1998) notes that United States courts may also waive the notice requirement if the contractor was not immediately aware of the facts, although he also argues that failure to notify the owner of potential problems can put the burden of proof for additional costs or damages on the contractor.

Addressing the issue from a civil law perspective, Rubino-Sammartano (2009) makes reference to German, French, Spanish and Italian case law to demonstrate that enforceability of an express time-bar provision, such as that of the FIDIC 1999 Red Book, hinges upon several civil law considerations, such as employer's acknowledgement of the event for which the notice is served, excessive difficulty of the contractor to comply with the notice requirement and unconscionability of the time-bar clause. He also suggests that lack of service of a timely notice by the contractor will not automatically entitle the employer to the application of liquidated damages and will not release the employer from the burden of proving that the contractor has breached his duty of care. Sakr (2009) discusses the enforceability of time bar clauses in the ICC Model Turnkey Contract for Major Projects from an Arab Middle Eastern perspective and concludes that such clauses may be unenforceable because they modify the limitation periods set forth in the laws of these Middle Eastern countries. More specifically, addressing the issue of time-bars from the perspective of the Kingdom of Saudi Arabia, Jalili (1996) makes reference

to a case in which a time-bar was held unenforceable by the Board of Grievances (a specialized court in the Kingdom that adjudicates disputes between contractors and governmental employers) on account of being contrary to public policy. Addressing the issue of time bar notices from the Qatari Civil Code perspective, Hall and Warren (2012) bring forward four recommendations to contractors to elude contractual time bar notices, which include good faith and the Shariah principle of a “a just claim never dies”.

The above demonstrates that the topic of time bar of construction claims has held its place in construction law literature. There are miscellaneous opinions published on the definition of a time bar, but also, there is the more controversial enforceability component. As demonstrated very briefly in this section, this enforceability component has been discussed in various locations around the globe, with different conclusions reached for each region due to the different jurisdictions governing those regions.

C. Time-bar Clauses in Standard Construction Contracts

Lal (2007) suggests that time bar clauses were very rare prior to the FIDIC sub-clause 20.1 and the NEC3 clause 61.3. Similarly, Champion (2008, p.208) opines that, prior to 1999 (when the FIDIC 1999 Red Book was published) standard construction contracts in the United Kingdom did not

contain time bar clauses and parties to a contract were free to deal with claims months, even years, after the claims first arose. Along the same vein, Chern (2010, p.322) attributes the rise of time bar clauses to FIDIC sub-clause 20.1 and suggests that, prior to the FIDIC 1999 contract, time bar clauses did not truly exist. Taking into account that Lal, Champion and Chern's statements apply to time bar clauses in standard construction contracts in the United Kingdom, their statements are well supported by the fact that the topic of time bar clauses in construction law literature in the United Kingdom has gained notable ground after the FIDIC 1999 Red Book was published. As Chern also points out (2010, p. 323), NEC published its third edition, introducing the time bar clause of Clause 61.3, in 2005 – i.e., six years after FIDIC. Hence, it is suggested that the FIDIC 1999 Red Book that first contained the express time bar clause, which had been in commercial use for six years before NEC's was introduced.

Having identified from the literature two clauses in standard form contracts which are said to include time bar clauses, and hence be based upon the doctrine of condition precedent, it is now appropriate to consider in a little more detail both what that doctrine is, and what the relevant contract clauses say. Gould (2008, p.5) takes the view that, in order for a clause under English courts to qualify as a condition precedent, it has to satisfy two conditions: (a)

a clear time is set by which the notice must be served, and (b) the clause must clearly state that the claimant will lose its right if the notice is not served by the set time. Glover and Tolson (2008) mention the same two points. *bBremer Handels GmbH v Vanden-Avenne Izegem PVBA* (1978), which is briefly discussed in Section E.1.1 of this Literature Review chapter.

On the second point, the following are the wordings of each clause:

NEC3, clause 61.3:

The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if:

- The Contractor believes that the event is a compensation event and
- The Project Manager has not notified the event to the Contractor.

If the Contractor does not notify of a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.

FIDIC 1999 Red Book, sub-clause 20.1:

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions 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.

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.

Brewer (2008) and Glover and Tolson (2008) opine that the time bar in the FIDIC and NEC3 clauses serve as a condition precedent to the contractor's recovery of cost or time, as they fulfil the two requirements for the enforceability of a condition precedent clause, namely (a) a clear time period by which the contractor serves the notice, and (b) a clear statement that the contractor will lose his right to claim if the notice is not served within this time period. On the former requirement, the NEC3 time period is eight weeks, while FIDIC's is 28 days. On the latter requirement, the NEC3 form expressly states that if the notice is not served within the eight-week time period, the contractor loses the entitlement to claim, but subject to whether the Project Manager should have notified the event to the Contractor but did not. FIDIC, on the other hand, does not contain any way out to the contractor for failure to notify within the 28-day deadline.

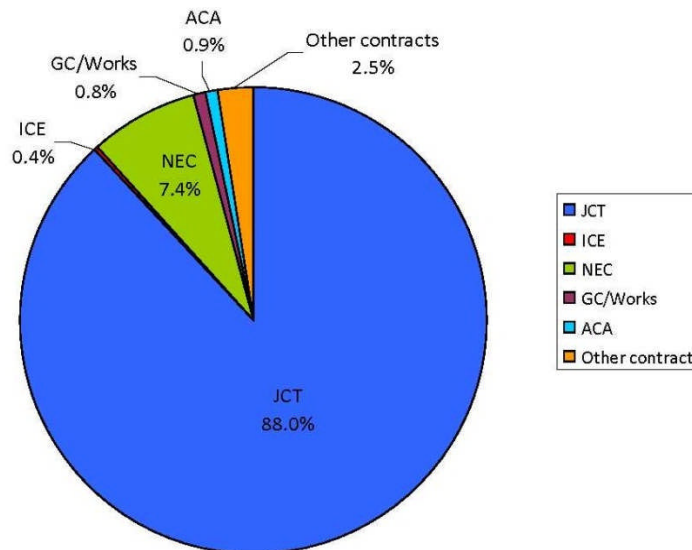
The above discussion demonstrates that, in terms of standard construction contracts in the United Kingdom, the FIDIC and NEC3 contracts contain time bar clauses which fulfil the condition precedent prerequisites under English law. Therefore, in light of the above, the standard contract form that can be

used as the benchmark for the comparison between the English law and Egyptian Civil Code jurisdictions is either the clause 61.3 of the NEC3 form or sub-clause 20.1 of the FIDIC 1999 Red Book.

D. The Commercial Use of the FIDIC and NEC3 Contracts in England/Wales and Egypt

In addition to the matter of the time bar clauses as a pivotal factor for selection of the standard contract form in this research, there is also the factor of prevalence of commercial use in the geographical locations covered in this research, namely England / Wales and Egypt. In terms of use in England, the "Contracts in Use" surveys conducted by the Royal Institute of Chartered Surveyors (RICS) and the "National Construction Contracts and Law Survey" conducted by the Royal Institute of British Architects (RIBA) are of value in this regard. The following are the results of the RICS Contracts in Use Survey of 2010:

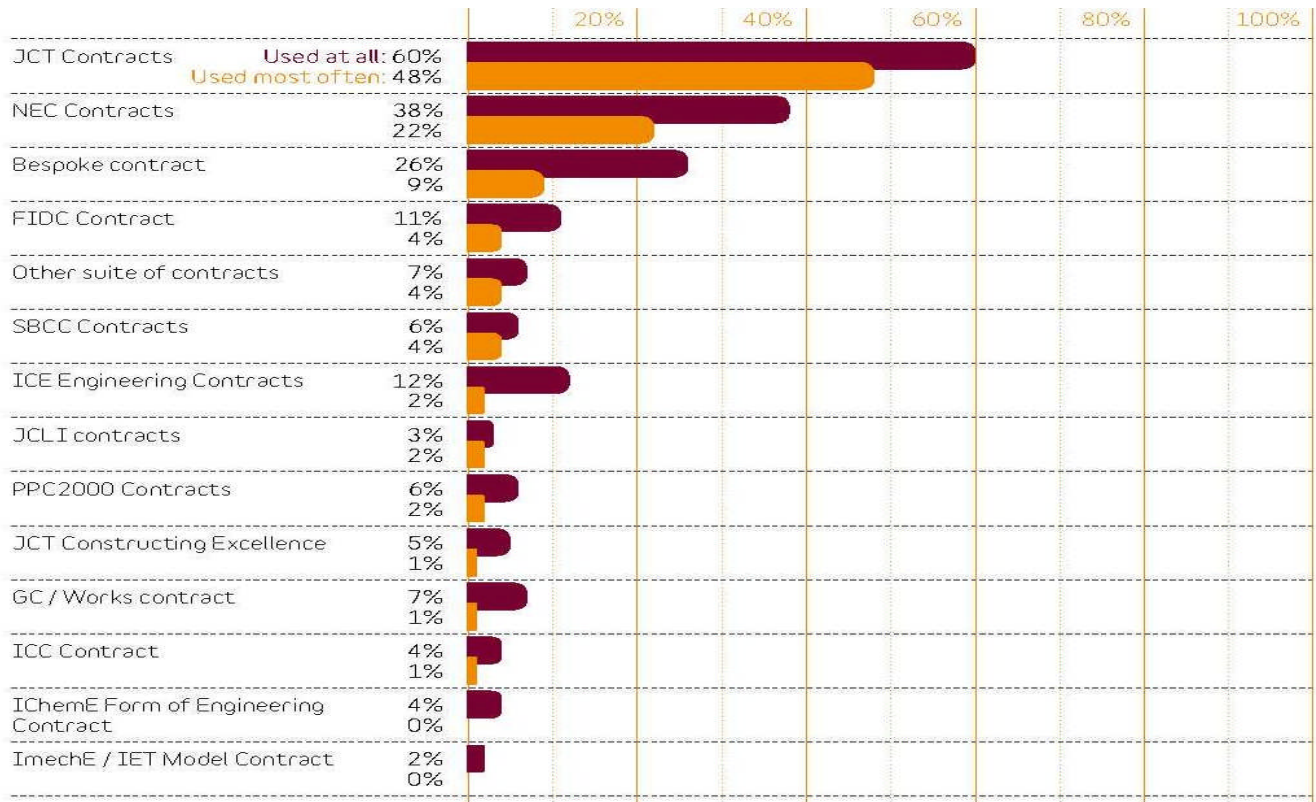
**Figure 1 RICS “Contracts in Use Survey” 2010
(Use of Standard Forms of Contract by Number)**



The results demonstrate that, during the year 2010, the JCT form of contract is by large the most prevalent standard form in Great Britain in terms of number. It is also observed that there is no mention of the FIDIC contracts, although it may be included within the 2.5% “other” contracts used.

RIBA’s National Construction Contracts and Law Survey for the year 2013 provided the following results:

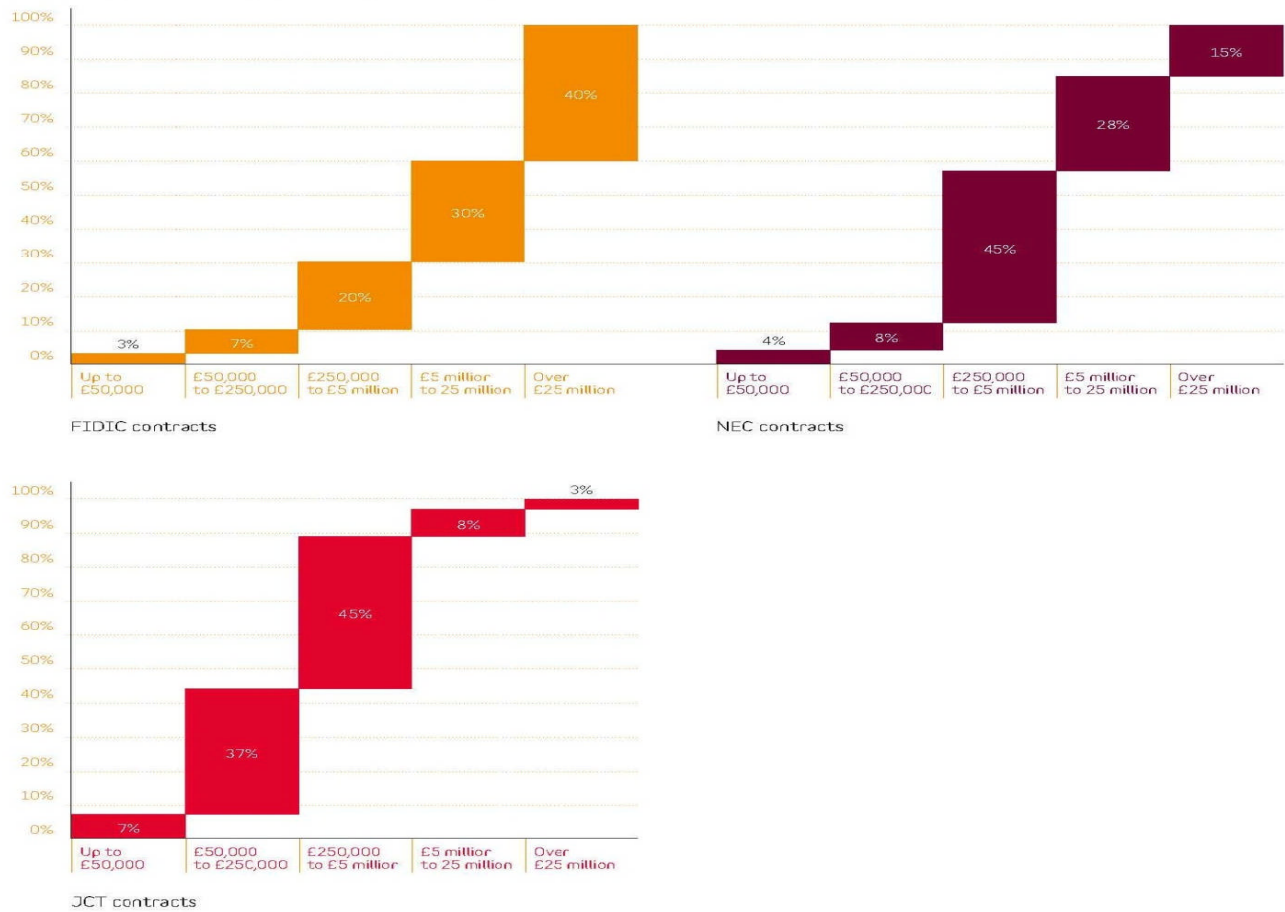
**Figure 2 RIBAs National Construction Contracts and Law Survey
2013
(Standard Forms of Contract Usage)**



In line with the RICS survey three years earlier, the RIBA survey demonstrates that the JCT and NEC contracts are still the most prevalent in use. However, this time, the FIDIC contracts are visibly used. An explanation of this data is provided in the following figure:

Figure 3 RIBAs National Construction Contracts and Law Survey 2013
(Average Value of Projects Used Per Contract Form)

What is the average value of the projects that you use that type of contract for?



The important observation from Figure 3 is that, generally, JCT contracts are selected for smaller projects, NEC contracts for medium to large projects and FIDIC, for very large projects. Project value is less than £ 250,000 for 44%

of the projects using JCT. For NEC it's only 12%. When we look at FIDIC contracts, over 70% of their use is in projects with a value of over £ 5 million. In terms of this research, as mentioned in the previous section, the JCT contract does not contain a time bar clause. Therefore, despite its prevalent use in the United Kingdom, the JCT contract cannot be used as a reference in this research. On the other hand, the FIDIC contract, although not commonly used in England, is used in large projects and does contain the time bar clause that serves as a condition precedent. Therefore, the question at this point is whether the FIDIC and NEC3 contracts are used in Egypt and which is more prevalent.

As mentioned by Downing, Healey and Ramphul (2013), the FIDIC forms are very well established internationally. In 1994, it was reported that the FIDIC form of contract was the most used international standard form of civil engineering contracts in the Arab Middle Eastern countries (Sarie El Din, 1994, p.951). In a 2009 survey conducted by Norton Rose Middle East, which encompassed contractors, employers, developers and banks with a combined turnover of \$ 11.7 billion, it was reported that "FIDIC was by far the most used form of contract" (Brufal, 2009). Sarie El Din (1994) reports that the FIDIC form of contract has been widely used in a considerable number of important projects in Egypt, such as Terminal Two of the new airport, the

Greater Cairo Wastewater Project, the Cairo Metro Project and Damietta Project. Sarie El Din further reports that it is used in all projects financed by the World Bank, USAID (United States Aid for International Development), both of which fund a large number of infrastructure projects in Egypt. In January 2012, a construction contract was signed for the third and final phase of the Grand Egyptian Museum, which is a prestigious project funded in the most part (65%) by the Japanese International Cooperation Agency "JICA" (El-Aref, 2012), which uses the FIDIC form of contract in its contracts worldwide (JICA, 2009). The importance of FIDIC in Egypt is further highlighted by the conferences FIDIC hosts in Egypt and which are attended by professionals from Egypt and the Middle East, such as the conference hosted by FIDIC and the International Chamber of Commerce (ICC) in April 9 and 20, 2005, titled "International Construction Contracts and Dispute Resolution", which attracted 130 participants from more than 26 countries (Hanafi, 2005). In January 2011, FIDIC collaborated with the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the Egyptian Society for Consultative Engineers (ESCON) to hold a conference at the CRCICA to discuss the latest developments in FIDIC contracts. The conference included 19 speakers, three of whom are key FIDIC representatives and the rest are prominent speakers in construction disputes in Egypt and the Middle

East, including Jordan, Libya, Syria and Saudi Arabia. The conference was attended by numerous representatives from Egypt and the Middle East.

There is no reported literature of any use of the NEC3 contract in Egypt.

E. Reported Issues Regarding the Enforceability of the FIDIC Time Bar in the Egyptian Civil Code and English Law Jurisdictions

This section provides a discussion on the topics covered in the literature with respect to the enforceability of time bar clauses under each of the Egyptian Civil Code and English law, with specific reference to the FIDIC 1999 time bar under sub-clause 20.1 as necessary. Information in this section will be used in a subsequent section to identify the key points on which the comparison between the two jurisdictions is based.

E.1 English Law

E.1.1. Enforceability of Time Bar Clauses by Common Law Courts

Time bar clauses are not enforced if their application does not make commercial sense. In *Chiemgauer Membran Und GmbH (formerly Koch Hightex GmbH) v New Millennium Experience Co Ltd (formerly Millennium Central Ltd)(No.1)(1999)*, a contract was executed between Koch Hightex (claimant contractor who specialises in the design and construction of

membrane structures) and Millennium Central (defendant owner) for the supply and fitting of the Millennium Dome. The contract contained a clause 3 which stated that the contractor must submit a performance bond and guarantee as a condition precedent to the owner's accepting any obligation under the contract. Clause 31(5) allowed the owner to terminate for convenience and referred to clause 32(2) for compensation due to the contractor in the event of such termination. A few weeks after the contract signature and instruction of the owner to the contractor to proceed with the work, the owner chose to terminate for convenience pursuant to clause 31(5) after receiving a more competitive tender from another contractor. When the contractor raised a claim of GBP 6.7 million in compensation, the owner rejected the claim on the basis that they were not under an obligation to pay due to the contractor's not submitting the performance bond and guarantee pursuant to clause 3. At first instance, it was held in favour of the defendant and the claimant's compensation claim was struck out. The claimant appealed and it was held that the purpose of clause 3 is to ensure that the contractor provides the performance bond and guarantee at the start of the work. By triggering the termination for convenience clause, the owner effectively chose to treat the agreement as continuing and waived the requirement to provide the performance bond and guarantee. Notably, the Court of Appeal held that it would not make sense, and was not in the parties' contemplation at contract

signature, that the contractor would perform work indefinitely without pay until the performance bond and guarantee were provided.

In the House of Lords case *Bremer Handels GmbH v Vanden-Avenne Izegem PVBA* (1978), a contract of sale using the GAFTA 100 form was executed between the claimant and defendant. One of the key points to the dispute centred around the notice provision required under clause 22, which read:

1. Sellers shall not be responsible for any delay in shipment of the goods ... occasioned by any ... strike, lock-out, riot or civil commotion ... or any other cause comprehended in the term force majeure.
2. If delay in shipment is likely to occur for any of the above reasons, Shippers shall give notice to their Buyers...within seven consecutive days of the occurrence...
3. The notice shall state the reason(s) for the anticipated delay."

The House of Lords held that this notice is a condition precedent. Lord Salmon at paragraph 113 explained the basis of any clause being a condition precedent as follows:

...the clause (is expected to) state the precise time within which the notice was to be served and to (make) plain by express language that unless the notice was served within the time, the sellers would lose their rights under the clause.

This explanation has led several practitioners to conclude that English courts will strictly enforce a time bar clause that acts as a condition precedent if two parameters are met: (a) a time period is clearly stated by which the contractor

serves the notice, and (b) the clause clearly states that the contractor will lose his right to claim if the notice is not served within this time period (Brewer, 2008; Glover, 2007; Lal, 2007). Since the time bar clause under the FIDIC 1999 contract (sub-clause 20.1) refers to a 28-day time period for serving the notice and contains an express statement that the contractor will lose his right to claim if the notice is not served within the 28-day period, it fits the two prerequisites described above and therefore can be considered to serve as a condition precedent that is strictly enforced by arbitral panels and courts applying English law (Gould, 2008; Brewer, 2008), although there is a view that the success of its operation will depend on the circumstances of the case and the applicable law (Glover, 2007). It is not necessary that the words “condition precedent” be expressly mentioned in the clause, as courts will usually look into the intent of the wording (Tweeddale, 2006). This raises another point with respect to the notice and its being regarded as a condition precedent, namely the form of the notice. There are cases which enforced express contract requirements for the form in which the notice is served. An example is the case of *Waterfront Shipping Co. Ltd v Trafigura AG* (2007), in which clause 16 of the contract between the parties required that any claim for additional time would be accompanied by pumping logs signed by an authorized representative of the claimant. Clause 23 included a period of 90 days for the notification of any time delay claim and clearly stated that non-

compliance with this time period would result in the employer's discharge and release from all liability associated with the claim. The claimant presented the claim within the 90-day period, but accompanied with unsigned supporting documentation, contrary to the requirement of clause 16. The Commercial Court held that the claim was time-barred due to the claimant's failure to submit the signed pumping logs required under the contract. Therefore, if a notice is submitted in time but not in the required form by reason of a failure to provide a relevant document or signature, then this case demonstrates that the contractor's submitted claim may not be successful (Peters, 2008). In *WW Gear Construction Ltd. v McGee Group Ltd* (2010), the Technology and Construction Court held that time bar clauses are strictly applied where the contract parties intended that they be strictly applied. If the wording of the time bar clause includes a clear requirement for the time limit and form of the notice, then the courts will assume that this was the intent of the parties, and will therefore enforce the time bar notice. In this case, disputes were undergoing adjudication proceedings and, in light of the employer's lack of satisfaction with the adjudicator's decision, in which he referred to the condition precedent clause in the JCT Trade contract as "devoid of meaning" (paragraph 8 of the case transcript) and having "no teeth" (paragraph 9 of the case transcript), the employer issued the proceedings for final declarations. Akenhead J concludes, in paragraph 19 of the judgment

transcript, that the contractor has no entitlement to recover such loss or expense unless the condition precedent clause is followed as agreed between the parties and that, in respect of the condition precedent clause, "It is not an unduly onerous provision in any event." The employer sought a declaration from the court again in 2012. Mr Justice Edwards-Stuart summarised the case by clarifying that the result of the 2010 case is that where the contractor has not complied with the required time bar clause under the contract, the contractor seeks (through the 2012 case) to make claims for loss and expense under other provisions of the contract. The other provision in this case is the variations clause. Ultimately, Mr Justice Edwards-Stuart decided that the application for declaration fails and the claim is dismissed. However, Akenhead J's judgment in 2010 with respect to the enforceability of clearly worded time bar clauses remained unchanged by the 2010 judgment.

In *Education 4 Ayrshire Limited v South Ayrshire Council* (2009), the importance of strictly complying with the requirements of a time bar clause is clearly highlighted. The claimant entered into a contract with the defendant to design and construct six schools, which included Prestwick Academy. The contract was part of the South Ayrshire Schools PPP. Clause 17 included a time bar, which required a notice to be sent within specific periods of time (depending on the type of event) and clearly stated that non-compliance with

the provisions of that clause would not entitle the contractor to any extension of time, compensation, or relief from its obligations under this Agreement. Clause 72.1 describes the formality requirements of notices under the contract, which included sending the notices by first class post, facsimile or hand, to the Chief Executive at County Buildings, Wellington Square, Ayr. The facts of the case centre on a letter which the claimant argues fulfils the notice requirements under clause 17. The letter refers to previous correspondence sent to a representative of the defendant, which forwarded details of the claim by the claimant's subcontractor. The letter also contained the statement: "We will submit our full claim in accordance with clause 17.6 of the project agreement." The Court of Session decided that the notice did not comply with the requirements of the contract. The following are extracts from Lord Glennie that illustrate this case:

Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.

The clause required that a notice be sent within a particular time to the Chief Executive of the Authority giving notice of what claim the pursuers were making. The letter of 2 May 2007 did not do that. It matters not that, at certain levels, employees of the Authority may have been aware of what was going on. Nor, to my mind, does it help the pursuers to say that the letter of 2 May 2007, when read with the letter of 30 April 2007 from the Building Contractor, would have enabled the Authority to infer that the claim by the Building Contractor against the pursuers was going to be passed up the line to them. That may be so, but the purpose of the clause is to avoid such uncertainty. The pursuers were required to tell the Authority what claim they were making. It does not do for them

to say: "here is what the Building Contractor has written to us, you work it out for yourself". That is not a valid notice under the clause. The failure to give a valid notice in accordance with clause 17.6.2 is fatal to the pursuers' claim for relief. (paragraph 19)

In *Steria Limited v Sigma Wireless Communications Limited* (2007), the time bar clause did not specify a period within which the contractor serves the notice, nor did it clearly state that the contractor will lose his right if the notice is not served. Rather, clause 6.1 of the contract stated:

If by reason of any circumstance which entitles the Contractor to an extension of time for the Completion of the Works under the Main Contract, or by reason of a variation to the Sub-Contract Works, or by reason of any breach by the Contractor the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works, then in any such case provided the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay, the time for completion hereunder shall be extended by such period as may in all the circumstances be justified and all extra costs incurred by the Sub-Contractor in relation thereto shall be added to the Sub-Contract Price together with a reasonable allowance for profit. The Sub-Contractor shall in all cases take such action as may be reasonable for minimising or mitigating consequences of any such delay.

Notwithstanding the general nature of this claim notification clause, Judge Stephen Davies made some points as to what, in his judgment, qualifies as a notice under such a clause and if this notice can be regarded as a condition precedent. Regarding the qualification of the notice, he stated that (paragraphs 81 and 82 of the judgment transcript):

1. The notice must identify the relevant circumstances that have occurred and clarify that those circumstances have caused a delay to the execution of the sub-contract works. The latter is required, either by a process of purposive construction or by a process of necessary implication, because otherwise the notice would not achieve its objective.
2. The notice need not go on to explain how and why the relevant circumstances have caused the delay. That would be tantamount to import a requirement for a level of detail which goes beyond the simple notification mentioned in the clause.
3. The written notice must emanate from the entity required to give the notice under the contract (in this case, the sub-contractor). Therefore, for example, an entry in a minute of a meeting prepared by a second-tier subcontractor which recorded that there had been a delay, and that as a result the subcontract (the contract between the main contractor and the subcontractor) works had been delayed, would not itself amount to a valid notice under the clause. The essence of the notification requirement is that the main contractor must know that the subcontractor is contending that relevant circumstances have occurred and that they have led to delay in the sub-contract works.

Regarding the condition precedent, Judge Stephen Davies considered that clause 6.1 does operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. The words “provided the Sub-Contractor shall have given within a reasonable period written notice to the Contractor...” is clearly worded so as to affirm that the contracting parties intended that the clause acts as a condition precedent. Argument may take place regarding what constitutes a “reasonable period” but that is not in itself any reason for arguing that the clause is unclear in its meaning and intent. Glover and Tolson (2008) opine that the importance of the case emanates from the fact that the Judge held that the extension of time clause gave rise to a condition precedent even though there were no express words to that effect. Hence, courts may strictly interpret such clauses, even when the clause does not follow the requirements of *Bremer Handels GmbH v Vanden-Avenne Izegem PVBA*.

A broad interpretation of time bar clauses (in this case, sub-clause 20.1 of the FIDIC Yellow Book) is apparent in the case of *Obrascon Huarte Lain SA v Attorney General for Gibraltar* (2014), which was decided by the Technology and Construction Court. Mr Justice Akenhead states in paragraph 312 of the judgment:

I see no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably

broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer.

He refers to sub-clause 8.4 in respect of extension of time to deduce that the notice under sub-clause 20.1 takes effect when the contractor became aware that the event giving rise to the delay claim will take place (prospective delay) or has already started (retrospective delay). Therefore, the time bar would be triggered when the contractor believes a delay situation will take place or is in place, not when the event itself took place. The time bar would not be construed strictly against the contractor in this respect and the burden of proof would be on the employer seeking to argue that a notice had not been given in time. This position has been recently described as a broad construction of the time bar (Hall and Khan, 2015) and as a "softening" of English law position regarding the enforceability of time bar clauses (Bell and Witt, 2016). Mr. Justice Akenhead also addresses the form of the notice in sub-clause 20.1 of the FIDIC Yellow Book and clarifies, while there is no form called for in the sub-clause, there are some general characteristics:

there is no particular form called for in Clause 20.1 and one should construe it as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the Contract or in connection with it. It must be recognisable as a "claim" (paragraph 313).

It is worthy to note that the claimant appealed the case but the reasoning highlighted above was not among the grounds of the claimant's appeal and was not challenged (or discussed) by the Court of Appeal in its decision in 2015 (which upheld the decision by the Technical and Construction Court).

In *Van Oord UK Limited v Allseas UK Limited (2015)*, there was an Article 22 in the contract, which set the procedures for contractor's request of a change order as follows:

CONTRACTOR shall issue such request for CHANGE ORDER to COMPANY within a maximum of five (5) days of the occurrence of any such event. CONTRACTOR shall prepare at its own cost and, within twelve (12) days (or any other mutually agreed period of time) from the occurrence of such event, submit to COMPANY an evaluation of all its consequences with fully substantiated supporting documents, failing which and notwithstanding any other provisions of the CONTRACT, CONTRACTOR shall not be entitled to any claim based on the occurrence of such event.

The contractor in this case argued that the ground conditions encountered during execution of the project were not as those identified in the geotechnical information provided before entry into the contract. The contractor did not provide the notification or the required substantiation within the time limits and did not deny that compliance with this clause was required. Rather, the contractor argued that he complied with these requirements through the letter that was sent to the employer that "we wish to advise you that any additional costs incurred, which are your responsibility under the Agreement, we will be

seeking reimbursement under the appropriate Articles". Mr Justice Coulson did not consider this statement as a request for a Change Order in accordance with Article 22 and held that the contractor did not satisfy the time bar therein. In *NH International (Caribbean) v National Insurance Property Development Company (2015)*, one of the points in dispute was whether sub-clause 2.5 of the FIDIC 1999 contract acted as a condition precedent to the employer's entitlement to counter-claim from the contractor. The sub-clause states the following:

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor... The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period...The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.

It would appear from the onset that this sub-clause does not satisfy the two requirements set in *Bremer Handels GmbH v Vanden-Avenne Izegem PVBA* for a clause to be considered as a condition precedent. This was initially the case in the first instance, where an arbitrator held that "clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims" (paragraph 36) and, by implication, the words of sub-clause 2.5 were not clear enough.

However, the Privy Council took a different view and held that sub-clause 2.5 acts as a condition precedent. Lord Neuberger explained the reasoning in paragraph 38 as follows:

...it is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given "as soon as practicable". If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served "as soon as practicable".

Hence, it appears that Privy Council relied on the purpose of the employer's notice in the clause, despite there not being a specific time for the employer's notice and a clear statement that the employer's entitlement to claim will be barred if the specific time is not achieved. Furthermore, the employer's provision of a proposal in addition to the notice is emphasised in this decision, bearing in mind that the time bar in sub-clause 20.1 is in relation to the notice only, not the detailed particulars.

The above demonstrates that English/Welsh case law tends to enforce time bar clauses if the contracting parties intended for such provisions to be

enforced and, as evident from *Chiemgauer Membran Und GmbH (formerly Koch Hightex GmbH) v New Millennium Experience Co Ltd*, if the application of the condition precedent makes commercial sense. Although *WW Gear Construction Ltd. v McGee Group Ltd* (2010) demonstrates that there may be a disparity between adjudicators and courts with respect to the strict enforceability of time bar clauses, and *Obrascon Huarte Lain SA v Attorney General for Gibraltar* (2014) demonstrates a possible inclination to construe such provisions (in this case, sub-clause 20.1 of the FIDIC Yellow Book) broadly, the general trend is that a clearly worded time bar clause is enforced by the courts. *Bremer Handels GmbH v Vanden-Avenne Izegem PVBA* demonstrates that a “clearly worded” time bar clause comprises two key components, namely the period of time within which the notice of claim must be served and the consequence of not serving the notice within this time. However, there are exceptions to this rule, as evidenced by *Steria Limited v Sigma Wireless Communications Limited*, in which the time bar clause neither specified a time period nor the consequences, but yet was held by the court to be a condition precedent. A similar situation occurred in *NH International (Caribbean) v National Insurance Property Development Company* with respect to sub-clause 2.5 of the FIDIC 1999 Red Book. Strict enforcement of the form or manner specified in the contract for the serving of a notice is another consistent trend in English courts, as evidenced in *Education 4*

Ayrshire Limited v South Ayrshire Council. There are situations, however, which may result in courts not enforcing a time bar that is expressly stated in the contract. These are addressed in the next section.

E.1.2.Situations of Unenforceability

The following are situations where English/Welsh courts or arbitral tribunals held time bar clauses to be unenforceable:

E.1.2.1 Waiver and Estoppel:

Clayton (2005, p.354-355) describes the principle of waiver as the loss of right or cessation of entitlement to the performance of the contractual obligation either temporarily or permanently through an act which shows that the contracting party in question is intentionally not intending to enforce the contractual right or to require the performance of the contractual obligation. He sets out three elements which comprise the principle of waiver:

- (a) Clear and unequivocal words or conduct by the waiving party, reflecting its intention to not enforce the contractual right or require the performance of a contractual obligation
- (b) Knowledge by the waiving party of the right or the performance requirement

- (c) Communication of the words or conduct in (a) to the other party

The Scottish case *City Inn Ltd v Shepherd Construction Ltd* is a particularly challenging one as it has undergone four judgments to date of this research (i.e., 2002, 2003, 2008 and 2010). The case touched on several principles, the most notable being concurrency and apportionment of delay. In this respect in relation to English law, the case was criticised as being “incorrectly decided and ought not to be adopted in England” (McAdam, 2008, p.79) and “a departure from many tenets of what were understood to be generally accepted practice and law relating to delay analysis” (Pickavance, 2008, p. 667). However, one aspect of the case that was not subject to criticism is waiver, which is discussed here as the point of concern. In the contract governing the dispute in the case, there was a clause 13.8, which detailed the procedures to be followed in the event of any contractor claim which the contractor believes will result in an entitlement to additional time or money. The procedures included an early notification of the event in question, followed by an estimate of the cost and time impacts before proceeding with the work. Clause 13.8.5 stated expressly that failure to follow the procedures in clause 13.8 will not entitle the contractor to any extension of time under the contract. It is important to add that there was provision for the contractor and the architect to agree the estimates provided by the contractor and, failing which,

the architect can make a decision as to whether the contractor can proceed with the instruction or not. Sub-clause 13.8.4 provided that the architect may dispense with the contractor's obligation under clause 13.8.1. The facts of the case demonstrate that the employer and architect did not insist on strict compliance with the procedures under sub-clause 13.8.1 and, in fact, had processed claims that had not followed this procedure and granted a time extension which did not go through the procedure set in sub-clause 13.8. Accordingly, it was considered that the employer waived compliance with the condition precedent in the contract. In the third judgment of the case by the Outer Court of Session in 2008, Lord Drummond opines the following at 152 in drawing the conclusion that a waiver took place by the claimants and the architect (RMJM):

In drawing this inference I rely principally upon the immediate reaction to the defenders' claim, as disclosed at the meeting held on 8 April. It is clear from the minutes of that meeting that the claim for an extension of time was discussed at length. In view of the apparent importance of clause 13.8, it would be very surprising if no mention were made of the clause unless either the pursuers or the architect, acting on their behalf, had decided not to invoke the clause. It is adding significance of both representatives of the pursuers and representatives of RMJM were present at the meeting, yet neither mentioned the clause.

Lord Drummond continued at 153 to highlight another parameter of waiver, which is that the person claiming the waiver to have taken place must have conducted his affairs in reliance on the waiver to his prejudice. He opined that, in this case, the defenders acted on the basis of the waiver at the meeting

held on 8 April by pursuing a claim under clause 25 (the extension of time clause) without any reference to clause 13.8 (the variations clause that contains the time bar). This is taking into account that, if clause 13.8 had been applied strictly, the defenders would have been out of time prior to 8 April. However, that did not happen, leading to the conclusion that defendants relied on the pursuers conduct to their prejudice by not complying with the time bar requirement under clause 13.8.

The well-renowned reference on English contracts law, *Chitty on Contracts* (Beale, 2015), sets seven key requirements in order for the principle of waiver to apply (although it is important to note that the term “waiver” is interchangeably replaced throughout this reference by the terms “forbearance” and “equitable or promissory estoppel” – the latter denoting “forbearance in equity”):

1. There must be a pre-existing legal relationship between the parties
2. There must be a promise or representation which intended to affect the legal relationship between the parties, and which indicates that the promisor will not strictly insist on his legal rights.
3. The promise or representation must be “clear” and “unequivocal”. That does not mean the promise has to be express. Rather, the promise can be implied but clear enough so as to indicate that a promise did in fact arise.

4. Mere inactivity regarding a promise or representation will not suffice as a waiver. Conduct that causes promise or representation is essential. The rationale is that mere failure to assert a right does not lead to its loss.
5. The promise of representation must have in some way influenced the conduct of the party to whom it was made.
6. The party relying on the promise must have suffered a “detriment” by acting in reliance on the promise. This “detriment” can be an action by the promisee that he would not have been previously bound to do, but which has caused him loss.
7. The promisee must be in a position so that he cannot be restored to the position he was before he took the action relying on the promise. If he can be restored to the same position, then it would be equitable for the promisor to go back on the promise and, consequently, the waiver would not hold.

In terms of the impact of the doctrine on the enforcement of a time bar clause, the book refers on several occasions to *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion) (1980)*, in support of the principle that the waiver (or forbearance in equity doctrine) acts as a defence mechanism that can prevent the enforcement of existing rights but does not create new causes of action where none existed before. Therefore, it may deprive a promisor of

certain defences. The case centres on a ship owner who represented to a charterer that he would not rely, by way of defence to claims under the charter party, on a one-year time bar (which had expired). This representation was through a letter that was sent after the expiry of the one-year time bar that contained language dealing with the settlement of cargo claims. This language amounted to a representation that the time bar was not being relied on. The Commercial Court held that the ship owner could not, after nearly another year had passed, go back on the representation, since it would by then have been too late to restore the charterer to his original position.

Sheppard (2007) suggests that the English courts' position varies depending on whether the waiver is before or after the breach of contract. An example is given for the former case in which a buyer requests the seller for a later date than that specified in the contract. The buyer cannot insist on strict compliance with the contract completion date and the seller cannot bring an action for non-delivery or refuse to perform his or her obligations on a later date. Sheppard names this former case as concession or forbearance under the contract. Regarding the latter case of waiver after breach, Sheppard refers to two types of waiver, namely waiver by election (which is similar to the former case) and total abandonment which is also referred to as "total waiver" or equitable estoppel. In terms of waiver due to the lapse of a time

bar, Sheppard's forbearance or concession principle is applicable and more germane to this research. Therefore, if Sheppard's example is applied to this point, one can reasonably deduce that an English/Welsh court would decide that an employer who administers a contractor's claim after the specified period for claim notification has lapsed is considered to have waived the "immunity" granted to him by the time bar and, therefore, cannot hold the contractor accountable for this delay in notification. Rana (2006) opines that waiver is one of the defences that can be used by a time-barred contractor to defeat the time bar. She suggests that waiver can arise when the employer expressly waives its right to strict compliance with the terms of the contract or when the employer does not insist upon a right, either by an express statement or by conduct. Non-insistence of a right can be exemplified by the manner in which the employer dealt with contractor's past claims. Rana mentions that once the employer's right has been waived, the contractor can claim that it relied on this waiver by not submitting the claim notice within the specified time. Gould (2008) considers that a contractor may be able to rely on waiver and estoppel, as principles of equity, to claim additional time or money when a notice is served after the set time limit. He opines that the contractor can argue that, through the employer's words or conduct, reliance on the strict time limitations will not take place. He adds that, as Rana had two years previously, the contractor will need to demonstrate reliance on the

employer's conduct or statements and that it would be inequitable to allow the employer to act inconsistently with the employer's previous representations. An interesting point brought forward by Gould is in the case of a partnership-based contract which includes a requirement for the parties to act "in a spirit of mutual trust and cooperation". He opines that it may be ironic for the employer to insist on strict compliance with the contractual time bar when the contractor can claim that a notice was not served within the time limit in the spirit of mutual trust and cooperation.

Another principle closely tied to waiver is estoppel, which means that a party will be prevented from departing from a promise, assumption or representation it has encouraged or made if it would be unconscionable to do so (Clayton, 2005). Sheppard (2007) suggests that both waiver and estoppel require communication of the representation, either by words or conduct, to the other party. However, the position of equitable estoppel is concerned with whether or not the position of the person to whom the representation is made has been altered to his or her detriment by relying on the promise or representation made by the other party. Sheppard highlights six differences between waiver and equitable estoppel, which can be summarized as follows: (a) unlike waiver, equitable estoppel is not about electing between two inconsistent rights that have arisen after the occurrence of a breach, (b) equitable estoppel entails the representor's forbearance of its right to rescind

the contract after a serious breach as well as its right to damages or to performance, (c) knowledge by the representor of its rights is not necessary in equitable estoppel, (d) action by the person to whom the representation was made in reliance of such representation is necessary in equitable estoppel, but not necessary in waiver, (e) it is necessary in equitable estoppel to demonstrate that the person to whom the representation is made altered its position to its detriment or that it would be equitable for the representor to go back to its representation, and (f) waiver is irrevocable while estoppel can be suspensory. In terms of time bar clauses, the principle of estoppel can be used to stop the employer who has, through words or conduct, promised or represented to not apply the time bar if applying it would be unconscionable after such promise or representation. A case cited by Beale (2015), Gould (2008) and Sheppard (2007) for the case of estoppel (and forbearance in equity, as highlighted by Beale) is *Hughes v The Directors, etc., of the Metropolitan Railway Company (1877)* in which a landlord, Thomas Hughes, owned property leased to the Railway Company. Under the lease, Hughes was entitled to require the Railway Company to repair the building within six months of notice. Hughes issued the notice on 22 October 1874, therefore setting 22 April 1875 as the required date for the Railway Company to finish the repairs. On 28 November 1874, the Railway Company sent a letter proposing to purchase the building from Hughes. Negotiations began and

continued until 30 December 1874, with no consensus reached. Once the six months had passed, Hughes sued the Railway Company for breach of contract and tried to expel it. The Court of Common Pleas ruled in favour of Hughes, but, on appeal, the Court of Appeal reversed the decision. This was affirmed by the House of Lords, which ruled that the initiation of the negotiations constituted an implied promise by Hughes not to enforce his legal rights with respect to the time limit on the repairs, and the Railway Company acted on this promise to its detriment. In terms of the time bar clauses, the ruling of this case can be extrapolated to indicate that the time bar under sub-clause 20.1 of the FIDIC 1999 Red Book may be rendered unenforceable by English courts if the employer promised the contractor, through words or conduct, that the provisions of the time bar would not be enforced and the contractor acted upon this promise to its detriment.

Waiver and estoppel are common factors under English law jurisdiction where a clearly stated time bar may not be enforceable. However, there are two other factors, which have not been commonly addressed in English construction law literature, but which are nevertheless worthy to mention in this context. These are, namely, work outside the contract and statutes regarding unfair contract terms.

E.1.2.2 Work Outside the Contract

Addressing the matter of whether a contractor can recover when time-barred from the perspective of Australian courts, Clayton (2005) takes the view that, in addition to waiver and estoppel, condition precedent clauses do not apply to work that it is outside the scope of the contract. In describing the meaning of the term “work outside the contract”, Clayton suggests that it is work which, due to its nature, extent or timing, cannot be regarded as a variation within the understanding of the parties at the time of contract signature. Examples cited include a variation causing a fundamental change to the work, the cumulative impact of changes fundamentally changing the nature of the work and work outside the completion date of the contract. The rationale is that work outside the scope of the contract is not considered a variation or even subject to the terms of the contract. Accordingly, the condition precedent clause does not apply. Clayton identifies three ways a contractor can recover in the case of work outside the scope of work. The first is payment on the basis of *quantum meruit*, or a reasonable sum for the work executed. This would apply only to the additional scope, not the scope as a whole. The rates in the contract can be used as a guide for what a reasonable price is until the contrary is proven. The second is the application of the law of restitution due to unjust enrichment. Clayton suggests that the law of restitution requires a

person who has been unjustly enriched at the expense of another (through the performance of work outside the scope of the contract) to “make restitution” to the party incurring the expense. The basis for recovery under the application of restitution is also *quantum meruit*. The third is the entry into a separate agreement with regards to the scope outside the contract, which will of course not be subject to the condition precedent clause. Clayton refers to the following statement from Lord Cairns in the English case of *Thorn v. London Corporation* (1876) which summarises the main concept:

If it is the kind of additional work contemplated by the contract, [the contractor] must be paid for it and will be paid for it according to the prices regulated by the contract . . . If the additional or varied work is so peculiar, so unexpected and so different from what any person reckoned or calculated upon, it may not be within the contract at all, and he could either refuse to go on or claim to be paid upon a *quantum meruit*.

Lord Cairns’ above statement begs the question that if the contractor can either refuse to go on or present a claim to be paid on quantum meruit, and the contract in question contains a time bar clause, shouldn’t the contractor comply with the time bar clause in either case? Wouldn’t compliance with the time bar clause in this case make the employer reconsider instructing the contractor to perform this additional work? It is suggested that, unlike Clayton’s inference that such additional work instruction would render the time bar clause (and the contract terms as a whole) no longer be applicable to this

work, the time bar clause can be directly applicable so that the employer is given the opportunity to reconsider his position than to be surprised with the contractor's claim at a later date.

It is observed that, unlike the principles of waiver and estoppel, few writers make reference to the work outside the scope of the contract as a means to overcome time bar clauses. Champion (2008) makes a passing reference that, in addition to the principles of waiver and estoppel, work outside the contract may render enforcement of time bar clauses difficult. In support of this statement, he refers to Lal (2007) and Keating (2006). However, an examination of both references demonstrates that there is hardly any direct reference to work outside the contract defeating the time bar clause. Lal discusses time bar clauses under English law and concludes that freedom of contract is the crux of the matter, not the "prevention principle" (discussed in Section E.1.3 below) as commonly discussed in the literature. In the process, he makes no reference to work outside the contract being a tool for defeat by the contractor of the contractual time bar. Keating, on the other hand, discusses payment for extra work and provides (p.130) a brief account of work outside the contract under English law. There is no direct reference to time bar clauses and work outside the contract, although the most relevant reference is the statement that work outside the contract is not governed by

the terms of the contract. This is in line with Clayton's (2005) analysis discussed above, which was published one year earlier. This statement can be interpreted to mean that, since the time bar is a term in the contract, extra work will not be affected by the time bar. This point is unchanged in the following edition (9th) of the book Keating on Construction Contracts (Furst and Ramsey, 2012). In terms of what comprises extra work, the authors suggest that it is work that is so different than the contracted scope, work that is carried out after completion of the contract duration or work not within the scope of the variation clause. Again, this definition is in line with Clayton's, which is in turn an indication that the English and Australian jurisdictions are in harmony regarding this point. However, it must be emphasised that, as highlighted above, few writers make reference to the work outside the scope of the contract as a means to overcome time bar clauses.

E.1.2.3 Statutory Controls

There are statutes under English law which can affect the enforceability of time bar clauses, such as the one in sub-clause 20.1 of the FIDIC 1999 Red Book. The most notable one is the Unfair Contract Terms Act 1977. The following sections from the Act are germane to this research:

Section 3 highlights the extent of the applicability of the Act in contract:

S 3 Liability arising in contract.

- (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
- (2) As against that party, the other cannot by reference to any contract term –
 - (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
 - (b) claim to be entitled –
 - (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
 - (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

Section 3(1) limits the applicability of this Section 3 to the situation where one of the contracting parties deals on the other's standard terms of business (note that the "one of them deals as a consumer" portion is recently addressed in the Consumer Rights Act 2015 and is no longer applicable). In a construction project context that is germane to this research, this standard form would most likely be a modified version of the FIDIC contract. However, it is important to note that the terms "deals on the other's standard terms of business" indicates that one of the contracting parties deals on the other's own standard terms on a "take-it-or-leave-it" basis without being given the opportunity to negotiate. This may not be the case on most construction projects, since the terms of contract are usually negotiated between the contracting parties. Section 3(2) prevents any contracting party that is liable

to the other party in terms of a breach to restrict or exclude this liability by using “any contract term”. Considering whether this “any term” can be the time bar provisions within sub-clause 20.1 of the FIDIC 1999 Red Book (assuming Section 3(1) is applicable), this statutory provision can be interpreted to mean that, if an employer is in breach of contract, he may be prevented from relying on the time bar clause to limit or restrict his liability to the contractor. This employer breach can be, for example, a pivotal factor in the contractor’s delay or a main cause for the bearing by the contractor of additional cost. This interpretation, if valid, can render the time bar under the FIDIC Red Book, NEC3 or any similar provision as unenforceable if it is proven to be “onerous” or “restrictive” (section 13-1) or if the contracting party relying on it (i.e., the employer in this case) is in breach of its contractual obligations (section 3-2-a). However, section 3(2) ends with an important condition, i.e., that the contract term (i.e., sub-clause 20.1 in this case) satisfies the test of “reasonableness”. The test of “reasonableness” is addressed in Section 11, which states:

S 11 The “reasonableness” test.

(3) In relation to a notice (not being a notice having a contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

From a cursory examination of the wording of section 11, one may assume that the time bar under sub-clause 20.1 fits the description of the notice in section 11(4), as it can be argued that this time bar “seeks to restrict liability (of the employer) to a specified sum of money” (and an extension to the project’s completion date, in this case). Therefore, the notice is subject to the test of reasonableness and may not be enforceable notwithstanding the fact that it is a term in the contract. As per section 11(5), the burden of proof is on the employer to show that application of the time bar in sub-clause 20.1 is reasonable. It is for this reason that writers, such as Knutsen (2005), opine that sub-clause 20.1 of FIDIC 1999 Red Book is subject to the Unfair Contract Terms Act 1977 which requires a test of “reasonableness” to be applied regarding its enforceability since, he suggests, this application is with regards to clauses in commercial contracts that seek to exclude or limit rights which would otherwise exist. He suggests that it is possible that an arbitrator

deciding on the reasonableness of this sub-clause could decide that it is unreasonable and hence unenforceable. This opinion is not shared by Champion (2008), who opines that the chances of success by a contractor in defeating the time bar under this sub-clause in the United Kingdom using the Unfair Contract Terms Act 1977 are low. Champion's position is perhaps corroborated by the fact that there are few references in the English literature to challenging a time bar under the Unfair Contract Terms Act 1977. In fact, there is literature to support the concept of 'freedom of contract' and, therefore, this literature supports the enforceability of the time bar even if the contractor is delayed by a breach of the employer (in contravention to section 3(2)(a) of the Act). However, this point touches on the "prevention principle", which is elaborated upon in the following section. This leads one to question if this is a gap in English literature regarding the treatment by the Act of the time bar clauses in construction contracts such as that of sub-clause 20.1 of the FIDIC 1999 Red Book or if there is another explanation. One possible explanation is that most construction contracts are negotiated between the parties and may not therefore be applicable pursuant to section 3(1) of the Act. Chadwick L.J.'s statements in the case of *Watford Electronics Ltd v Sanderson CFL Ltd* (2001) illustrates this point well. In the case, clause 7.3 of the contract stated: "Neither the Company (Sanderson) nor the Customer (Watford) shall be liable to the other for any claims for indirect or

consequential losses whether arising from negligence or otherwise.” Watford sued for consequential losses arising from the unsatisfactory performance of the software it purchased from Sanderson. The court ruled in favour of Watford while drawing support from the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977. Sanderson appealed and the Court of Appeal held in favour of Sanderson. Chadwick L.J. stated at paragraphs 54-55:

In circumstances in which parties of equal bargaining power negotiate a price for the supply of product under an agreement which provides for the person on whom the risk of loss will fall, it seems to me that the court should be very cautious before reaching the conclusion that the agreement which they have reached is not a fair and reasonable one.

Where experienced businessmen representing substantial companies of equal bargaining power negotiate an agreement, they may be taken to have had regard to the matters known to them. They should, in my view be taken to be the best judge of the commercial fairness of the agreement which they have made; including the fairness of each of the terms in that agreement. They should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other--or that a term is so unreasonable that it cannot properly have been understood or considered--the court should not interfere.

S13

- (1) To the extent that this Part of this Act prevents the exclusion or restriction of liability it also prevents--
- (a) making the liability or its enforcement subject to restrictive or onerous conditions;

- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting any person to any prejudice in consequence of his pursuing any such remedy;
- (c) excluding or restricting any rules of evidence or procedure;

Hence, one of the purposes of this Act is the “restriction or exclusion of liability”. There has been debate in the literature as to whether section 13 (1) adds to what is covered in other sections of the Act or whether it should be considered as highlighting different type of clauses which fall within the description of clauses that “restrict or exclude liability (Macdonald, 1994). *Stewart Gill Ltd. v Horatio Myer & Co. Ltd.* (1992) centred on a clause in the contract that prevented the defendants from the entitlement to “withhold payment of any amount due ... under the contract by reason of any payment set off counterclaim allegation or incorrect or defective goods or for any other reason whatsoever...”. The Court of Appeal concluded that the clause fell within section 13(1)(b), as it attempted to exclude or restrict a right or remedy. Importantly, the court considered section 13 of the Act as extending the operation of the Act. In relation to the time bar under sub-clause 20.1 of the FIDIC 1999 Red Book, one may interpret enforcement of the time bar to fall within section 13(1)(a), depending on the facts of the case, since a contractor may argue that an employer’s enforcement of the time bar is “onerous” or “restrictive”.

Peel (2001) suggests that, while the purpose of the Act is to guard against the unreasonable imposition of exemption clauses which do not reflect a fair allocation risk (i.e., those described in section 13 of the Act that exclude or restrict liability of a contracting party), courts should be cautious that they do not transgress into the parties' freedom of contract. He therefore welcomes the decision made by the Court of Appeal in *Watford Electronics Ltd v Sanderson CFL Ltd*.

However, recent court cases indicate that time bar clauses in construction contracts may be held unenforceable by the Unfair Contract Terms Act 1977 in certain situations. In the first instance case of *Commercial Management (Investments) Ltd vs Mitchell Design and Construct Ltd. & Anor* (2016), the Technology and Construction Court ruled that the following time bar clause was unreasonable:

All claims under or in connection with this Contract must be notified to us in writing within 28 days of the appearance of any alleged defect or of the occurrence (or non-occurrence as the case may be) of the event complained of, and shall in any event be deemed to be waived and absolutely barred unless so notified within one calendar year of the date of completion of the works.

The court's general rationale is that the person required to give the notice was not using the building, so it would be impractical for that person to give a notice within 28 days of the appearance of a defect. The claimant argued that

contracting parties should be free to agree their own terms without the court's intervention as to the reasonableness of those terms. To this, Mr. Justice Edward-Stuart stated at paragraph 84:

Mr Mort reminded me also, quite correctly, that commercial parties are entitled to allocate the risk as they think fit and that the court should not place too high a hurdle in the way of a party, such as Regorco, that is seeking to show that a particular term was reasonable. I do not consider it necessary to refer to the authorities that he mentioned, but I am acutely aware that the court must consider all the conflicting factors carefully before reaching a conclusion that a particular term is not reasonable.

In this case, the court did consider carefully all the conflicting factors before deciding that clause 12(d) did not satisfy the test of reasonableness under the Unfair Contract Terms Act 1977. Of particular interest to this research, Mr. Justice Edward-Stuart made a clear distinction between sub-clause 20.1 of the FIDIC contract and clause 12(d) in which he concluded that the latter is much more onerous than the former. The following are his statements at paragraph 83:

In his skeleton argument Mr Mort referred to a number of examples of time bar clauses in particular types of contract. In my view, such examples - arising as they do in the context of different situations - are of limited value. For example, Mr Mort relied on clause 20 of the standard FIDIC form of contract which requires a contractor, who wishes to claim an extension of time or additional payment under the contract, to give notice as soon as practicable, and not later than 28 days after he became aware, or should have become aware, of the event or circumstance giving rise to the entitlement. Two points can be made about this. First, contractors on building projects generally know when

a contract is in delay or whether the work has been disrupted and so giving notice of the relevant event within 28 days should not be unduly onerous. Further, unlike clause 12(d), time runs from the date on which the contractor is aware, or should have been aware, of the event in question. Mr Mort's concession, which in my view was correctly made, that under clause 12(d) time runs when the defect was capable of being seen, rather than from when the contractor knew or ought to have known about it, also shows why clause 12(d) is much more onerous than clause 20 of the FIDIC contract.

It follows from the above that freely negotiated time bar clauses can still be held unreasonable, and therefore unenforceable, by English courts pursuant to the test of reasonableness in the Unfair Contract Terms Act 1977. In the case of *Commercial Management (Investments) Ltd vs Mitchell Design and Construct Ltd. & Anor*, the test of "reasonableness" was applied between the FIDIC time bar and the time bar clause in the contract and the FIDIC time bar passed.

Reference was made above to section 3(2)(a) of the Unfair Contract Terms Act 1977 and its connection to "the prevention principle". The following section provides an elaboration on this principle.

E.1.3.The Prevention Principle

E.1.3.1 Background

The "prevention principle" is a substantive concept which states that a party to a contract may not benefit from its own breach (Gould, 2008). Applying

this in a construction context would suggest that if a contractor fails to provide the notice to claim for a time extension, and the delay in question is due in part to a breach of the employer, then the employer is prevented from benefitting from its own breach by applying liquidated damages. On the other hand, it might be said that the cause of the loss is not the employer, but the contractor for failing to give the notice. Hence, judgments have been divided. Knutsen (2005) opines that the condition precedent under sub-clause 20.1 should not apply to cases where the contractor's requirement for extra time or money ultimately arises from breaches of contract by the employer or engineer, notwithstanding the apparently inclusive language in sub-clause 20.1. Similarly, Champion (2008) suggests that acts of breach by the employer where the employer benefits from the breach can void the condition precedent clause. In Australia, Clayton (2008) cites acts of prevention by the employer as one of the circumstances where a time-barred contractor can recover. There is considerable literature on the concept that the employer should be prohibited from benefitting from his own breach, which is discussed in the following section.

E.1.3.2 Case Law History and Discussion

One of the commonly discussed cases in English construction law literature regarding the historical evolution of the "prevention principle" is the

nineteenth century case of *Holme v Guppy* (1838), which was regarding a contractor who carried out carpentry and joinery work forming part of a new brewery in Liverpool with a completion date of 31 August 1836 and the provision of liquidated damages if this date was not met. The contractor was not granted possession of the site for four weeks following execution of the contract and was further delayed by factors attributable to his own defaults as well as the employer's other contractors. The Court of Exchequer held that the contractor was not liable for liquidated damages. Parke B held that if a party is prevented by the refusal of the other party from completing the contract within the time limit, it is not liable in law for the default. In more recent times, a notable case is *Peak v McKinney* (1970), which centred on a contractor (Peak) and his piling subcontractor (McKinney), who could not achieve the contractual completion date to build a 14-storey block of flats due to, in part, the employer's delay in issuing instructions for the means of repair of defective piles. Upon the lapse of the contractual completion date, the employer imposed liquidated damages on Peak who in turn passed these damages on to McKinney. The Court of Appeal held that, since the delays were in part due to the employer, and since the extension of time mechanism in the contract did not cater for the situation of employer-caused delays, the completion date became "at large" and the liquidated damages clause became inoperable. Furthermore, the employer's remedy became limited to the

damages he proved were incurred beyond a “reasonable” period. *Peak v McKinney* increased contract drafters’ awareness of including employer-caused delays in the extension of time machinery within the contract and eventually resulted in the inclusion of the notice requirement on the part of the contractor when such delays are encountered as a condition precedent to the contractor’s entitlement for the extension of time (Mendelblat and Pickavance, 2011a). The question then arose as to whether the contractor’s failure to provide the notice had any effect on the application of the “prevention principle”, which otherwise would set the completion date at large and invalidate the employer’s application of liquidated damages. In other words, if the contractor is delayed by the employer, and the contractor fails to meet the condition precedent requirement by not notifying the employer within the set time limit that this delay is impacting the contract completion date, would the condition precedent take priority over the “prevention principle”, so that the employer would benefit from its breach while the contractor would not be entitled to any time extension due to its failure to meet the condition precedent? This point arose in the Australian courts through the case of *Turner Corporation Ltd v Austotel* (1994) which upheld the condition precedent against the prevention principle. A second case, *Turner Corporation Ltd v Co-Ordinated Industries Pty* (1995), led to the same result in which Cole J, as cited in Lal (2007, p.126), summarized the conflict

between the condition precedent and prevention principle as follows: "A party to a contract cannot rely upon the preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct." In *Gaymark Investments Pty Ltd. v Walter Construction Group Ltd* (2003), the prevention principle was upheld against the condition precedent. One of the key considerations for this decision was the parties' deletion of a term in the standard contract form allowing the contract administrator to unilaterally extend time due to employer's delays, which was construed by Baily J as the employer having taken on the risk that the prevention principle would apply in the event the contractor was delayed and did not provide the required notice. Another Australian case which upheld the prevention principle against the condition precedent is *Peninsula Balmain v Abigroup Contractors* (2002), in which the contract contained a condition precedent clause but also gave discretionally powers to the contract administrator to issue extensions of time and to act fairly and honestly. Although Hodgson JA, who delivered the judgment, acknowledged that the contractor's failure to comply with the condition precedent clause could have resulted in invalidating the contractor's claim despite the employer's delays, he held that the requirement on the contract administrator to act fairly and honestly, coupled with the discretionary powers given to him to extend the time for completion, upheld the prevention principle over the condition

precedent (Clayton, 2008). Notwithstanding the upholding of the prevention principle over the condition precedent in the cases of *Balmain* and *Gaymark*, Clayton cautions contractors in Australia against not complying with the time bar requirements, as he concludes that these two cases have been questioned and that, in the vast majority of cases, the circumstances would not permit time-barred contractor to obtain recovery under any of the heads addressed in his paper, which include the prevention principle.

The conflict between the condition precedent and prevention principle was encountered in the English courts in the case of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007), in which Jackson J supported the Peak and Turner cases and stated the following regarding Gaymark:

I have considerable doubt that Gaymark represents the law of England...If Gaymark is good law then a contractor could disregard with impunity any provision making notice a condition precedent. At his option the contractor could set time at large. (Mendelblat and Pickavance, 2011a, p.4).

Glover (2007, p.20) stated the following after the judgment of *Multiplex v Honeywell*: "The debate as to whether the decision in the court of Gaymark should also be followed by the courts in England and Wales is therefore now over."

The same reasoning was applied in the case of *Steria Ltd v Sigma Wireless Communications Ltd* (2007), which applied the condition precedent on the

contractor despite the lack of express words to that effect. In the case, the claimant sub-contractor (Steria) claimed for the final contractual payment in respect of its provision of a computer-aided dispatch system to the defendant main contractor (Sigma). The client awarded Sigma a contract to provide a new computerised system for the fire and ambulance services. Sigma, as the main contractor, sub-contracted the CAD portion of the main contract to Steria. Clause 6.1 of the sub-contract contained an extension of time provision and required Steria to give written notice of delays to Sigma within a reasonable period of time. Sigma withheld 5% of the sub-contract price due to Steria, alleging that Steria had delayed the completion of the sub-contract works. Steria contended that the delays arose out of difficulties caused by the client and sought to rely on clause 6.1. Sigma claimed it was entitled to set-off against the final payment and to counterclaim liquidated damages under the sub-contract or general damages for losses incurred as a result of the delay. Steria submitted (among other things that are not directly relevant to this research) that the requirement to give written notice in clause 6.1 was not a condition precedent to its right to an extension of time or, if it was, then it had complied with that requirement. On this point, it was decided that, where there was ambiguity as to whether or not notification was a condition precedent to a time extension, then the notification should not be construed as being a condition precedent. However, the wording of clause 6.1 was clear

and there was no need for the inclusion of an express statement that, unless written notice had been given within a reasonable time, Steria would not be entitled to an extension of time. Delays on the part of the client entitled Steria, under clause 6.1, to an extension of time and, on the facts, Steria had complied with its notification obligations by email. On the matter of the prevention principle, Judge Stephen Davies stated his agreement with the reasoning of Jackson J. in *Multiplex v Honeywell* and concluded that the prevention principle does not mean that a contractor's failure to comply with the condition precedent notice requirement puts time at large.

The above discussion on the English case law in respect of the "prevention principle" demonstrates that there is a potential controversy between this principle and the condition precedent, although the direction of the courts appears to be clearly inclined towards upholding the condition precedent over the prevention principle. It is appropriate at this stage to highlight some of the commentaries on this case law in English legal literature.

E.1.3.3. Commentaries on the Prevention Principle in English Legal Literature

Mendelblat and Pickavance (2011a, p.18) state the following with respect to the *Gaymark* decision and the trend of judgments thereafter:

The decision in *Gaymark* has and continues to receive a significant amount of attention, both in judgment and academic literature. By and

large, subsequent decisions favoured the *Turner* decisions rather than *Gaymark*.

The authors conclude in a subsequent article:

Although it is suggested that the contract administrator should be given the right in professionally drafted contracts to extend the time for completion when the contractor fails to provide the notice, it is submitted that the decisions in *Peak* and *Turner* must be right. The reason is that the notice provisions have been specifically drafted by the parties with the understanding that the contractor is best placed to assess, understand and monitor the risk of delay (Mendelblat and Pickavance, 2011b, p.21).

Lal (2007) argues that the real issue is not the collision between the condition precedent and the prevention principle, but rather, between the principle of "freedom of contract" and the "prevention principle". He suggests that when the "prevention principle" is not applied, this is because it is only a rule of construction, not law. He further takes the view that the "proximate cause" for the contractor's loss is not the employer's act of prevention, but the contractor's own breach of failing to activate the contract machinery (serving the notice) so that the employer does not benefit from its own wrong. Along the same lines, Atkinson (2008) considers five key points when analysing whether an employer is entitled to delay damages in the situation where a contractor is delayed by the employer but fails to provide the notice required under a condition precedent clause in the NEC3 form. It is important to note here that the conclusions drawn by Atkinson with respect to the NEC3 form

are totally applicable to the FIDIC 1999 form since the basis for Atkinson's analysis is a condition precedent clause, which both contract forms contain in their clauses 61.3 and 20.1, respectively. The following are the five key points highlighted by Atkinson:

1. Failure of the contractor to give notice means that it deprives itself of a remedy for the employer's breach of contract. He draws support from *Gilbert-Ash (Northern) Limited v Modern Engineering (Bristol) Ltd* (1976).
2. Failure of the contractor to give notice deprives him of the opportunity to avoid liability. He draws support from *Mackay v Dick* (1881) and concludes (p.33): "If the operation of the condition precedent depends on the exercise of a discretionary contractual right, then the condition should not be made ineffective when a free choice has been made not to exercise the right."
3. Failure to give notice can be regarded as a "waiver by election", since the contractor elected to accept the employer's breach by waiving its right to operate the contractual machinery. The contractor cannot later rely on the breach which it has waived for failure to achieve the completion date.
4. The employer can obtain a benefit from his own breach by being entitled to liquidated damages if the contractor is delayed by the employer and does not serve the notice. As evidenced by *Alghussein Establishment v*

Eton College (1988), the prevention principle is a rule of construction, not a rule of law (as discussed above by reference to Lal, 2007). In the case, Lord Diplock stated that this rule of construction was considered to be subject to clear provisions in the contract to the contrary. Therefore, examining the NEC3 form, there are provisions that entitle the contractor to an extension of time for an employer's breach but the contractor is given the option (under the time bar of sub-clause 61.3) whether or not to operate the contractual machinery to extend the time due to the employer's breach (the same is applicable to the FIDIC 1999 Red Book). If the contractor chooses not to operate this contractual machinery, then the employer is entitled to rely on its own breach to obtain a benefit.

5. Under NEC3, the prevention principle does not operate to prevent the employer's right to have the contractor pay delay damages simply because the contractor has not exercised its right to give notice pursuant to clause 63.1 for the employer's breach of contract.

Views that favour the upholding of the prevention principle over the condition precedent include McAdam (2009, p.94), who mentions that there is no support, whether judicial or academic, for a contractor being immediately responsible under contract for an act of prevention by the employer. Yet, he suggests, there is notable authority in the opposite direction. Pease (2007,

p. 24) described Jackson J's obiter remarks in *Multiplex v Honeywell*, which did not support the *Gaymark* decision, as "much damaging obiter remarks from a well-respected judge" and as failing to address what he terms as "the collision of legal principles" (i.e., the condition precedent and the prevention principle). Jones (2009) considers that, in order for a condition precedent to override the prevention principle, words must be used to explicitly convey the following: "the contractor agrees to complete the works by the date specified notwithstanding having been actually delayed by acts of prevention by the owner" (p.68). He suggests that, in the absence of such clear provisions, a time bar such as that in the FIDIC contract is considered to apply to only contractor-caused, or neutral (not attributable to either the contractor or employer), delays. He opines that the purpose of time bar clause is to deal with delay risks for which the contractor is responsible and that a contractor's bearing the risk of employer-caused delays is not the intent of contracting parties when entering into a contract (unless express words are given to that effect, as highlighted above). Hrustanpasic (2012) suggests that fundamental principles of fairness mean that time bar clauses should not override the prevention principle and advocates the use of discretionary extensions of time (DEOTs) as a middle ground so that time extensions are granted retrospectively to take into account employer delays and to hold the contractor responsible for his own delays.

The commentaries demonstrate that there is controversy, although there is an inclination in line with that of the courts to support the condition precedent in light of the “freedom of contract” principle. It is not surprising that, in light of this controversy, there are writers who proposed middle-ground solutions in an attempt to address this controversy, as highlighted in the following section.

E.1.4.4 Suggested Solutions

Several suggestions have been put forth in an attempt to resolve the conflict between the condition precedent and prevention principle:

1. Tweeddale (2006) suggests that, since the prevention principle entails that a party should not benefit from its own wrong, the contractor should not be entitled to time and money for failing to serve a notice and the employer should not be entitled to apply the liquidated damages if he contributed to the delay. Hence, the employer gains no benefit due to the contractor's failure to claim time and money. If the employer caused delays to the contractor, then the employer should be prohibited from recovering delay damages for his portion of the delay. However, the author acknowledges that this may not be enforced as it entails a modification to the conditions of contract.

2. Along the same vein, Jones (2009) suggests that it is time to revisit the "time at large" consequence of the prevention principle, and instead apply the principle to simply reduce the recoverable damages by those periods of delay caused by the employer. As mentioned above, Jones suggests that there is a distinction between delays caused by the contractor and neutral delays, on one hand, and delays caused by the employer, on the other hand. He suggests that the prevention principle must apply to the former, but not be applied to the latter.
3. In agreement with Jones is Bailey (2010) who opines that the concept of a contractor being held liable for liquidated damages for delay caused by the employer, notwithstanding the contractor's failure to provide the notice, is absurd and lacks commercial common sense. Like Jones, he suggests that there should be a distinction in the interpretation of time bars, between the circumstance where a contractor fails to notify the employer of a delay for which the employer is not responsible and that where the delay is not only caused by the employer, but which the employer has prior knowledge about. In the latter case, he concludes that the contractor's failure must be regarded as unintentional.
4. As stated above, Hrustanpasic (2012) advocates the use of discretionary extensions of time (DEOTs) as a middle ground so that time extensions

are granted retrospectively to take into account employer delays and to hold the contractor responsible for his own delays. Apportionment of the delays would be carried out using critical path method (CPM) scheduling techniques.

The suggestions made in English construction law literature bring an end to the section on the prevention principle and opens the floor to another principle that is commonly discussed in English legal literature, namely the principle of good faith.

E.1.4. Good Faith

Mason (2011) takes the view that the strict enforcement of a time bar, particularly when the employer was aware of the event giving rise to the contractor's claim, may be conflicting with the principle of good faith obligations. He points out, however, that good faith provisions (which he suggests need not use the phrase "good faith," but also "mutual trust and cooperation", "fairness", "fair dealing" and "trust and respect") which are connected to the employer's exercise of other rights may require that a contractor is warned of the imminent expiry of a notice period as a precondition to the time bar's enforcement. He adds that good faith provisions are to be interpreted taking into account the contract as a whole and gives an example from the NEC3 contract, which contains an express obligation to

cooperate but may (implicitly) preclude the application of the time bar in clause 61.3 if the project manager fails to notify the contractor of the compensation event. The question here is whether the principle of good faith is an overriding obligation in English law. Mason refers to standard contract forms that include express contractual obligations to act in good faith, such as the JCT Partnering Charter, the ICC Turnkey Contract, the NEC2 and NEC3 and suggests the enforceability of such provisions depends on the manner in which these provisions are drafted. There are provisions which can be interpreted to merely assist in delineating the scope of the parties' contractual obligations (such as in the case of the ICC Turnkey Contract) and there are others (such as in the NEC2 and NEC3 forms) that are overriding provisions that may impose obligations additional to those in the contract for proper performance. However, in the absence of express good faith obligations in contract, there is no explicit provision under English/Welsh law that obligates contracting parties to act in good faith. As Mason (2007) notes, English law historically made a choice to promote trade through contractual certainty rather than widely drawn concepts, such as good faith. He opines that, although the principle of good faith has its roots in the history of English law and was described by Lord Mansfield in 1766 as the governing principle applicable to all contracts and dealings, it has been gradually removed by statute law for the purpose of promotion of trade, which necessitated

contractual certainty. Despite the contractual uncertainty that characterises the principle of good faith, there are advocates in English literature for increasing the role of good faith in construction contracts (e.g., Minogue, 2013). There are also writers who believe that English courts tend to enforce good faith principles as a matter of implied terms or remedies (Colledge, 1999). Examples from English case law that support this view are provided in Table 10 in Chapter VI, Section B.1.5. There are also those who view good faith as an intervention on the principle of freedom of contract and, therefore, opine that any express doctrine thereof in construction contracts should be avoided (Korde, 2000). Giles (2014) suggests, after examining several cases involving the principle of good faith, that there is no general doctrine of good faith in English contract law and that the implication of such term would only be in very particular circumstances, which are unlikely to arise in construction and engineering contracts. He concludes that, if a party requires good faith obligation, it should expressly include one and clarify where it relates to specific clauses or obligations. On the matter of time bar clauses acting as a condition precedent, he considers that a condition precedent clause should be complied with and that a good faith obligation is very unlikely to override that requirement, particularly where such a requirement would exclude a party's entitlement (which is the situation with sub-clause 20.1 of the FIDIC 1999 Red Book).

E.1.5. Conclusion of Reported Issues Regarding the Enforceability of the FIDIC Time Bar in the English/Welsh Common Law Jurisdiction

On the basis of the examination above, it appears justified to conclude that English/Welsh case law tends to enforce time bar clauses if they fulfil the two prerequisites for condition precedent clauses. Such a fulfilment demonstrates that the contracting parties intended that the time bar should act as a condition precedent to the contractor's entitlement and, therefore, is strictly enforced by the courts. There are cases, however, where such clauses are considered unenforceable, such as the cases of waiver/estoppel, work outside the scope of the contract, statutory controls (most notably the Unfair Contract Terms Act 1977) and the "prevention principle". However, although there are cases where a condition precedent clause is rendered unenforceable due to any of these factors, the majority of the case law still indicates that these are exceptional cases and that time bar clauses that fulfil the two condition precedent requirements are enforceable under the English/Welsh common jurisdiction. In brief, it is apparent that the principle of "freedom of contract" is the overriding factor in English law jurisdiction.

E.2 The Egyptian Civil Code Jurisdiction

E.2.1. Background on Published Literature:

Despite the imprint of the Egyptian Civil Code on other Civil Codes in the Arab counties, and the wide application in Egypt and the Middle East of FIDIC contracts which contain in their 1999 suite the express time bar clause in sub-clause 20.1, the literature produced on the enforceability of the FIDIC time bar clauses under the Egyptian Civil Code is scarce. Prior to the issuance of the 1999 suite of contracts, literature predominantly focused on comparisons between certain FIDIC clauses and how they are addressed in the Egyptian Civil Code (El Shalakany, 1989; Sarie El Din, 1994). There is very limited discussion of the issue of condition precedents in respect of these pre 1999 contracts. For example, although the FIDIC 1987 Red Book contains a 14-day time bar for notification of additional cost due to variation instructions in sub-clause 51.2, and a provision in sub-clause 44.2 stating that the engineer is not bound to make a determination on a contractor's time impact claim if detailed particulars are not submitted within 28 days from the event giving rise to the time impact, there is seldom any literature addressing the enforceability of these sub-clauses. These sub-clauses are similar to sub-clause 20.1 of the 1999 suite in that they entail a negative consequence if the contractor fails to comply with the notification requirements in the contract.

In one of the few references to the time limitations under sub-clauses 51 and 52 of the FIDIC 1987 contract, Sarie El Din opines that the Egyptian law position (with respect to these time limitations) is that "This solution is questionable under Egyptian law. It is difficult under Egyptian law to characterize such notice as a condition precedent" (1994, p. 971). However, he provides no elaboration on the reasons this notice requirement is questionable under Egyptian law. It is also observed that, while he regards these clauses as being a condition precedent to the contractor's entitlement to additional payment under English law, there is no such express provision in these clauses (contrary to the clear wording in sub-clause 20.1 of the subsequent FIDIC 1999 contract).

Literature produced after the publication of the 1999 suite of contracts continued the trend of not addressing the express time bar notice in sub-clause 20.1. In 2001, Badran provided a comprehensive discussion of the FIDIC 1987 Red Book and addressed practical difficulties encountered in the application of this FIDIC contract in Egyptian law. However, when discussing the variation procedures under clause 51 and the extension of time provisions under sub-clause 44.2, he makes no reference to the time limitations included within these clauses. The only (remote) reference to time bar clauses in his

book is the reference to the time provisions regulating the dispute settlement procedures under clause 67 of the contract in which he states:

Regarding the timescales stipulated in clause 67, the Egyptian courts will respect the will of the parties except for the cases of gross fault and fraud on the part of the entity that relies on these timescales. This is so that this party does not benefit from his fraud or gross fault in accordance with the general rules of the Egyptian Civil Code. (Badran, 2001, p. 493)

It may be that Badran here is asserting that Egyptian courts will uphold the time bar clause agreed by the contracting parties. However, that is only one interpretation of his position and he may in fact simply be arguing in general terms that Egyptian courts will uphold the procedural provisions agreed by the contracting parties. The only other area where Badran may, arguably, be considering matters which could bear on enforceability of notice provisions like sub-clause 20.1 of the FIDIC 1999 Red Book is his reference in page 492 to the "contemporary records" required under sub-clause 53.2 of FIDIC 1987 to support any claim the contractor wishes to submit to the engineer. In this regard, Badran argues if a contractor fails to substantiate the submitted claim with "contemporary records", Egyptian courts will, owing to the commercial nature of the dispute, liberally interpret the term "contemporary records" to mean any record associated with the claim or any other means of evidence. If this approach is extrapolated into the context of sub clause 20.1 of the FIDIC 1999 Red Book, then one interpretation of Badran's opinion is that

Egyptian courts would not be concerned by the technicalities of when notices are served, but would rather focus on the substance of what is known to the parties. Of course, this is a somewhat strained analysis, but the fact that it is required at all is indicative of the scarcity of writing regarding these issues. Badran's 521-page book written on the FIDIC contract (13 years after the issuance of the 1987 Red Book and three years after the issuance of the 1999 edition) and its applicability in Egypt does not clearly address how time bar clauses are handled under Egyptian law.

Atalla (2005) refers to select clauses of the FIDIC 1999 Silver Book and addresses their application in the Egyptian law. The author uses the Egyptian Civil Code at times, but also refers to other government-based legislature, such as the Tenders Act (1998). On Clause 20 of the FIDIC conditions, the author does not even mention the claims procedures and briefly discusses the Arbitration Act (1994).

In the same year, Hanafi (2005) simply elaborates on the proceedings of the fourth International Chamber of Commerce (ICC) and FIDIC conference on International Construction Contracts and Dispute Resolution, which was held in Egypt that year. The stated aim of the article is to discuss the views discussed by Egyptian practitioners in the conference concerning the "new" (i.e., 1999) FIDIC forms. The article discusses topics such as liquidated

damages and decennial liability under the Egyptian Civil Code, the miscellaneous 1999 FIDIC forms, risk allocation under the “new” FIDIC contracts, the role of the “Engineer”, dispute boards and arbitration. However, no reference is made to the time-bar notice provision. This observation is notable given that this article is published six years after the publication of the FIDIC 1999 forms and highlights the proceedings of a unique FIDIC conference in Egypt and the Middle East. The reference to “the initiative of FIDIC and ICC to visit the region” (p. 443) is an indication that this may have been the first conference of its kind. Yet, despite the significance of this conference, and the fact that the FIDIC 1999 Red Book had been in commercial use for six years by then, there had not been a single reference in the article to the time bar under sub-clause 20.1 or any problems encountered in its application or enforceability in Egypt or the region. Interestingly, the only remote reference made in the article to time bar clauses concerns an exculpatory time bar clause under Article 657 of the Egyptian Civil Code. The article addresses the situation where quantities in a construction contract are re-measured as the work progresses and, therefore, the contract price would be subject to increase when the actual quantities exceed the quantities in the contract. The article requires the contractor to provide an “immediate” notification when the contract price is likely to increase as a result of such an increase in quantities. The notice must be accompanied with a

statement regarding the anticipated increase in the contract price. The article stipulates that the contractor's failure to provide this notification and statement results in the contractor being unable to recover the expenses incurred in excess of the contract price. This article is discussed later in this research, but Hanafi concludes the discussion regarding "forms of contract" under the Egyptian law (i.e., namely lump sum and re-measured) by the following:

... as a general rule, where extra work was clearly requested by the employer and carried out in good faith by the contractor, Egyptian tribunals have, in numerous cases, shown themselves to be reluctant to deprive contractors of their proper remuneration due to their mere failure to comply with formal contractual requirements" (Hanafi, 2005, p. 446).

Hanafi's use of the words "mere failure to comply with formal contractual requirements" may be interpreted to mean, as in the case of Badran above, that Egyptian courts would not be concerned by the technicalities of when notices are served. However, although Badran was addressing the FIDIC 1987 contract, Hanafi is in this quote addressing a general rule under Egyptian law. Therefore, it can be interpreted from Badran and Hanafi's references that Egyptian tribunals or courts would not be concerned by the technicalities of a written notice, even if the requirement of this notice originates from the contract or the law. Again, this is a somewhat strained analysis in light of the

fact that no explicit reference is made in the article to the time bar in the FIDIC 1999 Red Book.

Nassar conducts a detailed examination, divided into three parts, regarding the FIDIC contracts (2009). The first part of this series regards claims, disputes and arbitration and is, therefore, the relevant part to this research. Although the first part discusses numerous parameters of the FIDIC contract, such as the role of the engineer, variations, unforeseeable physical obstructions and the principle of force majeure, and although the article was published 10 years after the publication of the FIDIC 1999 suite of contracts, the content of the article is predominantly in relation to the FIDIC 1987 contract and does not address the time bar clause at any reasonable length. Rather, the only pertinent reference made to the time bar under sub-clause 20.1 of the FIDIC 1999 contract is a reference to an arbitration case between a contractor and an "Arab government" which Nassar relies on to argue that, in cases where the grounds of a claim put forward by a contractor are unavoidable adverse circumstances which are not the fault of either party, the time bar notice provision will not be enforced. In the case, the unavoidable circumstances were the presence of 400 land-mines in a site which caused the contractor hardship and additional cost to exercise caution to avoid their explosion. The circumstance was known from the beginning of the contract

and the contractor had not served the required notice (he served it at the end of the work) and, although the employer (i.e., the government) argued that the claim was time-barred under sub-clause 20.1 of the FIDIC 1999 Red Book (the applicable contract), the arbitration tribunal ruled in favour of the contractor. This is the first example of the issue of the enforceability of the time bar under the FIDIC 1999 Red Book being addressed in the literature despite it being 10 years since the publication of the FIDIC 1999 Red Book. Even so, the issue is only dealt with in the very limited context of unavoidable adverse circumstances, and there is no wider discussion of the general enforceability of this clause in principle under the Middle East Civil Codes (specifically in regard to the Egyptian Civil Code).

Hamed (2011) identifies risks in the FIDIC 1987 construction contract and compares them to the Egyptian Civil Code. It is unclear why, 12 years after the publication and use of the FIDIC 1999 Red Book, Hamed chose the older FIDIC edition of 1987 as opposed to the edition of 1999 on which to base his research. The result is that the risk borne by the contractor through the time bar clause under sub-clause 20.1 of the FIDIC 1999 Red Book is not addressed. Hamed does, however, identify and analyse 36 risks, two of which are the claim notice provisions under sub-clauses 44.2 and 53.4. Of these, the notice provision under sub-clause 44.2 is more relevant to the research at

hand since it states that the engineer is not bound to provide a determination on a time extension claim presented by the contractor if a notice is not provided by the contractor within 28 days after the event giving rise to the event. Hence, sub-clause 44.2 of the 1987 Red Book shares some features with sub-clause 20.1 of the 1999 Red Book. Hamed does not consider that sub-clause 44.2 creates a time bar, as it does not bar the contractor from his entitlement, but only does not make the engineer bound to make a determination. He then recommends (p. 187) that the Egyptian Civil Code be amended to include a provision stating that the employer is not bound to make any increase in the cost or time of the contract if the contractor does not present the claim within a "reasonable period".

In a unique and informative article that addresses the topic of the application of the time bar clause of the FIDIC contract in comparison with the common law, Glover (2015) uses the UAE Civil Code as the basis for the civil law position and opines that the civil code application may adopt "a more lenient approach" in comparison to the common law. He gives three main principles in the UAE Civil Code, namely good faith, unlawful exercise of a right and unjust enrichment (all of which have equivalent references in the Egyptian Civil Code), as examples of what a contractor working in that region may rely

on as a defence against the strict interpretation and imposition of time bar clauses by an employer.

Helmi, Qodsi, Serag and Shafik (2016) address the application of FIDIC contracts under the Egyptian Civil Code using five main reference points, namely force majeure, termination, interest charges, subcontracting and the time bar notice provision. In respect of the time bar clause, they conclude that the application of the time bar clause under the Egyptian Civil Code depends on the circumstances of the case and the conduct of the parties. They suggest that there are differing views regarding the application of the time bar clause. One view, which would support the enforceability of the time bar clause, is that the Civil Code advocates that the contract is the law of the parties (Article 147/1) and that, if the statements in the contract are clear, they cannot be deviated from (Article 150/1). The other view, which can render the time bar clause unenforceable in certain situations, is the principle that contract obligations must be performed in good faith (Article 148) and the principle of unlawful exercise of a right (Article 5). The writers recommend that contractors follow the notice requirements under the FIDIC contract and that contracting parties amend the particular conditions of the FIDIC contract so that the time bar clause is in line with the provisions of the Civil Code.

The conclusion to be drawn is that published literature in the Egyptian context

has not adequately addressed the issue of the time bar under sub-clause 20.1 of the FIDIC 1999 Red Book. Until recently, only indications are provided regarding time bar clause with no clear, definitive answer on the extent to which time bar clauses in construction contracts are enforceable under the Egyptian Civil Code. Although the recent research of Glover (2015) and Helmi, Qodsi, Serag and Shafik (2016) represent a trend that the application of the FIDIC time bar clause may be given attention in the near future, the overall observation of the literature produced demonstrates that there is a knowledge gap which needs to be filled, bearing in mind the wide adoption of the FIDIC contract in the Egyptian context.

E.2.2. The Principle of 'Good Faith':

The topic of "good faith" is a mandatory requirement for the performance of any contract pursuant to Article 148 of the Egyptian Civil Code, which states: "A contract must be performed in accordance with its contents and in compliance with the requirements of good faith". Glover (2007) addresses the time bar clause under sub-clause 20.1 with specific reference to the Egyptian and French Civil Codes and refers to the principle of good faith in Civil Code jurisdictions and describes it as being a mandatory provision of the law or public policy which may defeat the time bar clause under sub-clause 20.1. To illustrate this point, Glover gives two examples of situations where

sub-clause 20.1 might not be enforceable in this regard, which are a contractor being only a few days late in submitting the notice for a very substantial claim which will cause the contractor serious financial difficulties if forfeited for being time-barred; and the case where the employer has actual knowledge of the event giving rise of the claim and suffers no hardship due to the notice not being served in time. At the same time, Glover opines that some time bar clauses may be enforced and makes reference to Article 750 of the Egyptian Civil Code which enforces time bar clauses in insurance contracts if the delay in providing the notice was not reasonably justified.

Similarly, Hall and Warren (2014) refer to Article 172 under the Qatari Civil Code, which is identical to 148 of the Egyptian Civil Code (discussed above), and they argue that on the basis of this article, in Qatari Law the principle of “good faith” may be used to defeat the FIDIC 1999 time bar, although the circumstances in which it may apply vary and may be limited in scope. They give an example of a situation where the employer denies the contractor an extension of time claim on the grounds of non-compliance with the notice requirement, when the employer or engineer knew, or ought to have known, that the contractor had been delayed for reasons that are contractually attributed to the employer. Longley (2012, p.8) opines that time bar clause are given more weight in common law jurisdictions than in civil law

jurisdictions where the time bar may be rendered void or voidable due to concepts related to fair dealing, which can encompass the principle of good faith.

Hence, the topic of good faith is closely linked to the enforceability of time bar clauses under the Egyptian Civil Code. Interestingly, this link is more apparent in English literature than in Egyptian literature (which, as highlighted above, rarely provides any direct information regarding the enforceability of time bar clauses). The following section addresses another principle addressed to time bar clauses under the Egyptian Civil Code, but which has been addressed in both the English and Egyptian literature, namely the principle of limitation.

E.2.3. The Effect of Limitation Periods:

Although relatively little Middle Eastern literature is produced on the enforceability of the time bar clause under sub-clause 20.1 under the Egyptian Civil Code, there is more written in relation to the topic of "limitation" under the Egyptian and other Middle Eastern Civil Codes. In order to clearly situate the following discussion, there is a need to spend a moment defining relevant terms. Haloush (2008) suggests that the terms "limitation" and "prescription" are used interchangeably in Middle Eastern Arab countries to refer to a number of ways of losing rights as a result of the effluxion of time. However, when these terms are translated into English, there is the risk of confusion. Johnson

(1950) notes that in international law there are two types of "prescription". There is "extinctive prescription", which covers the situation where (as indicated above) a right is lost owing to the passage of time; and there is "acquisitive prescription", which refers to cases where, by effluxion of time, title is gained to property or rights of which the ownership was originally invalidly demonstrated, or impossible to prove. In this research, the focus is on extinctive prescription, but that clarification does not end the potential for confusion, since the other term which Haloush refers to as being synonymous with the term "prescription" is the term "limitation". However, in English and Welsh law the term "limitation" refers ordinarily to a particular type of extinctive prescription, being the one defined in the Limitation Act 1980 (as amended), which relates to the period in which a party may bring a claim in court or arbitration. However, this research does not exclusively focus on that limited meaning. Accordingly to avoid confusion, the term "limitation periods under the Civil Code" will be used in this research. Since both limitation periods under the Civil Code and the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book are each associated with the loss of the ability to assert a right after the lapse of a certain period of time, it may therefore be reasonable to assume that understanding the enforceability issues pertaining to limitation under the Egyptian Civil Code may be the doorway to understanding the enforceability of the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book.

According to Article 374 of the Egyptian Civil Code, the limitation period under the Civil Code is 15 years:

The term of prescription for obligations is fifteen years with the exception of those cases for which a special provision is contained in the law and with the exception also of the following cases.

The “following cases” referred to in Article 374 are addressed in Articles 375 to 378 and are summarized below as follows:

**Table 1 – Limitation Periods under the Egyptian Civil Code
(Referred to in Article 374)**

Article	Civil Code Limitation Period	Applicability (As Per Wording of Egyptian Civil Code)
375	5 years	“for sums payable periodically at recurring intervals such as the rent of buildings and of agricultural land, the rent of hekr, interest, periodical payments, salaries, wages and pensions”
376	5 years	“for sums due to physicians, chemists, lawyers, engineers, experts, receivers in bankruptcy, brokers, professors or teachers ... provided that the debts are due as remuneration for work coming within the scope of their professions or in payment of expenses incurred by them.”
377	3 years	“for taxes and dues owing to the State and for the right to claim repayment of taxes and dues unduly paid”

**Table 1 – Limitation Periods under the Egyptian Civil Code
(Referred to in Article 374)**

Article	Civil Code Limitation Period	Applicability (As Per Wording of Egyptian Civil Code)
378	1 year	<p>"a) the rights of action of merchants and manufacturers in respect of things supplied to persons who do not trade in these articles, as well as the rights of action of hotel and restaurant proprietors for the cost of accommodation and food and for expenses incurred by them on behalf of their clients.</p> <p>b) the rights of action of workmen, servants, wage earners, in respect of their pay, daily or otherwise, and for the cost of supplies provided by them."</p>

Haloush takes the view that modification of limitation periods under the Civil Code is strictly prohibited under the provisions of the Civil Code. This is reflected in Article 388 of the Egyptian Civil Code which states that agreement cannot be made to a term of prescription than that fixed by law. According to Halloush, this restriction stems from public policy to prevent disputes which arise long after an obligation was formed. The creditor is deemed to have lost his right of action if he/she remained inactive for so long. This purpose of public policy would be defeated if contracting parties could extend the limitation periods in the law or delete them altogether, so that disputes may arise long after an obligation was formed. Creditors would insert conditions

that their rights of action should not be prescribed. The ramifications of such agreements can lead to an abundance of cases put forth to courts and great difficulty in investigating such cases due to lack or shortage of witnesses (who may have died or whose memory would have faded) and shortage or inability to compile evidence. If this interpretation of Article 388 is applied to sub-clause 20.1 of the FIDIC suite of contracts, there may be two interpretations, depending on the kind of “right” being addressed. First, there is the interpretation mentioned by Klee (2015) in his commentary of an identical provision in the Qatari Civil Code (i.e., Article 418), which is that, by agreeing to include such provisions in the contract (i.e., such as sub-clause 20.1 of the FIDIC Red Book), the contractor is waiving his underlying rights (i.e., the right to make a claim under the contractual machinery), but not the entitlement to claim these contractual rights in court. Accordingly, following this interpretation, Article 388 in the Egyptian Civil Code would be addressing only the right of a contracting party to take legal action before a court, while sub-clause 20.1 would be addressing a contractual right that bears no relation to the right to take legal action set in the law. Consequently, the contractual right might be an enforceable, binding agreement. So, for example, if a contractor does not provide a notice within the 28-day period, an employer may reject the claim due to the waiver contained in sub-clause 20.1. However, the contractor may still challenge the employer’s rejection of the

claim in an arbitration or court proceeding within the limitation period set in the law. In such a proceeding, though, the contractor may need to provide reasons for not complying with the notice provision in the contract. If the contractor does not provide any justification for his non-compliance, the arbitration tribunal or court may enforce the time bar because it represents a contractual agreement. If, on the other hand, the contractor provides a justification, and the employer did not suffer material prejudice due to the contractor's non-compliance, the arbitration panel or court may not enforce the time bar clause. Second, there is the (rather common in the Middle East) interpretation mentioned by Sakr (2009, p. 149) with regards to the 28-day notice period in the FIDIC 1999 contract:

the limitations contained in this clause should be held invalid under the laws of the Arab countries, because they modify the period of limitation provided for in the laws of those countries. This solution seems to prevail under the laws of Egypt (which is the main source of inspiration of the law of the GCC countries).

Sakr's rationale for this is not explained in the article but it can be deduced that sub-clause 20.1 may be interpreted to have reduced the time period set in the law from 15 years to only 28 days. Therefore, by the plain words of Article 388, such "reduction" may be considered null and void. To understand this interpretation, it is important to examine the wording of the time bar under sub-clause 20.1:

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 words “shall not be entitled” and “discharged from all liability in connection with the claim...” can be broadly interpreted to refer to an entitlement to take legal action and all liability in connection with the claim, including legal liability (although this strained extrapolation is made to make sense of the second interpretation and is not mentioned by Sakr). In that case, it can be argued that, according to the law, the contractor’s “entitlement” (to take legal action before an arbitration panel or court) and the employer’s “liability” (if a case is brought before arbitration or court) are preserved for a period of 15 years at the most and this right cannot be reduced or limited by contract agreement. So, in the example mentioned above, the contractor’s primary defence is that the contractual time bar cannot be relied upon by the employer because it is illegal as it reduces the mandatory limitation periods within the law. Any contractor’s justification for not complying with the time bar would be immaterial, since the contractual time bar would be perceived as a mere administrative tool without any legal enforceability.

This point of the enforceability of the time bar under sub-clause 20.1 vis-à-vis limitation periods under the Civil Code has been, and continues to be, the subject of debate in FIDIC conferences in the Middle East. However, since this is not a topic of published literature, further discussion on this point is not addressed in this literature review chapter but is provided in Section V.B.2.1.

E.2.4. Exculpatory Time bar clauses in the Civil Code:

Another argument generated by Saket (2012) in favour of the enforceability of sub-clause 20.1 under the Egyptian Civil Code is that the time bar therein does not contravene the spirit of the time bar under Article 657 in the Egyptian Civil Code (there are similar versions in the Civil Codes of other Arab Middle Eastern countries, including Article 886 of the United Arab Emirates Civil Code, Article 794 of the Jordanian Civil Code, Article 689 of the Kuwaiti Civil Code, Article 390 of the Sudan Civil Code, Article 612 of the Bahraini Civil Code and Article 656 of the Libyan Civil Code), which reads:

When a contract is concluded with an estimate drawn up on a unit price and it becomes apparent, during the course of the work, that it will be necessary, in order to complete the works according to the agreed plan, considerably to exceed the estimated price, the contractor is bound to notify the master thereof forthwith and to inform him of the anticipated increase in price; if he fails to do so he forfeits his right to recover the incurred expenses in excess of the estimate.

Saket concludes that, in light of the time bar present in this Article (and its similar versions across the Middle East), the time bar under sub-clause 20.1 of the FIDIC contract does not contravene the limitation principle set in the Civil Codes of Arab Middle Eastern countries. In fact, Saket goes on further to state that the FIDIC time bar is enforceable even if amended by the contract parties to apply to the period for submitting substantiation for the claim (not just the notice).

Not surprisingly, this exculpatory Article in the Civil Code has been subject to criticism. Larkin (2007) comments on an identical article in the Civil Code of the United Arab Emirates, i.e., Article 886(1), and observes that, while the notice under this article serves as a condition precedent to payment for extra quantities, there is no such provision under the FIDIC 1999 suite of contracts. As Larkin opines in the beginning of his article, such provisions are a reflection of how the law appears to be outdated or even in conflict with modern forms of contract, although Larkin also concludes that it is unlikely that the courts or arbitrator would strictly apply Article 886(1) and ignore the agreed terms of the contract, thereby giving an unfair decision. This time bar has also been criticised by Hamed (2011) in his comparative research between risk provisions in the FIDIC contract and the Egyptian Civil Code as reflecting a misunderstanding of the nature of construction contracts. Hamed's view is

that legal scholars discussing this Article tend not to take into account the nature of construction contracts (as opposed to other types of contracts). He maintains that the increase in contract price is generally due to four main factors: (a) change in the design due to a defect therein (b) increase in the scope of work or in the contracted quantities due to inaccuracies within the bill of quantities, (c) increase in the scope of work or in the contracted quantities due to a contractor's default, and (d) change in the design due to unforeseen and unavoidable physical conditions. Article 657 is broadly drafted and could apply to all of these potential causes for cost increase, but Hamed argues that holding the contractor accountable for risks which the contractor does not control (i.e., factors a, b and d) is not equitable. He therefore suggests that the wording of the Article should be adjusted so that the time bar therein is applicable to any addition to or changes in the design (i.e., factors a and d), but not applicable to the case of a natural increase in the actual quantities executed due to the inaccuracy of the quantities in the bill of quantities (i.e., factor b). As for the situation where the increase in quantities is due to a default of the contractor (i.e., factor c), Hamed suggests that the contractor would not be entitled to any increase in the contract price.

Similarly, Shafik (2010) identifies Article 886(1) of the United Arab Emirates' Civil Code as one of the provisions that should be deleted or modified so to

enhance the Civil Code of the United Arab Emirates to a level comparable to that of the United Kingdom.

The exculpatory provision with the Egyptian Civil Code raises an interesting observation. Although there are provisions within the code which advocate fair dealing, and which render unenforceable any agreement to the contrary, there are provisions within the code which contradict this fair dealing principle. For example, as discussed above, the provision of good faith between contracting parties is mandatory and supersedes all contract agreements to the contrary. So, if an employer decides to rely on the time bar in the contract to reject a substantial contractor claim, when he knew about it, such an action may be held contrary to the principle of good faith and, therefore, the contractor's claim may be valid. Similarly, if contracting parties agree to reduce the limitation period under the Civil Code, such an agreement would be held unenforceable as it contravenes public policy. However, the Civil Code contains a provision, like Article 657, which can result in a substantial loss to a contractor who does not immediately notify an employer of an increase in the contract price due to a significant increase in quantities. As Hamed observes, the causes of the increase, which may not be attributable to the contractor, are not taken into account in the code at all. So, in the case of a re-measured construction contract, if a contractor omits to notify an employer

of the increase in price due to an inaccuracy of the quantities in the contract bill of quantities (which is expected), then pursuant to Article 657 the contractor is then time-barred and not only loses his right for additional cost, but also may be subject to termination of the contract with no recovery for lost profit. Yet, if that same contractor fails to comply with the time bar for claim notification under the contract, the Egyptian Civil Code may be used (through, for example, the application of the “unlawful exercise of a right” principle under Article 5) to undermine this agreed time bar clause and justify the contractor’s non-compliance with the time bar clause. Hence, it can be argued that the exculpatory nature of this provision contradicts other provisions within the code.

In a very unique and insightful article, Crawley (2011) analyses Article 886/1 of the UAE Civil Code (among other articles), along with Islamic law principles, to conclude that the time bar clause under sub-clause 20.1 of the FIDIC 1999 contract and the time limitations under the FIDIC 1987 contract are consistent with the law. He refers to the Islamic jurisprudence principle of *gharar* (uncertainty) in contracts which can result in illicit gain (*riba al fadl*) and suggests that one of the primary purposes of Article 886/1 is to limit *gharar* through the contractor’s immediate notification to the employer of the increase in contract price. This notification will consequently allow the

employer to affirm if he wishes to continue with the works or to exercise the option of suspending or terminating the contract. Importantly, Crawly takes the view that the increase in price referred to under Article 886/1 encompasses variations and additional work as well as any claim for additional time arising from a variation or an act of prevention by the employer. His rationale for that view is based on the alluded and required meanings of Article 886 in accordance with the principles Islamic jurisprudence. In addition, Crawley interprets Article 887 (equivalent to Article 658 of the Egyptian Civil Code), which addresses lump sum contracts, to also be subject to the contractor's immediate notification for a substantial increase in price (although Article 887 does not expressly state that) because of the requirement therein for a variation to be with the employer's consent. Since the purpose of the employer's consent is to keep the employer informed of variations that affect the contract price, the purpose of Article 886/1 of ensuring certainty applies to Article 887. Crawley's interpretation is significant in that it indicates that the time bar clause under sub-clause 20.1 is perfectly in line with the time bar under Article 886/1 of the UAE Civil Code (and, consequently, with the Egyptian Civil Code) and that it applies to all types of construction contracts (whether re-measured or lump sum). In fact, Crawley indicates that the 28-day time limitation under sub-clause 20.1 is a relaxation of the UAE Civil Code requirement, since the code requires an "immediate" notification.

E.2.5. Egyptian Arbitration Cases Concerning Enforceability of Time Bar Clauses

The above discussion is predominantly theoretical in nature, as it addresses writings on the matter of enforceability of time bar clauses under Egyptian law. The missing element is the application of the law through cases. Unlike English law, Egyptian legal cases are not readily available to the public and, those that are available, are not organised into categories. Therefore, it is very difficult to look through cases and identify those related to enforceability of time bars. For the purpose of this research, pertinent case law was investigated through books published by two arbitration centres in Egypt, namely the Arab Centre of Arbitration (ACA) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA). A total of nine books were found, covering a span of 36 years (from 1984 to 2010) and containing 153 cases in total. From those cases, 75 were related to construction of which only three were related to time bars or to the concept of a loss of a right with time (another case was identified but was not a construction case). There were no cases that addressed the FIDIC Red Book 1999 time bar in sub-clause 20.1.

Table 2 provides a breakdown of the case information by book:

Table 2 – Account of Egyptian Arbitration Cases

No.	Book Ref.	Arbitration Centre	No. of Cases total	No. of Constr. Cases	No. of Cases related to time bars
1	Abbas and Kholosy, 2000	ACA	21	21	None
2	Alam El-Din, 2002	CRCICA	26	8	None
3	Kholosy, 2005	ACA	19	19	1
4	Alam El-Din, 2010a	CRCICA	13	12	2
5	Alam El-Din, 2010b	CRCICA	19	4	None
6	Alam El-Din, 2011	CRCICA	17	2	None
7	Alam El-Din, 2012	CRCICA	12	None	None
8	Alam El-Din,	CRCICA	11	4	None

Table 2 – Account of Egyptian Arbitration Cases

No.	Book Ref.	Arbitration Centre	No. of Cases total	No. of Constr. Cases	No. of Cases related to time bars
	2014				
9	Alam El-Din, 2015	CRCICA	15	5	1 (not construction)
Total			153	75	4

In the following discussion, the salient points of the four cases are discussed:

Arbitration Case No.1 (Kholosy, 2005, p. 236 - 249):

The case is about an Egyptian contractor (the claimant) who contracted in 9 May 2000 with a local education authority (the respondent) for the construction of a school. According to the contract, the commencement date was the date of site handover to the contractor and the time for completion was 10.5 months thereafter. There were obstacles in the site handover to the contractor due to inconsistencies between the actual site coordinates and those in the drawings, which necessitated that a subsequent handover takes place. This led to a delay of 10 days. In addition, there were notable changes to the bills of quantities throughout the course of the project, as the authority

added more than 30 new items and omitted 26 after half of the project duration had elapsed. There were changes that took place before the substantial completion by one week and others that were added to the contractor's scope after substantial completion. The authority did not extend the time for completion, delayed the payment of the final invoice until after completion and applied the maximum amount of liquidated damages.

Although the arbitration tribunal held that the liquidated damages were wrongly applied and should be returned to the contractor, the point of significance in this research is the tribunal's handling of the miscellaneous changes to the bills of quantities. In this respect, Kholosy (2005, p. 247) reports the tribunal's reasoning as follows:

Although these changes omitted items in whole and replaced these items with others, the contractor did not contest these change orders and in fact accepted and executed them with all satisfaction. The contractor should have contested these changes at the time of their issuance. Therefore, the tribunal finds that the claimant had waived his right for a time extension as a result of these change orders.

It is important to note that, although this contract did not contain a time bar clause, the tribunal seems to have imposed one through its reasoning.

Arbitration Case No.2 (CRCICA Case no. 310/2002; Alam El-Din, 2010a, pp. 2-99):

The case is between a Belgian construction company (the claimant) and a

Saudi-Egyptian tourism company (the respondent) for the construction of a five-star hotel. The contract was signed on 30 June 1997 and the time for completion was 30 months. Two amendments to the contract were made when, on 19 April 1999, the claimant submitted a claim for an extension of time and associated costs. The claim ultimately resulted in a third amendment, which extended the time for completion to 31 March 2001 with an increase in the contract price of US\$ 5,500,000 and a US\$ 500,000 bonus for early completion. Due to a variety of reasons, the extended date of 31 March 2001 was not met. The claimant submitted a claim for his entitlement to an additional 273 days with associated costs, which was rejected by the respondent and which resulted in the dispute and the arbitration proceedings. As reported by Alam El-Din (2010a, p.5), the case was subject to two final awards. Through case no. 310/2002, the arbitration tribunal decided on some specific demands of the parties and, some days after this award, the case no. 449/2005 was filed for the final account of the project. Alam El-Din reports that the two awards were (as of 2010) the longest in all awards of CRCICA.

The disputes in this case were intricate, with eight heads of claim submitted by the claimant and a counterclaim submitted by the respondent. One of the challenges raised by the respondent as a defence to the claims submitted by the claimant was that the notices of claim were not valid and not in accordance

with the requirements of the contract. To this challenge, the tribunal decided as follows (El-Din, 2010a, p.89):

With regard to the notice requirement of GC-41(3), the Arbitral Tribunal finds that this applied to Claim 3 but, upon examination of CN No. 149, the Arbitral Tribunal finds that the Claimant did notify the Respondents that the timing of such change notice would adversely affect practical completion of the Works. In respect of the “formal summons” required by virtue of Article 218 of the Egyptian Civil Code, the Arbitral Tribunal has examined each of the letters referred to by the Claimants as notices. The Arbitral Tribunal finds that the Claimants did contemporaneously bring to the Respondents’ attention the matters which now form their Claims 1B, 3, 6, 7 and 8 and, accordingly, the Arbitral Tribunal holds that the Claimants did satisfy the notice requirements in respect thereof. In addition, formal summons are not required in commercial matters as per Article 58 of the New Code of Commerce.

It is observed from the logic applied by the arbitral tribunal that the notice requirements in the contract were not dismissed as being unenforceable by law. Rather, the tribunal examined each notice submitted by the claimant and decided that these notices were valid. The last sentence in the quoted extract refers to the law to invalidate the respondent’s argument but it only addresses the form of the notices – not the substantive issue of loss of a claimant’s right for not submitting a notice to claim within the time set in the contract.

Arbitration Case No.3 (CRCICA Case no. 449/2005; Alam El-Din, 2010a, pp. 100 – 177):

This case was the successor of Case No.2, but with a different arbitral tribunal

and addressed the final account between the claimant and respondent of Case No.2. The dispute concerned the outstanding status of several changes, as well as other claims associated with the final account. One of the items in dispute is what the respondent named as "Category B" changes, which were change notices that did not result in a mutual agreement between the contractor and the project manager in terms of monetary value. The amount claimed for these "Category B" changes was US\$ 544,908, while the project manager had certified only US\$ 127,520. One of the respondent's defences that was related to the topic of time bars and their purpose was presented under the heading "Claims of Inadmissibility due to Claimant's Lack of Compliance with Contract Protest/Dispute Procedures" is quoted below (Alam El-Din, 2010a, p. 144):

It is worthy to note that Contract Clauses contain clear procedures for the administration of disputes under the Contract. These procedures entail the active involvement of Bechtel and the Owner in resolving the dispute in question prior to its escalation to arbitration. Claimant's unilateral pursuit of the Category B changes as disputes in these proceedings, despite their presence since Bechtel's involvement on the project, has robbed Respondent from the opportunity of performing a detailed review of the "disputes" at the appropriate time, in Bechtel and the Consultant's presence, which would at least result in a clear delineation of the dispute range, if not settlement of the dispute in its entirety. The fact that Claimant is now, belatedly and without recourse to the Contract protest and dispute settlement procedures, presenting a US\$ 417,388 claim for Category B changes has in fact jeopardized the Respondent's standing. This is due to the fact that, instead of having the disputes thoroughly reviewed in their appropriate time, Respondent finds itself having to sort through box files, while being heavily involved

in two arbitration proceedings, and not having the benefit of its project management and technical expertise who were actively involved in the evaluation and negotiation of these changes...Claimant chose to wait and, to Respondent's detriment, lump all outstanding issues in this proceeding for a Final Account settlement. In light of the above, Respondent requests the Arbitral Tribunal to limit the Claimant's compensation of the Category B Changes to the amounts certified by Bechtel.

It is apparent from this extract that the respondent was justifying the purpose behind the time periods in the contract for contractor's claim notices. By the time this second arbitration proceeding took place, Bechtel (the project manager) had left the project and so had the construction supervision consultant. Therefore, according to the argument above, the respondent was left to sort out the mess alone. According to this argument, had the claims been presented within their contractual timeframes by the claimant, the respondent would have had the opportunity to address them and the scope of the disputes would have at least been crystallised. At the onset, the respondent's argument seems persuasive in an Egyptian law setting, since the argument did not blindly rely on a claimant loss of right because of non-compliance with the claim notice period, but rather, the argument focused on the harm caused to the respondent as a result of the alleged delayed notification. The only remote reference by Alam El-Din to the arbitration tribunal's response to this argument can be found in the following quote (p. 162):

The legal relationship between the two Parties is a lump sum contract in principle, with possibility that the Parties may use the method of cost reimbursable. Accordingly, the provisions applicable on the claims and counterclaims are article 658 of the law applicable to the substance, i.e., civil code for the lump sum basis contract and article 659 of it, for the cost reimbursable basis undertakings the remuneration which was not agreed in advance; unless agreed otherwise.

It appears from this reasoning by the arbitration tribunal that the respondent's argument concerning the claimant's non-compliance with the claim procedures under the contract, and the subsequent harm caused to the respondent, was dismissed. Instead, the arbitration tribunal simply referred to the relevant article in the Egyptian Civil Code and applied it to the contract (although there are no claim procedures under this Article 658). It is possible that the arbitration tribunal may have had justifications for the dismissal of the respondent's arguments but such justifications are not addressed in Alam El-Din's account of the case. Furthermore, it is apparent from the remaining account of the arbitration award that all the change notices submitted by the claimant were considered by the tribunal and not dismissed.

Arbitration Case No.4 (CRCICA Case no. 698/2010; Alam El-Din, 2015, pp. 159 - 181):

This case is not about construction but it is mentioned here due to a direct reference by the arbitral tribunal to the concept of loss of a right due to lack

of claim notification. The claimant is a developer who leased space (commercial and parking) to the respondent and who filed this case due to the respondent's non-payment of his dues according to the provisions of the contract they had signed. The contract stipulated that the respondent would lease the space to the claimant on February 2007 and that delays would result in damages of 0.5% per month. The space was actually leased on 01 June 2008. In his defence, the respondent did not deny the delay or that damages were due, but rather, claimed that the claimant had waived his right for damages due to lack of notification throughout the 15-month delay period. The arbitration tribunal decided on this point as follows (Alam El-Din, 2015, p. 178):

There is no merit in the argument that a lack of claim for damages during a specified period signifies a waiver thereof, for such a silence does not mean a waiver and does not add words to the party in silence. No one can allege that the mere lapse of a period of time without a claim is tantamount to a will to waive, unless there is solid evidence of a party's intention to waive. The argument's lack of merit is also due to its neglect of the limitation periods in the law, which permit a bearer of a right to claim that right as long as the period set by law has not elapsed.

The arbitration tribunal's reasoning here is in support of that of Sakr (2009) and Attia and Joshi (2016), wherein any contractual time bar clauses containing periods less than those prescribed by the law are considered

unenforceable. It is important to note, however, that Alam El-Din did not disclose in his account of this case whether there was a time bar clause in the contract between the claimant and respondent. It appears from the references quoted above that the defence raised by the respondent was in relation to the claimant's silence during the 15-month period without protest or a reservation of rights. No reference was made to a clause in the contract barring the claimant from recovery of damages. It is worthy to note also the stark difference between Case No.1 and this Case No.4, wherein the arbitration tribunal imposed a time bar in the former and rejected the concept of imposing one in the latter.

Before concluding this section, it is worthy to note that Helmi, Qodsi, Serag and Shafik (2016) refer to an arbitration case before CRCICA, which was recorded in Kholosy (2005). They take the view that the case, which was based on a FIDIC 1987 Red Book, demonstrated the arbitration tribunal's enforcement of a time bar in clause 67 through reliance on Article 147 of the Egyptian Civil Code, which states that the contract is the law of the parties. It was also reported that the tribunal dismissed the claimant's reliance on Article 150 of the Egyptian Civil Code to argue an ambiguity in the time bar clause and decided that the clause was clearly worded. Notably, they added that the claimant's reliance on Article 148 (good faith) failed and that the

tribunal made reference to an article by Seppälä in support of its decision to enforce the time bar clause. Upon closer examination of the case referred to in that article, it is apparent that the above reasoning was not the reasoning of the arbitration tribunal, but rather, a dissenting opinion of the decision that was recorded after Kholosy's presentation of the case. Under the heading "Commentary on the Decision in Respect of Claim Presentation Procedures under FIDIC Contracts", an opinion is provided (not clearly attributed to Kholosy) which disagrees with the arbitration tribunal's decision to dismiss the time bar clause and argues for the enforcement of the time bar clause in this case. The person giving this opinion refers to clause 67 in the FIDIC 1987 contract but, when quoting the pertinent part of the clause, seems to refer to the time bar clause in sub-clause 20.1 of the FIDIC 1999 Red Book. It is possible that clause 67 was modified by the parties (this is not clear from Kholosy's account of the case), although the procedures for claim notification in the FIDIC 1987 Red Book are present in sub-clause 44.1 (for extensions of time) and sub-clause 53.1 (for additional payment). Importantly, the tribunal in this case, as apparent from Kholosy's account of the case, did not seem to address claim notification procedures. Rather, they addressed the claimant's compliance with the dispute procedures under clause 67 and decided that the claimant had complied with the procedures therein and that the respondent's arguments failed. There was no reference of non-compliance with a time bar

clause for claim notification.

Notwithstanding the above clarification, Helmi, Qodsi, Serag and Shafik (2016) make an interesting contribution as they demonstrate that there are published opinions in Egyptian literature that advocate the enforcement of the time bar clause in FIDIC contracts. The opinion not only refers to Western literature in support of this position, but also bases its argument on the principle of the contract being the law of the parties in Article 147/1 of the Egyptian Civil Code and argues against the utilisation of the good faith principle under Article 148 of the Egyptian Civil Code to render the FIDIC time bar clause unenforceable. Such an opinion, as evident from the account of the Egyptian literature in this section, is rare in published Egyptian (and even Middle Eastern) literature.

E.2.6. Egyptian Court Cases Concerning Enforceability of Time Bar Clauses

The Egyptian court system is comprised of three tiers, namely:

- The Courts of First Instance
- The Courts of Appeal
- The Court of Cassation

The Court of Cassation is the supreme court of the Egyptian court system. A

website has been recently developed and is still under construction (as of February 2017) which publishes many of its civil judgments (http://www.cc.gov.eg/Courts/Cassation_Court/All/Cassation_Court_All_Cases.aspx). To date, the judgments are published in Arabic only. The published judgments are not organised by topic, so an investigation on how time bar clauses in construction contracts are enforced in the Egyptian Court of Cassation would entail a search by key words. For the purpose of this research, a search using the key word "construction" was used to identify all the construction cases shown in the database, which would then be used as a base for the search of any time bar incidents within these cases. The search resulted in 96 cases (95 in the civil circuit and one in the commercial circuit). None of these cases addressed the topic of the enforceability of a time bar clause. The only remotely related case is Case No. 1164 for the judicial year 48, decided upon on 12 March 1984, which was related to Article 657 of the Egyptian Civil Code.

The case is about an employer who, on 28 March 1966, contracted with a company for the supply and application of insulation material on the roofs of buildings and other structures. The quantities in the contract were notably exceeded and the contractor did not notify the employer of this increase. The employer did not compensate the contractor the increase and did not permit

him to complete the remaining scope of work in the contract. The employer's position is that the contractor failed to comply with the notice requirement under Article 657 of the Egyptian Civil Code and was therefore barred from recovery of the additional costs. The case went through the Court of First Instance, the Court of Appeal then was concluded with the decision of the Court of Cassation who decided in the favour of the contractor. The rationale of the Court of Cassation is that, in light of the provision in the contract that the quantities in the bill of quantities were subject to increase, decrease or omission, it was in the contemplation of the parties that the quantities will increase. Therefore, the increase in quantities should not be a surprise to the employer. The Court of Cassation clarified that the intent of the notification under Article 657 is that the employer is not taken by surprise by the increase in the contract price, which was not anticipated and accounted for at entry into the contract. However, if the employer had knowledge of such an increase or anticipated it at entry into the contract, then there is no need for the notification and the contractor is entitled to be compensated the increase in the contract price.

The reasoning of the Court of Cassation does not seem to take into account the nature of a re-measured contract, which centres on the principle that the quantities are subject to adjustment. Contrary to the Court's reasoning, it is

suggested that an agreement which stipulates that the quantities are subject to increase or decrease does not mean that the employer anticipates a notable increase in the quantities of the contract. This is not a modern concept, as Al Sanhoury explains in paragraph 32 of Volume 7 of *Al-Waseet* the difference between a re-measured contract and a lump sum contract for construction works. He states, for instance, that:

The employer may in this method (i.e., re-measurement) increase in the amount of the required work or decrease from it. The parties can also agree that the increase or decrease will not exceed a certain percentage. The advantage of this method is that it does not pose a risk on the employer or the contractor, since the employer pays the contractor the actually executed work. However, the total price is not known in advance at the execution of the contract, but rather, the parties must wait until the works are completed and measured.

Notably, in paragraph 95 of the same reference, Al Sanhoury confirms that Article 657 applies to a contract whose quantities are subject to increase or decrease:

Hence (in order for Article 657 to apply), the price must be on a unit price (i.e., re-measured) basis, where the price varies in accordance with the quantities of executed work.

It is readily apparent from the above references that the Court of Cassation in this case may not have taken the explanations of Al Sanhoury above into account, who confirms that one of the key features of a re-measured contract

is the anticipation of an increase or decrease in quantities. Therefore, a clause in the contract that merely states this concept does not infer that the employer expects an indefinite increase to the contract price.

E.2.7. Conclusion of Reported Issues Regarding the Enforceability of the FIDIC Time Bar in the Egyptian Civil Code Jurisdiction

This discussion demonstrates that there are various views regarding the enforceability of the time bar in sub-clause 20.1 under the Egyptian Civil Code. On the one hand, it may be unenforceable if it contravenes the principle of good faith according to the particular circumstances of the case (Glover and Tolson, 2008) and if it is construed as shortening the limitation periods under the Civil Code (Haloush, 2008). On the other hand, there is the opinion that it may be considered enforceable if it is categorized as a “preclusion period”, not a limitation period under the Civil Code (El Haggan, 2010; Saket, 2012). However, the validity of this opinion is yet to be explored as there is controversy on the definition of “preclusion periods” and their legal distinction from limitation. Also to be explored is the distinction between the “right” being extinguished in the limitation periods under the Civil Code and that in sub-clause 20.1 of the FIDIC 1999 contracts. Exculpatory time bar clauses within the Egyptian Civil Code have led some practitioners, such as Saket, to adopt the interpretation that the time bar under the FIDIC 1999 Red Book is

enforceable, as it is in line with (and, as Saket opines, more stringent than) the exculpatory provision of the Egyptian Civil Code. Examples of case law are very scarce, as demonstrated by the 152 arbitration cases that have been investigated, which spanned 36 years, but which resulted in only four applicable cases. The decisions made by the arbitration tribunals in these cases have also been inconsistent, since time bars were enforced in some and not enforced in others. None of the cases involved the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book. Similarly, there are rarely any court cases that address time bar clauses in construction contracts, with the exception of only one case addressing the time bar under Article 657 of the Egyptian Civil Code which it is suggested did not render a correct decision in respect of the application of the time bar.

F. Conclusion

The following points can be concluded from the information provided in this literature review:

1. The topic of enforceability of time bar claim notices in construction contracts has been subject of scrutiny in the construction law literature worldwide. The general trend from the literature presented in Section II.B is that the time bar clauses are enforceable in countries under

common law jurisdictions (notably the UK and Australia and, to a lesser extent, the US) while the trend in countries of Civil Code jurisdictions, whether in Europe or the Middle East, is that the time bar clauses are not enforceable if their enforcement would be unconscionable or contrary to the principle of good faith.

2. Section II.D demonstrates that the NEC3 and FIDIC 1999 suite of contracts are the two most commonly discussed standard contract forms in UK construction law literature in terms of time bar claim notice requirements, in light of the express time bar clause in clauses 61.3 and 20.1, respectively. The FIDIC 1999 form of contract is widely used in the Middle East and in Egypt and, although not widely used in England, it is used commonly on large projects.
3. Section II.E addresses issues highlighted in English and Egyptian construction law literature with respect to time bar clauses in the FIDIC 1999 contract. An observed striking contrast is that the Egyptian literature, to date of this research, and despite the prevalent use of the FIDIC standard contract forms in the country, contains rarely any substantive research on the enforceability of the clear time bar in sub-clause 20.1 of the FIDIC 1999 Red Book. In fact, there is still research addressing the previous edition of the FIDIC contract (i.e., 1987).

Generally, literature produced to date focuses on a comparison between general provisions in the FIDIC contract with their counterparts in the Egyptian Civil Code. A similar trend is observed in respect of construction arbitration and court cases, in which there are scarcely any cases addressing time bar clauses and, in the few arbitration cases which addressed time bars (whether stated in the contract or inferred by the arbitration tribunal), the decisions made were inconsistent. In contrast, the English construction law literature contains substantive literature on the FIDIC 1999 time bar that is still developing. Notable examples of topics covered include the prerequisites of the form of the notice to be enforceable and unenforceable circumstances, such as waiver, estoppel, work outside the contract and employer's breach. In respect of the employer's breach, there is substantive literature, case law and controversy regarding the "prevention principle" and its conflict with the "condition precedent". There is also, to a lesser extent, literature on the principle of good faith and its affect, if any, in rendering the time bar clauses acting as condition precedent unenforceable. Hence, in a nutshell, literature produced in England is far more advanced and direct than that produced in Egypt as far as the enforceability of the FIDIC 1999 time bar is concerned.

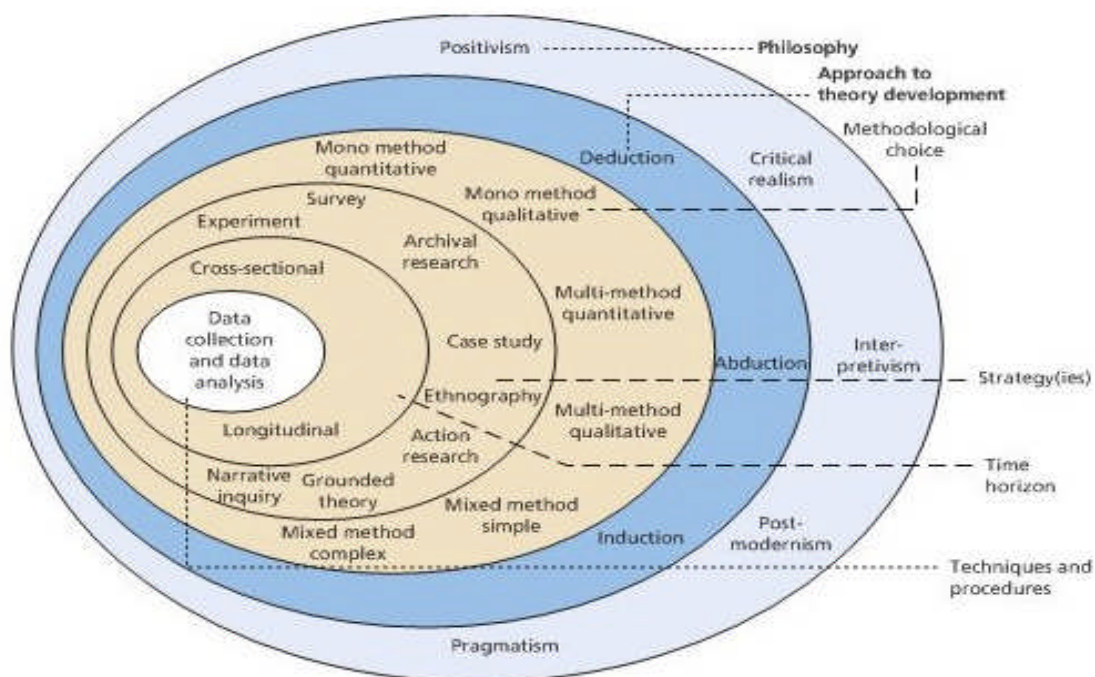
Conclusion of this literature review section sets the stage for the manner or methodology with which this research is conducted. This is explained in the following chapter.

III. RESEARCH METHODOLOGY

A. Introduction

At the core of research methodology is the way information is collected to achieve the research aim and objectives. However, the means of collecting information is at the centre of the “research onion”, which is comprised of outer layers that need to be peeled and opened so that the issues underlying the choice of the selected research methodology can be understood. The “research onion” is illustrated below:

Figure 4 The “Research Onion” (Lewis, Saunders and Thornhill, 2016)



This chapter aims to uncover the outer layer of the onion by elaborating on the philosophical underpinnings of research methods then identifying the positioning of this research in respect of this research philosophy. Since this research is related to the specific field of comparative law, the research methods of comparative law are then explored with the aim of developing the theoretical framework of this research. The chapter concludes with the four stages that comprise the core of the methodology applied in this research.

B. Philosophical Underpinnings of Research

B.1 Introduction

There is more to the utilisation of the most appropriate methodology than simply selection or choice. There are underlying philosophical assumptions that need to be comprehended. These philosophical assumptions relate to the researcher's views on reality (ontological assumptions), how warranted knowledge is obtained (epistemological assumptions) and the extent to which the researcher's values influence the research process (axiological assumptions). It is important to understand these philosophical assumptions because they shape the researcher's view of reality of the topic being researched and, consequently, the means by which the knowledge about this reality will be acquired, taking into account the researcher's own values. A

consistent set of assumptions leads to a credible research philosophy that underpins the selected research strategy and data collection techniques and analysis procedures.

B.2 Objectivism and Subjectivism

Lewis, Saunders and Thornhill (2016) opine that the three research philosophical assumptions of ontology, epistemology and axiology are scattered along a set of continua between two opposing extremes, namely objectivism and subjectivism. Objectivism incorporates the assumptions of the natural sciences as it argues that the social reality being researched is external to the researcher. Ontologically, this means that there is one true social reality that is experienced by everyone. Epistemologically, this means that knowledge about the world can be acquired through observable, measurable facts, from which solid generalisations can be drawn. Axiologically, objectivists keep their values distant throughout the research process so that these values do not bias the findings. Subjectivism, on the other hand, incorporates the assumption of the arts and humanities as it argues that reality is made from the perceptions and consequent actions of people. Ontologically, subjectivists believe that there is no underlying reality to the social world and that, because each person experiences and perceives reality differently, there could be multiple realities rather than a single reality.

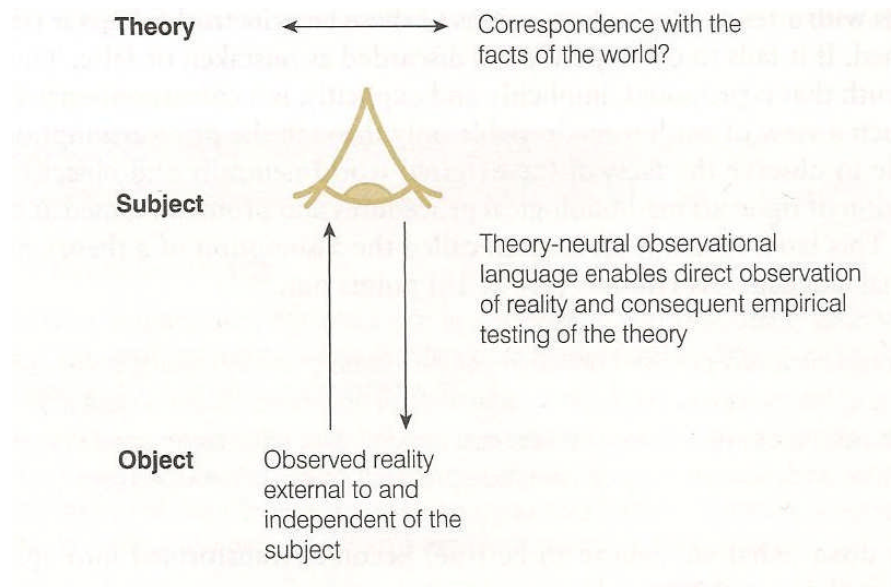
Epistemologically, subjectivists believe it is necessary to study a situation in detail, including historical, geographical and socio-cultural contexts, in order to understand the situation or how the realities are being experienced. The subjectivist researcher is interested in different opinions and narratives that can help explain the different social realities. In their comprehensive work on qualitative research, Denzin and Lincoln (2000) opine that every researcher is inherently affected by an interpretive community that governs the multicultural, gendered components of the research act. This community has its own historical research traditions, which form a specific point of view of "the other" being researched. Axiologically, subjectivists cannot detach themselves from their values and, in fact, they can reflect on and question their own values and incorporate these within their research.

Expressing similar ideas in different terms, Engle (2008, p.106) divides ontology into two components: scientific materialism and philosophical idealism. Scientific materialism is in essence equivalent to the objective ontological assumption, while the philosophical idealism is equivalent to the subjectivist assumption. Engle is critical of the philosophical idealist assumption on the grounds that it leads to opinion, not knowledge. He rejects philosophical idealism because it cannot be objectively verified and, therefore, cannot lead to an understanding of the physical world. In his ontological

categorisations, Engle introduces two further views of reality, namely the monist view (reality is unitary) and the dualist view (reality is binary) and suggests (p. 106) that, although materialism is frequently associated with the monist view and idealism is associated with the dualist view, it is not necessary that this is always the case. In other words, a monist idealist view and a dualist materialist view are also possible.

Gill and Johnson (2010, p.191) classify epistemological assumptions into two categories: (a) positivist and (b) subjectivist. Positivists adopt the objectivist view highlighted by Lewis, Saunders and Thornhill (2016) above as they claim that warranted science is related to directly observable phenomena and completely exclude the intangible or subjective as being meaningless. In doing so, positivists assume that there is a certain dualism between “subject” and “object”; that it is possible to separate both through the application of scientific methodology. The authors illustrate this positivism dualism in Figure 5.

Figure 5 Dual Positivism (Gill and Johnson, 2010)



Gill and Johnson (2010, p.193-195) take the view that one of the problems with the positivist view is that it is based on the assumption that the truth can be passively registered in one's sensory experience. In other words, observers can objectively register the outside world and thereon use deduction or induction to arrive at theories regarding the outside world. The inherent flaw in this argument in their view is that it does not take into account one's perception of the reality and how this perception can influence one's understanding. By contrast, as explained above, a subjectivist epistemology assumes that perception is influenced by one's engagement with the world and his/her "social construct" of reality. Accordingly, subjectivists claim that the positivists' claim of "directly observable phenomena" is in fact a socially

constructed creation of the observer. Gill and Johnson (2010, p.200) summarize the subjectivist epistemological stance in three points:

1. Scientific claims are socially constructed creations of the scientist and are not accurate descriptions of an external reality.
2. The acceptance of a scientific claim is not based on universally accepted evaluation criteria, but rather, on the subjective values of a scientist or a group of scientists.
3. Observation cannot objectively explain scientific claims. Therefore, empirical data does not contribute to the absolute determination of scientific claims.

B.3 Research Philosophies and Paradigms

Lewis, Saunders and Thornhill (2016) classify research into the following five major philosophies (shown in the outer layer of the “research onion” in Figure 4):

1. *Positivism*: Similar to the Gill and Johnson reference above, this relates to the philosophical stance of the natural scientist as it entails working with an observable social reality to produce concrete generalisations.

2. *Critical realism*: In contrast to positivism, critical realism focuses on explaining what is seen and experienced, in terms of the underlying structures of reality that shape the observable events (as opposed to the positivist approach of what is seen through the senses accurately portrays the world). Critical realists see reality as external and independent, but not directly accessible through observation. They claim there are two steps to understanding the world. First, there are the sensations of the experienced events. Second, there is the mental processing of the experienced events.
3. *Interpretivism*: Interpretivism argues humans are different from physical phenomena because they create meanings. Therefore, human beings and their social worlds cannot be studied in the same way as physical phenomena. Interpretivists are critical of the positivists' attempts to discover definite, universal laws to apply to everybody because they realise that different people of different backgrounds and cultures create different meanings and therefore experience and create different realities. Rather, interpretivists believe that rich insights into humanity are essential for the creation of new, richer understandings and interpretations of social worlds.

4. *Postmodernism*: Postmodernism emphasises the role of language and power relations, aiming to give voice to alternative marginalised views and to question accepted ways of thinking. Postmodernists reject the objectivist, realist ontology of things and instead emphasise the chaotic character of movement and change. They believe that any sense of order is provisional and baseless and can only be brought about through language.
5. *Pragmatism*: Pragmatism reconciles objectivism and subjectivism, facts and values, accurate and rigorous knowledge. From a pragmatist viewpoint, there are many different ways of interpreting the world and there may not be a single point of view that can ever give the entire picture, but rather, there may be multiple realities. Pragmatists may utilise one method, or a multiple of methods, as long as the selected method(s) enable credible, well-founded and reliable data to be collected.

Collis and Hussey (2014) illustrate the “continuum of paradigms” by illustrating the transition of six philosophies from the two opposing ends, namely positivist and interpretivist, while depicting the underlying ontological and epistemological assumptions, as well as the research methods employed, for each category. The result is illustrated in Figure 6:

Figure 6 Continuum of Paradigms (Collis and Hussey, 2014)

	<div> <div>Positivism</div> <div>←</div> <div>→</div> <div>Interpretivism</div> </div>					
Ontological assumption	Reality as a concrete structure	Reality as a concrete process	Reality as a contextual field of information	Reality as a realm of symbolic discourse	Reality as a social construction	Reality as a projection of human imagination
Epistemological stance	To construct a positivist science	To construct systems, process, change	To map contexts	To understand patterns of symbolic discourse	To understand how social reality is created	To obtain phenomenological insight, revelation
Research methods	Experiments, surveys	Historical analysis	Interpretive contextual analysis	Symbolic analysis	Hermeneutics	Exploration of pure subjectivity

In terms of the utilisation of theories and hypothesis across the two opposing ends, Collis and Hussey (2014) opine that, under a positivist paradigm, the literature is studied to identify a theory then form a hypothesis. The hypothesis is then tested against empirical evidence using statistics. In an interpretivist paradigm, a theory may not be utilised or there may not be an existing one in the first place. Therefore, a researcher may carry out his/her own investigation to describe different patterns that are perceived in the data or may construct a new theory to explain the phenomenon. The findings could then be used to develop hypotheses that are tested in other main studies. Importantly, Collis and Hussey take the view that the terms “quantitative” and “qualitative” should be used to describe data, not paradigms. This is because a positivist study can collect data that is either quantitative or qualitative. In a positivist study, the collection of qualitative data may be carried out so that

it is quantified before statistical analysis. However, in an interpretivist paradigm, there is no intention of analysing data statistically and therefore no intention for a quantification of qualitative data. Since the emphasis is on the quality and depth of the data collected, the emphasis in an interpretive paradigm is on the quality and depth of the data collected about a phenomenon, which leads to the collected data normally being rich in detail. They also point out that some researchers blend qualitative and quantitative data to an extent that it is difficult to determine which paradigm is being used. They advise students against such practice, as it may not be acceptable to the researcher's supervisors and examiners.

Denzin and Lincoln (2000) take research paradigms a step further by subdividing qualitative research into four main interpretive paradigms:

1. *Positivist and postpositivist*: The positivist paradigm believes that there is a reality out there that can be captured, whereas the postpositivist believes that reality can be approximated, but never fully apprehended.
2. *Constructivist-interpretive*: This paradigm assumes a relativist ontology (i.e., there are multiple realities), a subjectivist epistemology (i.e., knower and respondent co-create understandings) and a naturalistic (in the natural world) set of methodological procedures.

3. *Feminist, cultural, Marxist and ethnic*: This paradigm reflects the vision that the real world is materially affected by race, class and gender (i.e., a materialist-realist ontology).
4. *Poststructural feminist*: This paradigm addresses problems with the social text, its logic and its ability to represent the world of lived experience.

B.4 Relevance to Research

The author of this research ontologically adopts the interpretive paradigm, as he recognises that (in the words of Lewis, Saunders and Thornhill) humans are different from physical phenomena and therefore cannot be studied in the same way as physical phenomena. The concept of a single reality is not convincing, in the author's view, because of the diversity of cultural backgrounds of people, which create different meanings and therefore different realities. This is especially true when studying legal concepts, such as the one in this research. It is apparent from the Literature Review chapter that, although the topic studied is in relation to the law in two jurisdictions, which can be perceived as being a solid set of rules, there is fluidity and room for interpretation in both jurisdictions. The literature under the English and Welsh jurisdiction is rich with various interpretations of factors affecting the

enforceability of time bar clauses in construction contracts and case law is in constant development. Similarly, under the Egyptian law, although there is a shortage of literature on the subject, there is constant development in the understanding of how time bars may be enforced while building on core principles within the Civil Code. Therefore, the essence is that the interpretivist paradigm, and the underlying subjectivist assumption, is the governing philosophy of this research and its author. Accordingly, in terms of the theory and hypothesis explanation of Collis and Hussey, this research does not test an existing theory. Rather, it utilises the interpretivist approach of carrying out an investigation to describe and construct a new theory to explain the phenomenon of the enforceability of time bar clauses in the English and Egyptian legal jurisdictions.

It is important to note that, at the very start of this research, both qualitative and quantitative research methods were planned to be employed so that, in addition to comparing across the two jurisdictions the enforceability of time bar clauses, the research intended to delve into the Egyptian construction industry to understand how time bar clauses are applied in practice by both legal and construction practitioners. The intent was that this component of the research would be collected through questionnaires and assessed statistically using quantitative methods. However, as Collis and Hussey

articulated, this suggestion was challenged by the examiners at the first interim assessment of this research. It is then that the concept of a comparative law research was born and applied to this research, which is in perfect harmony with the interpretivist, subjectivist philosophical commitments of the author, and which is limited to a qualitative form of research.

In light of the above positioning of the philosophical underpinnings of this research with respect to the continua of paradigms, there is still the fact that there are different areas of research that adopt the qualitative method, such as in management, social sciences and law. Since this research can be categorised as a form of legal research, specifically a comparative law research, it is subject to the methodologies of comparative law. Therefore, it is necessary to understand the theoretical framework of comparative law research and the details of its application in this research.

C. Theoretical Framework of Comparative Law Research

C1. Introduction

This section addresses the theoretical framework of comparative law and, hence, comprises the theoretical backbone for the methodology undertaken

in this research. References from literature written on legal research, in general, and comparative law, in specific, are utilised to arrive at this methodology. The discussion takes place in stages, starting from the broader concept of legal research styles and the positioning of this research vis-à-vis these styles, then transitioning to the positioning of this research with respect to the term 'comparative legal studies' and concluding with a discussion on comparative law methodologies as discussed in the literature before concluding with the framework used in this research. This section, in turn, sets the stage for the following section which elaborates on how this framework is applied. The following is a brief account of the constituents of this section.

1. *Positioning of this research in terms of legal research styles:* Since, as clarified in the preceding section, this research is categorised as a form of legal research, it is beneficial to understand the positioning of this research with respect to the taxonomy of legal research. The categorisation explained by Chynoweth (2008) is briefly presented and the positioning of this research within this taxonomy is identified.
2. *Positioning of this research in terms of comparative legal studies:* From legal research, the discussion delves into the more specific discipline of comparative law. Foster (2006) reports numerous constituents of the

term 'comparative legal studies', which are briefly discussed in this section. The constituents addressed in this research are identified in this section.

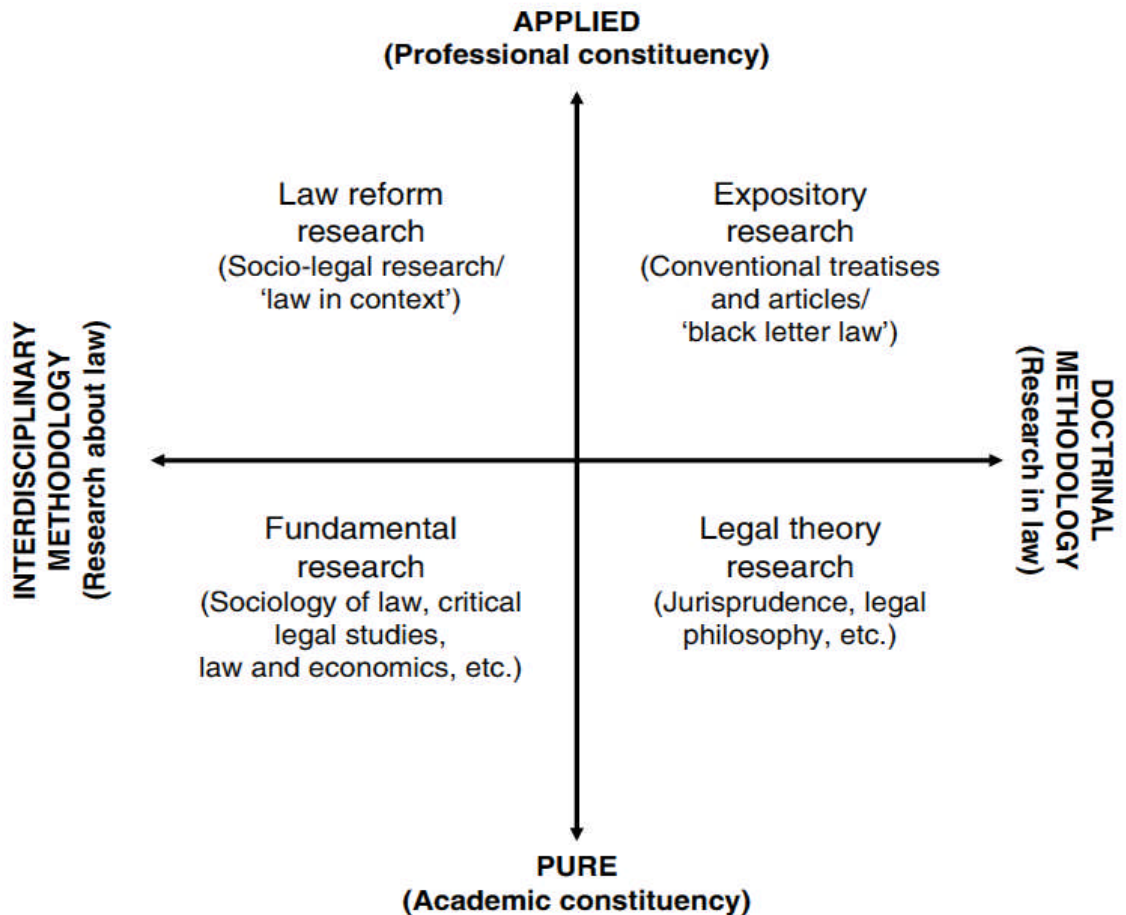
3. *Literature discourse on comparative law methodology*: This section is the theoretical base of the research methodology, as it explores literature written on the methodology of comparative law and concludes with a theoretical framework for the undertaking of this research.
4. *Applied comparative law methodology*: This is the conclusion of this section, as it distils the preceding discussion into concrete steps of the methodology that is applied.

C2.Positioning of research in terms of legal research styles and comparative legal studies

C.2.1 Legal Research Styles

Chynoweth (2008, p.29) illustrates that legal research can be divided into the following matrix:

Figure 5 Legal research styles (Chynoweth, 2008)



The vertical axis illustrates the purposes for which legal research can be undertaken. Legal research can be undertaken for purely educational purposes (i.e, the “pure” legal research located at the bottom of the vertical axis) and can be undertaken for professional purposes to serve legal practitioners and policy makers (i.e., the “applied” legal research located at the top of the vertical axis). The horizontal axis distinguishes the types of

legal research, for there is research undertaken in the field of law itself (i.e., the “doctrinal” research, located in the right) and there is research about the law, which explores areas from other disciplines to understand the legal matter under study (i.e., the “interdisciplinary” research, located in the left). This research starts as doctrinal research (research “in law”), as it investigates the enforceability of time bar clauses in English law and Egyptian Civil Code jurisdictions through the first four objectives, and moves horizontally towards interdisciplinary research (research “about the law”) by the exploration of the reasons (not related to law) for the similarities and differences highlighted through the last objective. Vertically, this research is more on the applied range than the pure. The results are intended to help construction contracts and legal practitioners in Egypt and England (as well as, generally, in the Middle East and the United Kingdom) gain an insight into their respective jurisdictions regarding the enforceability of time bar clauses. This understanding can, consequently, lead to an improvement in the drafting of time bar clauses in these geographical locations so that any conflicts or inconsistencies with the applicable jurisdiction are eliminated or, at least, minimised. Therefore, in terms of the positioning of this research vis-à-vis the legal research styles in Figure 5, it can be stated that this research starts as an expository research and, through achievement of its last objective, concludes as a law reform research.

C.2.2 Comparative legal studies

In his attempt to define the term “comparative legal studies”, Foster (2006, p.7-10) provides the following six categories which encompass the term:

- (a) *Theoretical aspects of comparative legal studies*, which addresses the theoretical base or methodology of the study. Foster describes this category as a weakness in comparative law literature and which needs more attention.
- (b) *Single-system analysis*, which focuses on the analysis of a single system, but from the viewpoint of a lawyer trained in another system.
- (c) *Directly comparative analysis*, which focuses on the comparison of phenomena in one system with another system or systems. It is in essence double the effort of the single-system analysis.
- (d) *‘Harmonization’, ‘Legal Transplants’ and mixed jurisdictions* all involve interaction between two legal regimes and refer to the following:
 - ‘Harmonization’ is a drive towards creating homogeneity between legal systems through the assessment of similarities

- 'Legal transplants' refers to the importing of laws / legal concepts from one system to another
 - 'Mixed jurisdictions' is the study of jurisdictions that are comprised of more than one legal system.
- (e) *Problems arising from trans-border transactions and events*, which utilise comparative law in solutions to trans-border legal phenomena. Examples include environmental law (e.g. problems arising from the pollution of the Amazon River, which flows through different countries) and cross-border insolvency (e.g. failure of transnational corporation), child abduction, immigration law and nationality law.
- (f) *Conflict of laws*, which refers to difficulties arising from conflicts between municipal and private laws in cross-border transactions. An example is a transaction which is subject to the laws of jurisdiction (A), but is enforced in jurisdiction (B), while jurisdiction (A) allows the transaction and jurisdiction (B) does not.
- (g) *Divergent approaches to public international law*, which refers to public international law (e.g., human rights, international trade law, international criminal law and international environment law) and its possible conflict with local jurisdictions.

- (h) *Comparative law and legal theory.* Foster opines that comparative law should be one of the foundations of legal theory. Samuel (1998) suggests that comparative law can make its contribution to legal theory by demonstrating that legal knowledge need not be accessed only through the language of rules (i.e., legal theory). In his words, “comparative law might be restyled ‘comparative legal facts’ so as to bring out the constructive nature of this discourse within ‘social reality’”.

This research encompasses the first and third categories of Foster’s definition of the term ‘comparative legal studies’. The first category, namely the theoretical base of legal studies, is addressed in this research methodology section as comparative law theory is investigated to arrive at a methodology that can be used in this research. As Foster suggests (and, as shown in the following sections, numerous comparative law researchers agree), there is scarcely any agreed theory on the methodology of comparative law. Therefore, the methodology used in this research is obtained from an investigation of the (scattered) literature written on this topic. The third category, namely the directly comparative analysis, is applied in this research as one of the key steps to compare the status of the enforceability of the time bar in construction contracts in the English law and Egyptian Civil Code jurisdictions.

C3. Theories on the methodology for comparative law

The following are samples on the literature produced on the methodology of comparative law, in ascending chronological order:

Kamba (1974, p. 511-512) opines that the method employed by the comparatist varies depending on the extent to which the legal systems under comparison are similar in cultural and socio-economic backgrounds. In this respect, he makes a distinction between *intra-cultural* and *cross-cultural* legal comparisons and gives an example that a comparison between a legal system in France or England and one in an African country would employ a different methodology than a comparison between the legal systems in England and Australia. He suggests that, ultimately, the comparatists needs to exercise judgment on the method to be used but suggests three stages that should be in any comparative law research. The three stages may be addressed separately or intermingled, but in all cases, he regards them as essential. The first stage is the "description" stage in which the norms, concept and institutions of the two systems are described and the socio-economic problems that are addressed by the legal systems are explained. The second stage is the "identification" stage in which the similarities and differences are identified. The third stage is the "explanatory" stage in which the similarities and differences are explained. He cautions against the practice of describing

the two legal systems without relating them to each other and suggests that this is not considered comparative law, as it excludes the identification and explanatory stages. Kamba takes the view that this three-stage process is influenced by the researcher's jurisprudential outlook, the social context of the systems under comparison and the legal context of the topics under study in the case of micro-comparison (which he defines as the comparison of topics of two or more legal systems, as opposed to 'macro-comparison', which is the comparison of two entire legal systems).

Fang (1994, p. 34) sets a three-step process for the methodology to undertake comparative law research. The first is defining the subject to be compared. When collecting material on the subject to be compared, Fang opines that consideration must be given to whether the law under comparison is 'the law on paper' or 'the effective law in reality'. If it is the former, the researcher must take into account any deviations from reality. The second step is defining the comparison. Fang suggests that important similarities must reflect substance, not some mere common characteristics. An example given is the law of marriage and law of natural resources being promulgated by the same authorities. In this example, the commonality of the source of the laws does not reveal the advantages and disadvantages of the laws. The third step,

according to Fang, is giving the research concrete form. He gives the following examples of concrete comparisons:

- a) Length vs. breadth of comparison – Former researches the law of different historical periods, while the latter researches the law of different countries during the same historical period.
- b) Macroscopic vs. microscopic comparison – Former involves comparative research on legal systems as a whole, while the latter involves similar specific laws of different countries (addressed in the preceding discussion on Kamba).
- c) Inner vs. outer comparison – Former studies laws of the same type to identify similarities and differences between laws of the same type, while the latter studies different types of laws to understand their differences and commonalities.
- d) Functional vs. structural comparison – Former researches the laws of different countries with an aim to tackle the same social problem in domestic legislation, while the latter researches the structure of legal systems of different countries with an aim to assist in the construction of the domestic legal system.

Reitz (1998) opines that, although there may be no set “comparative law methodology”, and that comparative law scholars adopted a kind of self-taught experimental approach to comparative law over the years, there is perhaps consensus on nine essential principles of comparative law. The following is a summary of three points relevant to this research:

Table 3 Basic Principles of the Comparative Method (Reitz, 1998)

No.	Principle	Key notes
1.	Explicit comparison	<ul style="list-style-type: none"> • The act of comparison cannot be left to the reader • Explicit comparison is summarised as follows: <ol style="list-style-type: none"> a) Break the subject down into the natural units that are important to the analysis b) Describe each country’s law with respect to that unit c) Compare and contrast them immediately. d) Contrasts documented in each section should build toward the overall conclusion.
2.	Causes of similarities and differences in a comparative law analysis	<ul style="list-style-type: none"> • The comparative method encompasses giving reasons for the similarities and differences among legal systems or analysing their significance for the cultures under study.

Table 3 Basic Principles of the Comparative Method (Reitz, 1998)

No.	Principle	Key notes
		<ul style="list-style-type: none">• This is the aspect of comparative law that leads the student beyond the law to the rest of the humanities and social sciences, maybe even to the natural sciences.
3.	Anthropological and linguistic skills of a comparative law researcher	<ul style="list-style-type: none">• In-depth knowledge of the history of the country and its peoples and its philosophical and religious traditions is necessary to understand the indigenous forms of legal reasoning and value judgments.• Involves linguistic knowledge (at least where the foreign law is in a foreign language) and substantial historical and cultural knowledge.

From the summary of points in Table 3, it is observed that Reitz places emphasis on the process of explicit comparison, where units of comparison are identified and compared immediately. Like Kamba (1974), he criticises the methodology used by some comparatists whereby characteristics of two legal systems are explained and the reader is left to figure out the similarities and differences. Furthermore, it is apparent that Reitz highlights the

importance of understanding the causes of the similarities and differences that have been explained and of reaching beyond the law to the cultures of the legal systems being compared. In doing so, he indicates that anthropological and linguistic skills may be used.

Roman (1990, p.962) suggests that the comparative process starts with an identification of the object of comparison, which he categorises as the units of law (e.g., legal norms, legal regulations, legal institutions, branches of law, legal systems, legal families and types of law) and forms of legal thought (e.g., legal ideas, ideologies, doctrines and programmes). He takes the view that comparison can focus on either the form, or structure, of the objects under comparison or both the form and content. He suggests that supporters of the analytical-linguistic normativist trend confine themselves to the former, while supporters of the sociological studies adopt the latter by delving into the social and material contexts of the objects under comparison. He adds that "the requirement of scientific methodology" limits the range of comparison to units of a common, homogeneous category. Therefore, legal norms are compared with legal norms; legal institutions with legal institutions; systems of law with systems of law, and so on. The units of law are compared based on selected criteria. He also refers to the role that values play in comparative law and suggests (p. 965) that values made reference to can either be existing beyond

the compared units or be based on their intrinsic values. In the case of the former, it is important to bring down the compared units to a pattern common to them in at least one respect. In the case of the latter, the values of one of the compared units is considered superior and used as the reference. Finally, he suggests that determination, measuring and recording of comparative results is one of the least developed methodological premises of comparative law.

Orucu (2006, p.31) takes the view that comparative lawyers have not invented methods, but rather, borrowed such methods from other disciplines and applied them to the problems of comparative law research. Consequently, in light of the absence of a single methodological approach for comparative law, a variety of approaches may be employed, depending on the strategy of the legal researcher. She proposes (p.31) a five-phased "methodological blueprint". The first phase is the conceptualisation phase, which involves the creation of a level of abstraction of concepts. This includes distinguishing between an inter-cultural and cross-cultural comparison (similar to the concept put forth by Kamba 32 years earlier) and the classification of legal systems, if necessary. In brief, the stage involves what will be compared, classification of the concepts and selection of the relevant strategy and approach. The second phase is the descriptive phase, which, as in the case

of Kamba (1974), involves the description of the norms, concepts and institutions under comparison and could include an examination of the socio-economic problems as well as the solutions provided by the legal systems under comparison. The third phase is the identification phase (also called the classification phase), in which comparable concepts are described then juxtaposed and, consequently, the similarities and differences are identified. The fourth phase is the explanatory phase in which the similarities and differences are accounted for. Orucu observes (again, as Kamba did earlier) that the outlook of the researcher is important here and that this outlook can be jurisprudential, historical or sociological or textually oriented. She adds that the explanatory phase would not be complete without a socio-cultural overview, without which the analysis would present an incomplete and distorted picture. Also, in the case of micro-comparison, the topics under comparison should be placed in the context of the legal system as a whole. Finally, Orucu suggests that simulation is key in this stage, as it involves generating hypotheses from interrelationships involving political, economic, cultural and other social phenomena. In this respect, she opines that assistance from historians, economists, cognitive psychologists and anthropologists may be needed. The fourth and final phase is the confirmation phase, in which the generated hypothesis are tested and final statements are made.

Chynoweth (2008) takes the view that a methodology for legal research does not exist as in the sciences. In this regard, he opines that legal research is more in line with the humanities (or the qualitative approach) than with the sciences, as its approach aims to develop scholastic arguments that are subject to criticism and rework by other scholars rather than the achievement of final and definitive results as in the sciences. Accordingly, any methodologies involved are subconsciously employed by legal researchers through the use of logic and common sense as opposed to a concrete research methodology employed in the sciences. On the other hand, Samuel (1998) categorises comparative law as a "legal science" that, as in the case of science, is comprised of models, but that the legal models, unlike scientific models, consist of norms (such as rules and relations) that cannot be directly observed. However, he suggests that legal science is not void of facts, for it is "integrated into the world of social facts in the same way as meteorology is integrated into the physical reality of weather."

Eberle (2011, p.57) proposes a methodology comprised of four rules. The first rule is with respect to the skill of a comparatist. He opines that the comparatist needs to shed his/her built-in bias, or "cognitive lock-in," so that the data can be reviewed objectively. The second rule is to evaluate external law, as written or stated. In other words, there is a need to understand what

meaning the words have within the context of the case, statute or other legal norm. The comparatist should compare and contrast the similarities and differences between the data points then explore the reasons for the similarities and differences and evaluate their significance within their legal culture. The third rule requires a deep exploration into what Eberle refers to as "the invisible dimension of the law", which is associated with the underlying forces that operate within a society to help form and influence the law and give it substance. The fourth and last rule is to determine comparative observations. The results of the investigation are assembled and critical questions are answered. These questions include: What is the significance of the data? What have we learned? Has our investigation of a foreign legal system shed light into the operation and meaning of the foreign legal system? What has the foreign system taught us?

C4. Formation of the comparative law methodology

The following observations are made in light of the above selected discourse on comparative law:

- a) Kamba and Orucu provided a concrete methodology for comparative law research. In fact, Kamba's three-phase methodology was almost mirrored by Orucu 32 years later, but with more elaboration. Of

particular reference is Orucu's mentioning of the description, identification and explanatory phases (all elaborated upon in Kamba's paper) and her reference to the researcher's jurisprudential outlook, the social context of the systems under comparison and the legal context of the topics under study in the case of micro-comparison as factors affecting the research. The phases suggested in their work represent, in the writer's opinion, the most straightforward methodology for application in this research.

- b) Although not presented in phases, Reitz's 'explicit comparison' approach is another directly relevant approach, as it breaks down the comparative law process into four distinct steps (as listed in Item 1 of Table 3), which also follow – but in a more simplified manner – the suggestions brought forward by Kamba 24 years earlier.
- c) The work of Roman, Fang, Eberle and Chynoweth presents general guidelines that are not as explicit as those of Kamba, Orucu and Reitz. However, there are still some overlaps and similarities. For example, Eberle's reference to the "invisible dimension of the law" reflects the explanatory phase in Kamba, Reitz and Orucu's work. Chynoweth's "interdisciplinary" legal research categorisation in Figure 2 is another

reflection of the explanatory phase. Roman and Fang refer to the identification phase in their research.

In light of these observations, the methodology used in this research is comprised of the following four phases:

1) The Conceptualization phase:

The conceptualization phase is clearly mentioned in Kamba (1974), Reitz (1998) and Orucu (2006) and can be described as the stage in which the main concepts, comprising the units of comparison, are identified and defined. These units will then form the basis for the comparison. This stage constitutes the first step in the four-step process of the explicit comparison approach advocated by Reitz (1998, see Table 3), in which the subject is broken down into its natural units for comparison. As Kamba (1974) stated, and Orucu (2006) later reiterated, it is in this stage that the *intra-cultural* and *cross-cultural* distinctions are made, where the extent to which the compared units are similar in cultural and socio-economic backgrounds is explained. Consideration can be made at this stage to Fang's (1994) statement that the units of the comparison must reflect some substance, not merely some superficial common characteristics of the two legal backgrounds. Along the same vein, Roman's (1990, p. 962) theory of the compatibility of the units of comparison is explored at this stage. This principle of defining key concepts

as a base for comparison is in line with the principle of explicit comparison advocated by Reitz (1998). Since this research involves the comparison between two legal systems of different linguistic backgrounds, it is anticipated that legal terminology may not be identical. Therefore, in such cases, the principle of the “functional equivalence” will be adopted. Kamba (1974) describes the functional approach as identification of the legal norms, concepts or institutions in one system that perform the equivalent functions performed by certain legal norms, concepts or institutions in another system.

2) The Descriptive Phase:

This phase constitutes the first stage in the methodology proposed by Kamba (1974) and the second stage in the methodology proposed by Orucu (2006). It is also the second step in the ‘explicit comparison’ approach advocated by Reitz (1998, see Table 3). This phase provides a description of the selected concepts and may examine the socio-economic problems and the legal solutions provided by the systems in question (Kamba, 1974; Orucu, 2006).

3) The Identification Phase

This phase constitutes the second stage in the methodology proposed by Kamba (1974) and the third stage in the methodology proposed by Orucu (2006). It is also the third step in the “explicit comparison” approach

advocated by Reitz (1998, see Table 3). This phase entails identification of similarities and differences under comparative consideration (Kamba, 1974). It is the implementation of this stage and the explanatory stage that follows, which Kamba and Reitz characterise as the essential components for any comparative law research, so that the comparatist does not simply describe the legal issues regarding the units of comparison, leaving the reader to deduce the similarities and differences. It is also at this stage that Roman's theory of the values application can be applied. It has been mentioned that, according to Roman, the reference point for the comparison can either be based on a factor existing beyond the compared units or be based on their intrinsic values. It is therefore important to highlight in this stage the reference point for the similarities and differences.

4) The Explanatory Phase

The reasons for the identified similarities and differences are then explained and accounted for in the explanatory phase (Orucu, 2006). At this stage, it is important to go beyond the theoretical framework of the law and explain external factors, such as culture, social context and economics. This cultural factor in comparative law had its roots in the "Columbia experiment" that took place at the Law School of Columbia University in New York in the 1920s. It was an attempt to reorganize the curriculum on "functional lines" and add

non-legal material which was seen as relevant to the study of the problems with which law and the legal system had to deal and to give the problems themselves greater prominence (Wilson, 2007). Numerous researchers on comparative law highlighted this point. Reitz (1998) stated that the significance of identifying the similarities and differences is to understand the respective legal systems and the broader cultures of which they are a part. In his words, this aspect "leads the student beyond the law to the rest of the humanities and social sciences, maybe even to the natural sciences." As mentioned, Eberle (2011) suggests the deeper part of the law, i.e., "the invisible dimension of the law", must be explored. He characterizes this "invisible dimension" as the underlying forces that operate within a society to help form and influence the law and give it substance. Fang (1994) opines that the law must be examined in its place in the whole system. Wilson (2007) summarizes the significance of this cultural factor by stating: "There is much to be said ... for a functional study of the law that places the emphasis not on doctrine and the methods of elaborating and applying it, but on the purposes which the law and the legal system are designed to serve."

D.Application of Comparative Law Theoretical Framework

Applying the above four stages highlighted in the previous section to this research yields the following:

1) The Conceptualisation Phase

To identify and define the key concepts for comparison, the literature review is analysed for topics discussed on the enforceability of the time bar claim notice provision in the standard contract form that is selected for this research with respect to each of the English law and the Egyptian Civil Code jurisdictions. While analysing the literature review for the concept points identification, priority is given to literature published in renowned construction law journals. If publications in renowned journals is lacking in a certain jurisdiction, then books by renowned authors in the field of construction law are researched. Conference material, internet articles and published dissertations are secondary sources of literature to complement the journal and book references.

Analysis of the information gathered to identify the key points for comparison will proceed as follows:

STEP 1: A general overview of the topics covered for each jurisdiction with respect to the enforceability of the time bar clause in the contract form selected under Objective 2 is discussed. If the information for a certain jurisdiction is not sufficient regarding the enforceability of this time bar clause, then literature will be investigated to cover a more general topic related to the time bar clause. For example, as shown in the preceding literature review section, published literature on the topic of the enforceability of the time bar under Sub-Clause 20.1 of the FIDIC 1999 Red Book is abundant regarding English law. However, the opposite is true regarding the Civil Code jurisdiction of Egypt. Therefore, the more general topic of limitation periods under the Egyptian Civil Code will be researched to understand the extent of enforceability of contractual time bar clauses. Along the same vein, published journals on the topic are abundant for the English common law system, whilst the opposite is true for the Egyptian Civil Code system. Therefore, the utilization of books, conference material and dissertations can be used more heavily for the Egyptian Civil Code system.

STEP 2: After the research is completed for each jurisdiction (i.e., completion of the literature review section), the identification of the key points for comparison is developed. The information gathered from each jurisdiction is grouped into sub-headers, or categories. A list of categories is then created

from the literature gathered for each jurisdiction. The key points for comparison are identified through one or a combination of the following options:

- (a) Categories that are similar or identical are chosen as comparison points. So, for example, if the literature review demonstrates that the wording of the time bar notice provision affects, whether directly or indirectly, its enforceability in both jurisdictions, then the form of a time bar notice provision will be chosen as a comparison point.
- (b) A category that is present in one jurisdiction, but not mentioned at all in another, can be chosen as a comparison point for the purpose of exploring uncovered grounds of research. Hence, for example, if the form of the time bar clause has an effect on its enforceability in English courts, but there is no reference whatsoever to its effect in Egyptian courts, then the form of the time bar clause may be chosen for comparison for the purpose of understanding if and how the form of a time bar clause would be enforced under the Egyptian Civil Code. Even if the research demonstrates that the time bar clause has no effect whatsoever, and is totally superseded by an article in the Civil Code, that in itself is a notable finding.

The Conceptualisation Phase in this research would not be complete without selecting the standard contract form, containing the time bar clause that acts as a condition precedent, which will be used as a basis for the comparison of the key concepts across the two jurisdictions. Therefore, the phase will end with the selection of the contract form and time bar clause to be used in this research, in light of the background information provided in Section II.D (page **Error! Bookmark not defined.**).

2) The Descriptive Phase

After the identification of key points for comparison, the descriptive phase commences. Each key point is analysed from the perspective of the common law jurisdiction first then the Civil Code jurisdiction. At this stage, only descriptions will be provided of the legal principles associated with each key concept. Hence, for example, if the principle of 'good faith' is chosen as a point for comparison, implementing the descriptive phase entails describing in detail the effect of 'good faith' on the enforceability of the time bar clause in the selected contract form in Objective 2 under the English common law. The associated legal principles under the English common law would be described and a general conclusion would be stated at the end of the section. Then, under a separate header, the description of the role 'good faith' plays in the enforceability of the time bar clause of the selected contract form under the

Egyptian Civil Code begins, highlighting the associated legal principles and concluding with a general principle under this Civil Code jurisdiction.

3) The Identification Phase

After each key concept is elaborated upon from the perspective of the common law and the Civil Code jurisdictions, the similarities and differences between both jurisdictions are identified in this phase. Therefore, up to this stage, each key point of comparison consists of three sub-sections:

- (a) Description of key point under English law
- (b) Description of key point under the Egyptian Civil Code jurisdiction
- (c) Comparison and contrast of the key point vis-à-vis both jurisdictions

4) The Explanatory Phase

The reasons for the similarities and differences identified in the Identification Phase are elaborated upon and explained in this phase. This explanation will entail going beyond the theoretical framework of the law to the historical origin. Due to the possible length of information of this phase, the Explanatory Phase is listed as the second objective of this research. To undertake this phase, it is envisioned that research would be conducted on the origins of each jurisdiction and the evolution of the law to the current stage. For example, it

is envisioned that the results of the Egyptian Civil Code jurisdiction would be influenced to some extent with the principles of Islamic law, since, as explained in the Literature Review section, the Egyptian Civil Code was developed after the attempt to codify Islamic law during the Ottoman Empire by the Majella. Also, in light of the fact that the Egyptian Civil Code was developed by Dr. Abdel Razzak Al Sanhuri, who was influenced by the French Civil Code at the time, the results under the Egyptian Civil Code can be attributable to certain principles existing under the French civil law jurisdiction.

E. Ethical Approval

According to Sections 6.1 (p) and 6.2 (e) of the University of Salford's Code of Practice for the Conduct of Postgraduate Research Degree Programmes 2011-2012, ethical approval is required where appropriate. According to the University's introductory notes on the topic of ethical approval (The University of Salford, 2013a), there are three basic ethical principles that guide postgraduate research, with the aim of facilitating research whilst protecting the University, researchers and research subjects:

- Respect the autonomy of human research subjects
- Do no harm to researchers or human research subjects

- Act justly towards those who contribute to your research

The University's Ethical Approval Form for Post-Graduates (The University of Salford, 2013b) states at its forefront that ethical approval must be obtained by all postgraduate research students as a prerequisite to the start of any research with human subjects, animals or human tissue.

Since this research is a comparative law research based on theory, and does not involve human or animal subjects (or human tissue), ethical approval has not been sought or obtained.

IV. CONCEPTUALISATION PHASE - IDENTIFICATION OF POINTS FOR COMPARISON

A. Introduction

The purpose of this section is to identify the points for comparison in this research. This is accomplished by application of the "Conceptualisation Phase", which was discussed in Section D of the Research Methodology chapter. As discussed therein, the literature review is analysed in order to identify the concepts that will be compared across the two jurisdictions. Before delving into the literature review discussion, it is important to note that, since this research is in essence a comparative law between English law and the Civil Code jurisdiction of Egypt, it is important to supplement the literature review with background information on the two legal jurisdictions under comparison. After this background information is provided, this chapter takes into account the topics identified in the literature review and provides the rationale for the identification of the concepts that will be used as the base for the comparison. The chapter ends with a summary, in point form, of the identified points for comparison and with a selection of the contract form to be used as the basis for comparison in light of the information provided in the Literature Review.

B. Background on Legal Jurisdictions under Comparison

B1. English Law

B.1.1 Historical Development

Tetley (1999) reports that the common law system originated in England and has subsequently formed the basis for the law in the Republic of Ireland, nine of the fifty states of the United States of America, nine Canadian provinces, as well as in the countries that were former colonies of the British empire. The author adds that, in addition to England and its former colonies, some legal systems converted to common law, which include Guyana, the Panama Canal Zone, Florida, California, Arizona, New Mexico and other former Spanish possessions. Common law originated in England after the Norman Conquest in 1066. Prior to the Conquest, the law stemmed from the feudal system in the Middle Ages, whereby disputes were settled independently in local regions, with each region not having knowledge about the other region (Dainow, 1967). There was no national legal system. Rather, the law was enforced by local lords and sheriffs within the feudal system. The rights and obligations came from the status of the individual within the system. Huxley-Binns and Martin (2010) concisely summarize the start of the development of common law. After William the Conqueror conquered England in 1066, he attempted to

take control through the establishment of a national government and a unified system of justice. He therefore travelled the land with his most trusted advisors to listen to grievances of the people and deliver judgments. This led to the establishment of the *Curia Regis* (King's Court) which is considered the start for the development of common law. Subsequent kings appointed judges to the *Curia Regis* and a system of unified laws emerged which replaced the local customized laws. Being applicable to everyone, these laws became common to everyone, hence the name "common law". Walker (1985) suggests that William the Conqueror's creation of a unified system of national laws that overcame the local customised laws was not straightforward. Rather, the process was met by resistance from the landlords and sheriffs, who made revenues from the local courts and, therefore, resisted attempts to diminish their jurisdiction. The author takes the view that, over a period of three centuries, the King assumed control of the administration of justice through the creation of a centralized system of courts administered by judges and justices.

Dainow (1967) addresses another important point in the development of common law, which is the "deep jealousy" the common law courts experienced from the law-making function of legislation, which developed after the centralization of the common law courts. Whenever legislation was applicable

to a particular case, the common law courts would interpret the text in a narrow fashion so as to minimize the encroachment of the legislation on the jurisdiction of the common law courts.

A third important point regarding the development of common law is the complexity of procedural considerations which eventually led to the principle of "equity". New forms of legal action established by the King were issued through written royal orders known as "writs". The system of writs became highly formalized and complicated, resulting in grievances being made directly to the King to achieve justice. Bunni (2005) suggests that each writ had its own fixed procedure which outlined the steps to be followed, the admissibility of evidence, the handling of incidental questions and the manner by which a decision is enforced. In any given procedure, claimant and defendant had to be styled by a specific wording which, if not used appropriately, would be fatal to the proceeding. This resulted in grievances being raised directly to the King, as the administrator of justice. The King delegated this function to the Chancellor of the Royal Court, who would resort to sources other than common law, including Roman Law and natural law, to achieve justice. This, in turn, became known as the Court of Chancery which embodied a substantial body of independent law. Hence, at the time, English law comprised of "law" and "equity" (Dainow, 1967). Common law courts and equity courts co-existed

until the writs system was abolished in the mid-nineteenth century (The Robbins Collection, 2010). Bunni (2005) reports that a confrontation was inevitable between common law and equity and that this took place in 1615 when King James 1 decided in a case between Chief Justice Coke and Lord Chancellor Ellesmere in the favour of the Chancellor. Since then, Bunni concludes, equity prevails when there is a conflict between common law and equity.

B.1.2 Characteristics and Sources of Law

Dainow (1967) suggests that judicial decisions are the basis of the common law system whereby the judicial decision of each case constitutes the rule that must be followed in another case of the same sort. Hence, each case serves as a "precedent" for future cases. If a new decision setting out a new rule is given, it is the responsibility of the judge to declare it. However, Dainow opines, the rule of precedent applies to the exact point which was necessary and critical to reach a decision. Other, non-essential points are not binding and are classified as "*obiter dicta*". If a new case is similar to a previous one, but not identical, the judge can either apply the previous rule or just limit the application to the point to which the previous case precisely applies. In extreme situations, the judge may rule that the previous decision was erroneous and overrule it, thereby setting a new precedent.

Another main source of English law is legislation, which is comprised of primary and secondary legislation. Primary legislation, which is the supreme type of legislation, is made by Parliament, while secondary legislation is made by individuals and bodies, such as the government and local authorities.

European Union (EU) law is a third main source of law in England and Wales. However, this is subject to change in light of the Brexit ("British exit"), which refers to the referendum of 23 June 2016 whereby British citizens voted to exit the EU. Among the legislation that may change (or be repealed) is the European Communities Act 1972 (ECA), which provides for the supremacy of EU law.

B2. The Egyptian Civil Code

B.2.1 Historical Development

Tetley (1999) reports that, before the Islamic conquest of 641 AD, Egypt was ruled by Roman Law. After the conquest, Islamic law governed Egypt for eleven hundred years and was administered by Islamic law courts in civil, criminal and family matters. Interestingly, the author observes, Islamic law permitted non-Muslims to apply their religiously-based family law systems, hence making Egypt a mixed legal system for centuries. Badr (1956) records that, by the mid-nineteenth century, Egypt was going through a period of

rapid “westernization” and, it is at the rule of Khideve Ismail, that a Civil Code along the lines of the French *Code Napoléon* was adopted. Since 1883, this Civil Code was applied in lieu of Islamic law. North African countries under French domination at the time included Egypt, Algeria, Morocco and Tunisia. The rest of the Arab World was in closer affiliation with the Ottoman Empire who, during the second half of the nineteenth century, promulgated an Islamic code of law, titled the *Majallat-ul-ahkam-al-adliyya*, which was directly derived from Islamic law in a synthesized, modern fashion. Hence, as Badr (1956) notes, at the end of World War I, the Arab World countries fell into two categories regarding the Civil Codes: (a) the Islamic law code (i.e., Syria, Iraq, Palestine and Jordan), and (b) the French code (i.e., Egypt, Tunisia, Algeria and Morocco). In 1875, a system of “mixed courts” was implemented to administer the mixed codes in Egypt at the time and govern the relations between foreigners or between foreigners and Egyptians. Meanwhile, a system of “national courts” was established to administer the Egyptian Civil Code, inspired by *Code Napoléon* on Egyptian citizens. Islamic law was used by Islamic courts to govern family matters concerning Muslims and Muslims married to non-Muslims. For non-Muslim Egyptian minorities, such as the Coptic Christians, separate religious councils governed family law matters in accordance with their respective rules (Tetley, 1999). Saleh (1993) reports that, in 1891, Mohamed Qadri Pasha produced the *Murshid al-Hayran*, which

was a treatise on property, contracts and agencies, developed in accordance with the Hanafi school of Islamic law. He suggests that the treatise served as a nationalistic reminder of the existence of Islamic law, but that, like the *Majallat*, it was never put in practice in Egypt. Different reasons are recorded regarding the need for the Egyptian Civil Code. On the one hand, Tetley (1999) refers to the confusion and jurisdictional conflict arising from the “complex legal and judicial structure”, thereby leading to demands for simplification and rationalization. On the other hand, Badr (1956) captures the sentiment at the time and attributes the need for the new Civil Code to a “renewed interest in Arab heritage, including Islamic law” as a result of the “revival of nationalistic feeling in Arab countries and the impetus given to the Pan-Arab movement by the events of World War I and the years that followed.”

According to Hill (1988), the aim for the new Civil Code was to make Egypt’s Civil Code more Islamic. In an insightful article on Abdel Razzak Al-Sanhuri (the drafter of the Civil Code) and Islamic law, Hill provides lengthy information demonstrating how Al-Sanhuri infused Islamic law into the Egyptian Civil Code. For example, the article mentions that the intent behind Al-Sanhuri’s revision of the Code was to produce an Islamic civil law as much as the conditions at that time permitted. This was reflected in the record of

the revision activities by the Ministry of Justice, which demonstrates that substantial studies and considerations went into this new code and various articles were derived from the letter of the spirit of Shari'a. The Senate Committee debates demonstrate that the new code was closely derived from Shari'a. The constitutional amendment of 1980, which requires that the Islamic Shari'a be the basis for legislation, is another strong indicator. In 1985, a Constitutional Court decision ruled on the relationship of that amendment to the Civil Code saying, in effect, that this constitutional amendment applied to legislation after its issuance. Therefore, a legislative authority was assigned the responsibility for revising existing laws, which included the Civil Code. It was declared that the Civil Code was very much still intact. This, in turn, is a strong indication that the Civil Code is very much in line with the Shari'a. Hill opines that the popular notion that the Egyptian Civil Code is a carbon copy of the Code Napoléon is unfounded and surprising when one considers Al-Sanhuri's outline of the rules of Islamic law found in the Civil Code. She adds that the 'Frenchness' of the Egyptian codes was deliberately highlighted and the fact that there were considerable borrowing from Qadri Pasha's *Murshid* was for the most part ignored from the beginning, and throughout the British occupation.

The Egyptian Civil Code became a model for the civil law codifications in numerous Arab countries which include Morocco, Tunisia, Algeria, Libya, Syria, Lebanon, Kuwait, North Yemen, Mauritania, Iraq, Syria, Jordan, United Arab Emirates and Qatar (El Shalakany, 1989; Sarie El Din, 1994).

B.2.2. Characteristics and Sources of Law

B.2.2.1 General Characteristics:

Dainow (1967, p.424) suggests that the basis for a civil law jurisdiction is legislation and that a Civil Code comprises a group of laws that control the relationship between individuals. He observes that a Civil Code is essentially a body of general principles that are closely arranged and integrated, not merely a set of rules for particular situations. The code is intended to be comprehensive by means of the principles, not the details, so that it can provide answers for questions as they arise.

The Egyptian Civil Code was promulgated by the Law No. 131 of 1948 and put in force since 15 October 1949. Yehia (2009, p.10) observes that the Egyptian Civil Code regulates two kinds of relationships:

- Personal: The relationship between a person and his/her family
- Specific: The financial relationships between persons or the financial activity of a person.

The Egyptian Civil Code is arranged into the following hierarchy:

- Sections (2)
- Books (4)
- Parts (17)
- Chapters (49)
- Articles (1149)

The arrangement of the Sections, Books and Parts within the Code, and the corresponding number of articles per Book, is shown in Table 4.

Table 4 Article Structure of the Egyptian Civil Code

Book	Part	No. of Articles
Section 1: Personal Obligations or Rights		
1 – Obligation in General	I. Sources of obligation II. Obligation effects III. Factors modifying the effect of obligation IV. Transfer of obligation V. Termination of the obligation VI. Evidence of obligation	417
2 – Nominal Contracts	I. Contracts on ownership II. Contracts on benefiting by an object III. Work-related contracts IV. Aleatory contracts V. Warranty	384
Section 2: Original Real Rights		
3-Original Real Rights	I. Title of property	228

Table 4 Article Structure of the Egyptian Civil Code

Book	Part	No. of Articles
	II. Rights ramified from the right of ownership	
4 – Ancillary Real Rights or Real Guarantees	I. Mortgage II. Lien right III. Rights stemming from the right of property IV. Lien rights	120

B.2.2.2 Main Sources of Egyptian Law:

Yehia (2009, p. 16 - 21) categorises the main sources of law in Egypt, as follows:

1. Legislation: Comprises the written legal rules issued by the relevant authorities and is divided into the following:
 - a. The Constitution
 - b. The law
 - c. The statutes (also called the peripheral legislation)
2. Custom: This is the unwritten component of the law, which supplements the legislation in the absence of any provision to the contrary. The author opines that custom cannot overrule a written, mandatory legal principle, although it can overrule a complementary (i.e., not

mandatory) legal principle. Furthermore, custom cannot be against public policy.

3. Islamic law: The author divides this component into two applications, personal conditions and conditions in kind. The former is governed by the Hanafi school of Islamic law and, if the judge decides on a case using a premise that violates the most probable premise of the Hanafi school, then that decision would be incorrect. The latter uses the general principles of Islamic law and is applied on all Egyptians regardless of their religion.
4. Natural law and rules of justice: The judge here strives to make a decision in light of the general principles of the Egyptian law as a whole. Hence, the judge has no excuse for not being able to decide on a case that was put forth to him.

B.2.2.3 Order of Application of Egyptian Law Sources

Pursuant to the second paragraph of Article 2 of the Egyptian Civil Code:

Where no legislative provision is applicable, the judge shall pass his ruling according to custom. In the absence of custom, his judgment shall be pronounced according to Islamic Law principles. In the absence of such principles, his judgment shall be passed according to the principles of natural law and the rules of justice.

Hence, the following is the order of the application of the four sources of Egyptian law:

1. Legislation
2. Custom
3. Islamic Law
4. Natural law and rules of justice

Yehia (2009, p.22) summarizes the sources of Egyptian law and their application through the following table:

Table 5 Sources of Egyptian law (Yehia, 2009, p.22)

Personal Conditions (Relationship between the individual and his/her family)	In-Kind Conditions (Financial matters)
<ol style="list-style-type: none"> 1. Legislation 2. Religion <ol style="list-style-type: none"> a. Muslims: The most probable of the Hanafi school b. Non-Muslims: Application of their own rules 3. Custom 4. Natural law and rules of justice 	<ol style="list-style-type: none"> 1. Legislation 2. Custom 3. Islamic law (the general principles of Islamic law that are in harmony with the Civil Code) 4. Natural law and rules of justice (the judge strives in light of the general principles of the Egyptian law)

Atalla (2005, p.21-22) categorises the sources of Egyptian law into the following:

- Legislative sources – these include the Egyptian Civil Code, the Tenders Act (1998) and Tenders Regulation 1998; the Contractors Federation Act (1992); the Building Act (1976) and Building Regulations 1998; and the Social Security Regulations for construction workers (1988).
- Case law – Two collections of cases are mentioned: (a) The Egyptian *Cour de Cassation*; and (b) the High Administrative Court.
- Legal writings – The author refers to two authors, namely Professor Abdel Razzak Al Sanhuri on the Egyptian Civil Code and Professor Suleiman El-Tawawy on administrative contracts.

C. Rationale for Comparison Points Identification

In the description of the research methodology for the Conceptualisation Phase (page 1), two steps are mentioned. The first is analysis of the topics discussed in the literature with respect to each of the two jurisdictions under study in this research. This step has been achieved through the literature review section. Table 6 provides a summarised account of the topics discussed in the literature review for each jurisdiction.

Table 6 General Topics Discussed in the Literature Review

Common Law Jurisdiction of England and Wales	Civil Code Jurisdiction of Egypt
<ul style="list-style-type: none">• Form of the time bar clause and its role in barring recovery from the contractor• Waiver and estoppel and work outside the contract and their role in rendering the FIDIC 1999 time bar unenforceable• The Unfair Contract Terms Act 1977 and its role in rendering the time bar unenforceable• The 'prevention principle' and the debate in common law courts	<ul style="list-style-type: none">• Principle of 'good faith' in rendering the FIDIC 1999 time bar unenforceable• Principles of 'limitation periods' under the Civil Code' and 'preclusion periods' in rendering the FIDIC 1999 time bar unenforceable• The existence of exculpatory time bar clauses within the Egyptian Civil Code and effect of rendering the FIDIC 1999 time bar unenforceable.

Table 6 General Topics Discussed in the Literature Review

Common Law Jurisdiction of England and Wales	Civil Code Jurisdiction of Egypt
<ul style="list-style-type: none">• The principle of 'good faith' and its effect on condition precedent time bar clauses	

The second step is to group the information gathered into sub-headers or categories. The information shown in Table 6 can be grouped as follows:

- Although extensively discussed in the English literature, time bar clauses are seldom discussed in Egyptian law literature and case law. However, the topic of limitation periods and their relationship to time bar clauses is a recurrent (although debatable) topic for discussion with respect to the Egyptian law. Therefore, understanding how limitation periods are addressed under the Egyptian law can be the key to understanding the extent to which time bar clauses are enforceable.
- Waiver, estoppel, work outside the contract and the Unfair Contract Terms Act 1977 are topics discussed in the English law literature but not discussed in the Egyptian law literature. Accordingly, these topics will not be considered to understand the enforceability of time bar clauses under the English and Egyptian laws.

- The topic of “good faith” is a common topic of discussion with respect to time bar clauses.
- The “prevention principle” is a topic that is discussed more extensively under the English law literature but not explicitly discussed in the Egyptian law literature. However, since the prevention principle is a matter of equity, there seems to be a relationship between the prevention principle and good faith.

An examination of the above leads to the following potential points of comparison:

1. The extent to which the principle of limitation periods under each jurisdiction affects the enforceability of condition precedent time bar clauses.
2. The extent to which the principle of ‘good faith’ can affect the enforceability of condition precedent time bar clauses in each jurisdiction.
3. The extent to which the ‘prevention principle’ can defeat the FIDIC time bar under English law and how this principle is treated under the Egyptian Civil Code jurisdiction.

D. Selection of Standard Contract Form as Basis for Comparison

In Section D of the Literature Review, background was provided on the contracts used in England and Wales, which resulted in the following:

- According to the RICS “Contracts in Use” survey of 2010, the JCT and NEC contracts are the most used in the United Kingdom.
- According to the RIBA National Construction Contracts and Law Survey of 2013, the JCT and NEC are the two most prevalent used contracts in the United Kingdom. FIDIC ranks fourth after bespoke contracts.
- According to the RIBA survey, the FIDIC contracts are used more frequently in substantially larger projects than the JCT and NEC contracts.
- The FIDIC and NEC contracts both have time bar clauses that are considered a condition precedent to a contractor’s entitlement to claim.

It appears from the above that the FIDIC and NEC contracts would be most appropriate options for this research in terms of English law due to their inclusion of condition precedent time bar clauses as well as their commercial use (FIDIC being used more frequently for large projects while NEC used more frequently for middle and small sized projects). Since the comparison under

this research targets England/Wales and Egypt, the decisive factor for the selection is which of the two forms is used more frequently in Egypt. Section D of the Literature Review demonstrates the following with respect to Egypt:

- According to surveys in 1994 and 2009, the FIDIC form of contract was the most used international standard form of civil engineering contracts in the Arab Middle East
- The FIDIC form of contract has been widely used in a considerable number of important projects in Egypt, such as Terminals Two and Three of the Cairo airport, the Grand Egyptian Museum, the Greater Cairo Wastewater Project, the Cairo Metro Project and Damietta Project.
- The FIDIC form of contract is used in all projects financed by the World Bank, USAID and JICA all of which fund a large number of infrastructure projects in Egypt.
- Egypt hosted a number of FIDIC conferences attended by professionals from Egypt and the Middle East, including the FIDIC-ICC conferences of April 9 and 20, 2005, and the FIDIC-CRCICA-ESCON conferences of January 2011 and April 2016.

In light of the foregoing, the FIDIC form of contract is the common factor in both jurisdictions, as it is both commonly used and inclusive of the time bar clause. Therefore, the time provision in sub-clause 20.1 of the FIDIC 1999

Red Book is selected as the basis for the comparison undertaken in this research regarding both jurisdictions. It is important to note, however, that the results in this research are applicable to any bespoke contract containing a time bar clause that satisfies the two prerequisites under English law for the clause to be considered a condition precedent. The selection of the FIDIC 1999 Red Book is merely a sample or benchmark for the comparison to take place.

V. COMPARISON POINT # 1 – THE PRINCIPLE OF STATUTE OF LIMITATIONS

A. Introduction

The previous section identified three points that can be used as a base for comparing how condition precedent time bar clauses are enforced in each of English law and the Egyptian Civil Code jurisdiction. The first is the extent to which the principle of limitation periods under the Civil Code under each jurisdiction affects the enforceability of condition precedent time bar clauses. The trigger for this comparison point is the absence of any literature in Egypt that directly addresses the enforceability of the FIDIC 1999 time bar in sub-clause 20.1 (or any other international standard contract). It is therefore only reasonable to step back and study how the Egyptian Civil Code treats the concept of the extinguishment of rights by the lapse of a certain period of time. As highlighted in the previous chapter, there is also the question of the right that is being extinguished, i.e., the substantive right or the right to take legal action. As discussed in the literature review section, the principles of limitation periods under the Civil Code and preclusion periods are the most salient to address this point. Following the Research Methodology chapter,

this comparison point is the focus of comparison for the two jurisdictions. It has been explained in the Research Methodology section that there are four key phases to undertaking the comparison in this research, namely the Conceptualisation, Description, Identification and Explanatory Phases. This section is organised so that it takes into account the remaining three phases, namely the Description, Identification and Explanatory Phases. The first phase, the Conceptualisation Phase, has already been addressed in the previous chapter and concluded with the identification of the three concepts or comparison points on which this research is based. The fourth phase, the Explanatory Phase, is handled at the end as it delves into the historical reasons for the points identified. However, a chapter will be dedicated to the Explanatory Phase after the completion of the three identified comparison points, which ties the results in the separate Explanatory Phases together.

B. Descriptive Phase for Comparison Point No.1

B.1 Statute of Limitations under English Law

B.1.1 Introduction to the Limitation Act 1980

Varoujian (2013) reports that the purpose behind the concept of the statute of limitations is that, in time, evidence is tainted and disappears, the memory of witnesses (if alive) fades, documents are destroyed and, consequently, the chances of producing a fair result in civil proceedings are slim. Therefore, it is necessary and considered part of public interest, to limit the amount of time for a claim to be made through the statute of limitations. He further observes that, in English law, the main source for the provisions of the statute of limitations is the Limitation Act 1980, which is applicable to all laws, except criminal law as there is no statute of limitation on any crime committed in England. An examination of the Act demonstrates that it is comprised of three main parts. The first (Part I) is titled "Ordinary Time Limits for Different Classes of Action" and is a list of causes of action and their limitation periods. The second (Part II), titled "Extension or Exclusion of Ordinary Time Limits", is a description of the exceptions to the rule of limitation. The third (Part III) is titled "Miscellaneous and General" and provides general provisions and clarifications.

The limitation period is generally six years for both tort and breach of contract from the date the cause of action arises. An exception in the case of breach of contract is contracts made by deed, in which case the limitation period is twelve years. There are two exceptions in the case of tort, which are defamation and personal injury. In the former case, the limitation period is one year from the date of occurrence (which can be extended in certain circumstances) while, in the latter, the period is three years from the date of the injury or the date it is discovered.

B.1.2 The Limitation Act 1980 and Contractual Time Bar Clauses

It has been discussed in the Literature Review and Conceptualisation Phase that the topic of limitation periods under the Civil Code and the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book is a recurrent topic in Egypt and in the Middle East. Although English construction law literature does not relate the topic of statute of limitations to contract time bar clauses, it is necessary to delve into this topic pursuant to the research methodology being followed in which a point of comparison (in this case, limitation) is compared across the two jurisdictions. Since, as mentioned in the Literature Review, the Egyptian Civil Code contains an Article (i.e., 388) that prevents contracting parties from agreeing to limitation periods that are different than those prescribed in the Civil Code, it is only fitting that in this section the English

law position is explored to understand whether contracting parties can agree to limitation periods other than the six-year limitation period for simple contracts set in the Limitation Act 1980.

The Law Commission, which was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law, published a report no. 270 on the limitation of actions in 9 July 2001 (referred to as "the LC Report"), directly addresses this point. Under Part III, paragraphs 3.170 to 3.175 (section titled "Agreements to Change the Limitation Period"), the LC Report starts with the statement that, although the Limitation Act 1980 does not have a provision as to whether contracting parties can change the relevant limitation period, there is case law to suggest that courts will uphold such agreements (paragraph 3.170 of the LC Report). However, the LC Report clearly places a condition that such agreements are subject to the reasonableness test under the Unfair Contract Terms Act 1977. Furthermore, the LC Report excludes the agreement of any provisions related to disability, dishonest concealment or the ten year limitation period applying to claims under the Unfair Terms in Consumer Contracts Regulations 1999 (which 14 years after the LC Report was integrated into the Consumer Rights Act 2015). Notably, for the purpose of this research, the LC Report mentions (paragraph 3.172) that agreements to extend the limitation periods is not in the interest

of the public or legal system as it may lead to an unfair trial due to the deterioration of evidence with time. However, the LC Report notes that over sixty five percent of the views from persons consulted on this point responded that the principles of freedom of contract overrode any other limitation considerations. This led to the Law Commission's recommendation that such agreements are valid subject to the three conditions mentioned above.

The way courts apply the test of reasonableness in order to decide whether a contractual time bar is enforced or not is reflected in the case of *Röhlig UK Limited v Rock Unique Limited* (2011). Rock Unique Limited alleged that Röhlig had overcharged it for freight forwarding services and, consequently, was not liable to pay Röhlig's invoices. In its defence, Röhlig referred to two clauses from the British International Freight Association (BIFA) standard form of contract, one of which was a time bar clause for notification of any complaints within a period of nine months. In deciding the case, the Court of Appeal had to first determine whether the clauses in question were reasonable under the Unfair Contract Terms Act 1977. The Court held that the clauses were reasonable due to the following factors:

- (a) Rock has considerable commercial experience notwithstanding that it is a small business;
- (b) There were alternative transport providers for Rock to consider;

- (c) Rock was aware that Röhlig used the BIFA terms and, in fact, was familiar with them;
- (d) Standard terms such as the BIFA terms are negotiated in the industry and represent "*a fair balance of competing interests*"; and
- (e) Clauses of this type are common on a wide variety of commercial contracts.

Having determined that the clauses were reasonable, the Court of Appeal then held that the wording "*...shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided*" within the time bar clause was broadly framed and therefore effectively barred Rock from recovering any overcharged amounts, including amounts due to accounting errors resulting in overpayments by Rock. This ruling is significant in respect of this research, as it demonstrates the factors considered by the courts for applying the 'test of reasonableness' under the Unfair Contract Terms Act 1977 as well as the courts' position regarding contractual time bar clauses. If one examines the five factors applied by the court to test the reasonableness of the time bar in this case, it is observed that these factors can be easily applied to the provisions of the FIDIC 1999 Red Book (including the time bar in sub-clause 20.1), as these factors are not related to the wording of the time bar clause itself. Rather, the factors focus on the contracting parties, their commercial experience and familiarisation with the contract in question. This is in line with the principle of 'freedom of contract'

and the courts' reluctance to interfere between the contracting parties regarding what they have negotiated at their free will. It is also observed that, as long as the time bar clauses are held to be reasonable by the courts, they are enforced.

Two cases illustrate the manner in which the limitation period under the Limitation Act 1980 is applied in respect of contracting parties' agreements. The first is *Oxford Architects Partnership v Cheltenham Ladies College (2007)*, which demonstrates that, in the absence of a clear time bar clause in the contract, the courts will construe the contractual time bar as working alongside the limitation period set out in the Limitation Act 1980. Article 5 of the contract stated that no action or proceedings for any breach could be brought after the expiry of six years from practical completion. The facts of the case centred on the partnership providing architectural services to the College. Practical completion took place on 25 November 1998. The College served an arbitration notice on the partnership on 24 November 2004 alleging breach of contract and negligence. The partnership argued that the College's claim was time barred by statute due to the lapse of six years from the cause of action. The College argued that Article 5 superseded the Limitation Act 1980 and, consequently, the College could commence proceedings any time within six years after practical completion. The arbitrator ruled in favour of

the College, but the court held that the arbitration award was legally incorrect as Article 5 did not contain express wording preventing the partnership from relying on a statutory limitation defence. The second case is *Inframatrix Investments Ltd. v Dean Construction Ltd. (2012)* in which Inframatrix engaged with Dean Construction to carry out roofing and cladding work for a camera factory project. The works were carried out in November and December 2008 and snags were completed on February 2009, leading Dean Construction to maintain that the works had been completed then. During the course of the following months, Inframatrix claimed that Dean Construction's works were defective and initiated pre-action litigation procedures. In March 2010, the parties met on the site and Dean Construction reported, on a "strictly without prejudice" basis, that they offered to carry out further investigations and remedial works. In December 2010, Inframatrix refused and initiated legal proceedings. Dean Construction's main line of defence was clause 17.4 of the bespoke contract which stated:

No action or proceedings under or in respect of this Agreement shall be brought against the contractor after:

- (a) the expiry of 1 year from the date of Practical Completion of the services or;
- (b) where such date does not occur, the expiry of 1 year from the date the Contractor last performed Services in relation to the Project.

Dean Construction argued that February 2009 constituted the date referred to in sub-paragraph (b) and that, in light of the lapse of more than one year from that date to the initiation of legal action, Inframatrix was time-barred under the contract. Dean Construction further clarified that its actions after February 2009 were without prejudice to its position and, therefore, these actions did not constitute a contractual performance. The Court of Appeal ruled in favour of Dean Construction. This case demonstrates that, although Inframatrix's claim was well within the six year limitation period under the Limitation Act 1980, the court ruled in favour of the express limitation period in the contract. Therefore, this further reinforces the point that courts will enforce clearly worded time bar clauses within the contract over the statutory limitation periods. In the Oxford case, in the judge's reasoning, it would have been contractually possible to confer on the College the right to retain a right of action in respect of a breach of simple contract more than six years after that right accrued by excluding the other party's entitlement to rely on the Limitation Act 1980. In the absence of such exclusion by the express words of the contract, the six year period from the accrual of the right (as opposed to the practical completion in this case) is considered to run alongside the contractual time bar. The same principle is applicable in the Inframatrix case in which the contractual agreement to not start any legal proceeding within one year after Dean Construction's last performance of the Services resulted

in the inability of Inframatrix to rely on the limitation period within the Limitation Act 1980 as a defence against the contractual time bar in clause 17.4.

B.1.3 Conclusion

The above demonstrates that, as long as the contract terms pass the reasonableness test under the Unfair Contract Terms Act 1977, courts will enforce the agreement of two contracting parties of equal bargaining power regarding limitation periods that may be different from the limitation periods within the Limitation Act 1980. In case the contract terms are not clear, the periods in the Limitation Act 1980 are considered to run alongside the contractual limitation periods. This observation is clarified by renowned practitioners in English law. For example, Herriott (2012), who writes on behalf of Pinsent Masons LLP, opines that contractual terms imposing a shorter limitation period than that in the Limitation Act 1980 may be subject to the “reasonableness test” under the Unfair Contract Terms Act 1977. She suggests, though, that while the Unfair Contract Terms Act 1977 protects consumers who may be of less bargaining power in respect of complex commercial entities, the courts would be less willing to intervene in contractual terms agreed between contracting parties of equal bargaining power. Hence, the courts would enforce shortened limitation periods in this case. It is worthy

to mention that, while Herriott refers to the Unfair Contract Terms Act 1977 as a vehicle for the protection for consumers, the Consumer Rights Act 2015 is the main statutory vehicle at present for protection of consumers, not the Unfair Contract Terms Act 1977. Similarly, TaylorWessing LLP, state that, in order for time bar clauses with periods shorter than that in the Limitation Act 1980 to be enforceable, the term must be “reasonable” in accordance with the Unfair Contract Terms Act 1977 (McCall, 2014). They add that limitation clauses negotiated between two sophisticated commercial entities are unlikely to be challenged by the courts and that the parties will be free to negotiate any period less than that in the Limitation Act 1980.

At this juncture, it is time to describe limitation under the Egyptian Civil Code.

B.2 Statute of Limitations under the Egyptian Civil Code Jurisdiction

B.2.1 General

The topic of limitation under the Egyptian Civil Code has been briefly discussed in Section E.2.3 of the Literature Review chapter. Therefore, this section provides additional information to that provided.

Sakr (2009) discusses turnkey contracting under the ICC Model Turnkey Contract for Major Projects (“the Model Contract”) and examines provisions in the Model Contract that may be rendered invalid or unenforceable in the Arab

legal systems. He refers in the article to the provision of time limitations in which he draws a distinction between Statute of Limitations (also called "prescription" or "prescriptive period") and preclusion periods, as two principles within the civil law systems (including those of Arab countries) in which a party is barred from raising a claim due to the passing of a certain period of time. He suggests that the distinction between the two principles is not clear, although, in principle, the Statute of Limitations extinguishes the right of action itself, while the preclusion period limits in time the exercise of that right of action by its holder. Importantly, he refers to Article 388 of the Egyptian Civil Code, as Haloush did a year earlier, with an emphasis that the "Statute of Limitations (or prescriptive period) in the Arab law systems is set forth by the legislation itself and may not be extended or reduced by the agreement of the parties being of a public policy nature" (p. 148). However, he suggests that some preclusion periods can be modified by agreement of the parties and makes a passing reference to Al Sanhoury's book *"Al-Waseet"*. He refers to Islamic law ("Sharia"), which is a key influence in the laws of most Arab countries, to state that, as a matter of public policy, the Statute of Limitations only bars the remedies and the claim, but not the substantive right itself. It is important to point out at this juncture that it is reported that the basic principle in Islamic law is that no one's right can be affected by the lapse of time, notwithstanding that some Islamic schools of thought have resolved

that an action to enforce a claim can be barred after the lapse of a certain period of time (Amin, 1985). Consequently, whether taken from the express provisions of the Arab Civil Codes, or from the Sharia, reducing by contract a limitation period deriving from statute may be invalid or unenforceable.

The year following the publication of Sakr's article (i.e., 2010), in the FIDIC Middle East Contract Users' Conference in Abu Dhabi, El Haggan (2010) made a presentation on time limitations in the FIDIC Yellow Book and made reference to the two principles in the Arab Civil Codes mentioned by Sakr, namely the limitation periods under the Civil Codes and the preclusion periods. As in Sakr's article, El Haggan opines that the limitation periods under the Civil Code cannot be modified by contracting parties as a matter of public policy, while preclusion periods may be modified. He mentions that some commentators conclude that the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book is considered invalid due to the notion that it violates the limitation period within the Arab countries' Civil Codes and expresses his disagreement. He opines that the topic of limitation periods under the Civil Code is not a matter of public policy and that sub-clause 20.1 does not attempt to reduce the limitation periods under the Civil Code. Rather, he suggests, the time bar under sub-clause 20.1 can be categorised as a preclusion period and, therefore, is enforceable under the Arab Civil Codes. He concludes the section

of his presentation on time limitations with the observation that many arbitrators choose to ignore the agreement of the parties and hold the time bar unenforceable, thereby creating a dangerous precedent due to the parties' uncertainty in evaluating their position when referring disputes to arbitration. On the assumption that the time bar is a condition precedent, an employer may be surprised to find an award against him despite the contractor's non-compliance with the express notice requirement. Similarly, a contractor may choose to not refer certain disputes to arbitration in light of the assumption that his entitlement has been time-barred by the express provisions in sub-clause 20.1 only to find (from practitioners in the industry through conferences such as that of the FIDIC mentioned above) that, in similar cases, arbitrators have ignored the express time bar clause and evaluated the submitted disputes. An example of an arbitration case in Egypt that used the reasoning of limitation periods in the law to reject the concept of a time bar is Case No. 4 in Section E.2.5 of the Literature Review chapter.

Six years later, in 2016, the topic continued to be a centre of discussion in the same conference (which was held then in Dubai). When addressing the enforceability of sub-clause 20.1 of the FIDIC 1999 suite of contracts under the UAE Civil Code, Attia and Joshi (2016) opine there are two possible defences for a contractor against the time bar in the FIDIC contract. One of

these defences is a jurisdictional defence, taking into account that the statutory time bar clauses under Article 487.1 of the UAE Civil Code are mandatory and that the 10-year time limit in the code is intended to apply to (commercial) construction contracts. The equivalent to the 10-year period in the UAE Civil Code is the 15-year period in Article 374 of the Egyptian Civil Code. When asked during his presentation on 18 February 2016 about the extent to which the FIDIC time bar is enforceable in the UAE, F. Attia responded that the FIDIC time bar would not be upheld under UAE law and that, according to his experience, there were two instances where arbitration proceedings upheld the statutory provisions against the FIDIC time bar in sub-clause 20.1.

The following year, in 2017, the topic of time bar clauses was discussed again by Witt. In his presentation, Witt succinctly summarised the matter as follows (but with respect to the UAE Civil Code):

There is a substantive difference between a contractual provision which seeks to prevent the Contractor from commencing any proceeding before the expiry of a statutory limitation period (which clearly offends the code provisions), and a contractual provision which does not seek to bar any such proceeding being commenced, but provides that there shall be no entitlement to an EOT or further remuneration (see Sub-Clause 20.1) or similar relief in any such proceeding (Witt, 2017).

The above discussion demonstrates that there is debate as to whether the FIDIC time bar in sub-clause 20.1 is considered a limitation period under the Civil Code or a preclusion period. If it is a limitation period under the Civil Code period, then it would be unenforceable due its substantial reduction of the limitation periods under the Egyptian Civil Code. If it is considered a preclusion period, then it may be enforceable.

Another argument regarding the enforceability of the FIDIC time bar in sub-clause 20.1 vis-à-vis the Egyptian Civil Code is that of Saket (2012). This was discussed in Literature Review, Section E.2.4, which referred to Article 657 of the Egyptian Civil Code as an example of a time bar that applies to construction contracts of a re-measured nature. It is important to note that the Egyptian Civil Code contains a section that specifically addresses construction contracts. This section is from Articles 646 to 673 and is titled “Contracts for Work”. There are two notable time bars in that construction contracts section. The first is addressed in Articles 651 to 656, which is in relation to the engineer and contractor’s decennial liability regarding any total or partial collapse of a constructed structure. Article 654 contains a limitation period of three years from the date of collapse or the discovery of the defect. The second is Article 657, which contains the time bar for “immediate” notification by the contractor to the employer of any substantial increase in

the contract price due to an increase in quantities in a re-measured contract. The time bar under Article 657 is more closely related to the FIDIC time bar in sub-clause 20.1, as they both address contractor notifications regarding an increase in the contract price. It can therefore be argued that, while Article 388 contains the general limitation period under the law for taking legal action concerning a certain claim, the time bar in Article 657 is applicable to construction contracts as it specifically addresses claims notification for additional cost increase in re-measured construction contracts. Although Article 657 is limited to quantity increases in re-measured contracts for an agreed design by an employer, it can be argued that it can have a broader application to claims for any substantial increase in the contract price. The reason is that, although the article only addresses the situation of an increase in price due to an increase in the quantities of an agreed design, it is silent about an increase in the contract price as a result of a variation or an event caused by the employer. If the increase in quantities in a re-measured contract is considered by industry standards common practice, and the contractor is time-barred under this article from raising a claim (and in fact may be subject to termination of his contract without recovery of lost profits), then by inference it is reasonable to deduce that the same time bar would apply to the situation where the contractor believes he is entitled to an increase in the contract price due to a factor attributable to the employer or

for which the contractor is not responsible (which is the case in sub-clause 20.1). This reasoning is in fact in line with Hamed (2011) who, as mentioned in Section E.2.4 of the Literature Review chapter, considered factors that can cause an increase in price but which have not been accounted for under the article and suggests that the article would be modified so that the time bar is applicable to additions to or changes in the design (which is similar to the scope of the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book).

It is also important to observe that the main reference point of all the points discussed above is Professor Abdel Razzak Al Sanhoury, who, as discussed in the Literature Review section, is considered the founder of the Egyptian Civil Code as well as the codes of numerous other Arab countries. Therefore, in order to properly assess the underlying issues of this debate, it is important to examine Al Sanhoury's references directly.

B.2.2 Al Sanhoury on the Statute of Limitations

In addition to drafting the Civil Codes of Egypt as well as numerous Arab countries, Al Sanhoury is well renowned in the Arab world and elsewhere in the world for his 12-volume work called *Al-Waseeṭ fī sharḥ al-qānūn al-madani al-jadīd* (Medium commentary on the new Civil Code), which was written in Cairo between 1952 to 1970. The third volume of this work addresses the principle of limitation periods under the Civil Code. Although an entire chapter

is dedicated to this principle, it is important, for the purpose of this research and in light of the above background, to understand in particular two concepts: (a) the distinction between limitation periods under the Civil Code and preclusion periods, and (b) the prohibition on contracting parties against modifying limitation or preclusion periods where these are provided for by law. The importance of the former is that, as mentioned in the Literature Review section, there is debate in the literature and FIDIC seminars (e.g., Sakr, 2009 and El-Haggan, 2010) as to whether the time bar under sub-clause 20.1 is enforceable in Middle East Civil Codes and the pivotal point of discussion is whether the sub-clause is categorised as a limitation period under the Civil Code or a preclusion period. The importance of the latter is that, notwithstanding the legal position of limitation periods under the Civil Code and preclusion periods within the law, the matter of relevance in this research is how this impacts contract agreements (such as FIDIC).

B.2.2.1 Distinction between Limitation Periods and Preclusion Periods in Al-Waseet

This distinction is set out in paragraph (594). The following is a summary of the distinctions mentioned in this paragraph:

1. Preclusion and limitation periods under the Civil Code have a common purpose, which is to protect stable circumstances and to penalise the creditor for his negligence. By 'stable circumstances', Al Sanhoury

explains in section (592) that it is the stretch of time during which the creditor did not ask for his debt, thereby leading the debtor to believe that his debt has been paid off and that the circumstance has stabilised. However, preclusion periods have an additional purpose, which is to set a time period during which an action must be performed, else the action would be considered null.

2. The application of preclusion and limitation periods under the Civil Code differs under the Egyptian law. Preclusion periods can be triggered by the court, cannot be interrupted and cannot be stopped. Limitation periods, on the other hand, must be initiated by the litigant party (i.e., not the court), can be interrupted and can be stopped. A preclusion period cannot be used as a defence because it is a right that has been extinguished for non-use. On the other hand, a limitation period under the Civil Code can be used as a defence because defences are not subject to prescription.
3. Preclusion periods are generally short, while limitation periods are generally long. However, Al-Sanhoury states that this is not necessarily always the case. There are preclusion periods that are as long as some limitation periods in the law, while there are limitation periods that are relatively short. He adds that there are periods in the law that can be interrupted but not stopped and clarifies that these periods can be

categorised as limitation periods unless the primary cause of such periods is to act as preclusion periods.

4. The purpose of the period in question is the primary means of distinguishing as to whether the period can be categorised as preclusion or limitation. If the purpose is to be the evidence of discharge of an obligation, then such a period can be categorised as being limitation. Al-Sanhoury clarifies that a debt that is overtaken by the expiry of its limitation period is assumed to have been fulfilled and the debtor discharged from his obligation. The law makes this assumption a legal reality. The limitation period is therefore a means of evidence, or a means of discharge thereof, rather than a cause for the cessation of an obligation. However, preclusion periods are not subject to any assumption or any discharge. Rather, Al-Sanhoury explains, preclusion periods require their use within a certain period of time or else the right in question is extinguished. Therefore, they are a punishment for the non-use of a right within a specified period of time.

5. Preclusion periods are considered an integral component of the right, without which the right would not be complete. As a prerequisite for the right to be complete, litigation must be commenced within the specified time. However, in the case of a limitation period, the right had already been completed and formed and the period is not a prerequisite

for the completeness of this right. The law is concerned with the preservation of the complete right and, therefore, it is for this reason that limitation periods can be interrupted or stopped. However, the law is not concerned with the protection of a semi-right that has not come to light and, therefore, the law does not permit any stoppage or interruption of a preclusion period – even if the end date falls on a national or religious holiday or was impacted by a case of force majeure.

6. Preclusion due dates cannot be modified by the will of the concerned parties as opposed to limitation dates, which can be modified during a dispute through a party's waiver of the lapsed period. Moreover, preclusion periods cannot be waived after their commencement. Upon the lapse of the preclusion period, the right is extinguished absolutely.

Al-Sanhoury then provides examples from the Egyptian Civil Code as to what constitute limitation periods and preclusion periods. The following is a summary of the examples given for limitation periods that may be applicable to a construction contract setting:

Table 7 Examples of Limitation Periods under the Egyptian Civil Code (Sanhoury, *Al-Waseet*, Volume 3, Paragraph 594)

Article(s)	Description
374 to 378	Addressed in more detail in the Literature Review section. These include:

Table 7 Examples of Limitation Periods under the Egyptian Civil Code (Sanhoury, *Al-Waseet*, Volume 3, Paragraph 594)

Article(s)	Description
	<ul style="list-style-type: none"> • General limitation period of 15 years (Article 374) • Period of five years for sums due to physicians, chemists, lawyers, engineers, experts, receivers in bankruptcy, brokers, professors or teachers (Article 376) • Period of one year for the rights of action of merchants and manufacturers in respect of things supplied to persons who do not trade in these articles (Article 378).
140	Period of three years for the right of rescission of a contract. In the cases of rescission claimed as a result of mistake, fraudulent representation or duress, fifteen years from the date of the conclusion of the contract is the maximum period.
172	Period of three years for damages arising from an unlawful act from the date upon which the harmed party was aware of the harm and the person who was

Table 7 Examples of Limitation Periods under the Egyptian Civil Code (Sanhoury, *Al-Waseet*, Volume 3, Paragraph 594)

Article(s)	Description
	responsible. An action for damages is prescribed in any case after fifteen years from the date on which the unlawful act was committed.
180	Period of three years for unjust enrichment from the date on which the injured party knew of his right to be compensated and in any case after fifteen years from the date that the right first arose.
187	Period of three years for restitution of payment unduly received from the day on which the payer knew of his right to claim restitution and in any case after fifteen years from the date upon which the right arose.
452	Period of one year for an action on a warranty from the time of delivery of the thing sold. However, if it is proven that that vendor has fraudulently concealed the defect from the purchaser, this period does not apply.
434	A period of one year for the purchaser to apply for a reduction of the price or for cancellation of the contract in a case of deficiency or excess in the thing sold, as

Table 7 Examples of Limitation Periods under the Egyptian Civil Code (Sanhoury, *Al-Waseet*, Volume 3, Paragraph 594)

Article(s)	Description
	well as the right of the vendor to claim that the price be made up, from the date of the actual delivery of the thing sold.

The following is a summary of the examples given by Al-Sanhoury for preclusion periods under the Egyptian Civil Code (only the ones that may be applicable to a construction setting are listed):

Table 8 Examples of Preclusion Periods under the Egyptian Civil Code (Sanhoury, *Al-Waseet*, Volume 3, Paragraph 594)

Article(s)	Description
129	Proceedings instituted on the grounds of a contracting party exploiting another shall be barred unless commenced within one year from the date of the contract.
455	When a vendor has warranted the proper working of the thing sold for an agreed period of time, the purchaser, in the case of a defect subsequently appearing in the thing sold, must, under pain of

Table 8 Examples of Preclusion Periods under the Egyptian Civil Code (Sanhoury, *Al-Waseet*, Volume 3, Paragraph 594)

Article(s)	Description
	forfeiture of his right to the warranty and subject to any agreement to the contrary, give notice to the vendor within one month from the date of the appearance of the defect and commence an action within six months from the date of notification.

The explanation provided by Al-Sanhoury on the difference between limitation and preclusion periods under the Egyptian Civil Code, as well as the examples given of each, is pivotal to this research. Based on the explanation and examples given, the time bar under Sub-Clause 20.1 of the FIDIC 1999 Red Book can be categorised as resembling a preclusion period. This conclusion can be reached by giving special consideration to the following wording under this sub-clause:

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.

It can be understood that, in Al-Sahoury's words, the serving of this notice within the specified time is considered an integral component of the

contractor's right to claim. In other words, the right of the contractor cannot come to fruition unless the notice is served within the specified time. In addition, an examination of the examples given under the Egyptian Civil Code demonstrates that the sub-clause 20.1 resembles a preclusion period. For example, Article 129 (i.e., the first example in Table 8) specifically mentions that the cause of action will be barred or forfeited if legal proceedings are not commenced within one year. Interestingly, Al Sanhoury refers to Article 248 (not listed in Table 8 due to not being related to construction contracts), which states:

The right of retention is extinguished by the fact of the thing ceasing to be in the hands of the possessor or the holder. A person retaining the thing, who has lost possession thereof without his knowledge or in spite of his opposition, may claim restitution of the thing, if he makes his claim within a period of thirty days from the time he became aware of the loss of possession, provided that one year has not elapsed since the date of loss.

It is observed that the specified time for action is linked to the "awareness" of the person losing his possession, which is the same wording used by FIDIC to trigger the 28-day time bar for contractor's claim. However, the above explanation of limitation and preclusion periods is in relation taking legal action based on provisions within the Egyptian Civil Code. The question then arises as to how the law treats the concept of extinguishment of rights that are agreed upon between contracting parties. As a first step to answering this

question, it is important to understand, in the context of the Egyptian Civil Code, the extent to which limitation and preclusion periods can be modified by contracting parties. This is elaborated upon in the next section.

B.2.3 Al Sanhoury on the Agreed Reductions to Civil Code Limitation and Preclusion Periods

B.2.3.1 Limitation Period

Al-Sanhoury elaborates on this point in paragraph (612) of *Al-Waseet* (Volume 3). He refers to Article 388 of the Egyptian Civil Code, which states: “A debtor cannot renounce the benefit of prescription before he has acquired the right to invoke it, nor can he agree to a term of prescription than that fixed by law” and explains that contracting parties cannot agree to extend or reduce the limitation periods set by the law. He states that this provision was not present in the Egyptian law prior to 1948, which followed the French Civil Code at the time. The French law mandated that limitation periods cannot be extended because that would not be in the interest of the debtor. In addition, if the contracting parties agree to extend the limitation period to 50 or 100 years, then such an agreement can be considered a renouncement of the limitation period from a practical standpoint. Al-Sanhoury comments that the French law, on the other hand, permits contracting parties to reduce the limitation period on the condition that the reduced period is sufficient for the creditor to

ask for his debt. He explains that the French law's rationale is that this reduction would be to the benefit of the debtor, although this is not necessarily the case. The debtor can, in some cases such as in transportation or insurance contracts, be the stronger bargaining party. It is for this reason that a French law dated July 30, 1930, in relation to insurance contracts, nullified any agreement to reduce the limitation period or to even extinguish the right of the insured in the first place if certain actions, such as notification of an accident or the provision of supporting documents, were not supplied within a specified period of time. Al-Sanhoury comments that the new Egyptian code (i.e., meaning that of 1948) has an explicit provision in regards to limitation periods, which was taken from the French-Italian project. The limitation periods are not subject to any extension or reduction by the contracting parties and are, therefore, a matter of public policy that is not left to the will of individuals.

B.2.3.1 Preclusion Periods

At the end of paragraph (594) of Volume 3 of *Al-Waseet*, Al-Sanhoury mentions that there are preclusion periods that are considered matters of public policy, which cannot be reduced or extended by agreement of the parties, and there are others that are not of public policy, which can be

adjusted by agreement. He refers to Article 455 of the Egyptian Civil Code which states:

When a vendor has warranted the proper working of the thing sold for an agreed period of time, the purchaser, in the case of a defect subsequently appearing in the thing sold, must, under pain of forfeiture of his right to the warranty and subject to any agreement to the contrary, give notice to the vendor within one month from the date of the appearance of the defect and commence an action within six months from the date of notification.

Al-Sanhoury refers to the phrase "subject to any agreement to the contrary" and states that this provision is not of public policy and, therefore, can be changed through agreement of the parties.

On the other hand, he refers to Article 739 which states:

Any agreement relating to a game of chance or a bet is void. A person who loses in a game of chance or on a bet may, notwithstanding any agreement to the contrary, reclaim what he has paid within three years from the time when he made the payment. He may prove such payment by all available means.

The phrase "notwithstanding any agreement to the contrary" is a clear indication that this provision is of public policy and, therefore, not subject to the parties' agreement.

Al-Sanhoury then explains that the main distinction is whether the provision serves to protect the rights of individuals or whether it serves a greater societal purpose. In the case of the former, it is not a matter of public policy and may be subject to the parties' agreement and, in the case of the latter, it is a matter of public policy and is not subject to the parties' agreement. As in

the case of the section on limitation periods under the Civil Code, it is observed in this section that preclusion periods are in relation to taking legal action. This is regardless of whether the prescription period in question is a matter of public policy or not.

B.2.3 Al Sanhoury on the Time Bar under Article 657 of the Egyptian Civil Code

In Volume 7, paragraph 2, of *Al-Waseet*, Al Sanhoury clarifies the distinction between contracts for work (which includes construction contracts) from all other contracts. In fact, Volume 7 is dedicated to four types of contracts, among which is the contracts for works. Al Sanhoury provides in this Volume comprehensive information regarding construction contracts, from inception until completion of the works. Throughout paragraphs 94 to 98, he explains Article 657 of the Egyptian Civil Code. The following are some highlights of his explanation:

1. There are three distinct conditions for this Article to apply:
 - a. The price of the contract must be agreed and the type of contract must re-measured. Hence, if the price is not agreed upon at the start of the contract, or if the contract is executed on a lump sum basis, this Article does not apply.

- b. The quantities in the bill of quantities must increase substantially due to a cause that was not known at the entry of the contract. The emphasis here is on the quantities, not the rates. So, for example, if a contractor determines while excavating foundations that it is necessary to excavate to a depth that is substantially more than that in the bill of quantities, that is the substantial quantity increase referred to under this Article. The increase must have also not been expected at the time of contract inception. If it was expected, or should have been expected, then the employer is required to compensate the contractor.
- c. The contractor must notify the employer as soon as he is aware of the increase. There is no form for such notification, for it can be by hand, registered mail, normal mail or orally. In all cases, the burden of proof that such notification was made falls on the contractor. If the contractor remains silent for a certain period of time with no justifiable reason, then it is considered that the contractor has implicitly waived his right to be compensated for the increase in price. The notice must also contain the contractor's estimated increase amount. The essence is in the estimate notified by the contractor, not in the actual increase.

Therefore, a contractor is advised to take caution so that the notice contains the basis for the estimate, not necessarily a certain amount. If the contractor fails to provide the notice, or is delayed in providing the notice without justifiable cause, or does not mention in his notice the estimated amount or at least the basis of the expected price increase, then the contractor would have lost his right to claim the increase in his costs as a result of the increase in the bills of quantities and his compensation will be limited to the amount in the bill of quantities notwithstanding the substantial increase therein.

2. Al Sanhoury then draws a distinction as to what can be considered a substantial increase in quantities. He mentions that the determination of what is substantial is in the hands of the judge but suggests that an increase of more than 10% of the contract price may be considered substantial.
3. If the increase is substantial, then pursuant to the second paragraph of Article 657, the employer has two options:
 - a. To maintain the contract effective and request that the contractor completes the work. In this case, the contract price is increased

in accordance with the substantial increase in the bills of quantities; or

- b. To terminate the contract if the employer considers that the substantial increase is exhaustive to him. In this case, the employer must promptly request the contractor to stop work. If the employer is delayed in making such a request without justifiable cause, then the contractor may proceed with the work assuming that the employer selected the first option.

- 4. In the case of termination, the contractor is compensated the works he completed in accordance with the rates in the bills of quantities (not his actual expenditures), without any provision for loss of anticipated profit of the terminated part of the works.

An example of a case concerning Article 657 that was decided upon by the Court of Cassation is provided in Section E.2.6 of the Literature Review chapter.

It is observed from the foregoing that a time bar, very similar in nature to the one in sub-clause 20.1 of the FIDIC Red Book 1999, exists in the Egyptian Civil Code. There is an “immediate” requirement for the notice (not even 28 days), which is triggered from contractor’s awareness of the substantial

increase in the contract price. In addition to the notice requirement, the contractor must also notify the employer of the anticipated increase in price. Failure to provide the notice and/or the estimate of the expected increase (at least the basis, not necessarily the amount) results in an unequivocal loss of the contractor's right. Interestingly, the FIDIC Red Book is based on a re-measured contract as well. There are, however, two main distinctions between the time bars in sub-clause 20.1 of the FIDIC contract and Article 657 of the Egyptian Civil Code:

1. Article 657 addresses the particular case of an unforeseen and substantial increase in the quantities of the contract that ultimately leads to a substantial increase in the contract price. Sub-clause 20.1, however, is applicable to any situation that the contractor believes will result in additional payment or an extension to the completion date. In this respect, it can be argued that Article 657 does not address factors, other than natural increase in quantities, which may result in an increase to the contract price. For example, additional scope of work, variations, changes in legislation, design errors and contractor errors during execution of the work are specific examples of how the contract price can increase in a re-measured contract. However, Article 657 is silent regarding these other factors. This point of the limited application of

Article 657 was also highlighted by Hamed (2011), as he examined the Article and made a proposed rewording to enhance its application. He proposed adjustments so that the time bar applies to the case of a substantial increase in the contract price due to additions or changes to the design but not to the case of an increase in the contract price due to the inaccuracy of the bill of quantities.

2. Article 657 applies only to re-measured contracts. However, sub-clause 20.1 applies to both re-measured and lump sum contracts. Although the Red Book 1999 is re-measured type of contract, the Yellow and Silver Books 1999 are both lump sum types of contracts and both include sub-clause 20.1 with its time bar.

The second point triggers the question: What is the status of the time bar in the Egyptian Civil Code with respect to lump sum construction contracts?

To answer this question, it is necessary to examine Article 658, which addresses lump sum contracts.

B.2.4 Al Sanhoury on Article 658 of the Egyptian Civil Code

Article 658 of the Egyptian Civil Code states:

When a contract is concluded on a lump sum basis according to a design agreed with the employer, the contractor has no claim to an increase of

price, even if modifications and additions are made to the design, unless such modifications or additions are due to the fault of the employer, or have been authorized by the employer and the price thereof agreed with the contractor.

Such agreement should be made in writing unless the principal contract was concluded verbally.

The contractor has no claim to an increase of price on the grounds of an increase in the price of raw materials, labour or any other item of expenditure, even if such increase is so great as to render the performance of the contract onerous.

When, however, as a result of exceptional events of a general character which could not be foreseen at the time the contract was concluded, the economic equilibrium between the respective obligations of the employer and of the contractor breaks down, and the basis on which the financial estimates for the contract were computed has consequently disappeared, the judge may grant an increase of the price or order the rescission of the contract.

Al Sanhoury provides the following clarifications regarding this Article:

1. In paragraph 100 of Volume 7 of *Al-Waseet*, Al Sanhoury highlights that there are three main conditions for the applicability of this Article 658:
 - a. The contract price must be fixed and not subject to any increase or decrease. The employer in this case desires to determine with certainty the price that will be paid for the work. Hence, if the price is not determined with finality and certainty, as in the case where the contract allows for an adjustment to the contract price depending on the actual expenses incurred by the contractor, then

this Article does not apply to this contract and the general rules of law apply.

- b. The contract must be based on an agreed design so that the extent of the work is clear and final. The design must be complete and inclusive of all the work that is needed at execution of the contract, not at a later date. The design must also be clear, meaning that the design cannot contain general guidelines or an inaccurate rough plan of the works. Finally, the design must be final. So, if any of the contracting parties is entitled to implement a change to the design, by way of addition, omission or modification, the design is not final and Article 658 does not apply.
- c. The contract entered into must be between an employer and a contractor. Hence, a contract between a main contractor and a subcontractor does not trigger the application of Article 658 and, in that case, the general rules of law apply. The reason is that the purpose of Article 658 is to protect the employer, who is usually an inexperienced, non-technical person from the contractor, who is always highly experienced and technical. The purpose of the Article is lost in the relationship between a main contractor and his subcontractor, since they are both of equivalent

stature in terms of technical knowledge and experience. Al Sanhoury clarifies that the third and fourth paragraphs of Article 658 can apply to a main contractor and his subcontractor as these paragraphs are not related to the price or design status of the contract.

2. In paragraph 101, Al Sahnoury clarifies that, if the above three conditions are met, the contract price cannot be adjusted for any reason whatsoever, even if the contractor adds an important and necessary modification to the design (it is not clear how a contractor can add to the design), if the prices of material and labour increased, if an accident occurs that results in increased costs, if the ground conditions result in additional works, if a plague spreads that results in increased costs, if the transportation costs of basic materials or of labour increased, if the costs of insurance over some of the required works increased or if taxes on imported materials increased.
3. Al Sanhoury then adds that all this is strictly in line with the intent of the parties (when entering into a lump sum contract), for the employer's intent is to seal a fixed price for a work because he wants to know with finality and certainty the amount he needs to pay so that the contractor cannot claim additional money. In the same time, he cannot pay to the

contractor less than that agreed amount. The purpose behind the employer's entry into such contract is to be in a stable state in which he is not surprised by any increase. Article 658 establishes this principle so that the employer is protected from the contractor due to the former's inexperience in relation to the latter. It is said that this principle is not a matter of public policy, therefore contracting parties can agree otherwise. However, in that case, Article 658 does not apply to that contract.

4. There are two exceptions under Article 658, which would entitle the contractor to compensation. The first, which is the most relevant to this research, is that the design is modified due to the employer's fault. Al Sanhoury gives several examples, including errors in the project boundaries and construction on a land that is not owned by the employer necessitating demolition of the part constructed on that land and redesigning the project so that it fits on the land owned by the employer. In these cases, the contractor is entitled to an increase to the lump sum price because the increase is attributable to the employer's fault. It is not necessary that the fault is intentional or that it is made in bad faith. It is also not necessary that the increase is due to a fault in design. It is sufficient that the employer causes, through his actions, an increase

in costs, such as the case where an employer is late in providing the building permit which delays the contractor and results in prolongation costs borne by the contractor.

The above clarifications on Article 658 demonstrate that the Egyptian Civil Code's understanding of a lump sum contract may be different than that understood and practiced in modern times. Hence, a lump sum contract that allows for adjustments due to changes in legislation or due to fluctuations in the cost of labour and material, as in sub-clauses 13.7 and 13.8 of the FIDIC Yellow Book respectively, would not fall under the scope of Article 658. Similarly, if the design is not complete, clear and final at the time of entry into the contract, Article 658 would not apply. So, for example, a lump sum contract that is design-build (such as the FIDIC Yellow Book), or a lump sum contract that is executed on a fast-track basis where construction proceeds for parts of the work as design is being completed for the remaining parts, would not fall under the scope of a lump sum contract under Article 658. Moreover, a subcontract agreement would not fall within the scope of the first two paragraphs of Article 658.

The question then is, absent the categorisation of the contracts mentioned above as lump sum contracts under Article 658 of the Egyptian Civil Code, would such contracts fall under the scope of Article 657 (i.e., re-measured

contracts) and therefore subject the contractor to the time bar notification therein regarding an increase to the contract price? It can be argued that these contracts would not fall under the re-measured contracts under Article 657, but rather, under the “general rules of law” which Al Sanhoury repeatedly refers to when he concludes that a certain situation (e.g., an incomplete design or an agreement for compensation in case of labour cost increase) does not fall within the scope of Article 658. It is understood that these “general rules of law” refer to the provisions of the Egyptian Civil Code other than those dedicated to construction contracts (i.e., namely Articles 646 to 673). This leads back to the discussion in the previous sections about limitation and preclusion periods within the Egyptian Civil Code. However, as pointed out in these sections, the main reference therein is to when a contractor can take legal action. The periods are also represented in years, up to a maximum of 15 years. However, is that consistent with the spirit of the law in respect of construction contracts in specific? Can a contractor rely on the “general rules of the law” to argue that notwithstanding any contractual time bar the right to claim is not waived or barred as long as the limitation periods (expressed in years) are not exceeded? It is suggested that this is highly unlikely, as evidenced from the clarifications of Al Sanhoury.

A closer examination of Articles 657 and 658 of the Egyptian Civil Code demonstrates that construction contracts have a special treatment under the law and that there is argument to support the view that law will uphold any contractual provision that bars the contractor from entitlement to additional payment or an extension of time if a notice to the employer is not served within a specific period of time. The rationale for such deduction can be summarised in the following points:

1. Article 657 is clear in its requirement for an “immediate” notice by the contractor if the quantities in a re-measured contract increase to the extent that the contract price is substantially exceeded. This is a relatively stringent requirement (certainly more stringent than sub-clause 20.1 of the FIDIC contract), since the employer in a re-measured contracts is usually expected to pay the contractor the price associated with the actual quantities executed. It is industry standard that the natural increase in the quantities of a re-measured contract is an employer’s risk and that the contractor is not under any obligation to notify the employer when the contract price increases substantially. If this is the law’s position regarding a risk that is commonly taken by the employer, then it is reasonable to assume that the law will support an arrangement in a re-measured construction contract where the

employer and the contractor agree that a contractor's compensation for an event to which the contractor believes he is entitled additional payment and time is contingent upon the contractor's notification within 28 days (not "immediately") of the event giving rise to the claim.

2. As Hamed (2011) opines, it is highly likely that Article 657 of the Egyptian Civil Code, when drafted, did not reflect an accurate understanding of the nature of re-measured construction contracts and did not address factors, other than the increase in quantities, which can lead to a substantial increase in the contract price. A similar view is shared by Larkin (2007) and Shafik (2010), who considered an identical article in the UAE Civil Code as outdated and requiring reform. As pointed out in Section C of the Literature Review, there is a view that time bar clauses did not come to the scene in the United Kingdom before 1999 (i.e., with the FIDIC 1999 contracts), therefore it is not surprising that fifty years earlier in 1948 (the time of the promulgation of the Egyptian Civil Code) the more sophisticated concept of applying the time bar to factors other than the increase in quantities (such as design changes, additional work and so on) was not present. However, it can be argued that the spirit or intent of the law is that in re-measured construction contracts (if not all construction contracts) a contractor's

immediate notification to the employer of a substantial price increase is of paramount importance.

3. It is apparent from Al Sanhoury's commentary on Article 658 that the purpose of the Article is to protect the non-technical, inexperienced employer from the technical and highly experienced contractor in a lump sum contract. Therefore, although Article 658 does not contain a time bar like the one in Article 657, it can be argued that the law is concerned with protecting the interests of the employer in a lump sum construction contract, especially when there is a potential increase in the agreed upon contract price. As Al Sanhoury explains, the law does not allow for any increase in the contract price, even if the factors are beyond the contractor's control (such as labour and material increases, except for the cases of employer's fault and exceptional circumstances). Of particular importance is Al Sanhoury's reference to the avoidance of the "surprise" factor to the employer, whose main purpose from entry into the contract is to have his project constructed for a fixed price. Therefore, it is reasonable to assume that the spirit of the law supports the protection of the employer from potential increases in the lump sum contract price due to reasons of which the contractor is aware (and the employer is not). It is certainly not in the interest of the employer, and

is contrary to the spirit of the law as clarified by Al Sanhoury, that a contractor remains silent about a significant price increase for months or years after being aware of the event giving rise to the claim on the basis that his right to claim is maintained under the law for a period of 15 years (according to the general limitation period in Article 374). Although a contractor can argue that Article 658 explicitly mentions the employer's fault as one of the two factors that allows compensation in a lump sum contract, and that variations and additional work are one of the most common characteristics of price and time increases in a construction contract, it can still be argued that the Egyptian law supports the view that the employer must be made aware that his fault may result in such a potential increase so that the employer may have the opportunity to remedy the situation and preserve as much as possible the price he bargained for with the contractor.

4. In addition to the above, if the parties to a construction contract agree that a period of 28 days from the event giving rise to a claim is the period within which the contractor must notify the employer of an additional payment or time extension or the contractor will lose his right to claim, it can be expected from the clear wording of the time bar in Article 657 (taking into account the omission in the law highlighted

above with respect to factors other than the natural increase in the quantities that can cause a substantial increase in price) and the intent of protecting the employer in Article 658 (as clarified by Al Sanhoury) that the law will uphold such an agreement.

B.3 Summary of Descriptive Phase for Comparison Point # 1

The above demonstrates that a key difference between the English law and the Egyptian Civil Code with respect to limitation is that contracting parties can agree to change the limitation periods in the former, while they cannot in the latter.

Two important observation are highlighted at this point:

1. Limitation periods are concerned with the right to take legal action before court, while the FIDIC time bar reflects the contracting parties' mutual agreement that a contractor's right to claim additional payment or an extension of time under the contract is forfeited if the contractor does not serve a notice to claim within 28 days from the event. This agreement does not bar the contractor from commencing legal action if it is within the duration of the limitation period set by the law. This observation is in line with that of Klee (2015) in his commentary on an identical provision in the Qatari Civil Code (i.e., Article 418). Klee refers

to a survey in which a lawyer from Qatar suggests that, by agreeing to include such provisions in the contract (i.e., such as sub-clause 20.1 of the FIDIC Red Book), the contractor is waiving his underlying rights, but not the entitlement to claim these rights in court. This observation is also in line with that of El Haggan (2010) in which he stated that the FIDIC time bar under sub-clause 20.1 does not attempt to modify the limitation periods under the law.

2. Although there is notable debate among practitioners in the Middle East as to whether contractual time bars can be categorised as limitation periods, there is the more pressing (and less discussed) issue of the time bar in Article 657 of the Egyptian Civil Code. This time bar can be categorised as a preclusion period, since the contractor's right to be reimbursed the additional payment (i.e., to the contract price) in a construction re-measured contract is only acquired when the contractor "immediately" provides the notice required under the Article. Hence, it can be argued that a preclusion period is present in the law with respect to a contractor's request for additional payment in a construction contract. Although this preclusion period's application is to re-measured contracts and, in particular, to the situation where the quantities in a contract are increased substantially, it is suggested in this section that

the intent of the law (whether in a re-measured or a lump sum contract) is that the contractor must promptly (if not immediately) inform the employer of any substantial increase to the contract price that the contractor may be aware of.

On the matter of preclusion periods, it is important also to refer to the discussion made in section B.2.3.1 of this chapter, which clarified that preclusion periods in the law can be subject to adjustment by contracting parties if the matter in question is not of public policy. Since the contractual agreement for a contractor's notification of a claim in a private construction contract (as opposed to one entered into with the government, which can be subject to administrative law instead of civil law) can be considered to not be a matter of public policy, there is support to the assumption that, in the case of sub-clause 20.1, agreement that the notice be given after 28 days (as opposed to the "immediate" notification in Article 657) is supported by law.

The following section delves into the Identification Phase on this comparison point and elaborates on the similarities and differences between the two jurisdictions on this point.

C. Identification Phase for Comparison Point No.1

Comparison Point No.1 as defined in Section IV.C is in relation to the impact of the principles of 'limitation' (and 'preclusion periods' under the Egyptian Civil Code) on the enforceability of condition precedent time bar clauses in each jurisdiction. As explained in the Research Methodology chapter, the Identification Phase follows the Descriptive Phase and identifies the similarities and differences between the two jurisdictions in respect of the comparison point being addressed. The following is an elaboration based on the information provided in this section.

C.1 Identified Similarities for Comparison Point No.1

The main similarity identified is that both jurisdictions contain a statute of limitations in their legal systems. The statute of limitations in English law stems from the Limitation Act 1980, while that in the Egyptian Civil Code stems from miscellaneous provisions within the Civil Code albeit there is a general limitation period of 15 years set in Article 374. Limitation in both jurisdictions refers to the limit of time during which a cause of legal action can be made. Therefore, this time limit in both jurisdictions does not extinguish the substantive right itself. There may be other similarities in the aspects of the limitation periods of both jurisdictions (e.g., the starting point for the

limitation periods, their expiry, etc.) but these factors have not been addressed above and are not addressed here as they are outside the bounds of this research.

C.2 Identified Differences for Comparison Point No.1

The differences identified for the topic of limitation under each jurisdiction can be summarised as follows:

1. Under the English Law, the limitation period under the Limitation Act 1980 can be superseded by the clear, express provisions in the contract between the parties. This is supported by *Oxford Architects Partnership v Cheltenham Ladies College (2007)* and *Inframatrix Investments Ltd. v Dean Construction Ltd. (2012)*, as well as the Law Commission Report (2001). In the absence of clear, express provisions in the contract superseding the limitation periods in the law, English courts will construe the time bar as working alongside the limitation period set out in the Limitation Act 1980. However, under Article 388 of the Egyptian Civil Code, there is a clear prohibition on contracting parties to agree by means of reduction or extension of the limitation periods set in the law. This is a notable difference as it denotes the weight of freedom of contract between the two jurisdictions. Needless to say, the difference between the nature of the two jurisdictions – namely that one (English

common law) is governed by case law or judicial decisions which advocates freedom of contract, and where legislation or statute plays a secondary role, while the other (Egyptian civil law) is governed by a legislation and code which governs the relationships of individuals and frequently imposes obligations that override contractual agreements – is key for explaining this difference because, in the latter case, the mandatory requirement in the code ousts the express words in the contract.

2. The Limitation Act 1980 has a basic six-year limitation period for claims for breach of a simple contract and 12 years for breaches of contracts executed as deeds. However, as apparent from Table 8, there is no such provision under the Egyptian Civil Code. Rather, the Egyptian Civil Code contains a general limitation period of 15 years as well as numerous other provisions dealing with particular situations. A general provision to govern all contractual agreements is not present. Although, as mentioned in the Literature Review, there is debate as to whether the limitation period under Article 388 of the Egyptian Civil Code applies to any contractual arrangement that stipulates that a party's right to claim is considered waived after the lapse of a period that is different than that set out by the Article, there is room for interpretation that, as highlighted in the conclusion of the Descriptive Phase of this comparison

point, contractual time bar clauses, such as FIDIC's sub-clause 20.1, do not attempt to reduce the limitation period under the law nor are they related to the right to take legal action. Therefore, if this interpretation is adopted, it can be argued that the time bar set by the contracting parties is enforceable and, hence, this enforcement of the parties' agreement may be considered a similarity with the English common law principle.

3. Unlike the English common law, it is apparent from the information presented that the Egyptian Civil Code contains "preclusion periods" that are different in nature from limitation periods. The differences between the two periods were explained in the Descriptive Phase and examples from Al-Sanhoury's *Al-Waseet* were tabulated. Aside from the purpose each period aims to fulfil under the law, one of the notable differences stated is that fulfilment of a preclusion period is mandatory in order for a right to be realised, while, in the case of a limitation period, the right exists but is discharged if legal action does not take place within the limitation period. In both cases, the periods are concerned with causes for legal action before a court. The form of sub-clause 20.1 in the FIDIC 1999 Red Book is closer to the form of a preclusion period under the law (as opposed to a limitation period), as the contractor's right to claim is

contingent upon providing the notice within 28 days. Hence, the right is created when the notice is served on time.

4. Another notable difference is the presence of a clear time bar for construction contracts in the Egyptian Civil Code, namely Article 657. Although Al Sanhoury did not mention Article 657 in the list of examples of preclusion periods, it can be categorised as such. As mentioned in the Descriptive Phase of this Comparison Point No.1, the application of Article 657 is limited to quantity increases in re-measured construction contracts but it can be interpreted to have a broader application to construction contracts in general. As a minimum, the time bar under Article 657 can be interpreted to support contractual agreements, such as sub-clause 20.1 of the FIDIC contract, as its intent to promptly notify the employer of substantial increases to the agreed price (as well as the intent to protect owners' interests in lump sum contracts in Article 658) can be argued to be in line with that of the FIDIC contract.

C.3 Summary of Identification Phase for Comparison Point No.1

The Identification Phase demonstrates that, although both jurisdictions contain a statute of limitations which enables causes for legal action to be made within set periods without extinguishing the right itself, there are

notable differences. As for the enforcement of express time bar clauses, such as FIDIC's sub-clause 20.1, it is clear from the first point of difference that English law will enforce the terms that are agreed upon by the contracting parties. However, outcomes in the Egyptian Civil Code may include the following three:

1. The FIDIC time bar can be construed as reducing the limitation period set in the law, which renders it unenforceable.
2. The FIDIC time bar can be considered to be a contractual agreement that is not a limitation period and has no bearing on the limitation period set in the law. Therefore, depending on the facts and circumstances of the case, the court or tribunal may be consider it enforceable.
3. The FIDIC time bar may be considered less stringent than the time bar in Article 657 of the Egyptian Civil Code (which can be considered also a preclusion period), if a broad interpretation is applied to this Article as explained in the Descriptive Phase. Not only is Article 657 a preclusion period within the law, it is also applicable to a contractor's claim for additional compensation in a construction contract and is therefore directly comparable to the purpose and application of the FIDIC time bar. In this case, the FIDIC time bar may be considered enforceable.

An overall observation of these results demonstrates that, unless overridden by overarching statutory principles of law, English law is absolute when it

comes to the principle of freedom of contract. The courts cannot overrule what the parties have agreed to in free will if there are no overriding statutory provisions. The situation is different under the Egyptian Civil Code, as there is no clear provision in how the law deals with this principle. There are interpretations that can go either way, although as highlighted in the Literature Review there is notable debate in the industry that gravitates towards the first outcome.

The following section delves into the reasons for the observations highlighted in the Identification Phase which triggers the final phase of Comparison Point No.1, the Explanatory Phase.

D.Explanatory Phase for Comparison Point No.1

It was explained in the Research Methodology chapter that the last stage of the comparative law process, i.e., the Explanatory Phase, provides an explanation of the similarities and differences highlighted in the Identification Phase through an understanding of factors that go beyond the theoretical framework of the law to other disciplines, such as historical, religious and cultural. In Comparison Point No.1, the topic of limitation in both jurisdictions is explored and it was concluded that, although both jurisdictions contain a statute of limitations, there are still differences. To understand the origin of these differences, it is necessary to explore the historical evolution of the statute of limitations in both the English and Egyptian legal systems. The section then concludes with a list of explanatory points for the similarities and differences highlighted in the preceding section.

D.1 Origin of Limitation in English Common Law

The first “limitation periods” in English law applied to land-related actions (Law Commission, 2001). In Section E.1 of the Literature Review chapter, it was established that common law originated in England after the Norman Conquest by William the Conqueror in 1066 and that the feudal system was replaced by

the establishment of the *Curia Regis* (King's Court) which is considered the start for the development of common law. Unified laws emerged and replaced the local customized laws. Shapiro (1983) records that William owned Jews whom he brought with him and who became his moneylenders (there is dispute as to whether the Jews arrived by William's invitation or with his permission). Although Jews could not own lands, they could lend money using land as the collateral security. The contracts used at the time (named 'shetar', also known as 'Jewish gage') contained a clause from the Bible (Deuteronomy 24:10-11) protecting debtors by releasing debt at the end of 7 years, although Warland (2010) speculates if these clauses were ever put into effect. Henry I succeeded William and introduced changes to the feudal laws, which included the setting of a date by which a 'disseisor' could claim ownership (i.e., a disseisor is a person claiming ownership of land as a result of adverse possession).

According to the Law Commission Report (2001), the following sequence of events took place leading to the current statute of limitations:

1. Before 1237, a claim could not be made on the basis of seisin (legal ownership of feifdom) before the day of Henry's death in 1135.
2. Under the Statute of Merton, 20 Hen III, c 8 (1235), a claim could not refer to any time before Henry II's coronation in 1154.

3. Under the Statute of Westminster, 3 Ed I c 39 (1275), the date was moved forward to the coronation of Richard I in 1189.
4. Under the Writs of Mort d'auncestor, of Cousinage, of Aiel, of Entry and of Nativis, the date was moved forward to the coronation of Henry III in 1216.
5. Under the Limitation Act 1540, limitation periods (in lieu of dates) were set for the first time. Periods of 60, 50 and 30 years were set for land-related claims.
6. The Limitation Act 1623 set a 20-year limitation period for "writs of formedon".
7. In 1829, the limitation periods for land-related actions were reviewed by the Real Property Commissioners reporting to the House of Commons. By that time, there were numerous remedies for land-related claims and a corresponding variety of limitation periods applicable to them. Therefore, they recommended the simplification of the periods to 20 years. The recommendation was implemented by the Real Property Limitation Act 1833. The limitation period was later reduced to 12 years by the Real Property Limitation Act 1874 which remains the limitation period for most land-related claims.

8. There were no limitation periods for non-land-related claims until the Limitation Act 1623. In addition to the 20-year period for land-related claims, the Act set the following limitation periods for non-land-related claims:

- a. Two years for actions on the case of words,
- b. Four years for actions of assault and false imprisonment, and
- c. Six years for most other actions

9. In 1936, the Law Revision Committee reviewed the limitation periods and reported that problems were encountered due to different periods being laid down for different actions. This resulted in the Committee's recommendation that a limitation period of six years be applied for actions in simple contract and actions in tort. This six-year period is what is present in the Limitation Act 1980 to date.

The Law Commission (2001) continues with an elaboration of historical debates on the justification of the six-year period as well as an account of how shorter limitation periods evolved regarding personal injury, acts of defamation, contribution claims by one tortfeasor against another, non-personal injury latent damage in the tort of negligence and claims under the Consumer Protection Act 1987. However, for the purpose of this

research, the limitation period for actions in simple contract is the most germane.

D.2 Origin of Limitation in Islamic Law and the Egyptian Civil Code

It has been previously mentioned in the Literature Review that the Egyptian Civil Code is based on the principles of Islamic Law infused with French law, albeit some writers, such as Hill (1988), assert that the former has a more notable impact on the code than the latter. It follows that, in regards to the Egyptian Civil Code, understanding the position of Islamic law with respect to the statute of limitations is pivotal. Amin (1985) reports that there is no statute of limitations under Islamic law in light of Prophet Muhammed's saying (hadith): "A Muslim's right cannot be abolished even if it is remote in the past". However, some Islamic schools, namely the Maliki and Hanafi, have resolved that legal action to enforce a claim can be barred after the lapse of a certain period of time. In Section E.2 of the Literature Review, it is stated that, during the second half of the nineteenth century, the Ottoman Empire promulgated an Islamic code of law, titled the *Majallat-ul-ahkam-al-adliyya*, which was directly derived from Islamic law in a synthesized, modern fashion. The *Majallat* contained statute of limitations in Articles 1660 to 1075. The following is the wording of Articles 1660 and 1661:

Article 1660:

Actions relating to a debt, or property deposited for safe-keeping, or real property held in absolute ownership, or inheritance, or actions not relating to the fundamental constitution of a property dedicated to pious purposes leased for a single or double rent, or to pious foundations with the revenue of a pious foundation, or actions not relating to the public, shall not be heard after the expiration of a period of fifteen years since action was last taken in connection therewith.

Article 1661:

actions brought by a trustee of a pious foundation relating to the fundamental constitution thereof by persons maintained by such foundation may be heard up to a period of thirty-six years. In any event these actions shall not be heard after the thirty-six years has elapsed

In 1891, Mohamed Qadri Pasha produced the *Murshid al-Hayran*, which was a treatise on property, contracts and agencies, developed in accordance with the Hanafi school of Islamic law (Saleh, 1993) and which served to be a reminder of the principles of Islamic law and which also served as a nationalistic reminder of the existence of Islamic law. However, like the *Majallat*, it was never put in practice in Egypt. Hill (1988) reports that, while drafting the Egyptian Civil Code, Al-Sanhoury infused the then dominant French code (which was also applied in Algeria, Tunisia and Morocco) with principles of Islamic law and significantly borrowed from the Mohamed Qadri Pasha's *Murshid*. As demonstrated in Section B.2 of this Comparison Point No.1, Al-Sanhouri dedicated a chapter in the third volume of his substantive work *Al-Waseet* to address the topic of limitation. Notably, when explaining

in section 612 Article 374 concerning the general limitation period of 15 years, he refers to the French law at the time on several occasions and distinguishes the Egyptian Civil Code from the French on this point. For example, he mentions that the French law mandated that limitation periods cannot be extended because that would not be in the interest of the debtor, but that the French law permits contracting parties to reduce the limitation period on the condition that the reduced period is sufficient for the creditor to ask for his debt. Al-Sanhoury then comments that the new Egyptian code (i.e., meaning that of 1948) does not follow the French example of permitting reduction of the limitation period (albeit it does follow what he referred to as the “French-Italian project”) and does not permit any extension or reduction by the contracting parties to the limitation periods in the law. This fact puts to question whether this divergence from the French example is an influence of Islamic law or simply an influence of the French-Italian project he referred to. In any case, Al-Sanhoury’s contribution of the insertion of the limitation (and preclusion) periods within the Egyptian Civil Code (which, as mentioned in the Literature Review, found its way to the Civil Codes of numerous other Arab countries) effectively established the concept of statute of limitations and strayed away from the route of traditional Islamic law, which holds that the right cannot be extinguished with the lapse of time. It is important to note at this juncture that there are some Middle Eastern countries that still apply the

traditional Islamic concept in some of its laws. Akaddaf (2001) reports, for example, that Morocco (which follows the Maliki school) states in Article 121 of its *Moudouana* (Code of Personal Status) that, among other things, "the right of a wife to seek support from her husband is not extinguished by prescription." The *Code of Obligations and Contracts* of 1913 in Morocco states in Article 378 that no prescription shall exist: (1) between spouses during the marriage; (2) between parents and children; or (3) between the incapacitated and the guardian or executor. Amin (1985) refers to the Iranian example which was subject to secular law before the revolution of 1979 and Islamic law after and suggests that the concept of statute of limitations was enforced in the former period but was abolished in the latter. He adds that not only does the Islamic law in Iran not extinguish a right with the lapse of time, it also does not bar a claimant from seeking a formal hearing to enforce a right through the Islamic judicial system.

Equally important to understanding the Islamic position of the statute of limitation, and the Egyptian law's deviation therefrom, is the understanding of the French influence on both concepts of limitation and preclusion periods under Egyptian law. It is observed from the title of paragraph 594 of Al-Sanhoury's *Al-Waseet* (i.e., "The Distinction between Negative Limitation and Preclusion") that Al-Sanhoury uses two French terms for limitation and

preclusion periods, namely “*déchéance*” and “*délais de déchéance*”, respectively. Therefore, in light of this fact, coupled with Al-Sanhoury’s reference to French laws and the “French-Italian Project”, it is reasonable to assume that the origin of the two principles in Egyptian law is French, not Islamic. Sakr (2009) mentions that the Arab countries influenced the most by the French civil law were those that received the French legal tradition directly through French jurists who drafted their civil legislation (i.e., Lebanon and Francophone North African countries). However, he continues, there were other Arab countries whose Civil Codes stemmed from Al-Sanhoury. Yet, Hill (1987) opines through an insight on Al-Sanhoury’s life, that the French influence was ever present in Egypt, in general, and on Al-Sanhoury, in particular, at the time. For starters, Al-Sanhoury completed his doctoral studies in Lyon, France, and it was his professor, Edouard Lambert, who later collaborated with him on drafting the Egyptian Civil Code. She suggests that, at the time, the School of Law in Cairo University had French directors in its early days, and that Lambert was the last, before this position was taken by Englishmen. Nevertheless, the French continued to be actively involved in the training of Egyptian lawyers and that they opened a law school of their own in Cairo in 1890 and encouraged Egyptian students to study in France. It is important also to note that French law had been the base for Egyptian’s legal system at the time. As mentioned in Section E.2 of the Literature Review

chapter, by the mid-nineteenth century, Egypt was going through a period of rapid “westernization” and, in 1883, a Civil Code along the lines of the French *Code Napoléon* was applied in lieu of Islamic law.

D.3 Conclusion of Explanatory Phase for Comparison Point No.1

In light of the information provided in the preceding section, when read in conjunction with the origin of each jurisdiction in Section E of the Literature Review, the following can be summarized with respect to each of the identified similarities and differences listed in Section C.2 of this Comparison Point No.1 chapter:

Table 9 Explanatory Phase Tabulation for Comparison Point No. 1

	Identified Similarities/Differences (Identification Phase, Section C)	Explanation (Explanatory Phase, Section D)
1.	<u>Similarity:</u> Both systems have a statute of limitations.	In English law, the statute of limitations originated in 1237 from land-related claims. Dates were set at first for causes of action to be made until 1540 when periods were established for different causes of action. In Egyptian law, the statute of limitations originated from the influence of French Civil Code, as it is not recognised under traditional Islamic law.

Table 9 Explanatory Phase Tabulation for Comparison Point No. 1

	Identified Similarities/Differences (Identification Phase, Section C)	Explanation (Explanatory Phase, Section D)
2.	<p><u>Difference # 1:</u></p> <p>The limitation period under the Limitation Act 1980 can be adjusted through the clear, express provisions in the contract between the parties. However, under Article 388 of the Egyptian Civil Code, there is a clear prohibition on contracting parties to adjust in any way the limitation period set in the law.</p>	<p>This difference is attributable to the origin of each jurisdiction, as highlighted in Section E of the Literature Review. In essence, it is the difference between the nature of a common law system, where judicial decisions are the base which constitutes the precedent for future cases.</p> <p>The situation is different under Civil Code jurisdictions in which legislation is the first source of law. Furthermore, by its nature, the Civil Code embodies general principles that govern the relationship between individuals.</p>
	<p><u>Difference # 2:</u></p> <p>The Limitation Act 1980 has a general, six-year limitation period for contracts. However, there is no such provision under the Egyptian Civil Code.</p>	<p>This is attributable to the history of the statute of limitations in each jurisdiction, as elaborated upon in Section D of this Comparison Point No.1 chapter.</p> <p>There is no such provision under the Egyptian law, as the statute of limitations was a direct influence from the French Civil Code, which, by the nature of a Civil Code jurisdiction, governs the relationships between individuals</p>

Table 9 Explanatory Phase Tabulation for Comparison Point No. 1

	Identified Similarities/Differences (Identification Phase, Section C)	Explanation (Explanatory Phase, Section D)
		(and, accordingly, the contracts they enter into).
	<p><u>Difference # 3:</u></p> <p>Unlike the English common law, the Egyptian Civil Code contains “preclusion periods” that are different in nature and purpose from limitation periods.</p>	<p>The concept of a “preclusion period” is a direct French influence on the Egyptian Civil Code (named as “<i>délais de déchéance</i>” by Al-Sanhoury and “<i>délai de déchéance ou de forclusion</i>” by Sakr (2009)). Therefore, it has no presence under the English common law.</p>
	<p><u>Difference # 4:</u></p> <p>Unlike the English common law, the Egyptian Civil Code contains a preclusion period in a section within the code that pertains directly to contractor’s entitlement to payment in construction contracts. If interpreted broadly, this time bar can be comparable to the time bar in sub-clause 20.1.</p>	<p>The time bar under Article 657 can be considered a preclusion period, so the explanation provided in Difference # 3 applies here.</p>

The question that arises at this point is: what is the applicability of the above explanation on the topic of enforceability of time bar clauses under the English common law and Egyptian Civil Code jurisdictions? The answer is that, in light of the nature of the common law of setting precedent through judicial

decisions while the priority of legislation comes in third, it is only expected that the principle of enforcement of express contractual provisions agreed between contracting parties, which has been established through case law, would be enforced under English law notwithstanding the six-year limitation period for contracts. There are, of course, ways by which contractual agreements may not be enforced by English courts (e.g., undue influence, duress and statutory intervention) but, in the absence of these specific factors, freedom of contract prevails. On the other hand, by nature of the Civil Code jurisdiction, legislation comes first as the source of law. Therefore, whether the time bar under FIDIC 1999 Red Book is considered a limitation period or a preclusion period, it can be interpreted to be in contradiction with the periods set in the law and, therefore, unenforceable. The reverse is true if time bar in sub-clause 20.1 is considered less stringent than the time bar in Article 657 of the Egyptian Civil Code, as explained in the Descriptive Phase. In addition to the fact that such time bar clauses may be considered in conflict with statutory limitation under Egyptian law, directly influenced by French civil law, the position of traditional Islamic law of not recognizing the statute of limitations may further weaken the possibility of enforcement of the express time bar under the FIDIC 1999 Red Book. There are, of course, counter arguments to this position. First, the two observations stated in the summary of the Descriptive Phase (in Section B.3 of this Comparison Point No.1 chapter)

clarify that the prohibition in Article 388 of the Egyptian Civil Code is in relation to modification of limitation periods set in the law. Limitation periods by definition are in relation to causes of legal action. The FIDIC time bar is a contractual agreement and may not prevent either contracting party from commencing legal action within the limitation periods set by the law. On the argument of Islamic law, there is notable support from the top two sources of jurisdiction within Islamic law (i.e., the Quran and Sunna) that contract agreements must be complied with. As McCormack (2009) highlights, the Quran states in 2:275: "You who believe, be faithful to your contracts" and in 16:91 "fulfil the covenant of God when you have entered into it, and break not your oaths after you have confirmed them". Furthermore, in terms of the Sunna, there is the Prophet's saying (i.e., hadith): "Muslims are bound by their stipulations." This is not to mention the clear provision under Article 147/1 of the Egyptian Civil Code which states: "The contract makes the law of the parties."

Hence, it is apparent from the above that the position under English common law is clearer on the topic of time bar enforcement than it is under the Egyptian Civil Code.

VI. COMPARISON POINT # 2 – THE PRINCIPLE OF GOOD FAITH

A. Introduction

In the summary of the Conceptualisation Phase (page 186), the second comparison point was identified as the extent to which factors other than limitation, such as 'good faith', 'waiver' and 'estoppel', as well as statutory controls (e.g., The Unfair Contract Terms Act 1977), affect the enforceability of condition precedent time bar clauses in each jurisdiction. This Comparison Point No.2 delves into the principle of "good faith" within each jurisdiction so that the principle is described, similarities and differences are identified and the results are explained.

B. Descriptive Phase for Comparison Point No.2

B.1 The Principle of Good Faith under English Law

B.1.1. Introduction

Section E.1.4 of the Literature Review chapter (page 76) provided a brief overview of the principle of good faith under English law. This section, as part of the descriptive phase for this Comparison Point No.2, delves deeper into the principle of good faith under English law.

B.1.2. The Meaning of "Good Faith"

In English law, there is no widely accepted definition of the concept of good faith. In *Merton LBC v Stanley Hugh Leach Ltd (1985)*, Vinelott J. stated at paragraph 80:

...the courts have not gone beyond the implication of a duty to co-operate whenever it is reasonably necessary to enable the other party to perform his obligations under a contract. The requirement of 'good faith' in systems derived from Roman law has not been imported into English law.

In an attempt to define the term, Lord Bingham states the following in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd (1988)*:

[Good faith] does not simply mean that [the parties] should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards on the table.' It is in essence a principle of fair and open dealing.

Goode (1992) took the view in a conference to a Roman audience that, in England, it is difficult to adopt a general concept of good faith and that the English do not know what it means. He suggested that the concept of good faith entails honest behaviour, even if negligently or unreasonably performed. He draws support from section 61(3) of the Sale of Goods Act which states: "A thing is deemed to be done in good faith within the meaning of this Act when it is done honestly, whether it is done negligently or not." Mason (2007) opines that, despite the term's apparent simplicity, it is elusive. He refers to attempts to define the terms by Australian judiciary and quotes the following by Judge Paul Finn (p.439-440):

Good faith occupies the middle ground between the principle of unconscionability and fiduciary obligations. Good faith, while permitting a party to act self-interestingly nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other.

Mason (2007, p. 440) remarks that:

Thus far the English courts have denied themselves the opportunity to engage in this shaping of the meaning of good faith in the modern

construction context despite its historical relevance, its resonance with the public and even in light of other recent stimuli to its introduction.

Sim (2001) corroborates the abovementioned notion that there is no agreed upon definition of good faith and suggests that there are numerous connotations and definitions of the term. She categorises the definitions into “negative” and “positive”, where the former addresses what good faith is not while the latter refers to what good faith is. In other words, in the case of a “negative” definition, a definition of good faith can be arrived at by considering clear cases of bad faith as opposed to instances of good faith. A “positive” definition, Sim opines, would refer to what the term has been directly described as, namely “fairness”, “fair conduct”, “reasonableness”, “reasonable standards of fair dealing”, “good faith and fair dealing”, “community standards of decency, fairness or reasonableness”, “honesty in fact”, “decent behaviour”, “a common ethical sense”, and a “spirit of solidarity”. Sim concludes that these definitions serve to equate good faith with vague and nebulous terms and, consequently, fail to pinpoint its meaning. She further comments that commentators tend to use these terms interchangeably, without regard to the fine nuances between them. For example, “honesty” refers to a subjective state of mind, while “fair dealing” refers to an objective state of affairs. One may also act unreasonably without being dishonest. Sim concludes that the

term “good faith” seems to be predicated on one’s intuitive sense of justice, which is problematic as it links the term good faith to everything that promotes justice, thereby making the term general and abstract in its meaning.

B.1.3. English Courts on “Good Faith”

English courts have struggled with the interpretation of express good faith provisions in contracts. In *Berkeley Community Villages Limited, Berkeley Group Plc v Fred Daniel Pullen, Kathleen Marguerite Pullen, Alan John Pullen (2007)*, the contract contained the provision:

In all matters relating to this Agreement the parties will act with the utmost good faith towards one another and will act reasonably and prudently at all times.

In deciding the case, Mr Justice Morgan concluded at paragraph 110 that the principle of good faith is associated with “observ(ing) reasonable commercial standards of fair dealing”, “observ(ing) faithfulness to the agreed common purpose” and “(being) consistent with the justified expectations of the (claimant)”.

A similar conclusion was reached three years later in *CPC Group Limited v Qatari Diar Real Estate Investment Company (2010)*, where the contract required the parties to “both act in the utmost good faith towards each other

in relation to the matters set out in this Deed and in Schedule". Mr Justice Vos held at paragraph 308 that:

...the good faith obligation required QD to adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose, and to act consistently with the justified expectations of CPC...

In deciding the case, Mr Justice Vos took into consideration the intent of QD's actions and the volatility of the political situation it was in to decide that it had not breached its obligation to act in utmost good faith:

I do not think QD was acting malignly or in bad faith or with the intent of depriving or delaying CPC's attainment of its deferred consideration. QD was, as I mentioned already, acting as best it could in a very difficult political situation, with the objective of securing the best possible planning permission in the shortest feasible time. It was making the best of a bad job.

The High Court case of *Yam Seng Pte Limited v International Trade Corporation Limited (2013)* addressed the enforceability of implied terms of good faith to give business efficacy. Mr Justice Leggatt highlighted that two key criteria for the identification of implied terms in a contract are that the term goes without saying and that the terms is necessary to give business efficacy to the contract. Examples of such implied terms are the good faith principles of honesty and fidelity to the parties' bargain as well as "other standards of commercial dealing which are so generally accepted that the

contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document” (paragraph 138). Importantly, in paragraphs 146 to 153, he outlines six observations about the reasons for the reluctance of English law to recognise an implied duty of good faith on contracting parties and concludes with a suggestion that “the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.” He also clarifies that the extent to which the duty of good faith is to be performed depends on context.

The reasoning in *Yam Seng Pte Limited v International Trade Corporation Limited* was not applied in the Court of Appeal case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading As Medirest)* (2013), in which Lord Justice Jackson remarked at paragraph 105:

... I start by reminding myself that there is no general doctrine of “good faith” in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract... If the parties wish to impose such a duty they must do so expressly.

And concluded at paragraph 154 that:

...care must be taken not to construe a general and potentially open-ended obligation such as an obligation to “co-operate” or “to act in good faith” as covering the same ground as other, more specific, provisions,

lest it cut across those more specific provisions and any limitations in them.

The High Court case of *Fujitsu Services Limited v IBM United Kingdom Limited* (2014) was in line with the reasoning in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* in that it was decided that, although there were principles annexed to the contract that required the contracting parties to work together on an “open, honest, clear and reliable” basis, there was no express obligation of good faith and consequently was not applicable. Mrs Justice Carr described the principles as “aspirational and motivational – part of a ‘vision’” but not giving “rise to fiduciary duties” (paragraph 141). She notes at paragraph 162:

The parties appear to have chosen deliberately to step back from an express agreement that they would owe each other a duty of good faith. Rather they chose to agree simply to “have regard to” the principles in Annex A. That choice should be respected.

A similar reasoning was applied in the Court of Appeal case of *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* (2016), where Lord Justice Moore-Bick stated at paragraph 45 that, although:

The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences ...there is in my view a real danger that if a general principle of good faith were established it would be invoked as

often to undermine as to support the terms in which the parties have reached agreement.”

It is apparent from the above that English courts look at the express words in the contract and the context of the good faith obligation therein when deciding a case. Unless there is a clear good faith obligation in the contract, courts are reluctant to infer any obligations that are not stated. After examining the case law on the topic of good faith, Giles and Walling (2014) suggest the following three points in order to avoid any breach of an express good faith obligation under the contract:

- Behaviours and communications should be regarded as commercially acceptable by reasonable and honest people.
- There should be no conduct improperly exploiting the other party or undermining the trust and confidence between the parties.
- The parties should facilitate each other’s roles in the contract but are not required to put aside self-interest or give up a financial advantage that was expressly contained in the contract.

B.1.4. Views in English Literature on "Good Faith" Being an Overriding Obligation

There have been differing views in English literature as to whether the principle of "good faith" should be an overriding principle that governs contractual obligations. Goode (1992) opines that, historically, English law adopted a rigorous application and enforcement of contractual provisions and set uncertain principles as good faith aside. He suggests that English law considers the predictability of the legal outcome of a case more important than absolute justice and that this position is necessary for England's financial and business positioning in the world. It is important that businessmen in a commercial setting know where they stand. He takes the view that, despite the rigidity of English law, many foreigners come to litigate in London although their contracts may not be governed by English law because of the predictability of the legal outcome. He concludes this point by stating (p.4):

The last thing we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party we regard that as an acceptable price to pay in the interest of the great majority of business litigants.

Discussing the scope and application of the principle of "good faith" in the Vienna Convention on Contracts for the International Sale of Goods (CISG), Sim (2001, p.20) suggests that "the concept of good faith is beset with so

many problems that it threatens to be merely an empty label.” She recommends that the CISG not promote the concept of good faith as one of its general principles, as it is expressly mentioned as an obligation in Article 7(1), due to the concept’s lack of coherency. She opines that adoption of the concept of good faith is a “loose cannon” and therefore should not be adopted for use in the CISG despite the desirability to promote good faith and fair dealing in international trade.

Korde (2000) discusses whether the concept of good faith can be in conflict with the principle of freedom of contract and concludes that there is no need for an explicit doctrine of good faith. In Korde’s words (p. 163), the adoption of “a concept that is ill defined and counter-productive would be a travesty on the law of contract” and can “work practical mischief if carelessly implanted in [the English] system of law.” Korde views the imposition of a doctrine of good faith on contractual agreements as a “paternalistic restriction on liberty” and describes it as an interference with freedom on the grounds of some altruistic desire of contractual justice which would result in a superfluous and unjustified intervention. The law of contract, Korde suggests, needs settled and workable rules, as opposed to the endless uncertainty that a moral interpretation of good faith would create. Korde suggests that, by adopting a doctrine of good faith, judges would reopen commercial transactions and uproot the law of

contract by attempting to regulate the fairness of every contract with a doctrine that is unclearly defined. It would invite difficult inquiries into a party's reasons for action and result in the judges' revision of the agreement in a manner that is inconsistent with the parties' intentions, which is, in turn, a direct violation of the principle of freedom of contract. Korde suggests that the traditional approach in English law is that a contractually-expressed right can be exercised regardless of whether its exercise would be fair, reasonable or justifiable in the given circumstances. There are, however, exceptions to this approach, for there are statutory controls over the enforcement of contractual provisions under English law, which can be considered to act as remedies for good faith. This is addressed in the following section.

B.1.5. Remedies for "Good Faith"

In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.*, Lord Bingham suggests that there are alternatives to the principle under English law:

The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.

He adds, giving specific examples of how the equivalent to good faith principle is applied under English law:

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.

Goode (1992) discusses this point in a lecture to a Roman audience and identifies different routes that can be taken under English law to reach the same results under Roman civil law with respect to the principle of good faith. Examples given included the following:

- A party induced by a wrong statement to enter into a contract can rescind the contract even if the other party made the statement honestly.
- In the case of breach of contract, a party cannot recover damages as a result of the breach if that party did not take measures to mitigate his loss.

- A seller of defective goods is liable under English law because of non-compliance with the contract requirements, not because of failure to disclose the defects or because of an act of bad faith.
- A seller of a product that contains a dangerous defect is liable in tort for the injury caused by the product to the buyer, not because of bad faith.

Similarly, Korde (2000) suggests that, although the principle of freedom of contract was historically unconstrained in English law, new exceptions and equitable rules were gradually introduced at the turn of the century that deviated from the strict classical model. A transformation took place from the historical contractual autonomy due to the principle of freedom of contract to a regulated modern model of the law. Today, English common law contains defined remedies for opportunistic acts of bad faith, such as misrepresentation, undue influence and anticipatory breach, and therefore Korde questions if an enforceable doctrine of good faith should be adopted. Korde also mentions statutory interventions such as the Consumer Credit Act 1974, s. 67-68, which allowed consumers to rescind a contract on grounds of undue pressure (the Consumer Credit Act 1974 was amended in 2006). Korde opines that, although the purpose of the Act is to ensure that the consumer fully consents and understands the contracts being entered into, courts have

also maintained a balance between protection of the consumers and their position as rational adults who can be legally advised. An example cited is the case of *Multiservice Bookbinding Ltd. v. Maiden* [1979], in which a contract was upheld, despite its unfair and harsh provisions, because the consumers were advised by their lawyers and understood the nature of the transactions.

In the same vein, Sim (2001) takes the view that, under the common law, a person may be held liable for fraudulent misrepresentation if he makes a statement intentionally and recklessly, without belief in its truth. Also, a contract may be held void under common law on the basis of mistaken identity when the plaintiff intended to enter into a contract with someone whom the defendant misrepresented himself to be. Sim describes principles such as undue influence, mistake and misrepresentation as embodiments of the idea of good faith because, in essence, the term "good faith" may broadly be considered to refer to anything that would require contracting parties to behave in a manner that would promote justice, fairness or ethical behaviour. However, she suggests, these principles would not collectively form the basis for a doctrine of good faith. Rather, the term "good faith" could serve as a "label for moral aspiration" (p. 18) for these particular principles.

B.1.6. "Good Faith" in Construction Contracts

There have been differing views on the application of the concept in good faith in the English construction industry. Minogue (2013) advocates that a duty to cooperate and to act in good faith would be enforced in the English construction industry. She refers to three arguments against the duty to act in good faith and responds to them. The first argument is that the effects of the duty are uncertain, in light of its dependency on context. She responds that implied terms in construction contracts resulted in endless debate and conflicting and overturned decisions and are, therefore, not conducive to certainty anyway. The second argument is that the duty is vague and unworkable. She responds that implied terms to arrive at the intention of the parties are more vague and unworkable. The third argument is that the application of the duty of good faith to pre-contract negotiations can prevent parties from concluding an unrestricted bargain. She responds that the duty of good faith should be applied after the contract is concluded. Minogue then provides several examples of how the application of good faith would improve the English construction industry. The first is that application of the duty would prevent quantity surveyors from under-valuing work on interim certificates to ensure there is a buffer as a matter of contingency. The second is that the duty can reduce the contractors' tendency to inflate claims and the

consequent potential of continued adjudication. Minogue concludes with an emphasis that good faith is really needed in pre-contract negotiations because it is at this stage that bad faith abounds. An example given is the situation where the employer knows of existing structures to be incorporated into the works but intentionally keeps silent so that the contractor takes the risk after contract signature. Minogue advocates that a risk register, identifying all risks, would be produced by the employer for the contractor to price. Then she questions how many practitioners do that in the industry? And for those who do, how many of them are rewarded for their integrity?

Colledge (1999) opines that, although an express duty of good faith does not exist in English law, there is a "hidden agenda" of good faith duties in construction contracts. She adds that English courts fill the gap of the absence of an express good faith provision with an alternative emphasis on implied remedies which conform to the general principles and definitions of good faith. Six examples are explained, which fall under the three principles of good faith evidence, namely exercise of discretionary power, basic standards of decency and implied terms. The following is a summary of the examples given for each category:

Table 10 Examples of Good Faith Obligations in Construction Contracts (Colledge, 1999)

Principle of good faith evidence	Circumstantial examples	Specific Examples
Exercise of discretionary power	Abuse of power to specify terms	If a contractor does not have the explicit right to object to a nominated supplier, and this nominated supplier excludes liability for certain defects, the employer cannot recover compensation for defective materials from the contractor (<i>Gloucestershire County Council v. Richardson (1969)</i>)
	Abuse of power in relation to accommodating change	An employer or engineer cannot issue a variation which is wholly outside the scope of the original contract and that is of a kind totally different from that originally contemplated (<i>Blue Circle Industries plc v. Holland Dredging Company (U.K.) Limited [1987]</i>)
Basic standards of decency	Evasion of spirit of bargain	Courts will uphold the basis of lump sum contracts and will not support a claim for additional payments to be made for work that is necessary or included in the original price (<i>Williams v. Fitzmaurice (1858)</i> ; <i>Sharpe v. Sao Paulo Brazilian Railway Company (1873)</i>)
	Wilful rendering of imperfect performance	A contractor who abandons the work because it turned out more difficult than expected is not entitled for payment for work carried out (<i>Ibmac Limited</i>)

Table 10 Examples of Good Faith Obligations in Construction Contracts (Colledge, 1999)

Principle of good faith evidence	Circumstantial examples	Specific Examples
		<i>v. Marshall (Homes) Limited (1968)</i>
Implied terms to fill gaps	Interference with the other parties' performance	An employer's interference of an architect's certification of a contractor's interim payment certificate will entitle the contractor to payment without a certificate (<i>Hickman v. Roberts (1913)</i>)
	Failure to cooperate in the other party's performance	<ul style="list-style-type: none"> • There is a duty on the employer to provide information at a reasonable time so as to not hinder or prevent the contracting from completing its work according to the contract (<i>Neodox v. Swinton and Pendlebury Borough Council [1958]</i>). • There is a duty on the contractor to warn of defects in design that they believe to exist (<i>Brunswick Construction Limited v. Nowlan [1974]</i>)

Harrison and Jansen (1999) address the applicability of the doctrine of good faith in the construction law of continental Europe and England, respectively. When answering the question as to whether English construction law needs a doctrine of good faith, Harrison suggests that the key point is the nature of

rules, as rules in contracts provide certainty and ease of dispute resolution. She suggests the three rules that one may choose from these days, as follows:

1. The “small print solution” – The rationale of this approach is that the potential misconduct of any contracting party will be spelled out so that, in the event of a dispute, the matter in question can be identified in the print of the contract. According to Harrison, the problem with this approach, although used in many statutes and some of the construction industry’s standard forms of contract, is that inclusiveness can lead to lack of predictability, which may be impossible to resolve. She opines that, in a very small contract focused on one thing, it may be possible to account for every eventuality and, therefore, produce a contract that may be detailed and predictable. However, in construction contracts, the matter is different due to the complexity of their nature. In her words, attempting to achieve inclusiveness with construction contracts leads to contracts “the size of several telephone books” (p. 367). A voluminous contract is at the risk of losing the factor of predictability since a contracting party may not be able to know which bit of the contract its conduct comes under. Loss of clarity may also result with the substantial details present since, the more provisions are read together, the greater the chance that any one provision, when read in conjunction with others, may be considered totally ambiguous.

2. The “wide discretion” approach is derived from the work of Hesselink, where the judge, arbitrator, adjudicator or similar persons entrusted with the resolution of the dispute in question, applies his/her understanding of the principle of good faith, as described in most of mainland Europe, and obliges the parties to comply with the express obligations in the contract and with those that follow from equity, usage or the law. This approach, Harrison comments, resulted in a number of good faith decisions in Europe which show no signs of connecting threads between them. Therefore, it lends itself to the subjectivity of the judge. This approach would not be workable in England, Harrison continues, because it would be perceived as unfair, unpredictable and subjective and would ultimately result in an increased cost of litigation.
3. The “good faith” approach, which Harrison advocates, entails applying specific principles of good faith as judges had implemented in nineteenth century cases. On this point, she opines that such cases revealed a substantial impact from writers from continental Europe at the time, namely Pothier, who referred to good faith for certain implied terms that were said to be “natural” and were considered included in the contract whether or not the parties thought about them. Such terms can be excluded expressly but only provided that such exclusion would be specific and fair. Harrison comments that this kind of an analysis of

contractual implied terms corresponds well with the reality of contract making, as not everything can be spelled out in the contract; many things have to be assumed. Although such principles were not used by the end of the nineteenth century because of encroaching statute law, Harrison concludes this point by stating that a return to these principles would result in a workable, practical system. She addresses the matter of predictability in that the application of the early good faith principles of the nineteenth century “do not map every inch of the terrain, but they give you a compass” (p. 369). She also advocates the application of early good faith principles because it empowers the contracting parties and enables them to eliminate a large number of potential disputes. She suggests that, as humans, we make contracts in words, which, in turn, leave gaps and ambiguities when facts are applied to them. However, the application of good faith principles as a contractual substructure, fills these gaps and serves to add an element of predictability.

B.1.7. Conclusion

The above discussion on good faith in English law indicates that there is agreement that there is no agreed upon definition on the term. Consequently, in the interest of upholding contractual certainty in cases,

and in the fear of relying on vague terms such as good faith which would lead to lack of certainty and predictability, such a doctrine is not applied in English law. It is evident from the literature that there is tension between the principle of freedom of contract and good faith, and that the former is dominant. Interestingly, the sample of construction law literature mentioned in this section (e.g., Minogue, College and Harrison) demonstrates a willingness to apply the principle of good faith in construction contracts and that, as College and Harrison suggest, principles of good faith are arguably already being indirectly applied through implied contract terms.

B.2 The Principle of Good Faith under the Egyptian Civil Code

B.2.1. Introduction

Section E.2.2 in the Literature Review section addressed the topic of 'good faith' under the Egyptian Civil Code. It stated that "good faith" is a mandatory requirement for the performance of any contract pursuant to Article 148 of the Egyptian Civil Code, which states: "A contract must be performed in accordance with its contents and in compliance with the requirements of good faith". Reference was made in the section to the interesting observation that, while Egyptian or Middle Eastern literature did not address the effect of the

principle of “good faith” on the enforceability of the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book, references discussing this point came from Western literature. Examples included Glover (2007) and Hall and Warren (2012). King (2014) echoes the statements made by Glover seven years earlier as she compares the concepts of good faith in English law and the United Arab Emirates Civil Code (in which Article 246 is identical to Article 148 of the Egyptian Civil Code). She concludes that the time bar under sub-clause 20.1 of the FIDIC Red Book may be restricted where the party relying on it knew about the breach, whether informally or through a meeting for which minutes were taken, because denial of a claim due to the time bar when it had already been communicated, even if informally, would constitute an act of bad faith. King also suggests that using a time bar to avoid a substantial claim may be unlawful in the case where the contractor’s substantial losses are not equal with the employer’s right to be notified within the period in the time bar. In this respect, King refers to Article 106(1) of the UAE Civil Code which states: “a person shall be held liable for the unlawful exercise of his rights” and concludes that this Article, with the good faith obligation under Article 246, may be used to challenge the effectiveness of a time bar in such circumstances. It is important to note that Article 5 of the Egyptian Civil Code states:

The exercise of a right is considered unlawful in the following cases:

- a) if the sole aim thereof is to harm another person;
- b) if the benefit it is desired to realize is out of proportion to the harm caused thereby to another person;
- c) if the benefit it is desired to realize is unlawful

Sub-paragraph (b) of this Article is particularly applicable to King's point regarding an employer gaining benefit from the time bar under sub-clause 20.1 that is out of proportion to the substantial losses a contractor may be incurring.

B.2.2. The Meaning of "Good Faith"

Hodgins and Rotherham (2012) discuss good faith under Article 246 of the UAE Civil Code and state that, in addition to the requirement of contracts being performed in a manner consistent with the requirements of good faith, the obligation is also extended to associated obligations required by law, custom and the nature of the transaction. This extension is also present in (actually, emanates from) the continuation of Article 148 of the Egyptian Civil Code (which is also in Articles 1134 and 1135 in the French Civil Code) which states:

A contract binds the contracting party not only as regards its expressed conditions, but also as regards everything which, according to law, usage and equity, is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract.

Hodgins and Rotherham conclude (p.1):

Unlike the much narrower UK version of the doctrine, the UAE concept of good faith is difficult to define, but in general, it means that the parties must not seek unfair advantage or exploit the other, must cooperate, and if possible, avoid conflicts. There is an implied obligation to perform not just what is contained in the contract, but what is connected to it by law, custom or the nature of the transaction is set out in the same article of the Civil Code as the good faith doctrine and can be considered as linked to it. The doctrine means that a party cannot rely on a strict interpretation of the words of a contract to do exactly what it has contracted to do and no more.

It is interesting to note that the good faith obligations under the UAE Civil Code is considered here “wider” and “more general to define” than the UK version of good faith. This is especially the case when, as described in the previous section, there is no agreed upon meaning of good faith in the UK in the first place. Moreover, the last sentence in their quote is also particularly important as it underlines that a contracting party cannot strictly rely on the wording of a contract as there are other obligations that govern this contract. This is of course directly applicable to the matter of time bar clauses, such as that of sub-clause 20.1 of the FIDIC Red Book.

Saghir (2008) discusses how scholars in the Arab World interpret the CISG (previously discussed in Section 0 of this Chapter, page 265) provisions and how this interpretation is affected by the culture and national legal system. He discusses the obligation of “observance of good faith in international trade” in Article 7(1) of the CISG and concludes that Egyptian scholars, influenced

by their national legal system, and in particular, Article 148 of the Egyptian Civil Code, tend to adopt a broad interpretation of the principle of good faith. Instead of considering the principle as a matter of interpretation, they consider the principle as a mandatory obligation and as one of the underlying principles of the CISG.

In his unique comprehensive book on the role of good faith in contract formation, Suleiman (2008) delves in depth regarding the historical and philosophical bases of good faith in contract formation, the role of good faith in the common law and Civil Code (with emphasis on the Iraqi Civil Code) jurisdictions, the role of good faith in international agreements and the role of good faith in pre-contract negotiations and agreements. In this comprehensive work, Suleiman defines good faith (after analysing how good faith is understood in the common and civil law jurisdictions) as the following:

The commitment to direct the (contracting party's) will to the achievement of the direct purpose of the contract, so that this will is in harmony with the justified and legitimate interests of the other contracting party. (Suleiman, 2008, p.157)

He suggests that this definition entails the following in respect of the principle of good faith:

1. It involves focusing the contracting parties' will to the principles of good faith. This, Suleiman notes, can be construed as contrary to the principle of free will when contracting, as it requires the contracting parties to direct their will towards the ethical considerations of good faith and to consider the other party's justified interests, as opposed to consideration of one's own interests in the case of free will. Importantly, Suleiman mentions that when good faith is a legal obligation upon contracting parties, fulfilment of this obligation entails each contracting party to be honest, trustworthy and dignified when dealing with each other and to respect the other contracting party's reasonable expectations as well as to take into account the justified interests of the other party in general.
2. It is also about focusing the contracting parties' will to the "direct purpose" of the contract. Suleiman clarifies that there is a distinction between the "direct purpose" of entering into a contract and the motive. He gives examples of direct purposes by stating that the direct purpose for a seller would be to collect the price of the item being sold, while the direct purpose of the buyer would be to purchase the item being sold. The motives and indirect reasons for the buyer and seller are not germane to the definition of good faith here.

3. The definition of good faith, as stated above, imposes an obligation on both contracting parties, not just one.

B.2.3. Al Sanhoury on "Good Faith"

As in the case of limitation, in order to gain a clear understanding on the principle of good faith under the Egyptian Civil Code, it is important to analyse and understand the explanations of the drafter of the Egyptian Civil Code, Professor Abdel Razzak Al Sanhoury. The most appropriate reference to gain this understanding is his substantial and one of his most renowned work, *Al-Waseet*. The explanation of the reference in the Egyptian Civil Code regarding good faith (i.e., Article 148) is addressed in paragraph 413 of the first volume of *Al-Waseet*. The following are key points mentioned by Al Sanhoury on this Article:

1. The first notable observation about paragraph 413 is its title: "But the Contract Must be Implemented in a Manner that is in accordance with what Good Faith Entails." The key word here is "But", as it indicates that there was a rule to which this article is an exception. This rule, which is addressed in paragraphs 411 and 412, is the principle enshrined in Article 147 of the Egyptian Civil Code, which reads as follows:

The contract makes the law of the parties. It can be revoked or altered only by mutual consent of the parties or for reasons provided for by law.

In paragraphs 411 and 412, Al Sanhoury explains that the contract reflects the will of the contracting parties and, therefore, constitutes the law (although, he clarifies, it does not supersede the provisions of the law in absolute terms) that binds these parties in their contractual relationship. As such, the contract cannot be altered without the parties' mutual consent. He states that, even if a judge attempts to alter a contract for the purpose of achieving justice, the judge cannot implement this alteration by law. The reason is that justice complements the will of the parties, but does not supersede it. Al Sanhoury then briefly mentions particular instances where the contract can be altered by law. Then paragraph 413 follows with the "But" title, indicating that there is an exception to the rule that the contract is the law of the parties that cannot be altered unless through mutual agreement. This exception is the principle of good faith.

2. The clarification memorandum for the preparatory project regarding the "new" law (i.e., the Civil Code of 1948) initially stated that contracts must be performed in accordance with good faith and with fair dealing according to custom. Al Sanhoury clarifies that the basis for the former

is the French Code while the basis for the latter is the German Code (BGB). It was later decided to omit the latter because good faith was considered to encompass the concept of fair dealing.

3. Al Sanhoury clarifies that good faith under the “new” Civil Code is a mandatory requirement for the performance of all contracts and that there is no longer the concept that the Roman principle of *contracts de droit strict* (strict or literal application of contracts) can be applied in some contracts, while good faith (referred to as *contracts de bonne foi*) would be applied in others. Rather, good faith encompasses all contracts, whether at the formation stage or at the implementation stage.
4. Al-Sanhoury then provides examples of the application of good faith in contracts through references to French cases. The first is related to construction works, which refers to a case where an electrical contractor is contracted to provide electrical wiring. In this case, the obligation of good faith dictates that the shortest route possible should be implemented by the contractor. Similarly, the second example is in relation to a driver who transports commodities. Good faith dictates that this driver should use the route that best serves the receiver of the commodities.

5. Al-Sanhoury then refers to examples from the Egyptian Civil Code, which demonstrate the application of good faith in the performance of contracts. Particular reference is made to the following Articles:

Article 346 (2) The debtor is granted in exceptional cases additional time to pay off his debt provided that no serious prejudice is caused to the creditor.

Article 221 (2) In contractual obligations, a debtor who is not guilty of fraud or gross negligence shall only be liable for damages to the extent of those that could have been foreseen at the time of entering into the contract.

Al Sanhoury refers to Article 346 as an example of how the law rewards good faith and refers to Article 221 as an example of how the law punishes the creditor for his bad faith if, in his performance of the contract, he was guilty of fraud or gross negligence.

6. Al Sanhoury states that the principle of good faith is reflected in contracts which obligate its parties to cooperate with each other in the performance of the contract. He then gives examples from the Egyptian and French laws of such cooperation, hence extending the examples of good faith principles within the Egyptian Civil Code. The following is a list of the examples given:

Table 11 Obligations to Cooperate under the Egyptian Civil Code

No.	Legal Reference	Cooperation obligation (as referred to by Al Sanhoury but as described in the Egyptian Civil Code)
1.	Egyptian Civil Code, Articles 530 – 531 and French Civil Code, Article 1871	<p>If a partner in a company does not perform his obligations or acts in a manner so as to give rise for grounds of dissolution or whose presence gives rise to objection from his partners, the court may order dissolution of the company.</p> <p>(Note – The grounds mentioned here are from the Civil Code, to which Al Sanhoury does not make direct reference in his commentary. Rather, he simply refers to the partner’s failure to cooperate with his partners).</p>
2.	French Law No. 13 for the Year 1930, Articles 17, 19 and 21	The insured has an obligation to notify the insurer of any accidents throughout the duration of the insurance contract and must take all measures to mitigate the damages
3.	None given	A publisher must notify the author of the status of the sales of the book.
4.	Egyptian Civil Code, Article 440	The purchaser must notify the seller within a reasonable period of his entitlement to the thing sold.
5.	Egyptian Civil Code, Article 449	The purchaser must notify the seller within a reasonable period of any defects in the thing sold.
6.	Egyptian Civil Code, Article 570	The lessee must not prevent the lessor from making immediate repairs for the preservation of the leased property.

Table 11 Obligations to Cooperate under the Egyptian Civil Code

No.	Legal Reference	Cooperation obligation (as referred to by Al Sanhoury but as described in the Egyptian Civil Code)
7.	Egyptian Civil Code, Article 581	The lessee may install in the leased property water, electric light, gas, telephone, wireless and other like installations. If the intervention of the lessor is necessary for the completion of any of these installations, the lessee may call upon the lessor to intervene, on condition that he undertakes to pay the expenses incurred by the lessor in this connection.
8.	Egyptian Civil Code, Article 585	The lessee must forthwith notify the lessor of all matters that require his intervention, such as urgent repairs, the discovery of defects, encroachments and disturbances or damage by third parties to the leased property.
9.	Egyptian Civil Code, Article 705	A mandatary is bound to give to his mandator all necessary information in connection with the execution of his mandate and render him an account thereof.
10.	Egyptian Civil Code, Article 717	The mandatary is bound, irrespective of the manner in which the mandate is terminated, to carry through any work he has commenced to such a condition that it is not exposed to deterioration.

7. Al Sanhoury concludes his clarification on the principle of good faith by a general statement that a contracting party's obligation to perform in good faith waives in some circumstances resorting to the theory of

abuse in the use of a right. He clarifies that the contracting party who deviates from meeting the required good faith obligation is held responsible for failure to comply with the contractual obligation of performing in good faith before being held responsible for abusing his right.

B.3 Summary of Descriptive Phase for Comparison Point # 2

The above indicates that the principle of good faith is not applied in English law, although there is a struggle regarding its application. A tension exists under English law between the concept of freedom of contract and good faith, with the former clearly governing. The situation is different under the Egyptian Civil Code, as there is a mandatory requirement for the application of the principle in all contracts with no exception, even if that application entails an encroachment on the principle of the contract being the law of the parties.

C. Identification Phase for Comparison Point No.2

As explained in Section D.3 of the Research Methodology chapter, the Identification Phase follows the Descriptive Phase and identifies the similarities and differences between the two jurisdictions in respect of the comparison

point being addressed. The following is an elaboration based on the information provided in this section.

C.1 Identified Similarities for Comparison Point No.2

The main similarity identified is that, in both jurisdictions, there is no solid definition of good faith. There have been attempts to define the term, but there is no agreed upon definition in each jurisdiction. Another similarity is that the principle of good faith is embedded within the laws of each jurisdiction. For example, it has been stated that under English common law, there are several remedies that take into account the principle, without a specific reference to the term "good faith". The references made in the Descriptive Phase to Goode (1992), Korde (2000) and Sim (2001) included fraudulent misrepresentation, undue influence, anticipatory breach and mistake. In the same vein, aside from the clear mandatory requirement in Article 148 of the Egyptian Civil Code, Al-Sanhoury refers to numerous provisions within the Egyptian Civil Code that reflect the principle of good faith without specific mentioning of the term "good faith". Notably, he mentions cooperation between contracting parties as an important factor of good faith and cites eight examples from the Egyptian Civil Code.

C.2 Identified Differences for Comparison Point No.2

The differences identified for the topic of good faith under each jurisdiction can be summarised as follows:

1. The key difference is that, while the concept of good faith is not applied in English law, there is a mandatory requirement under the Egyptian Civil Code that all contracts would be performed in accordance with the requirements of good faith.
2. In direct contrast to each other, the English common law and Egyptian Civil Code jurisdictions contain opposing justifications for the application and non-application of the principle of good faith. On the one hand, the English common law advocates certainty and predictability in the law, and strongly promotes the principle of freedom of contract, and therefore, cannot rely on vague concepts such as good faith. On the other hand, although the Egyptian Civil Code clearly contains a provision that the contract is the "law of the parties", it makes an exception that the contract must be performed in accordance with good faith and that law and other intangible factors, such as equity and custom, are considered a sequel to the contract. In fact, Al-Sanhoury makes it clear that the Roman principle of *contracts de droit strict*, regarding the literal implementation of contracts, does not exist in Egyptian law, even if on

a partial basis, with good faith. Good faith governs all contracts with no exception.

3. Hence, it follows from the above differences that, in the English common law, the terms of the contract, which the parties negotiated at their free will, govern and are generally not affected by the principle of good faith while, under Egyptian law, the contract is read in conjunction with the principle of good faith (i.e., as well as law, custom and equity).

C.3 Summary of Identification Phase for Comparison Point No. 2

It is apparent from this section that, although the English common law and Egyptian Civil Code jurisdictions share the commonality that the principle of good faith is not defined and is vague, there is a stark difference between both jurisdictions, which is that the principle does not play a notable role in the former jurisdiction while it plays a pivotal role in the latter. At the heart of the issue is also the principle of freedom of contract. English law considers this principle of utmost importance to the extent that good faith is completely overshadowed by this principle. In contrast, the Egyptian Civil Code considers the principle of good faith so important that it is an integral component of, and a sequel to, any contract that is entered into in free will between contracting parties.

In regards to the time bar in sub-clause 20.1 of the FIDIC 1999 Red Book, the above means that it is most likely to be enforced under English law, while, under the Egyptian Civil Code jurisdiction, its enforcement depends on the facts of the case. If an employer abuses his right under this sub-clause to reject a contractor's claim due to a late notice when the employer acted in bad faith (through, for example, prior knowledge of the event at hand), then such a rejection may be held unenforceable under the law. It can be deduced also that the duty of good faith imposes on the employer an obligation to cooperate with the contractor and inform him of any potential event that may cause the contractor substantial financial losses, notwithstanding the contractor's obligation to present a formal notification to the employer within 28 days of the event giving rise to claim.

D.Explanatory Phase for Comparison Point No.2

As in the case of Comparison Point No.1, in order to explain the similarities and differences identified with respect to each jurisdiction regarding the principle of good faith, it is important to understand the origin and historical evolution of good faith in each jurisdiction.

D.1. Origin of Good Faith in English Common Law

Goode (1992) provides a historical account of the evolution of good faith under English law. He suggests that the concept started when merchants had an accumulated law that was administered by the merchant courts and where the merchants themselves were judges. This law constituted a uniform, uncodified body of commercial law separate from ordinary common law administered by the King's courts. It was based on commercial custom and practice which the merchants would carry with them in their travels across Europe to the international fairs and they themselves would resolve in a rapid, businesslike fashion the disputes which inevitably arose. One of these commercial custom and practices was good faith. This concept therefore formed part of the law merchant. Gradually the merchant courts disappeared, their jurisdiction being taken by the royal courts, and the principles of the law merchant became absorbed into the general common law. The judges of this old common law adopted a rigorous attitude that was premised on the business world being rough and tough and that contracting parties in the business world are assumed to be aware of the risks they are getting into. This was to the extent that a judge (Goode does not mention who) stated that even if the seller of goods is guilty of fraud, this does not entitle the buyer to get out of the transaction. Eventually, as the common law developed, courts

came to consider this approach too ruthless. They began to try to help the weaker party by imposing certain duties of good faith in a range of other situations. This, in turn, eventually led to the presence of good faith principles within the English common law, although in a limited fashion. There is no general, overriding principle of good faith, as explained in the Descriptive Phase.

Harrison and Jensen (1999) trace back the concept of good faith to the ancient philosophical works of Aristotle and Aquinas, who were concerned about problems of buying and selling, and who wanted to achieve fairness while not stifling business transactions. They state that this ancient concept of good faith in a revived form went round Europe, England and the United States like wildfire at the end of the eighteenth century and the beginning of the nineteenth, due to the distribution of the works of writers such as Pothier and Grotius among others. Pothier was a French jurist and “natural lawyer”, who was made reference to on several occasions in nineteenth century English case law. Harrison opines that he was highly spoken of by English common law judges and that the label ‘good faith’ appears in his work for certain implied terms that were said to be ‘natural’. They are terms that are included in the contract whether or not the parties have thought about them. Harrison suggests that the legal concept of good faith was introduced in England by Lord Mansfield (who had been influenced by Grotius) in 1766 through the case

of *Carter v. Boehm* (1766). This legal concept was clarified and developed by the English courts mainly in the nineteenth century. Towards the end of the nineteenth century it fell into disuse in England, in favour of encroaching statute law. Harrison concludes this historical account by stating that, just as Aquinas had produced a more practical working out of Aristotle's principles, the English judges produced a more detailed practical working out of the principles found in the works of Pothier and other natural lawyers, who had a powerful and pervasive influence throughout the Western world then.

D.2. Origin of Good Faith in Egyptian Civil Code

Although Al-Sanhoury, as apparent from Section B.2.3 of this Chapter, directly refers to the French laws in his commentary about good faith, one must not forget the impact of Islamic law on his work (Hill, 1988). It is therefore important to address where the principle of good faith stands with respect to Islamic law. Saghir (2008) suggests that, despite of the fact that Islamic Law does not use the term "good faith", the concept is even broader in Islamic Law. Good faith in Islamic Law includes a duty to act unselfishly. Saghir suggests that this is natural because Islamic law does not separate between law, morality and religion. Rather, it addresses society's interests, not only those of contracting parties. The way in which this influences the formulation of rules is most obvious when the interest of contracting parties conflict with

those of the society at large. Islamic law goes beyond the narrower interest of contracting parties. For example, traders should pay due regards to the public interest and thus should not restrict their goals to making profit. They should also take into account the need to make products available to consumers at reasonable prices. As far as contracts are concerned, Islamic Law imposes a general duty to act in good faith in all transactions. It requires parties to act in good faith during negotiations, contract conclusion and performance. For example, a party who negotiates with another only to access that other party's confidential information violates the Islamic Law duty to act in good faith. In addition, a creditor bears a duty to give his debtor a grace period if he was unable to pay his debt.

Sulaiman (2008) addresses the principle of good faith from an Islamic law perspective and suggests that good faith is an important cornerstone on all principles governing Islamic law. Although the references of good faith are numerous in the Quran and Sunna (Prophet sayings and actions), he makes reference to the Quranic Verse 5:1: "O you who have believed, fulfill [all] contracts." However, he also refers to the Prophet's saying "Muslims must fulfill their conditions except a condition that orders a wrong or forbids a right." Sulaiman opines here that this entails that contracts cannot be fulfilled absolutely. Rather, there are limitations. He also mentions that Islamic law

requires honesty, dignity in dealings and forbids all kind of cheating and fraud during contract formation. He adds that, in general, the Quran requires that the benefit and interests of others must be taken into account, as exemplified in the Quranic Verse: "And they ... give [them] preference over themselves, even though they are in privation" (Quran, 59:9).

Sulaiman also refers to the Quranic Verse which states: "Indeed, Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression" (Quran, 16:90) and mentions that some researchers of the concept of good faith in Islamic law interpret the reference in this verse to "good conduct" to mean good faith and the prohibition of "bad conduct" to mean bad faith. Sulaiman also refers to the Prophet saying: "One's faith is not complete until he desires for his brother what he desires for himself." Sulaiman concludes that, although Islamic jurists have not reached a general theory on good faith under Islamic law, there are clear evidences from the Quran and Sunna that require good faith and honesty on all financial dealings and which prohibit all kinds of cheating and fraud.

D.3 Conclusion of Explanatory Phase for Comparison Point No.2

The Explanatory Phase for the second comparison point yields an important observation: the French Civil Code is a common denominator regarding the principle of good faith in both the English common law and Egyptian Civil Code

jurisdictions. It has been stated in the English common law section that English merchants would travel across Europe with their own merchant law that was separate from the common law applied at the King's court. This merchant law embodied good faith principles. More specifically, Pothier was mentioned as a French jurist who had his influence on the English case law of the nineteenth century. The work of Pothier, Grotius and other natural lawyers affected English common law at the time through the application of good faith principles. The French influence is more direct in respect of the Egyptian Civil Code jurisdiction. Al-Sanhoury clearly attributes the application of good faith in Article 148 of the Egyptian Civil Code to the French laws at the time. In addition to the French influence, there is the Islamic law which applies an even broader concept of good faith.

VII. COMPARISON POINT # 3 – THE “PREVENTION PRINCIPLE”

A. Introduction

The summary of the Conceptualisation Phase (page 186) identified the topic of the “prevention principle” as the third comparison point. As highlighted in the Literature Review chapter, this topic is covered extensively in the literature of English law. On the other hand, there is no reference in any Egyptian law literature to this principle. It is therefore appropriate to delve deeper into the English literature on the topic and explore how this principle is applied under the Egyptian Civil Code jurisdiction.

B. Descriptive Phase for Comparison Point No.3

B.1 The “Prevention Principle” under the English Common Law

B.1.1. Introduction

Section II.E.1.3 addressed the prevention principle with respect to the English common law. This section delves deeper in the case law discussed in the literature review and explores more cases to gain an insight as to how the

prevention principle is dealt with under English law. It is important to note that, while, in the literature review, the main focus was on the English literature, which at times made reference to Australian and Scottish case law, the focus in this section is on English case law only. A summary of the relevant cases is discussed first, followed by an analysis of the main salient points of the prevention principle under English law. This will then set the stage for exploring the same principle under the Egyptian Civil Code jurisdiction. Since the Literature Review chapter addressed certain cases regarding the prevention principle, these cases are not discussed in this section (but only made reference to) for the sake of avoiding repetition.

B.1.2. "Prevention Principle" Case Summary

1. The first case mentioned in Section II.E.1.3.2, which is considered one of the origins of the prevention principle, and which dates back to the nineteenth century, is *Holme v Guppy* (1838). This case planted the seeds of the prevention principle.
2. In *Dodd v Churton* (1897), the contractual completion date for the work was 01 June 1892. Liquidated damages were in the amount of GBP 2 per week if the work as a whole or any part thereof is not completed by the completion date. The contract had a provision that additional work

would not vitiate the contract and there were no provisions with respect to extensions of time due to additional work. The defendant ordered additional work and the actual completion date was 05 December 1892. The defendant presented evidence that the additional work would take a fortnight to complete and, therefore, asserted its entitlement to liquidated damages for the delay in completion. The court held that, by ordering additional work which affected the claimant's ability to complete on time, the defendant waived his rights for the application of liquidated damages. This decision was upheld by the Lord of Appeal, which referred to *Holme v Guppy* to support its decision.

3. *Peak v McKinney* (1970) was discussed in Section II.E.1.3.2.
4. In *Trollope & Colls v North West Metropolitan Regional Hospital Board* (1973), Lord Denning in the Court of Appeal made reference to *Dodd v Churton* when addressing that the prevention principle applied to acts of breach as well as legitimate acts, such as issuance of variations. He said:

It is well settled in building contracts – and in other contracts too – that when there is a stipulation for work to be done in a limited time, if one party by his conduct – it might be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work, within the stipulated time, then the one whose conduct caused the trouble can no longer insist on strict adherence to the time stated. He

cannot claim penalties or liquidated damages for non-completion in that stipulated time.

He further stated:

The time becomes at large. The work must be done within a reasonable time – that is, the stipulated time plus a reasonable extension for the delay caused by his conduct.

Lords Pearson and Cross corrected Lord Denning's statement when the case was heard in the House of Lords that *Dodd v Churton* was an authority for the principle of time being at large in the case of prevention because, rather, it is an authority for liquidated damages not being deducted in the case of prevention. Some commentators, such as Eggleston (2009), opine that Lord Denning's statement is correct in itself.

5. In *Rapid Building Group Ltd. v Ealing Family Housing Association Ltd.* (1984), the contractor was 43 weeks in delay for completing the work, with three of these 43 weeks being attributable to late site possession by the contractor. Due to the absence of any provision in the contract to grant an extension of time due to late site possession, the employer was barred from applying liquidated damages. This case was an

example of many in which the authority of *Peak v McKinney* was confirmed. In this regard, Lord Justice Stephenson stated:

In my judgment, the authority is binding upon us; it quite clearly supports the decision of the learned judge that no counterclaim for liquidated damages under clause 22 of this contract can succeed. Presumably if the employer is responsible for any delay which does not fall within the *de minimis* rule, it cannot be reasonable for him to have completed the works on the completion date. Whatever reasoning underlying the decision of this court it binds us and justifies the judge's decision that the counterclaim for liquidated damages is no answer to the plaintiff's claim.

Although the employer could not apply liquidated damages, he was permitted to counterclaim unliquidated damages.

6. *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* (2007) was discussed in Section II.E.1.3.2.

7. *Steria Ltd v Sigma Wireless Communications Ltd* (2007) was discussed in Section II.E.1.3.2.

8. In *De Beers UK Ltd v Atos Origin IT Services UK Ltd* (2010) the defendant (Atos) was appointed by the claimant (De Beers) to upgrade its software systems. Delays occurred for a number of reasons attributable to both De Beers and Atos, namely changes in scope attributable to the former and lack of communication attributable to the latter. De Beers' delays as a result of scope changes were on the critical

path and, as a result, resulted in a delayed delivery date of 19 December 2008. Since there was no agreement between the parties regarding the impact of the scope changes on the critical path, it was held that time was at large. Edwards-Stuart J considered, in order to decide whether to grant an extension of time, causes of delay for which Atos was responsible and held, as a result of the delays attributable to Atos, the completion date would have been delayed anyway until mid-December 2008 regardless of the scope changes attributable to De Beers and, accordingly, there is concurrent delay. Based on 'the general rule in construction and engineering cases' that where there is concurrent delay the contractor is entitled to an extension of time but cannot recover in respect of the loss, the court held that Atos would have been entitled to an extension of time up to mid-December 2008. According to Croft (2012), Edwards-Stuart J appears to have applied the test for concurrent delay to the prevention principle and concluded that the contractor was entitled to an extension of time where concurrent delay was caused partly by the employer's act of prevention.

9. In *Adyard Abu Dhabi v SD Marine Services* (2011), the defendant (SD) entered into a contract with the claimant (Adyard) to construct two ships. During construction, Adyard's designer attempted, unsuccessfully, to gain exemptions from certain codes. This entailed

that the doors below deck would be sliding and operated hydraulically. Adyard was in delay in ordering the doors, which resulted in not achieving the sea trials dates. Moreover, SD instructed what Adyard considered to be a variation late in the project. The contract entitled the employer to reject hulls if they were not ready on the sea trials dates set in the contract, which was the case. Accordingly, the employer rejected both ships and purported to rescind the contract. The contract contained a provision that, in order for an extension of time to be granted as a result of a variation, the time impact had to be agreed in advance (which was not the case). Adyard argued that it was prevented from completing on time because of the late variation, which delayed the work, and that the contract did not allow for an extension of time when the time impact is not agreed upon in advance. Hamblen J held that SD's instructions did not amount to a variation and considered that, even if they had, Adyard was in delay and would not have achieved the completion date in the contract regardless of SD's delays. Therefore, the prevention principle and extension of time provisions under the contract would not apply. He defined concurrent delay as: 'a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency' and referred to Royal Brompton when stating that 'there is only concurrency if both

events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time.'

Regarding prevention, Hamblen J referred to *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* and stated for the prevention principle to apply, 'the act relied upon must actually prevent the contractor from carrying out the works within the contract period'. Hamblen J also stated that English law requires that the relevant event is a concurrent delay event that caused actual delay. Accordingly, he disagreed with Lord Carloway's suggestion in the Scottish case *City Inn v Shepherd* that it is only necessary to show the relevant event is an operative cause of delay. In addition, Hamblen J suggested that the English courts would not apportion concurrent delay, but that "if there is true concurrent delay, English law approach would be to recognise that the contractor is entitled to an extension of time".

10. In *Jerram Falkus v Fenice Investments Inc (No 4)* (2011), the defendant (Fenice) engaged the claimant (Jerram Falkus) to carry out the design and construction of a development under a JCT Design and Build Contract, 2005 edition, revision May 2007. The standard JCT standard form was subject to numerous amendments, most notably the deletion of the following relevant events (events that entitle a contractor

to a time extension): (a) "Any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons" in Clause 2.26.5, and (b) "The carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Work, or the failure to carry out such work..." in Clause 2.26.6. Jerram Falkus alleged that Fenice prevented it from completing on time and that time was at large because the pertinent extension of time provisions had been deleted. Coulson J endorsed Hamblen J's judgment in *Adyard Abu Dhabi v SD Marine Services* (2011) in relation to the prevention principle and suggested that if there were two concurrent causes of delay the prevention principle would not be triggered because the contractor could not show that the employer's conduct made it impossible for him to complete within the stipulated time'.

B.1.3. Discussion of "Prevention Principle" Case Summary

The following are the salient points that can be highlighted from the above discussion on the "prevention principle" under English law:

1. As evident from the early case law, the presence of a time extension mechanism in the contract for delays caused by the employer is of

paramount importance for the operation of the prevention principle. As demonstrated in *Holme v Guppy*, *Dodd v Churton*, *Peak v McKinney*, *Trollope & Colls v North West Metropolitan Regional Hospital Board* and *Rapid Building Group Ltd. v Ealing Family Housing Association Ltd.*, the absence of a mechanism in the contract to extend the completion date due to employer's delays barred the employer from applying liquidated damages and set time at large.

2. It was established in *Rapid Building Group Ltd. v Ealing Family Housing Association Ltd.* that, although the employer may be barred from applying liquidated damages when preventing the contractor from completing on time (where there is no contractual mechanism for extending the time due to employer's delays), actual damages may be applied. Therefore, it can be concluded that, in cases where the prevention principle is applied, there is no effect on the employer's ability to claim actual damages. It must of course be noted that, in *Rapid Building Group Ltd. v Ealing Family Housing Association Ltd.*, there was a substantial delay caused by the contractor (40 weeks) and a relatively minor one caused by the employer (3 weeks due to late site possession). Hence, the employer's actual damages claim may be contingent upon proof that the contractor's delay is dominant.

3. It is established in *Trollope & Colls v North West Metropolitan Regional Hospital Board* and *Dodd v Churton* that acts of prevention by the employer do not only cover breaches of contract, but also other legitimate acts, such as the ordering of variations and extra work.
4. The cases of *Multiplex v Honeywell* and *Steria v Sigma* established that, where there is a clear mechanism in the contract for extension of time due to the employer's delays, and the contractor fails to trigger this mechanism, then the prevention principle does not apply. Furthermore, if there is an ambiguity in the wording of this contract mechanism, this ambiguity would be interpreted in the favour of the contractor. It must be noted that there is a distinction as to whether the contract in question contains a provision for the project manager to extend the time. If the project manager could have and should have extended the time, but failed to do so, and the contractor was prevented from completing on time due to the employer's act(s) of prevention, the prevention principle may be applied (Baily, 2010, p. 1037).
5. In more recent years (2010 and onwards), attention in English case law pertaining to the prevention principle addresses the situation where there is concurrency of delay, which prevents the contractor

from timely completion. As established by *De Beers UK Ltd v Atos Origin IT Services UK Ltd*, *Adyard Abu Dhabi v SD Marine Services* and *Jerram Falkus v Fenice Investments Inc (No 4)*, the English case law adopts the principle that, in order for the prevention principle to apply (assuming that there is no contract mechanism to extend time due to employer's delay and that, if there is, the contractor did not fail to trigger this mechanism), there must be actual delay caused by the employer to the contractor's work. If the contractor is already in delay and would not have completed his work anyway due to other factor(s), for which the contractor is responsible, the prevention principle does not apply. It is also established that English case law would not apportion concurrent delays (as the Scottish case law allows in *City Inn v Shepherd*). Rather, in order for the prevention principle to be considered, the contractor must prove that it was impossible for him to complete within the specified time in the contract but for the employer delays. Baily (2011) also suggests that the delay must be "actual", not "potential". So, the contractor must have been actually impacted by an employer's act of prevention. A potential or "theoretical" impact on the completion date does not count.

B.2 The “Prevention Principle” under the Egyptian Civil Code

B.2.1. Introduction

The previous section delved into how the prevention principle is treated under English law and how case law in respect of this principle developed through the years. Since, as mentioned in the Literature Review chapter, there is no direct reference to this principle in the Egyptian Civil Code jurisdiction, it is important to use the “functional equivalence” principle (Section C.4.1 of the Research Methodology chapter, page 159) to deduce how the prevention principle is treated under the Egyptian Civil Code jurisdiction. In this case, it is important to understand the legal principle in the Egyptian Civil Code that is equivalent to the “prevention principle” under English law. This is accomplished in this chapter in three stages. First, in Section B.2.2, the literature presented in the previous comparison point (i.e., good faith) is analysed so that principles in the Civil Codes of other Arab countries that are germane to the prevention principle in concept are identified. The reason for selection of good faith as the base for this identification is that both the principles of good faith and prevention appear to be related to the concept of equity and fair dealing. Therefore, it is expected that concepts applicable to the prevention principle are present within the discussion on good faith. Second, in Sections B.2.3,

B.2.4 and B.2.5, these identified principles are elaborated upon in further detail and the pertinent references from the Egyptian Civil Code are discussed. Third, section B.2.6 is dedicated to understanding the concepts discussed in Al-Sanhoury's comprehensive commentary on the Egyptian Civil Code, *Al-Waseet*, that are pertinent to the prevention principle as understood and applied in English law. This chapter concludes with a summary of the points discussed.

B.2.2. *The Principle of "Good Faith" and the "Prevention Principle"*

In order to understand how the principle of good faith is applicable to the prevention principle under the Egyptian Civil Code, it is necessary to refer to several points discussed in the previous chapter of "good faith" (i.e., chapter VI) and, from there, deduce how the prevention principle would be applied under the Egyptian Civil Code.

1. Applying the two examples of "good faith" given by Glover (2007) in Section VI.B.2.1 to the prevention principle, , it can be concluded that the prevention principle applies (and, therefore, renders the time bar in sub-clause 20.1 unenforceable) if, for example, the very substantial claim submitted by the contractor in the first example is in relation to an employer's breach or a legitimate act, such as the ordering of a variation. Similarly, if the claim in the second example is in relation to

a variation that an employer or his project manager ordered verbally or through a meeting (and, therefore, had knowledge of), the employer is prevented from relying on the contractor's lateness in submitting the notice to cover his own default. It should be noted that these inferences regarding the prevention principle are more specific than those highlighted by Glover. It is clear that Glover's examples do not just cover situations where the employer is relying on the lateness of the time bar notice to cover his own breach. Rather, the examples given are applicable to a more general scenario such as, in the case of the first example, rejection of a very substantial claim regardless of whether the employer is culpable in its causation or not and, in the case of the second example, the employer's prior knowledge of any contractor-claimed event regardless of whether the event was triggered by an employer's act of prevention or not.

2. Hall and Warren (2014) address the matter as legal practitioners within the region (i.e., members of the law firm Clyde & Co.), advising contractors in Qatar how to overcome the contractual time bar clauses when the contract is subject to Qatari law. Under the heading titled "conflict with local laws", one of their arguments that is related to the "prevention principle" is when the employer breaches his obligation to act in good faith according to Article 172 of the Qatari Civil Code

(identical to Article 148 of the Egyptian Civil Code) or abuses his right according to Article 63 of the Qatari Civil Code (similar to Article 5 of the Egyptian Civil Code, which lists the circumstances where a party's exercise of its rights may be unlawful). An example given by Hall and Warren of such breach or abuse of right under the law is where an employer denies the Contractor an extension of time in circumstances where the employer and/or the engineer knew, or ought to have known, about a delay experienced by the contractor that is attributable to the employer – which is in essence the cornerstone of the prevention principle.

3. Addressing the topic of good faith from the perspective of the Civil Code of the United Arab Emirates, King (2014) concludes that the time bar under sub-clause 20.1 of the FIDIC Red Book may be defeated if it is established that the entity relying on it acted in bad faith. The prevention principle is not discussed, but it can be deduced that the prevention principle would render the FIDIC time bar unenforceable under UAE law. This is evident from her mentioning that an employer's denial of a contractor's claim due to the contractor's failure to provide the notice required by the time bar when the employer knew about the claim, even if informally, constitutes an act of bad faith and, accordingly, the time bar would not be enforced in this situation due to

the breach of the overriding principle of good faith. This example can be easily applied to the prevention principle if an employer knew informally about a certain event that delayed the contractor and the contractor did not serve the required notice. The prevention principle would be further enforced if the contractor is delayed because of an act of prevention by the employer, whether illegitimate (i.e., a breach of any of the contract conditions) or legitimate (e.g., a variation or any other instruction made pursuant to the contract conditions).

B.2.3. The Principle of "Unlawful Use of Right" and the "Prevention Principle"

Embedded within the discussion in the previous chapter of the principle of good faith is the discussion on the legal principle of unlawful use of a right and its effect on rendering a time bar unenforceable. Reference was made, for example, to King (2014) who stated that that it may be unlawful when a time bar is used to avoid a substantial claim in the case where the contractor's substantial losses are not equal to the employer's right to be notified within the period in the time bar. In support, King refers to Article 106(1) of the UAE Civil Code which states: "a person shall be held liable for the unlawful exercise of his rights" and concludes that this Article, with the good faith obligation under Article 246, may be used to challenge the

effectiveness of a time bar in such circumstances. It was stated at that juncture that Article 5 of the Egyptian Civil Code contains a similar provision. Sub-paragraph (b) of Article 5 (i.e., the benefit desired from the exercise of a right is out of proportion to the harm caused to another person) is particularly applicable to King's point regarding an employer gaining benefit from the time bar under sub-clause 20.1 that is out of proportion to the substantial losses a contractor may be incurring.

In addition to sub-paragraph (b), sub-paragraph (a) (i.e., the sole aim to exercise the right is to harm another person) can also be applied to the prevention principle, depending on the facts of the case. For example, if a contractor can establish that an employer intended to harm the contractor by relying on the time bar to dismiss the contractor's claim in order to cover up for a concurrent delay caused by the employer, then that situation could fall under case (a) and render the employer's right to rely on the time bar unlawful. Similarly, if a contractor is only a few days late for serving the notice, or is notably late in serving the notice but the impacted activity is not critical (i.e., has no impact on the completion date of the project and/or has a negligible cost impact), and the contractor's claim is one that can cause him substantial loss if rejected, especially if the claim is associated with an action or inaction of the employer and/or his representative, then case (b) can be used to prevent the employer

from gaining benefit from his own breach and unlawfully exercising his right to reject the claim due to non-compliance with the time bar clause. As in the case of “good faith” as concluded in the previous section, the “unlawful use of the right” principle highlighted in Article 5 of the Egyptian Civil Code can be construed to have a broader application than an employer’s acts of prevention. For example, in case (a), the employer’s reliance on the time bar is unlawful if he intended to cause harm to the contractor regardless whether the claim in question was in relation to an employer’s act of prevention. Similarly, if the benefit gained by the employer from rejecting the contractor’s claim due to the contractor’s non-compliance with the notice, is dis-proportionate with the loss suffered by the contractor as a result of the rejection, then the employer’s reliance on the time bar to reject the claim is unlawful regardless of whether the event giving rise to the claim in question was caused by the employer.

It is clear from the above that the “good faith” and “unlawful exercise of a right” principles are closely intertwined and can uphold the prevention principle, rendering the condition precedent unenforceable. On this subject, it is worthy to refer to Professor Al Sanhoury’s commentary on the principle of good faith in his work *Al-Waseet*, which was summarised in Section B.2.3 of Chapter VI, and in particular the seventh point mentioned in page 294, in which he clarifies that the contracting party who

deviates from meeting the required good faith obligation is held responsible for failure to comply with the contractual obligation of performing in good faith before being held responsible for abusing his right.

Al Sanhoury dedicates a complete section to this principle in paragraphs 552 to 567 from Volume 1 of *Al-Waseet*. The following is a summary of the points highlighted. It is noted that Al Sanhoury's comments on the third point of Article 5 (i.e., unlawful benefit) is not addressed as it is not germane to this research:

1. The principle of unlawful use of a right is included in the "new" Civil Code (of 1948) in Article 5, within the preamble of the Code to underline its importance and applicability to all principles of law, whether in contract or tort (paragraph 556 and 557).

On sub-point "a" of Article 5 – the sole purpose is to harm another person:

2. The extent to which a person abuses his right is measured by the behaviour of the ordinary man (paragraph 559). It is not, therefore, enough to establish that a person intended to harm others, it is also important to establish that this person's exercise of a right deviated from that the customary behaviour of an ordinary man. For example, a person may intend, by his exercise of his right, to harm others.

However, the purpose may be to achieve a lawful benefit to himself that by far outweighs the harm caused to others. In this case, the intent to harm others is not considered an abuse of a right because it did not deviate from the behaviour of an ordinary man. On the other hand, if the intent to harm others is the driving factor behind this man's exercise of his right, then his exercise of a right is considered unlawful even if a benefit to himself is intended (alongside the harm as a secondary basis) and gained (paragraph 560).

On sub-point "b" of Article 5 – the proportionality of the harm and benefit:

3. This factor is also subject to the objective test of the ordinary man. It is not normal that a person uses his right to inflict harm on another person with little benefit to himself that is out of proportion to the harm inflicted. A person of this trait is either reckless, showing no concern to the harm he inflicts on others with little benefit to himself, or conceals an intent to harm under the guise of a superficial benefit of little importance that he pretends to be striving for. This test is also reflected in Article 818 of the Civil Code, which prevents an owner of a wall from demolish it at his own initiative and without good cause if, by its demolition, harm is caused to the neighbour whose property is enclosed

in it. Al-Sanhoury also refers to Articles 826 and 1029 as further examples within the law of this point.

It is observed from Al Sanoury's remarks that there is an emphasis on the "ordinary man" as the measuring stick for one's abuse of a right. In terms of the applicability of this to the time bar in sub-clause 20.1 of the FIDIC Red Book, this raises questions. If an employer delays a contractor, and the contractor fails to inform the employer of the impact of such delay within the specified time in the time bar, wouldn't an "ordinary man" in this position want to protect himself by rejecting the contractor's claim (or, at least, notably reducing its claimed amount)? Would such protection be considered an unlawful exercise of a right?

B.2.4. *"Onerous Penalties/Actual Losses" and the "Prevention Principle"*

Hall and Warren (2012) refer to Articles 171 and 172 of the Qatari Civil Code to conclude that courts have the discretion to adjust the compensation mechanism agreed between the parties if the loss of entitlement to a claim is disproportionate to the actual loss suffered by the party to whom the notice should have been served. They state that there may be little or no loss suffered by the employer as a result of a late or incomplete notice. King (2014) makes a similar observation regarding the

Civil Code of the UAE and refers to Article 390(2) therein to conclude that, whilst the parties are free to fix pre-agreed compensation amounts in their agreements, the court retains the discretion to adjust these amounts so that the compensation reflects the actual loss suffered in any event regardless of whether there was any act of prevention by the employer.

The references made by Hall, Warren and King to the Qatari and UAE Civil Codes are, of course, also part of the Egyptian (and also the French Code) Civil Code (being the source of Arab Civil Codes, as mentioned in the Literature Review, page 178). This is shown as follows:

- Article 223 of the Egyptian Civil Code states: "The parties may fix in advance the amount of damages either in the contract or in a subsequent agreement, subject to provisions of Articles 215 to 220."
- Article 216 states: "The judge may reduce the amount of damages or may even refuse to allow damages if the creditor, by his own fault, has contributed to the cause of, or increased, the loss."
- Article 224 states:

"Damages fixed by agreement are not due, if the debtor establishes that the creditor has not suffered any loss.

The judge may reduce the amount of these damages, if the debtor establishes that the amount fixed was grossly exaggerated or that the principal obligation has been partially performed.

Any agreement contrary to the provisions of the two preceding paragraphs is void.”

It is therefore apparent from the above that, if a contractor is late in serving a notice, and the employer decides to use his contractual right to reject a substantial claim due to the time bar, the court (or arbitration panel) under the Egyptian law may forgo the contract provisions and consider the actual losses suffered by the employer as a result of the contractor’s lateness of serving the notice. If no losses are suffered, then, pursuant to Article 224, the rejection may be rendered unenforceable. The words “any agreement contrary to the provisions of the two proceeding paragraphs is void” in Article 224 send a strong message that the law’s provision is mandatory in this regard and supersedes any contractual agreement. This is regardless of whether the claim in question is in relation to an employer’s act of prevention or not. If it is due to an act of prevention, however, then, pursuant to Article 216, the employer’s position under the law is even less favourable and the court may reduce the damages or reject them altogether. In terms of the employer’s rejection of a substantial claim due to the late notice, to which he has contributed, this means that the court may allow the contractor to recover the claimed amounts notwithstanding the late notice or, at least, reduce the claimed amounts

so that only the amounts associated with the employer's act of prevention are recoverable.

As in the case of unlawful exercise of a right, Al-Sanhoury dedicates a section in Volume 1 to discuss the topic of "fault". He divides fault into two different categories, namely "moral" and "physical". The "physical fault" is the one germane to this research, as it is in relation to physical loss incurred by the contractor as a result of an employer's act of prevention. Also applicable is the case where a contractor is late in serving the claim notice on the employer and the extent to which this lateness caused physical loss to the employer. In both cases, the matter under discussion is in relation to the "physical fault" category. Al Sanhoury states in paragraph (570) that there are two conditions for "physical fault" to take place, namely: (a) The fault must have violated the interest of the harmed person in a financially quantifiable manner, and (b) this violation must be certain, not probable. Hence, in terms of the time bar notice requirement and the prevention principle, it can be deduced by applying this definition that the employer's fault, or act of prevention, materialises if he actually delayed the contractor (i.e., the act of prevention must be certain, not probable) and caused the contractor financial harm (e.g., such as imposing on the contractor liquidated damages or any other monetary claim).

B.2.5. *The Principle of "Waiver" and the "Prevention Principle"*

The principle of "waiver" is reflected in Articles 371 and 372 of the Egyptian Civil Code, which state:

Article 371

Obligations are extinguished by a voluntary release of a debtor by his creditor. The release is completed as soon as it comes to the knowledge of the debtor, but becomes void if refused by him.

Article 372

The release of an obligation is subject to the basic rules that govern gifts. No special form is required for release even if it is the release of an obligation whose existence was conditional upon a special form required by law or by the agreement entered into by the parties.

The relevance of this to the prevention principle is that there may be situations where an employer, by his conduct, waives the obligation on a contractor to provide the claim notice within the specified time period. This can take place through, for example, the employer's processing of contractor's claims in the past despite the lack of a notice or despite the serving of a late notice. Another example is when a contractor's claim is not accepted by the employer, but on grounds that do not rely on the notice or its lateness. The recurrence of such incidents can lead to the

understanding that the strict requirement of the notice within the specified period has been waived or “voluntarily released” (using the wording of Article 371) by the employer. Therefore, pursuant to Articles 371 and 372 of the Egyptian Civil Code, an employer is prevented from benefiting from his own fault of not insisting on the contractor’s obligation to strictly abide by the notice requirements in the contract.

B.2.6. *Al Sanhoury on the “Fault of the Harmed”*

The most direct reference to the prevention principle made by Al Sanhoury is in Volume 1 of *Al-Waseet*, paragraphs 592 to 596, under the heading “Fault of the Harmed”. In this section, Al Sanhoury describes the Egyptian law’s position with respect to the situation where a person causes, or contributes to the causation of, harm to himself. Since, in the case of the prevention principle, the employer has caused or contributed to the project delay (therefore causing harm to himself through his own fault), the information provided by Al-Sanhoury in this section can be used to understand the Egyptian law’s position with respect to the prevention principle. The following are key points raised by Al Sanhoury when discussing this topic:

1. Al Sanhoury begins the discussion with a clarification that “fault of the harmed” takes place when a defendant caused harm to the

claimant but, in the same time, the claimant was at fault. It is important to know at this point the effect of the claimant's fault on the defendant's responsibility and it is a condition, in this case, that the fault of the defendant contributed to the harm caused.

2. The yardstick for measuring fault is the ordinary man.
3. In paragraph 593, under the heading "dominance of either fault over the other", Al-Sanhoury states that, in the case of dominance of one fault over the other, the dominated fault has no effect. Therefore, if the dominating fault is attributable to the harmed, the claimant bears no responsibility due to lack of causation.
4. Al Sanhoury then clarifies that this dominance of fault can take place in two forms: (a) if the dominating fault substantially exceeds the other fault and (b) if a fault is a consequence of the other. Regarding the former (which is the one that is more relevant to the topic of concurrent delays), Al Sanhoury refers to two further categories: (a) if the fault is intentional, and (b) if one of the faults is the harmed party's acceptance of the fault. In the former case (i.e., if the harmed intended to cause harm on himself), the harmed party's fault completely absorbs the fault of the other party, who is completely absolved from the responsibility due to lack of causation. In the case of the latter (i.e., if one of the faults is the harmed party's

acceptance of the fault), Al Sanhoury clarifies that the harmed party's acceptance of the fault does not absolve the other party's responsibility for the fault caused. However, the harmed party's fault of accepting the harm can reduce the other party's responsibility for the harm caused. Examples given for this point include someone who knowingly rides a faulty car, or who lets a person under the influence of alcohol to drive it, or who directs the driver to speed to dangerous levels. In all these situations, the harmed (the person in the car) is at fault for accepting the harm caused and this acceptance results in reducing the responsibility of the party causing the harm.

5. "The Contributory Fault" is discussed in paragraph 596 and can be considered the most direct reference in the Egyptian law to what is considered as a concurrent delay in modern context. Al Sanhoury defines "contributory fault" as one which each party is at fault and contributed independently to the harm caused. In this case, Al Sanhoury states that the responsibility is shared equally between the contributors to the fault. Al Sanhoury refers to Article 169 of the Civil Code which states:

When several persons are responsible for an injury, they are jointly and severally responsible to make reparation for the injury.

The liability will be shared equally between them, unless the judge fixes their individual share in the damage due.

6. However, Al-Sanhoury then refers to Article 216, which he states has been drafted to specifically address this point of contributory fault, which states:

The judge may reduce the amount of damages or may even refuse to allow damages if the creditor, by his own fault, has contributed to the cause of, or increased, the loss.

Al Sanhoury notes that this Article is applicable in contract and in tort and that, pursuant to it, if the harm caused is solely due to the creditor, then he would not be entitled to any compensation due to the harm. If he contributed to the harm, then his compensation would not be complete depending on his share of the harm causation.

7. There are two points that must be considered regarding Article 216:
 - a. The Article states "the judge may reduce". Hence, it is not mandatory that this reduction be made, for a judge may not reduce at all if the defendant's fault encompasses the fault of the harmed party.
 - b. The Article states "or may even refuse to allow damages", which refers to the case when the fault of the harmed party encompasses the fault of the defendant.

8. Al-Sanhoury notes that a party's not taking precautionary measures to mitigate a harm is considered a fault in itself, which can result in a reduction in the compensation in certain circumstances or even the waiver of entitlement to a right to this compensation in other circumstances.
9. Al-Sanhoury concludes that Articles 169 and 216 allow the judge to distribute the damages between the entities sharing responsibility for the harm caused based on the contribution of each entity to the harm caused. If the judge cannot determine the proportion of the damage with respect to each entity, then the judge can assume an equal share of responsibility (including the harmed entity) and allocate the damages accordingly.

B.2.7. The Prevention Principle as Reported in Egyptian Construction Law Literature

A unique research which addresses the topic of prevention principle in the Egyptian Civil Code is that of Fawzi, El-adawy and Hamed (2015). The research primarily targets how the principle of "time at large" is applied in the common law and civil code jurisdictions (France and Egypt) but addresses the prevention principle during the course of the analysis. The

following is the three-step rationale utilised by this article with regards to the application of the prevention principle under the Egyptian Civil Code:

1. Article 215 of the Egyptian Civil Code states:

If it is impossible for the debtor to perform his obligation, he will be ordered by a court ruling to pay damages for failure to fulfil his commitments, unless he proves that the impossibility to perform the obligation comes from an external cause which is not attributable to him. The same ruling shall be passed if the debtor delays the performance of his obligation.

2. The “external cause” that is used to exempt the debtor from paying damages for failure to fulfil his commitments can be applied to an employer who delays a contractor from completing on time due to a breach of contract or an instruction for additional work.
3. Thus, if an employer prevents a contractor from completing the contract by the agreed date, the employer is not entitled under the Egyptian Civil Code to the agreed damages. This is analogous with the prevention principle under English law.

It is observed from this reasoning that the authors relied on Article 215 of the Egyptian Civil Code as the main reference for the prevention principle. This flows with the results of this research which demonstrates, through direct references to Al Sanhoury, that Articles 169 and 216 (the latter being the direct follow-on to Article 215, to which the article refers) are

the references in the code which address the limitation of compensation to an employer who prevents a contractor from fulfilling his obligations.

B.2.8. Summary of Prevention Principle under Egyptian Civil Code Jurisdiction

The following points summarize the discussion in this section concerning the prevention principle under the Egyptian Civil Code, taking into account the scenario commonly discussed in English law, where an employer delays a contractor from completing on time, but elects to apply delay damages for the contractor's failure to comply with the condition precedent for claims notification:

1. If the employer had knowledge about the delays in question, then, notwithstanding the contractor's non-compliance with the time bar requirement, the waiver in the time bar clause is unenforceable, as the employer's enforcement of the time bar despite his prior knowledge is considered an act of bad faith in accordance with Article 148 of the Egyptian Civil Code.
2. If the employer rejects a substantial delay claim submitted by the contractor on the grounds of contractor's failure to comply with the time bar requirements, when the employer has not suffered harm or suffered little harm in comparison, then such rejection would be considered out of proportion to the benefit gained from such rejection. Accordingly,

the employer's rejection would be considered unenforceable, as it would be categorised as an unlawful exercise of a right pursuant to Article 5 (b) of the Egyptian Civil Code.

3. If an employer's conduct is such that the claims notice required by the time bar clause has not been strictly complied with by the contract with no subsequent contestation from the employer, then the employer cannot reject a contractor's claim, notwithstanding the contractor's non-compliance with the time bar clause, due to the employer's "voluntary release" (or waiver) of this requirement pursuant to Article 371 of the Egyptian Civil Code.
4. If an employer caused, or contributed to, the delay experienced by the contractor, then, notwithstanding the contractor's failure to comply with the time bar notice requirement, the employer cannot apply the full delay damages in the contract. Pursuant to Article 216 of the Egyptian Civil Code, the employer is prevented from applying the damages to his contribution of the delay. If he is the sole cause of the delay, then damages cannot be applied in their entirety.

B.3 Summary of the Descriptive Phase for Comparison Point No.3

The prevention principle in English law evolved over the years from being enforced (when there were no extension of time mechanism in the

contracts) to being overcome by the condition precedent principle (if the contract contains an extension of time mechanism to address the situation of employer delays). The prevention principle under the Egyptian Civil Code is more straightforward, as it is enforced through overriding principles of law such as contributory fault, good faith, unlawful use of a right and waiver.

C. Identification Phase for Comparison Point No.3

The similarities and differences between the English and Egyptian laws are highlighted in this section with respect to the prevention principle. The following is an elaboration based on the information provided in this section.

C.1 Identified Similarities for Comparison Point No.3

As in the case of the principle of good faith, as discussed in the previous comparison point, the main similarity is that the prevention principle exists in both jurisdictions. In English law, the principle existed since the case of *Holme v Guppy* in 1838. Case law indicates that the principle was applied well into the twentieth century with the case of *Peak v McKinney* in 1970, when there was no mechanism in construction contracts to account for employer-caused delays. In the Egyptian Civil Code, the principle is directly addressed in several principles of law, as highlighted in the previous section. Considering the above

period in English law history (nineteenth and twentieth centuries), and the fact that the Egyptian Civil Code was promulgated in 1948, it can be concluded that both jurisdictions applied the prevention principle for nearly two centuries. Accordingly, during this time, an employer who delayed a contractor from completing the works on time could not benefit from his own breach and claim damages.

C.1 Identified Differences for Comparison Point No.3

A clear divergence in both jurisdictions became apparent at the start of the twenty first century with the introduction of time bar clauses in standard contract forms that act as condition precedent. In particular, with the issuance of the FIDIC suite of contracts in 1999, and in particular sub-clause 20.1, where the contractor is required to provide a notice to claim and, failing which, the contractor is considered to have waived his entitlement to claim. As mentioned in Section C of the Literature Review, the NEC3 form of contract contained a clear time bar that acts as a condition precedent in its 2005 edition. As highlighted in the Descriptive Phase of this chapter, English law maintained the position that, in circumstances where there is a tension between the prevention principle and condition precedent, the condition precedent prevails (e.g., *Mutiplex v Honeywell* and *Steria v Sigma*). Hence, when a contractor is prevented from completing on time due to an employer's

delay, and the contractor fails to notify the employer within the specified period in the contract of these delays (where this notice within the specified period is a condition precedent to the contractor's entitlement for an extension of time due to this delay), the prevention principle does not apply and the employer can apply liquidated damages. The Egyptian law, on the other hand, remains firm on the application of the prevention principle, thereby resulting in the unenforceability of condition precedent clauses in cases of an employer's act of prevention.

C.3 Summary of Identification Phase for Comparison Point No. 3

It is apparent from this section that, as in the case of good faith, the prevention principle is present in both jurisdictions. However, as far as the condition precedent time bar is concerned, each jurisdiction handles its enforceability vis-à-vis the prevention principle differently. In English law, the condition precedent prevails over the prevention principle. A contractor who does not comply with the condition precedent notice requirement under sub-clause 20.1 of the FIDIC Red Book may suffer the consequence of liquidated damages application by the employer for failure to meet a contract completion date, despite the fact that the employer may have been the cause of the delay. In the Egyptian Civil Code jurisdiction, however, that employer cannot benefit from his own default notwithstanding the terms of the contract. Pursuant to

Article 216 of the Egyptian Civil Code, that employer is not entitled to damages when he is responsible or contributed to the "loss" suffered by the contractor (i.e., in this case, this loss is the liquidated damages). Moreover, even if the employer is not a cause of the delay or did not contribute to it, the employer cannot rely on the condition precedent to reject a substantial contractor's claim when little or no loss was suffered by the employer for the late notice (Article 5 of the Egyptian Civil Code), for that would be considered an unlawful exercise of a right. Furthermore, an employer cannot reject a contractor's claim for non-compliance with the time specified for serving the notice when the employer, through his conduct, waived this requirement (Article 371). This is, of course, not to mention the mandatory good faith provision under the code (Article 148) which requires both parties to act in good faith in all contract dealings. This entails, for example, an employer not rejecting a contractor's claim due to non-compliance with the notice requirement when the employer knew, or should have known, about the claim event in question.

D.Explanatory Phase for Comparison Point No.3

As in the case in the previous two comparison points, the historical origin of the concept in question (prevention principle) is investigated in order to

explain the similarities and differences identified with respect to each jurisdiction regarding this concept.

D.1 Origin of the Prevention Principle in English Common Law

Scarcely any literature is written on the historical origin of the prevention principle in the English common law. Although the common reference in this regard is the case of *Holme v Guppy* of 1838, there is scarcely any literature that discusses how this principle found its way to English law at the time. It can be deduced that the prevention principle could have been introduced to English law in the same manner of, or within, the concept of good faith as explained in the explanatory phase of the previous comparison point. It was explained that, at the end of the eighteenth century and beginning of the nineteenth, English law was affected by the work of natural lawyers, such as Grotius and Pothier, who spread the ancient philosophical works of Aristotle and Aquinas in a revived form around Europe, England and the United States. As mentioned therein, Pothier in particular was frequently made reference to in English law and was highly spoken of by English common law judges. Reference was also made to Harrison and Jensen (1999), who stated that the legal concept of good faith was introduced in England by Lord Mansfield (who had been influenced by Grotius) in 1766 through the case of *Carter v. Boehm*, and was clarified and developed by the English courts mainly in the nineteenth

century. It is observed that *Holme v Guppy* was decided in the third decade of the nineteenth century and, therefore, fell into that period of time. Therefore, in the absence of literature on the subject, and in light of the fact that the principles of good faith and prevention were present in English common law in the nineteenth century, it can be deduced that they were both an influence of the natural lawyers' works at the time.

D.2 Origin of the Prevention Principle in Egyptian Civil Code

In order to understand the origin of the prevention principle in the Egyptian Civil Code, it is useful to examine Al-Sanhoury's *Al-Waseet* for any pertinent references. Upon examination, it is observed that Al-Sanhoury provides historical references with respect to the topics of abuse of right and fault, both of which are germane to the prevention principle, as discussed in the previous section. Therefore, in an attempt to understand the origin of the prevention principle in the Egyptian Civil Code, Al-Sanhoury's pertinent commentary sections in *Al-Waseet* in respect to unlawful use of a right and fault are examined.

D.2.1. *Origin of Unlawful Use of a Right under the Egyptian Civil Code*

Al-Sanhoury elaborates on the history of this concept throughout paragraphs 553 to 556 of Volume 1 of his work *Al-Waseet*. In paragraph 553, Al-Sanhoury provides a summary of the evolution of this concept, stating that it was initially a Roman theory which found its way to the old French laws and which was saturated in Islamic law. It then disappeared for a while as the principle of individualism took over well into the French revolution in the eighteenth century. The revolution called for principles of individual's freedom of rights with no limitation on such freedom. This led to the abandonment of this principle well into the nineteenth century, although there were sporadic references in the French judicial rulings to this principle. For example, in 1855, the Colmar court of appeal decided against an owner of a house who built a chimney for the sole purpose of obstructing light from his neighbour. In 1871, the French court of cassation upheld the following rule: "in order for compensation to take place, there must be fault. The law does not consider one at fault if he exercises his right except if the intent behind this exercise of one's right is to harm another person with no benefit or interest to that person". Despite these references to the abuse of a right principle, and despite the occasional literary works on the subject (e.g., Saintelette and

Sauzet), French jurisprudence did not give much weight to the principle. The situation changed when, in the end of the nineteenth century/ beginning of the twentieth, French jurists, Saleilles and Josserand, restored its ancient position and made it a fixed concept in the French legal framework. Josserand wrote a book entitled "De l'abus des droits" (abuse of right(s)) in 1905, which compiled all judicial decisions on the subject and organized them to deduce theories of the principle. He wrote another book in 1937 entitled "De l'esprit des droits et de leur relativité – théorie dite de l'abus des droits" ("In the Spirit of Rights and their Relativity – the Theory of Abuse of a Right"), which, according to Al-Sanhoury, was the most comprehensive on the theory and the clearest. Al-Sanhoury mentions that the theory was met with resistance, as jurists such as Planiol, considered the theory an intervention of one's right. Nevertheless, the theory made its way into the French legal system and was frequently made reference to in judicial decisions. The theory made its way also to the Swiss Civil Code at the time, which dedicated a general article to this theory applicable to all realms of the law. Al-Sanhoury then mentions that the principle was reflected in the German Civil Code (Article 226), the French-Italian Project (Article 2), Polish law of obligations (Article 135), the Austrian law (Article 1295) and the Russian law (Article 1). He then mentions that the theory found its way to the old Egyptian law, although not having a specific reference therein. It wasn't until the "new" Egyptian Civil Code of

1948 that the principle was given special attention and became a general rule of law located at the forefront of the code.

D.2.2. *Origin of Article 216 (Contributory Fault) of the Egyptian Civil Code*

It has been mentioned in the foregoing discussion regarding the prevention principle under the Egyptian Civil Code that Article 216 is one of the underlying references to the principle, as it stipulates that the amount of any damages may be refused by a judge or reduced if the creditor, by his own fault, contributed to the cause of, or increased, the loss. When discussing “contributory fault” in paragraph 596 of the *Al-Waseet*, Al-Sanhoury delves into the history of Article 216. However, unlike the case of unlawful use of a right, Al-Sanhoury does not provide an in-depth account of the origin of this principle. Rather, he makes brief references to the German and Swiss laws. He states that the principle of compensating the creditor as a proportion to his contribution to the fault caused is reflected in Article 354 of the German law. However, a difference exists between the German and Swiss laws in that, in the former, the creditor’s acceptance of the harm endured is not a factor in reducing the compensatory damages, while, in the latter (Article 44, paragraph 1), such acceptance is a factor. It is interesting that no French references are made in respect of this important provision.

D.3 Conclusion of Explanatory Phase for Comparison Point No.3

The above account of the explanatory phase of the prevention principle demonstrates that it is a difficult principle to trace historically in each jurisdiction. In English law, there is rarely any literature produced on the subject (i.e., regarding its inception and how it was introduced in the law through the case of *Holme v Guppy*). In the Egyptian Civil Code, there are the related principles of unlawful use of a right and contributory fault, which seem from Al Sanhoury's account of their drafting history were respectively French and German influences. Considering that the prevention principle could have been a French or European influence on English law through the works of nineteenth century natural lawyers, and that the unlawful use of a right principle under the Egyptian Civil Code was heavily influenced by the French law at the time, it can be deduced that a common factor for the existence of the prevention principle in each jurisdiction is the French laws.

VIII. THE EXPLANATORY PHASE

A. Introduction

At the conclusion of each of the three comparison points analysed in this research, an explanatory phase was inserted in an attempt to shed light on the historical origin of the point in question. As stated in the Research Methodology chapter (page 160), the explanatory phase goes beyond the theoretical framework of the law and explains external factors, such as culture, social context and economics. In this research, the factor that was the centre of attention is the historical factor. In other words, the origin of the principle explored in each comparison point, whether it is limitation, good faith and the prevention principle, is investigated to understand the underlying factors which historically affected the law as it is currently enforced. The purpose of this chapter is to gain a comprehensive understanding of the explanatory phases of the three comparison points. This will entail reaching an overarching conclusion with respect to the historical explanation of the similarities and differences highlighted regarding the enforceability of the time bar clauses in each of the English law and Egyptian Civil Code jurisdictions. The chapter starts with a summary of the results of the explanatory phases of

the previous comparison points then the results are studied to arrive at the final and comprehensive points to be studied to explain the similarities and differences highlighted in this research.

B. Summary of Explanatory Phases of Comparison Points

The following table summarises the results of the explanatory phases for the comparison points discussed in this research:

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
Limitation	Exists in both jurisdictions	Under English law, there is a statute of limitations that applies to simple contracts. However, under the Egyptian Civil Code, the statute of limitations applies to legal actions only.	<ul style="list-style-type: none"> This similarity and difference can be attributable to the different historical origins of the statute of limitations in both jurisdictions. In English law, the statute of limitations originated in 1237 from land-related claims. Dates were set at first for causes of action to be made until 1540 when

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
			<p>periods were established for different causes of action.</p> <ul style="list-style-type: none"> • In Egyptian law, there are two main influences, the French Civil Code and Islamic law. The statute of limitations originated from the influence of French Civil Code, as it is not recognised under traditional Islamic law.
		<p>Under English law, contracting parties can agree to limitation periods that are different than those in the Limitation Act through the clear, express provisions in the contract. However, under Article 388 of the Egyptian Civil Code, there is a clear prohibition on contracting parties to agree to any adjustment, by way of</p>	<ul style="list-style-type: none"> • This difference is attributable to the origin of each jurisdiction, as highlighted in Section E of the Literature Review. In essence, it is the difference between the nature of a common law system, where judicial decisions are the base

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
		reduction or increase, to the limitation periods set in the law.	<p>which constitutes the precedent for future cases. As shown in Table 2 of that section, judicial decisions come in first in terms of the sources of law in England, while legislation comes in third (after equity).</p> <ul style="list-style-type: none"> • The situation is different under Civil Code jurisdictions in which legislation is the first source of law. Furthermore, by its nature, the Civil Code embodies general principles that govern the relationship between individuals. • Therefore, it is not surprising that contracting parties under the Egyptian Civil Code jurisdiction

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
			may find that a time bar that is found to be in conflict with a mandatory provision in the Civil Code (i.e., Article 388) may be held unenforceable, while, under the English common law, a time bar that is in contradiction with a limitation period under the Limitation Act 1980 may be held enforceable, notwithstanding this conflict, in light of the case law and precedent established by judicial decisions (which is the top source of the law).
		Under the Egyptian Civil Code, there are other periods that can be confused with	As evident from Al-Sanhoury's commentary on limitation in the

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
		limitation periods and which are not present in English law.	Egyptian Civil Code, this difference denotes a key influence from the French Civil Code on the Egyptian Civil Code. The concept has affected the manner in which the enforceability of time bar clauses in contracts (such as FIDIC) are perceived in Egypt. The literature considered in this research does not demonstrate any reference in the English common law to such periods.
Good Faith	Exists in both jurisdictions	Under English law, good faith is not enforced unless there is a clear, express provision in the contract for its enforcement. In the Egyptian Civil Code, however, the principle is a mandatory requirement, which governs all contract obligations.	<ul style="list-style-type: none"> The reason the principle is not enforced in English law is that it lacks definition and is considered uncertain and unpredictable to be incorporated in the law. Historically, the principle of good faith originated from English

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
			<p>merchants who would travel across Europe with their own merchant law that was separate from the common law applied at the King's court. This merchant law embodied good faith principles. Pothier was mentioned as a French jurist who had his influence on the English case law of the nineteenth century through the application of good faith principles.</p> <ul style="list-style-type: none"> • The Egyptian Civil Code jurisdiction is affected by the French and Islamic laws. The French Civil Code's influence is clear in Al-Sanhoury's commentary on the principle of good faith in the

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
			law, as he refers to French cases and clearly attributes the introduction of the principle into the "new" Civil Code of 1948 to the French law. Islamic law, on the other hand, embodies principles of good faith that are even broader than those in the French law. Therefore, the Egyptian Civil Code is heavily influenced by both the French factor and the Islamic law factor.
Prevention Principle	Exists in both jurisdictions, with no direct reference.	<ul style="list-style-type: none"> Under the English common law, the prevention principle is a rule of construction, not of law. As such, it is not mandatory and, when in conflict with the condition 	<ul style="list-style-type: none"> As in the case of the preceding point of good faith, English law upholds contractual certainty and predictability. Therefore, condition

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
		precedent principle, the latter is upheld.	precedent is generally upheld against the prevention principle. A contractor's failure to comply with the time bar is considered a failure to trigger the contractual machinery for a time extension and, accordingly, the contractor is held responsible and liquidated damages may be applied. There is a lack of literature on the origin of the prevention principle in English law. It is therefore suggested in this research that the prevention principle could have been one of the principles of equity (alongside good faith) that originated from

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
		<ul style="list-style-type: none"> Under the Egyptian Civil Code jurisdiction, there are several principles that would uphold the prevention principle. For example, in the case of an employer delaying a contractor then applying liquidated damages for the contractor's failure to comply with the time bar notice, the prevention principle would be upheld against the condition precedent for several principles including the employer's abuse of his right and for the employer's contributory fault in delaying the contractor (if the employer is the sole cause of the delay, he would be 	<p>the merchant law used by English merchants (which embodied good faith principles) who would travel across Europe. In support of this theory is the fact that <i>Holme v Gully</i> was decided at the time when English case law was influenced by natural lawyers, such as the French <i>Pothier</i>, during the nineteenth century.</p> <ul style="list-style-type: none"> In <i>Al-Sanhoury's Al-Waseet</i>, there is a historical elaboration on the abuse of a right principle, which demonstrates that (as in the case of good faith) the principle was

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
		prohibited from applying any damages on the contractor).	<p>introduced into the Egyptian Civil Code as a French influence. He explains that this principle originally started as an ancient Roman theory which was also enshrined in Islamic law. The theory was revived by French law before disappearing for centuries then being revived again by the French laws in the nineteenth and twentieth centuries and becoming an established legal principle (which made its way to the "new" Egyptian Civil Code of 1948).</p> <ul style="list-style-type: none"> • On the matter of contributory fault, which is more relevant to the prevention

Table 12 Summary of Explanatory Phase

Comparison Point	Identified Similarities and Differences		Summary of Explanatory Phase
	Similarities	Differences	
			principle than the abuse of a right, Al-Sanhoury makes a passing reference to the German and Swiss laws but does not provide a historical account of how the principle was introduced into the Egyptian Civil Code.

The following two points are observed from the summary highlighted above:

1. In respect of the English common law, the overriding principle throughout the three comparison points is that express and clear contract provisions are upheld in English common law. So, whether the contract provision in question contains a time bar that is higher than or less than the limitation period in the law (first comparison point), negates the principle of good faith (second comparison point) or permits the employer to benefit from his own breach (third comparison point), the contractual agreement of the parties govern. It is for this reason that the time bar that acts as a condition precedent in any contract

would most likely be enforced under English law. In other words, the principle of “freedom of contract” is the overriding principle in English law that is most germane to this research.

2. In respect of the Egyptian Civil Code, the overriding observation throughout the three comparison points is the French civil law influence. In terms of limitation (the first comparison point), it was mentioned in Section D.2 of Comparison Point No.1 (page 261) that Al-Sanhouri refers to the French law when discussing the principle of limitation, particularly when addressing contracting parties’ ability to agree to limitation periods less than those under the law (as the French law permitted at the time). Although Al-Sanhoury makes the point that the Egyptian law chose to not follow the French’s path by prohibiting the reduction of limitation periods, he makes reference to a “French-Italian” project, which the Egyptian law set to follow in this regard. Either case, it is clear that Al-Sanhoury is considering the French law (as well as French international projects) as a major reference while drafting the Egyptian Civil Code. In terms of good faith (the second comparison point), it is sufficient to refer to Section B.2.3 of Comparison Point No.2, and in particular sub-paragraph 2 (page 290), in which it is mentioned that the basis for the good faith in Egyptian law is the French law, although the German principle of dignified dealing was also under

consideration. It is also important to refer back to sub-paragraph 3 in page 291, which mentions Al-Sanhoury's clarification that the Egyptian law chose to not follow the Roman principle of *contracts de droit strict* (strict or literal application of contracts) and to, instead, follow the principle of good faith (referred to as *contracts de bonne foi*) and apply it to all contracts (a sharp contrast from the freedom of contract principle under the English common law). In terms of the prevention principle (third comparison point), Al-Sahnoury clearly demonstrates that the principle of abuse of a right, which can uphold the prevention principle against the condition precedent, was revived and established by the French laws and incorporated into the Egyptian Civil Code.

As explained in Section D.4) of the Research Methodology chapter (page 166), the explanatory phase elaborates on the similarities and differences highlighted in the Identification Phase by going beyond the theoretical framework of the law to other disciplines. The discipline focused on in this research is the historical origin of each comparison point with respect to both jurisdictions. While each comparison point included its own explanatory phase, this chapter provides a summary of the results reached with the aim of arriving at a general conclusion for the similarities and differences identified. Since the two observation points highlighted above

denote the concentrated results of the three comparison points in the previous chapters, this chapter, being the final and comprehensive explanatory phase of this research, concludes with an elaboration on the following:

1. The origin and characteristics of the “freedom of contract” doctrine under English law, and
2. The origin of the French Civil Code and its impact on the formation of the Egyptian Civil Code of 1948.

C. Explanatory Phase Final Research Points

C.1 “Freedom of Contract” Doctrine under English/Welsh Common Law

C.1.1 The Origin of Freedom of Contract under the English/Welsh Common Law

In his unique book titled “The Rise and Fall of Freedom of Contract”, Atiyah (1985) discusses the history in England with respect to the concept of freedom of contract and breaks down his work into three periods: 1770, from 1770 to 1870 and from 1870 to 1970. He reports that in 1770 the concept of a contract based on consent was absent. Promises could be revoked and courts were concerned with the fairness of an exchange rather than upholding the

parties' will. From 1770 to 1870, however, the concept of freedom of contract rose. Atiyah argues that this began with the freedom of property which eventually transitioned into freedom of contract. The book concludes with the chapter "the wheel come full circle" which discusses the decline of freedom of contract in England during the 20th century. He attributes this decline to three separate streams, namely the decline in the economic importance of contract, the decline in the importance attached to the value of free choice as a source of legal rights and liabilities, and the shift from away from the use of contract as a calculated instrument for the allocation of risks. In Section D.1 of the Comparison Point No.2 chapter (page 300), reference was made to Goode (1992) regarding the origin of good faith in the English common law. He gives a striking example of the rigorous approach adopted by common law judges with respect to freedom of contract by referring to the judge (whom he did not name) who stated that even if the seller of goods is guilty of fraud, this does not entitle the buyer to get out of the transaction. He does not mention when this took place, although it can be reasonably assumed that his reference is to the 19th century when the freedom of contract concept was at its peak in England. Korde (2000) reflects on this time by stating that, historically, there was little control by means of law or regulation over contract terms. Harsh or unfair terms were insufficient to render a contract against public policy. The doctrine of consideration was defined by purely its formal

meaning and could not be used to trigger contractual justice. Similarly, the implication of any term into a contract can only be made through parties' consent, not because it was just or reasonable to do so. Korde concludes this point by stating that "The requirement of stability and predictability was reflected by this rigid adherence to the rules of contract, which assumed an almost mathematical guise" (p. 145). Peel (2007) suggests that, in the nineteenth century, the judges took the view that persons with the capacity to contract were free to contract in whichever manner they liked. The law interfered in certain circumstances, namely misrepresentation, undue influence and illegality, although there would be no interference due to a party being in a more economically powerful position than the other and therefore able to drive a hard bargain. Beatson (2002) suggests that the meaning of freedom of contract in the nineteenth century was twofold. The first is that a person is free to choose to enter in a contract on whichever terms it chooses that best serve its interests, or it may choose not to. This meaning, Beatson opines, was a key cornerstone of the laissez-faire economics at the time (laissez-faire economics being an economic doctrine that opposes governmental regulation of or interference in commerce). The second meaning is the concept that there is no liability without consent embodied in a valid contract. This second definition limits the law's interference of imposing obligations that were not specifically stated in the contract, tort and

restitution being the two made reference to by Beatson. According to Beale (2012), the function of the court at the time was to simply enforce an agreement that the parties had freely and voluntarily entered into. The courts' understanding and implementation of this freedom was shown in the extent to which contracting parties can limit or exclude damages due to breach of contract or in tort. The courts' rationale is that the parties to a contract could have limited or excluded any liability in damages, whether in contract or in tort. Also, this freedom was apparent in the courts' attitude towards any exception to it. For example, if parties to a contract agreed to a penalty clause, and although penalty clauses were considered ineffective by the courts, the courts would with considerable resistance and due to case precedent hold the penalty clause unenforceable. An example is *Betts v Burch* (1859) in which Martin B (at 509) regretted that he was "bound by the cases" and prevented from holding that "parties are at liberty to enter into any bargain they please and that we (i.e., the judges) have nothing to do except to ascertain their meaning and carry it out" so that "if they have made an improvident bargain they must take the consequences".

This point was elaborated upon by Lord Neuberger and Lord Sumption in appeal case *Cavendish Square Holding BV v Talal El Makdessi* [2015] raised before the Supreme Court. They started the hearing with a historical account

of the “penalty rule” and highlighted at paragraph 7 of the transcript that, during the 17th and 18th centuries, there was a tension between the court of equity and the common law courts in terms of the penalty rule. Courts of equity tended to adopt a flexible approach which considered the penalty as a secondary obligation because the real intention was that penalties serve the purpose of being a mere security for performance. In contrast, common law courts applied the penalty rule on the basis that although penalties were secondary obligations, the parties meant what they said and intended that penalties be applied to the party in breach.

Mulcahy and Tillotson (2004) state that, by the 19th century, the concept of contract became a topic discussed extensively by philosophers, economists, socialists, political scientists and others and it became the key to happiness in an emerging market society. According to the society’s view at the time, the autonomy of the individuals took precedence, as it was considered the key to economic success of society. The prevailing norm was that the individual was best to know what his/her needs were and therefore should be allowed to make the contracts this individual needed on whatever terms this individual desired. Beatson (2002) as well as Mulcahy and Tillotson refer to the work of Adam Smith, *Wealth of Nations* (published in 1776), which, according to Beatson, offered the first systematic account of economic affairs which

championed freedom of trade against the economic protectionism that was current at the time. According to Mulcahy and Tillotson, Smith emphasised that the State must support freedom of contract because of the reliance such enforcement created in the market, not because of the inherent quality of the promise within the contract. Mulcahy and Tillotson also refer to other writers at that time, namely Maine and Tonnies, to explain society's interest in the individual. Maine divided the ideal society into two types, namely the "status" type and the "contract" type. The former is a pre-industrial type of society in which power and relationships were based on a person's unavoidable connections and the status enjoyed as a result of such connections. Examples included kinship, marriage, neighbourhood and close relationships. The latter type of society is one in which individuals were the centre of attention and their associations are motivated by reason and economic gain. Tonnies talked of a similar drift from social union to a separation of individuals in an industrial society.

In conclusion to this point, it is apparent that freedom of contract in the 19th century meant little supervision by regulations over what contracting parties agreed to through their free will. The interest of the individual was taken as the key of economic gain and success and any intervention by the State in the

individual's pursuit of these interests was discouraged. However, as shown in the following section, this understanding has changed in recent times.

C.1.2 The Modern Doctrine of "Freedom of Contract" under English/Welsh Common Law

Peel (2007) provides numerous factors that demonstrate the changes the doctrine of freedom of contract underwent over the years to reach its current stage. First, Peel mentions that the doctrine of freedom of contract has been eroded by legislation over the years to equalise issues in relation to imbalance of bargaining power. Examples given included employment contracts being regulated by legislation (such as the Employment Rights Act 1996 and the National Minimum Wage Act 1998), many aspects of the landlord-tenant relationship being regulated by legislation (e.g., Rent Act 1977 and Leasehold Reform Act 1967), the imposition of implied terms into contract which cannot be excluded by agreement and the standard form contracts, especially between a commercial supplier of goods or services and a consumer, being under severe legislative restrictions. Second, Peel addresses situations where the law plays so large a role that it is doubtful whether there is a contractual relationship in the first place. Examples given by Peel include marriage contracts (which contain legal incidents that cannot be varied by contract), terms of employment contracts that are governed by legislation (especially

public service contracts) and contracts involving members of the armed forces and the Crown (even if the member enlists voluntarily). Third, Peel refers to situations where individuals do not have the choice by law whether or not to enter into specific contracts. Examples given include an innkeeper not accommodating a guest, withholding of supplies from distributors, refusal to enter into contracts due to unlawful discrimination (including race, sex, religion or belief or disability) and refusal to enter into an employment contract with a person who is not a member of a trade union.

Beale (2012) elaborates on qualifications of the freedom of contract under the modern common law and mentions the same points of Peel, but under a different categorisation. Beale provides four main factors which he describes as qualifications of the modern common law on the freedom of contract. First, Beale addresses the refusal to enter contracts and, in addition to the innkeeper example given by Peel, mentions that companies supplying public utilities, such as water, gas and electricity, are in some circumstances under a statutory obligation to supply. Second, Beale refers to the law of discrimination, which he says prohibits persons from refusing to enter into contracts that are discriminatory. Examples given for grounds of discrimination prohibited by law are sex, race, disability and, in the case of employment, prohibitions on discrimination include sexual orientation, religion

or belief and age. Beale refers to the Equality Act 2010 and suggests that this Act subjected the law of discrimination to considerable legislative consolidation, reframing and reform. Third, Beale refers to restricted freedom as to terms and breaks this restriction into three sub-points. The first sub-point is in relation to the fact that, even though a person may be free to decide as to whether to enter into a particular contract, that person may not be free to determine the terms governing that contract. Reference is then made to what are termed "adhesion contracts", which are standard form contracts containing one of the parties' terms that are not possible to be varied. Similarly, the terms of employment contracts may be defined through agreement between the trade union and the employer. The second sub-point is in relation to the terms the courts may imply into contract terms which, according to Beale, have been numerous over the years and which sometimes may not have been necessary. The third sub-point is in relation to the terms implied by statute. Examples given include consumer and employment contracts, which are both subject to legislative regulation. Fourth, Beale refers to regulation of the contractual environment, which predominantly refers to countering the imbalance of bargaining power mentioned by Peele.

C.1.3 Conclusion of "Freedom of Contract" under English/Welsh Common Law

This section demonstrates that, during the 19th century, the doctrine of freedom of contract was strictly applied but thereafter was subjected to numerous relaxations. These relaxations may cause some to consider that freedom of contract under modern English common law is limited. However, the results of this research must be remembered at this juncture. As highlighted in Section B of this chapter (page 361), freedom of contract is the overriding principle in the English common law with respect to the three comparison points in this research. As Beatson (2002, p. 7) remarks:

In many areas of contract, freedom of contract in the classical sense is manifestly lacking...it is nevertheless the fact that the law does still rest on the assumption of freedom of choice, and where a relationship is entered into in which there is no choice, a Court may hold that it is not contractual.

C.2 The French Civil Code

C.2.1 Before the French Revolution and the Seeds to the Preparation of the Civil Code

Prior to the French Revolution of 1798, there were two systems of law that comprised French law. Roman written law was paramount in southern France (which constituted roughly two-fifths of French territory), while customary law was in force in northern France. The separation was not exclusive, however.

Areas within southern France did have customary laws in force, and Roman law, even in the North, was the common background for French legal education. In addition to the local customs, usages and practices, there were also royal decrees that were in force throughout France, many of which formed the basis of the Napoléonic codes (Holmberg, 2002).

There had been grounds, however, which prepared France for the codification process. First, there were the ordinances mentioned above, which were already in force before the revolution, and which were used in the Napoléonic codes. Second, the codification of French law was a leading theme for over a century in the work of well renowned writers at the time, such as Bourjon, Argou, Domat and Pothier. In fact, Batiza (1984) reports that the abundance and quality of legal writing in France before the Revolution had achieved a remarkable degree of development that was probably unequalled anywhere. Pothier, for example, was mentioned to have been the author of numerous treatises on a variety of subjects, including obligations and various specific contracts regarding sale, lease, deposit, agency, loan, partnership, insurance, etc. Other treatises written by Pothier included persons, marriage, community property, possession, ownership, prescription, donations, successions, pledge, mortgage and the Custom of Orleans. Batiza opines that the drafters of the Civil Code resorted to the works of the above writers, in addition to Dargentre,

Lamoignon, Renusson, Duplessis, Ricard, Lebrun, Despeisses, Pocquet de Livonniere, Charondas, de Ferriere, Loisel, Prevot de la Jannes, Dunod, de Malleran, Cujas, Bacquet, Dimoulin, Furgole, Desgodgets, Basnage, Jousse, Valin, Loiseau and Mornac. This is in addition to the mutli-volumed encyclopedias such as those by Denisart and Guyot.

Holmberg (2002) reports that there had been numerous previous attempts at codifying French law but that local customs, regional antagonism, feudal privilege and the Parliament prevented all these attempts from being successful. These attempts included Louis XI's contemplation of a uniform code of laws for France, Charles VII's order in 1453 for the compilation of the various customs (which took a century to complete), the demand of a compiled codified laws by the États Généraux of 1484, 1560, 1576, and 1614, the compilation in 1583 by Barnabé Brisson of the principle royal ordinances in force at the time of Henri III (which were not officially sanctioned due to the king's death), the appointment by Louis XIV of a commission in 1665 to codify the laws, Colbert's consequent promulgation of the ordinances mentioned earlier covering Civil and Criminal Procedure, Waters and Forests (L'Ordonnance des Eaux et Forêts of 1669), and Commerce and Maritime Law and, finally, Chancellor d'Aguesseau's drafting of the three comprehensive ordinances mentioned above on donations, successions and entails in the hope of drafting a general code.

C.2.2 The French Revolution and the "Spirit" of the Civil Code

According to Holmberg, the Revolution led to the formation of more than 15,000 laws which were added to the already existing laws, and which necessitated the codification of the French law. This period would be an intermediate period after the Revolution and prior to the codification. In his opinion, although Revolutionary law added yet another layer to the laws in existence, they reformed France's public law and its political institutions, swept away feudal privileges, establishing equality before the law, guaranteed individual liberty and protected private property. Enlightenment philosophy, with its interest in the rational, greatly influenced legal thought in the eighteenth century. Legislation, they believed, should be the source of law and the law ought to be uniform, simple, concise and inspired by rationalistic principles. The law should recognize the private right of property, guarantee the "rights of man," the sovereignty of the people and the separation of powers of government. These thinkers held Roman, canon, and feudal law in low esteem, but saw customary law as the expression of social need. Batiza (1984) suggests that the French Civil Code does not reflect the spirit of the Revolution and distinguishes two periods after the Revolution and until the code was drafted (i.e., 1789 to 1804). The first is the period from 1789 to

1795, which was characterised by equality and liberty. The second is from 1796 to 1804, which was characterised by authority domination. He takes the view that the French Civil Code reflects the spirit of wisdom and moderation because it was completed at an intermediate period, which was not right after the Revolution and not too late thereafter. If it was drafted too early, during the Revolution, it would have yielded to revolutionary passions and political temptations, and if drafted too late it would have been affected by the severity of the military regime and by the reactionary attitude which was developing. Marsh (1994) suggests that the characteristics of the code are governed by a combination of the philosophy of the drafting committee and of Napoléon. This is manifested in three ways. First, the draftsmen did not attempt to make the code comprehensive so as to accommodate all eventualities. Second, it had to be concise and simple so that it could be read and understood by any intelligent layman. Third, the code was essentially conservative despite the revolutionary passion that prevailed. Of course, on this third point, Batiza offers a different explanation of this conservatism through the clarification that the code was not prepared in the midst of the revolutionary passion, but rather, in an intermediate period, as mentioned above.

C.2.3 The Drafters of the French Civil Code

It has been stated above that, according to Marsh (1994), the French Civil Code was characterised by the philosophy of its drafters. According to Holmberg (2002), on 13 August 1800, Napoléon appointed a commission to prepare the French Civil Code. The commission comprised four members who were tasked with drafting the code in four months. The members of the commission were François-Denis Tronchet (73 years of age), whom Napoléon called the "soul" of the debates in the Council of State, and who had an extensive legal career practising before the Paris Parliament being one of Louis XVI's legal defenders. He was an advocate of the Northern customary law. The second member was Jean-Étienne-Marie Portalis (54 years of age), who was named the "philosopher" of the commission and who was an advocate of the Roman law and a loyal Catholic. Holmberg opines that Tronchet and Portalis are credited as the principal authors of the Code. The third member is Félix-Julien-Jean Bigot de Préameneu (52 years of age), who was a commissioner in the Court of Cassation and an advocate of the customary law. The fourth member was Jacques Maleville (58 years of age), a lawyer of Bordeaux and a judge of the Court of Cassation. Maleville was an advocate of the Southern Roman law. This is the generally accepted opinion of how the code was drafted. However, Batiza (1984) offers a different explanation. He

suggests that, contrary to general opinion, the commission were not tasked to draft the code, but rather, to “hold conferences on the drafting of the Civil Code”. They were instructed to examine the three Cambacérès Projects of 1793, 1794 and 1796, respectively, and the Project Jacqueminot of 1799. Even when going beyond the scope of their assigned task, the commissioners used the four projects as a base, which, all in all, contained over 1800 provisions. Batiza opines that this is the reason the commissioners were able to meet the pressing four-month deadline. The process of codification, in Batiza’s opinion, actually started in 1789 (the year of the Revolution) with the *Projet d’Olivier*, which Olivier had sent to the King and the National Assembly at the time. Thereon, the code was completed in a fifteen-year period thereafter on several further stages, the second stage being the Plan Durand-Maillane in July 1793, followed by the first, second and third Project Cambacérès in 1793, 1794 and 1796, respectively, to the *Projet* of 1800, to the code in 1804.

C.2.4 The Structure of the French Civil Code

Holmberg (2002) reports that the drafting of the Code embodied the experience of generations and involved a variety of legal sources, such as the Coutumes, Roman law, Royal Ordinances, canon law, and Revolutionary law.

Customary law prevailed and supplied the articles dealing with the disabilities of married women, community property, and succession. Roman law was the source for ownership, obligations, contracts and the marriage property system. Royal Ordinances served as the basis for certificates of civil status, gifts wills and entails, evidence and the redemption of mortgages. Revolutionary laws were adopted for the age of majority, marriage, and the system of mortgages. The Civil Code enforced the Revolutionary laws dealing with the partition of estates among heirs. Canon law supplied rules dealing with marriage and legitimation.

The Code itself, following Roman law, is divided into "books," each book is then divided into "titles" dealing with specific aspects of the law such as successions, marriage, etc. The Civil Code comprises 2,281 articles. Book One, entitled "Of Persons," deals with the status of foreigners in France, marriage, divorce, paternal power, guardianship, emancipation, incapacities, the family council, etc. Book Two, entitled "Of Property, and the Different Modifications of Property," deals with the ownership of property, usufruct, servitudes, etc. Book Three, the longest, is entitled "Of the Different Modes of Acquiring Property" and covers successions, gifts and wills, obligations, contracts, matrimonial property systems, liens, mortgages, etc. This book has been criticized as being a bit of a catchall. Marsh (1994) suggests that the third book contains, despite its title being directed to property acquisition, the

whole of the law of contract, quasi-contracts, tort, the various special forms of contract according to the Roman pattern, sale, exchange, lease, employment, labour, materials, partnership, loan deposit and prescription.

C.2.5 Conclusion of "the origin of the French Civil Code and its impact on the formation of the Egyptian Civil Code of 1948"

The following are general observations regarding the information presented in this section:

1. Roman Law was in force in Northern France before the Revolution. Elsewhere in France, Roman Law was used in conjunction with customary law.
2. Pothier was a key influence on drafting of the French Civil Code. He was the author of numerous treatises, which were resorted to by the drafters of the code. This is a notable comment, as it provides a common link between the Egyptian Civil Code and the English common law with respect to the principles of good faith and prevention. As mentioned in Comparison Point No.2 (e.g., page 281), nineteenth century case law in England was affected by good faith principles from writers of continental Europe at the time, namely Pothier, who referred to good faith principles as "natural" implied terms in a contract whether or not the parties

thought about them. Eventually, these good faith principles were not used in England by the end of the nineteenth century due to encroaching statute law, but Pothier's influence on nineteenth century English law is evident. Meanwhile, as clearly demonstrated in the Egyptian Civil Code section regarding good faith, the mandatory provision in Article 148 that all contracts would be performed in accordance with good faith is a direct French influence. As shown in this section, Pothier is a notable influence on the French Civil Code. Therefore, the work of Pothier is a common factor in both the English and Egyptian Civil Code legal jurisdictions.

3. The French Civil Code, which clearly impacted the drafting of the Egyptian Civil Code, was in turn influenced greatly by the French Revolution. Whether this influence was direct so that the Code captured the spirit of the Revolution (as per the common understanding) or indirect so that the Code reflects an intermediate step between the Revolution and military rule (viewpoint of Batiza), there was an imprint one way or the other of the ideals of the French Revolution on the code. As Holmberg (2002) reports above, the French Civil Code advocated equality before the law, guaranteed individual liberty, protected private property and was a reflection of Enlightenment philosophy, with its guarantee of the "rights of man". It is not surprising, therefore, that these rights of persons, as provided for in the code, supersede and

prevail over contract terms. This is the prevailing theme in this research with respect to the three comparison points, which distinguish English law, which advocates the freedom of contract principle, from the Egyptian Civil Code jurisdiction, which at times places obligations imposed by law at a higher level than the terms agreed between contracting parties.

4. Whether the commission appointed by Napoléon solely drafted the French Civil Code (as per the common understanding) or did not (as per Batiza's explanation), it is important to observe that two of the four members (i.e., namely Portalis and Maleville) were advocates of the Roman Law.
5. A very important observation regarding the structure of the French Civil Code is that the provisions pertaining to the law of contracts in Book three, which is germane to this research, was based on the Roman Law. It is particularly interesting to observe that prescription (or limitation) (i.e., Comparison Point No.1) was one of the areas of contract law that were taken from Roman Law. The significance of this observation is that, for the purpose of this research, the provisions from the French Civil Code which affected the Egyptian Civil Code in terms of the law of contract (and which found its way to the Civil Codes of the majority of other Arab countries) stem from the Roman Law. As mentioned in the

background to the origin of the Egyptian Civil Code (Section E2 of the Literature Review chapter), before the Islamic conquest of 641 AD, Egypt was ruled by Roman Law. So, in a sense, Roman Law was a recurrent source of law in Egypt in terms of the law of contract.

In conclusion to this section, it is evident that the origin of the French Civil Code shed light on numerous factors that impacted the Egyptian Civil Code, in terms of the law of contract. It is important to observe that most of these factors involve the influence of Roman Law, under which Egypt was ruled before the Islamic conquest. Even the factor regarding Pothier has its link to Roman Law, since Pothier was a professor of law at Orleans and wrote on Roman Law, including the Commentary on the Custom of Paris and Orleans, which is reported to be substantially Roman Law that was largely drawn upon in the preparation of the French Civil Code.

D. Conclusion

An assessment of the similarities and differences highlighted in the three comparison points studied in this research demonstrates that the enforceability of time bar clauses in construction contracts varies in each jurisdiction with the extent to which the agreement of contracting parties is enforced vis-à-vis the governing law of the country in question. It was apparent from the results of the three comparison points that English

lawEnglish law holds the principle of freedom of contract at a higher level than the Egyptian Civil Code jurisdiction, which places numerous provisions of the code at a higher level than the agreement of the parties. The Egyptian Civil Code jurisdiction is, in turn, greatly affected by the French Civil Code, as evident from Al-Sanhoury's commentaries in his comprehensive work, *Al-Waseet*. It is for this reason that this chapter distils the basis of the similarities and differences highlighted in the past three comparison points to two key points, namely: (a) the doctrine of "freedom of contract" in England, and (b) the origin of the French Civil Code. After delving into the historical origins of these two points, it is evident that the "freedom of contract" doctrine arose in England during the nineteenth century in a stricter fashion than it is in practice today. Encroaching statute law gradually interfered and introduced legislation that can supersede the parties' agreement. However, when compared with the Egyptian Civil Code, English law still holds with high regard and priority the parties' agreement which was made at their free will. It is for this reason that, as stated in the Literature Review, the time bar under the FIDIC 1999 Red Book would most likely be enforced under English lawEnglish law. On the other hand, it is evident from historical origin of the French Civil Code that its drafting in the late eighteenth century came at a time after the French Revolution, when passions were high regarding the rights of persons and their freedom. It is also observed that ancient Roman Law played an important

part of the drafting of the code, for a variety of reasons including: (a) half of the commission appointed by Napoléon to draft the code were advocates of the Roman Law (which governed in North France before the Revolution), (b) the Code relied on the works of prominent legal writers at the time, among which is Pothier who was greatly influenced by Roman Law, (c) The law of contracts in the French Civil Code is largely taken from the Roman Law. All these factors indirectly shaped the way the Egyptian Civil Code is drafted and, consequently, the factors distinguishing it from the English law in this research. It is important to note that a topic worthy of research at this point is the three comparison points and how they are handled under Roman Law. However, this would be an extensive topic that is outside the scope of this research, but worthy of pursuit in a separate and further research.

IX. CONCLUSION

This section constitutes the final section of this research and is comprised of the research's contribution to knowledge and a list of suggestions for further research.

A. Contribution to Knowledge

At the conclusion of this research, it is important to ask the question: "What is the contribution of this research to knowledge? What has this research added to the construction law industry with respect to the enforceability of contractual time bar clauses in the English law and Egyptian Civil Code jurisdictions?" The answer can be distilled into the following five key points:

1. Identification of the literature gap between the two jurisdictions: The first contribution is apparent from the literature review, as it was evident that a stark contrast is present between the number and depth of literature produced regarding time bar clauses in each jurisdiction. As shown in the literature review section, the English construction law literature branches into several topics when addressing time bar clauses. There is, for example, case law regarding the prerequisites by the courts for a time bar clause to be interpreted as a condition precedent, the form of the notice as required by the contract and the

effect of non-compliance with such requirement in rendering a claim invalid. The literature also delves into circumstances where a time bar can be held unenforceable, such as the cases of waiver, estoppel and, to a lesser extent, work outside the contract and statutory controls such as the Unfair Contract Terms Act 1977. Significant literature also discusses the prevention principle and its clash with the principle of freedom of contract. On the other hand, there is scarcely any literature on the Egyptian Civil Code that discusses the time bar in the FIDIC 1999 Red Book in the first place. As shown from the literature review in this research, the available literature does not have a wealth of references that discusses how time bar clauses are dealt with under the law. The available literature predominantly discusses FIDIC clauses and their application under the Egyptian Civil Code. However, focus on the time bar in sub-clause 20.1, the very distinctive feature of the FIDIC 1999 suite of contracts, is clearly absent. Moreover, this research demonstrates that there is a notable focus by Egyptian literature on the FIDIC 1987 contract as opposed to the FIDIC 1999. Examples of such focus in literature produced after 1999, but focusing on the 1987 form, is Badran (2001), Nassar (2009) and Hamed (2011). As this research further demonstrates, the basis for the key comparison points selected in this literature did not predominantly arise from Egyptian published

books or peer-reviewed journals, but rather, from websites of law firms positioned in the Arabian Gulf and Middle East conferences that referred to the enforceability of the time bar vis-à-vis the Civil Code of another country (e.g., Glover, 2007, Hall and Warren, 2014, and Longley, 2012). Moreover, peer-reviewed journal articles with regards to time bar clauses in other (non-construction-related) contract forms, such as the UNIDROIT or the CISG, were used to extrapolate the application of the time bar under the Egyptian Civil Code. Examples include the works of Haloush (2008) on limitation while referring to the UNIDROIT contract; Sim (2001) and Saghir (2008) on good faith while referring to the CISG form, and Sakr (2009) on turnkey contracting while referring to the ICC Model Turnkey Contract for Major Projects. Peer-reviewed journal articles regarding the application of time bar clauses in other Arab countries were used to extrapolate the application in Egypt, such as the work of Sakr (2009). All this analysis and extrapolation serves to demonstrate that there is a notable gap in the Egyptian literature regarding this important sub-clause in the contract form that is one of the most widely used (if not the most widely used) form in the country, which this research attempts to fill.

2. Distillation of principles associated with time bar enforcement in the Egyptian Civil Code into limitation, good faith and prevention principle.

In attempting to fill in the gap in the literature regarding the enforceability of the time bar, this research identifies three key concepts that are used as the base for comparison across the English law and Egyptian Civil Code jurisdictions: limitation, good faith and the prevention principle. This is unique because, as evident from the literature review section, the (already scarce) literature discussing time bar clauses, with particular attention to the FIDIC contracts, does not go into the depth undertaken in this research where three principle comparison points were identified and historical justifications for the similarities and differences arising from the comparison were explained for each point.

3. Elaboration on the debatable topic of limitation periods under the Civil Code and its impact on the enforceability of time bar clauses. This research brings to light a topic that, although not frequently addressed in published journal articles or books, is highly debatable among construction law practitioners in the Middle East. This topic is the limitation periods under the Civil Code and its impact on rendering the FIDIC time bar unenforceable. In the literature review, reference is

made to the debate among prominent arbitrators and practitioners in the Middle East with respect to limitation and prescription periods in the Egyptian Civil Code and the effect in rendering the FIDIC time bar unenforceable. El Haggan (2010) expressed his disagreement about the FIDIC time bar being categorised as a limitation period and stated that it is a preclusion period that is subject to the agreement of the parties. In his presentation, El Haggan referred to Sakr (2009), who in turn referred to a presentation made at a training seminar for FIDIC contracts which provided that sub-clause 20.1 would be held invalid under the laws of the Arab countries because it modifies the limitation period in the law. More recently, this topic is alluded to by Klee (2015) through his reference to the questionnaire sent to numerous lawyers in different geographical locations and the Qatari lawyer's response that referred to time bar clauses as contravening the limitation periods in the law and therefore being held unenforceable. The research also highlights that this debate still continues until shortly before submission of this thesis, by making references to the FIDIC Middle East Contract Users Conferences of February 2016 and 2017. This research puts the spotlight on these debates and opines that the FIDIC time bar does not change the limitation period under the Egyptian Civil Code (and, consequently, the Civil Codes of the Arab countries). As highlighted by

the lawyer from Qatar in the survey mentioned in Klee (2015), Bell and Witt (2016) and Witt (2017), the clause addresses a waiver of an underlying right that is agreed upon between two contracting parties, but does not alter the right to claim before the courts this underlying right within the limitation periods set by law. Moreover, the research attempts to delve into the meaning of preclusion and limitation periods within the law, as elaborated upon by Dr. Al Sanhoury in his work *Al-Waseet*, and concludes that the FIDIC time bar is simply a contractual agreement that does not attempt to modify the period by which a contractor can take legal action before an arbitration panel or a court. Hence the FIDIC time bar should not be regarded as being limitation period within the law. It can, however, be regarded as a preclusion period, as explained in the following contribution point.

4. Insight on Egyptian case law with respect to the enforceability of the time bar in construction contracts. Unlike other research on this topic, this research investigated cases, both in arbitration and the Court of Cassation, that tackled in one way or another the topic of the enforceability of the time bar. An amount of 153 arbitration cases and 96 court cases were investigated. The (rather expected) result is that time bars were rarely addressed, as evidenced by only four arbitration

cases that were related to time bar clauses (in all of them, the time bar was not a main point of the dispute). One of the arbitration cases clearly reflected a tribunal's position that time bars conflict with statutory limitation periods and are thus unenforceable. The 96 construction cases investigated resulted in only one case related to the time bar in Article 657 of the Egyptian Civil Code, which does not address the concept of a time bar agreed between contracting parties, as in the case of the time bar clause in the FIDIC 1999 Red Book.

5. Identification of the link between the time bar in the Civil Code for construction works and that in the FIDIC 1999 contract. One of the notable contributions of this research is that it sheds light on the time bar in Article 657 of the Egyptian Civil Code and compares it to that in sub-clause 20.1 of the FIDIC 1999 Red Book. Although the common norm in the industry is that Article 657 refers to quantity increases in construction contracts, and therefore is commonly disregarded, this research suggests that there is more to Article 657 than its plain words. Through an analysis of Al Sanhoury's explanation of Article 657, and his reference to the significance of a construction contract in the Civil Code so that a section within the code is dedicated to this type of contract, the research proposes that the time bar in Article 657 is intended to

apply to any situation in a construction contract where a contractor is aware of an event that would result in a notable cost increase to the employer (who is unaware of this event). Furthermore, this research goes a step further and categorises the time bar under Article 657 as a preclusion period within the law and therefore enforceable in all construction contracts that include a time bar of similar form in their provisions. In fact, the “immediate” requirement for a notification and proposal provision under Article 657, as opposed to the 28-day notification period under the FIDIC 1999 contract, suggests that the code has a more stringent requirement, which underlines the importance given by the code to a contractor’s prompt notification to the employer of additional costs that may be borne that were not expected. Finally, the research suggests that the common perception that a contractor can simply disregard a contractual time bar for claim notification on account that his right to claim is preserved for years after the event giving rise to claim (i.e., the Civil Code limitation argument) simply negates the intent of Article 657 and is not correct. However, as clarified in the previous contribution point, the research makes a distinction between a contractor’s contractual right to claim and his legal right to take legal action. The FIDIC time bar, this research suggests, is relevant to the former but not to the latter.

6. Elaboration on the “prevention principle” in terms of the Egyptian Civil Code. As mentioned in the literature review, and as reflected in the English common law section of the third comparison point, the prevention principle has been subject to extensive coverage in the English construction law literature. A wealth of case law originating from *Holme v Guppy* (1838) until recent times is evident. As elaborated upon in the case summary in Section B.1.3 (page 314 to 316), at first, construction contracts did not have time bar clauses and there was no mechanism by which time would be extended in the case of employer’s delay. The result is that liquidated damages would not apply and time would be at large. This led to the introduction of time bar clauses in construction contracts, as a condition precedent to any extension of time as a result of employer’s delay. Case law then (in England and Wales, at least) held the contractor responsible for failing to trigger the contractual machinery and comply with the claim notice. Effectively, the condition precedent upheld the prevention principle. In more recent years, English case law experienced the topic of concurrent delays and held that, in order for a contractor to rely on the prevention principle in the case of a concurrent delay, he must prove that it was impossible to complete on time but for the employer’s delay. The delay must be actual (not potential) and there shall be no apportionment to be considered by

the courts. On the other hand, from an Egyptian Civil Code perspective, the topic of prevention principle is not discussed at all in construction literature or even in conferences, which necessitated the use in this research of functional equivalence to deduce how it is dealt with under the Egyptian Civil Code. To achieve this, this research delves into commentaries provided by Dr. Al Sanhoury regarding principles set in the Egyptian Civil Code to address the prevention principle and identifies four salient principles, namely good faith, unlawful use of a right, onerous penalties/actual losses and the waiver principles. Specific attention is also drawn to Al Sanhoury's elaborations regarding "fault of the harmed" and "contributory fault" in his book *Al-Waseet* to deduce cornerstones for the prevention principle that are set in the Egyptian Civil Code. The research acknowledges that there is another recent research (Fawzi, El-Adawy and Hamed, 2015) that addressed the prevention principle in the Egyptian Civil Code but clarifies that the research primarily discussed the concept of time at large in the Egyptian Civil Code, while referring to the prevention principle briefly during the course of the discussion. Moreover, as highlighted in Section B.2.7 of Chapter VIII (page 336), the article refers to Article 215 of the Egyptian Civil Code as the main source of the prevention principle in the Egyptian Civil Code. This is contrary to this research, which delves at greater

depth to highlight the sources of the prevention principle under the Egyptian Civil Code. The reason is that the article's focal point is the principle of "time at large", while that of this research is the enforceability of time bar clauses, in relation to which the prevention principle plays an important role. Therefore, this research can be stated to be unique in the depth at which the prevention principle is discussed with respect to the Egyptian Civil Code.

7. Comparison across the common law and Civil Code jurisdictions with historical justification of differences. This research focuses on comparative law and, as such, follows a certain methodology that has been derived from comparative law literature. The methodology consists of four distinct stages, the conceptualisation, descriptive, identification and explanatory stages. A key factor that distinguishes this research from others in respect of the construction law literature is the explanatory stage which dictates that, in addition to shedding light on an area that is not covered in the literature (i.e., time bar clauses in Egyptian Civil Code) and comparing its enforcement to English law, this research goes a step further and explores the historical origin of the similarities and differences identified between the two jurisdictions. In doing so, this research demonstrates that the origin

of the differences and similarities highlighted between the two jurisdictions is the concept of freedom of contract, for English law, and the effect of the French Civil Code on the Egyptian law, which came to light after the French Revolution in the late eighteenth century. Although the principle of freedom of contract in the nineteenth century took on a much stricter form than it is today, it is still an important pillar in the English law and is certainly the driving factor behind the enforceability of time bar clauses in the English law as demonstrated through the three comparison points of this research. On the other hand, although it is reported that Professor Al Sanhoury was heavily influenced by Islamic Law as he drafted the Egyptian Civil Code (Hill, 1988), the French law influence was also evident. A historical account of the French Revolution, which led to the formation of the French Civil Code, is provided in this research. One important outcome is that the contracts law provisions therein, which were picked up in the Egyptian Civil Code (e.g., limitation, good faith and abuse of a right) and are therefore germane to this research, were totally derived from Roman Law.

It is apparent from the above that this research has contributed to knowledge by attempting to delve into areas of research that were not explored, whether

at all or in sufficient depth, in respect of the important topic of enforceability of time bar clause in construction contracts in the Egyptian Civil Code in comparison with the more frequently discussed English law jurisdiction. It is hopeful that this research will stimulate further research on this topic and others of a similar nature so that the gap in literature is completely filled and parties contracting across Egypt and England are well acquainted with the risks involved.

B. Suggestions for Further Research

Although this research aimed to provide a comprehensive insight on enforceability issues regarding the time bar clauses in the English law and Egyptian Civil Code jurisdictions, there is still room for further study on the topic. Among the topics that can be studied further are:

1. The impact of Roman Law on the Egyptian Civil Code, in particular the concepts of good faith and prevention principle.
2. The effect of Islamic Law on the Egyptian Civil Code.
3. Limitation and preclusion periods in the Egyptian Civil Code and their effect on the enforceability of time bar clauses.
4. The similarities and differences between the time bar under Article 657 of the Egyptian Civil Code and the time bar under FIDIC sub-clause 20.1

and its effect in rendering time bars in construction contracts enforceable.

5. The basis of good faith in the English and Welsh common law jurisdiction (the legal basis for the *Holme v Guppy* decision).
6. The historical origin of the concept of “fault” and “contributory fault” under the Egyptian Civil Code jurisdiction.

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