

Doctrinal Absence and Judicial Pragmatism: The Anticipatory Breach Problem in UAE Law

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ABSTRACT

In general, the doctrine of anticipatory breach of contract addresses circumstances arising in the interim period between contract formation and the agreed time for performance that materially increase the risk that the promised performance will not be forthcoming when due. In short, the doctrine of anticipatory breach provides a party anticipating a future breach with immediate legal relief, without having to wait for an actual breach to materialise. The United Arab Emirates (UAE), an emerging civil law jurisdiction, does not expressly incorporate a doctrine equivalent to anticipatory breach into its statutory framework. The central inquiry of this article is whether the current UAE regime provides solutions that are functionally comparable to the doctrine of anticipatory breach. After a brief overview of the legal principles relating to anticipatory breach and the legal landscape in the UAE, this article proceeds to analyse a sample of construction-related disputes in which certain UAE courts appeared to permit forms of relief that resemble the outcomes typically associated with anticipatory breach. The article examines the legal implications of those cases.

INTRODUCTION

Contracts invariably generate expectations as to the contracting parties' respective promissory obligations. An important function of contract law, in any legal system, is to protect a party's legitimate expectation in receiving the promised performance when due from the other party.¹ This is known as the 'performance interest'—the primary legal interest acquired by parties at the time of contract formation.² A vital component of the performance interest is a party's sense of security and confidence that the other party will perform their executory obligations as and when agreed.³ This contractually-based sense of security and confidence about future performance is significantly impaired where events or circumstances materially increase the risk that the promised performance will not be forthcoming when due.⁴ In this respect, the doctrine of anticipatory breach of contract was devised to provide a party confronted with a prospective breach with immediate legal relief, without having to wait for an actual breach to materialise.⁵ At its core, anticipatory breach establishes a temporal link between present legal remedies and an anticipated future breach.⁶

¹ See, eg, American Law Institute, *Restatement (Second) of Contracts* (1981), Introductory Note to Topic 3:

A contracting party expects that the other party will not only perform his duties under the contract when the time for performance comes, but will do nothing substantially to impair this expectation before that time comes.

² Charlie Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) 26(1) *Oxford Journal of Legal Studies* 41, 45–47; Daniel Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *Law Quarterly Review* 628, 629.

³ Eric G Anderson, 'A New Look at Material Breach in the Law of Contracts' (1988) 21(4) *UC Davis Law Review* 1073, 1096–101.

⁴ J W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 2nd ed, 2018) [7–23].

⁵ *ibid* [7–17].

⁶ Qiao Liu, *Anticipatory Breach* (Hart Publishing, 2011) 220.

Although the doctrine of anticipatory breach is deeply rooted in the common law tradition, it has gained international recognition by some prominent international uniform law instruments, including the Vienna Convention on Contracts for the International Sale of Goods⁷ and the UNIDROIT Principles of International

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Commercial Contracts.⁸ By contrast, the United Arab Emirates (UAE), an emerging civil law jurisdiction, does not formally recognise the concept of anticipatory breach.⁸ This observation raises a central question: how does the current UAE regime address the problem of anticipated future breach?⁹ This article investigates whether the absence of the doctrine of anticipatory breach constitutes a doctrinal gap in UAE law, thus warranting reform, or whether the current statutory regime provides ‘functionally equivalent’ solutions.¹⁰

This article proceeds as follows: Part I provides a snapshot of the doctrine of anticipatory breach in common law, including its genesis, governing principles, and underlying policies. Part II provides a brief historical account of the UAE and outlines its current legal landscape. Part III examines the problem of anticipated future breach in the UAE context. Specifically, Part III surveys the current statutory regime to determine whether there are solutions functionally equivalent to the doctrine of anticipatory breach. It also analyses a small sample of construction-related disputes in the wake of the 2007–08 global financial crisis, during which the problem of prospective breach came to the fore.

THE DOCTRINE OF ANTICIPATORY BREACH: A BRIEF OVERVIEW

The doctrine of anticipatory breach traces its roots to the celebrated English case of *Hochster v De la Tour*¹¹ (*Hochster*). The facts are well known: on 12 April 1852, the claimant agreed to act as the defendant’s courier on a European tour, due to start on 1 June 1852 and last for three months. On 11 May, the defendant wrote to say that he would not, after all, require the claimant’s services. The claimant then commenced an action for damages on 22 May, i.e., before the due date for performance. The critical question before the Court of Queen’s Bench was whether the defendant’s express refusal to perform, which amounted to a renunciation of the contract, was immediately actionable or whether the suit was premature. It was held by Lord Campbell CJ on behalf of the court that the claimant was entitled to succeed in an action for damages.

Hochster is, therefore, the classic authority for the proposition that the effect of the renunciation of a contract in advance of the time agreed for performance was two-fold.¹² First, it conferred on the aggrieved party a right to ‘accept’ the renunciation as bringing the contract to an end, and to treat themselves as discharged from that time onward from further performance.¹³ Secondly, it enabled the aggrieved party to address the financial consequences by suing immediately, without waiting for the time fixed for performance.¹⁴ Lord Campbell’s reasoning, however, received much criticism from courts and commentators on the grounds of the absence of a

⁷ *Vienna Convention on Contracts for the International Sale of Goods* (1980) arts 71, 72, and 73(2) (CISG).

⁸ Nisreen Mahasneh, ‘1980 الأبعاد القانونية لانضمام دولة الإمارات العربية المتحدة لاتفاقية الأمم المتحدة للبيع الدولي للبضائع 1980’ [Legal Dimensions for the United Arab Emirates’ Accession to the United Nations Convention on the International Sales of Goods 1980] (2017) 69 *United Arab Emirates University Journal of Shari’a and Law* 77, 95–97. It is worthy of note that the United Arab Emirates (UAE) is not signatory to the CISG.

⁹ In this article, UAE law refers to the ‘mainland’ federal laws that govern contractual rights and obligations, namely, Federal Law No. 5 of 1985 on Civil Transactions (UAE Civil Code) and Federal Law No. 50 of 2022 Promulgating the Commercial Transactions Law (UAE Commercial Law). The laws of the Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM), which are ‘offshore’ semi-autonomous common law jurisdictions, are not examined in this article.

¹⁰ The expression ‘functionally equivalent’ is borrowed from comparative law literature. The principle of functional equivalence is premised on the proposition that different legal systems respond to similar factual problems with different legal institutions or technical rules, but which fulfil the same task. See generally Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 340.

¹¹ *Hochster v De la Tour* (1853) 2 El & Bl 678; 118 ER 922. See also the Scottish case *Howie v Anderson* (1848) 10 D 355.

¹² See, eg, *Bunge SA v Nidera BV* [2015] Bus LR 987, 992 [12] (Lord Sumption JSC); *Frost v Knight* (1872) LR 7 Ex 111, 112–3.

¹³ *Bunge SA v Nidera BV* [2015] Bus LR 987, 992 [12] (Lord Sumption JSC).

¹⁴ *ibid.*

logical basis and clear precedent.¹⁵ Nevertheless, it suffices to note that the decision to sustain the claimant's action for immediate damages has been rationalised on policy grounds, namely, practical convenience, mutual advantage, and avoidance of waste of resources.¹⁶

⁸ UNIDROIT Principles of International Commercial Contracts 2016 arts 7.3.3 and 7.3.4 (PICC).

Anticipatory breach is the technical term given to conduct of one party to a contract that precedes the time for performance that is sufficient to entitle the other party to treat themselves as discharged from further performance. English common law has recognised two modes of anticipatory breach.¹⁷ The first, renunciation, comprises words or conduct that evince an unequivocal intention by the defaulting party no longer to be bound by the contract, or to fulfil the contract only in a manner substantially inconsistent with their obligations, and not in any other way.¹⁸ The second, self-induced impossibility, comprises clear conduct by the defaulting party that puts it out of their power to perform their contractual obligations.¹⁹

For a renunciation or self-induced impossibility to be immediately actionable, the anticipated future breach must be 'repudiatory' in character.²⁰ That is to say that the prospective breach must be of the same character as would entitle the aggrieved party to treat themselves as discharged from future performance if it occurred after the time for performance had arisen.²¹ Thus, the anticipated future breach could be a breach of an essential term (a 'condition' in English law parlance) or a breach of an innominate term which deprives the aggrieved party of substantially the whole benefit of the contract.²²

Construction or development projects are a fertile avenue for anticipatory breach. A common performance-related problem encountered in this area is the delay in fulfilling obligations as agreed under the construction contract. The pertinent issue for the present discussion may be stated as follows: in what circumstances may a party anticipating a delay on the part of the other party treat the contract as discharged for anticipatory breach and sue for damages at once? The case of *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd*²³ illustrates this typical factual problem and the governing legal principles. By agreement entered into in October 2008, a developer undertook to construct four mixed-use blocks and to grant an investor a lease of the commercial units in the blocks. The target date for the developer's completion of two blocks was 21 July 2010, but this was not achieved (construction was eventually completed in January and April 2011, respectively). For the other two blocks, the target date was 28 February 2011, but because of funding difficulties, the developer suspended the building works for about a year after completing the initial stages of construction. The developer resumed work on 4 October 2010, and shortly thereafter (22 October), the investor purported to terminate the contract on the ground that the suspension of the building work amounted to a repudiatory breach. The investor alleged that the suspension interfered with the planning and marketing of the commercial units and made it

¹⁵ See, eg, *Daniels v Newton*, 114 Mass 530 (Mass, 1874); Sir Michael Mustill, 'Anticipatory Breach: The Common Law at Work' in *Butterworth Lectures 1989-1990* (Butterworths, 1990) 1, 38-45; Samuel Williston, 'Repudiation of Contracts' (Pt 2) (1901) 14(6) *Harvard Law Review* 421.

¹⁶ See, eg, *Bunge SA v Nidera BV* [2015] Bus LR 987, 992 [12] (Lord Sumption JSC); *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, 46 (Brennan J); *Roehm v Horst*, 178 US 1, 20 S Ct 780, 787 (1900).

¹⁷ *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, 436-38.

¹⁸ *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* ('*The Spar Capella*') [2016] EWCA Civ 982, [67] (Gross LJ); *Marine Transportation Co Ltd v Pansuiza Compania de Navegacion SA* ('*The Hermosa*') [1982] 1 Lloyd's Rep 570, 572-3 (Donaldson LJ).

¹⁹ *Geden Operations Ltd v Dry Bulk Handy Holdings Inc* ('*The Bulk Uruguay*') [2014] EWHC 885 (Comm), [15]; *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, 436.

²⁰ See, eg, *The Bulk Uruguay* [2014] EWHC 885 (Comm), [15]; *Afovos Shipping Co SA v Pagnan* ('*The Afovos*') [1983] 1 WLR 195, 203 (Lord Diplock); *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1979] AC 757, 778-9 (Lord Wilberforce); *The Bulk Uruguay* [2014] EWHC 885 (Comm), [15].

²¹ *The Bulk Uruguay* [2014] EWHC 885 (Comm), [15].

²² *ibid.*

²³ *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch).

impossible to complete work on the remaining blocks by the target date.²⁴

The issue before the Court of Appeal²⁵ was whether the anticipated delay in completing the development project, which was found to be just under one year beyond the contractual target date, deprived the investor of a substantial part of the benefit intended under the agreement.²⁶ Before appraising the actual and foreseeable effects of the delay, the court first considered the ultimate objective of the contract in question, which was to grant the investor a 999-year lease of the commercial units in each of the four blocks.²⁷ In this regard, the Court of Appeal held that the alleged delay was trivial in the context of a 999-year lease, such that it did not deprive the investor of a substantial part of the intended benefit.²⁸ In addition, the court noted that an important factor in determining whether the alleged conduct was repudiatory is whether the defaulting party made reasonable efforts to remedy the breach before the aggrieved party purported to terminate the contract.²⁹ On the facts, it was found that the developer made strenuous efforts to secure the necessary funding and to persuade the bank to advance the release date of the funds.³¹ For these reasons, it was held that the investor was not entitled to terminate the contract.

The above case illustrates that the threshold for invoking anticipatory breach is necessarily high in order to maintain a fair balance between the parties and reduce the likelihood of the aggrieved party abusing their right to terminate. Nevertheless, where it is successfully established, anticipatory breach enables an aggrieved party to replace the entire future relationship with the defaulting party with an economic equivalent elsewhere, thereby promoting economic efficiency and avoiding the waste of resources.

Having provided a concise overview of the doctrine of anticipatory breach, it is now possible to shift the focus of the discussion to UAE law and analyse the problem of anticipatory breach in that context.

LEGAL LANDSCAPE IN THE UAE

A. Road to Modernisation

Throughout its modern history, the UAE, known to historians as the Trucial States,³⁰ has lacked a discernible, homogenous legal system. The primary reason is that, before the Federation in 1971, the independent Gulf sheikhdoms had little, if any, formal administrative or legal structure. Furthermore, during the tenure of British hegemony in the region (1820–1971),³¹ historical records show that two distinct regimes of adjudication were in place.³² On the one hand, the British colonial power, through its Political Resident and Political Agents in the Arabian Gulf, exercised jurisdiction over all legal matters concerning British subjects (most of whom were British-Indian merchants)³³ and property (including ships and aircraft), as well as non-Muslim foreigners residing within the protected Gulf territories.³⁴

On the other hand, the rulers of the small Gulf sheikhdoms exercised jurisdiction over their Arab-natives and

²⁴ *ibid* [96].

²⁵ *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577.

²⁶ *ibid* [31]–[36] (Lewison LJ).

²⁷ *ibid* [51] (Lewison LJ).

²⁸ *ibid* [69] (Lewison LJ).

²⁹ *ibid* [44] (Lewison LJ).

³¹ *ibid* [67] (Lewison LJ).

³⁰ Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Quwain, Ras al-Khaimah and Fujairah.

³¹ British hegemony in the Arabian Gulf dates from the imposition of the General Treaty of 1820, which outlawed maritime tollcollection and piracy, and the Maritime Truce, which outlawed maritime warfare (first signed in 1835).

³² See generally Noura al-Falahi, 1971–1890 من الساحل المتصالح في النظام القضائي [The Judicial System in the Trucial Coast from 1890–1971] (Hamdan Bin Mohammed Heritage Centre, 2014).

³³ See Fatma al-Sayegh, ‘Merchant’s Role in a Changing Society: The Case of Dubai, 1900–90’ (1998) 34 (1) *Middle Eastern Studies* 87; Jeffrey R Macris, ‘Population and Economic Activities in the Arab Trucial States: A 1901 Accounting’ (2015) 6(2) *The Journal of the Middle East and Africa* 165.

³⁴ Foreign Jurisdiction Act 1890 (UK).

Muslim foreigners residing within their political dominion.³⁵ The adjudication of legal matters was conducted entirely in accordance with tribal or trade practices. Since no written codes of law or formal institutions were in place, disputes were heard before a ruling shaikh, a tribe elder, or an experienced arbiter.³⁶ The adjudicators would draw on Islamic Sharia principles, local norms and customs, or trade norms to reach their verdict.³⁷ Often, the enforcement of an adjudicator's decision would require the approval of the ruling shaikh before it could be duly executed.³⁸

In 1892, the rulers of the Gulf sheikdoms signed the Exclusive Agreements, binding them to exclusive treaty relations with the British Crown and ceding control of their external affairs to the British Crown.³⁹ The Exclusive Agreements effectively elevated the international status of the Gulf sheikdoms to that of 'Britishprotected states', i.e., states under the partial dominion of the British Crown.⁴⁰ However, despite British rule and protection—which reigned for 150 years—the Trucial States did not inherit the British common law tradition. Commentators explain that the number of disputes within the jurisdiction of British magistrates was relatively small and mostly concerned minor issues (e.g., outstanding debts), which did not significantly affect the behaviour and attitudes of the indigenous people.⁴¹ By contrast, the influx of desert dwellers and immigrants from other Muslim territories called for the establishment of more Islamic Sharia-based tribunals to settle disputes between people who had no local tribal links.⁴²

By the late 1960s, the British Crown, under mounting Arab nationalist pressure, declared its plan to withdraw its military and naval forces from the Arabian Gulf.⁴³ However, the British government needed to ensure the protection of its economic interests, particularly its lucrative oil concessions, before it could cede legal jurisdiction over its subjects and assets. To achieve this, the British actively promoted, with the cooperation of local rulers, the development of modern state infrastructures in the Gulf sheikdoms.⁴⁴ Crucial for the British government was the replacement of the traditional Islamic Sharia-based practice of adjudication and enforcement of legal rights with a more institutionalised legal and judicial framework.

A key mandate adopted by the British government was the commission of prominent Arab jurists from neighbouring jurisdictions (including Egypt, Jordan, and Sudan) to serve as legal advisers and judges.⁴⁵ The reason being that at that time there was an urgent need for legal experts to assist with the modernisation process, which the local community could not provide.⁴⁶ The commissioned jurists performed various tasks ranging from drafting new laws in areas traditionally governed by Islamic Sharia to hearing complex civil and commercial disputes. However, the promulgation of written laws did not, by itself, establish a uniform legal system, as those laws operated within the confines of each sheikhdom.

B. Multi-Layered Judicial System

In December 1971, the Trucial States gained independence from the British Crown and united to form the UAE.

³⁵ Mixed cases (i.e., claims or disputes between a British subject and a person subject to the jurisdiction of a ruling shaikh) were heard before a 'Joint Court' chaired by the local Political Agent and an adjudicator appointed by the local ruler. See James Onley, *The Arabian Frontier of the British Raj: Merchants, Rulers, and the British in the Nineteenth Century Gulf* (Oxford University Press, 2008) 119–27.

³⁶ It was commonplace for hearings to be heard at the local ruler's open *majlis* (court).

³⁷ See al-Falahi (n 34) 29–98.

³⁸ *ibid*; Onley (n 37) 120.

³⁹ James Onley, *Britain and the Gulf Sheikdoms, 1820-1971: The Politics of Protection* (CIRS Occasional Paper No 5, Centre for International and Regional Studies, 2009) 10–11 <<https://cirs.georgetown.edu/publications/occasional-papers>>.

⁴⁰ *ibid*.

⁴¹ Butti al-Muhairi, 'The Development of the UAE Legal System and Unification with the Judicial System' (1996) 11 *Arab Law Quarterly* 116, 126; al-Falahi (n 32) 99–102.

⁴² al-Muhairi (n 43) 123.

⁴³ Onley (n 41) 15–20.

⁴⁴ *ibid* 13–15.

⁴⁵ al-Muhairi (n 43) 128.

⁴⁶ *ibid*.

The establishment of the federal union marked a significant shift toward the systematisation and modernisation of the domestic legal order. According to Articles 120 and 121 of the UAE Constitution,⁴⁷ primary legislative powers are conferred on the federal government. Additionally, the Constitution grants emirate-level authorities limited legislative powers over minor areas outside the exclusive jurisdiction of the federal government. Importantly, federal laws govern all civil and commercial transactions, except those relating to real property. As alluded to above, the UAE operates under a civil law system with no system of *stare decisis* and is primarily based on statutes (generally assembled in codes), rather than case law.

Articles 95 and 102 of the UAE Constitution mandate the establishment of a federal judicial circuit. Accordingly, the UAE Federal Supreme Court is the highest appellate court in the federal judicial system. The Federal Supreme Court has exclusive jurisdiction in matters concerning the interpretation of the Constitution and the constitutionality of local laws, crimes involving national security, and settling disputes between member emirates.⁵⁰ However, Articles 104 and 105 of the Constitution give member emirates the option to retain their local judicial authority or merge with the federal judicial circuit. At first, only Dubai and Ras al-Khaimah chose to maintain their separate, independent local judiciary.⁵¹ In 2006, Abu Dhabi separated from the federal judicial system and established its own local judicial department.⁵²

At both the federal and local-emirate levels, the court structure comprises three levels of litigation: the Court of First Instance, the Court of Appeal,⁵³ and the Court of Cassation. Thus, four Courts of Cassation operate nationwide.⁴⁸ This structural division presents ongoing challenges for achieving complete harmonisation of judicial practice, as variations in legal interpretation can occur in the absence of binding precedent.⁴⁹

In 2004, the UAE's legal system underwent significant reform through a constitutional amendment and new federal legislation permitting the creation of "financial free zones" (FFZ).⁵⁰ These FFZs were to be exempt from all federal civil and commercial legislation; however, federal criminal laws still applied.⁵¹ Moreover, that year witnessed the inauguration of the Dubai International Financial Centre (DIFC), which aims to promote foreign investment and attract leading global financial institutions and service providers.⁵²

The DIFC operates as an English-language, common law-based jurisdiction with independent legislative and judicial authority.⁵³ Its courts are modelled primarily on the English Commercial Court. Initially, DIFC jurisdiction was limited to disputes arising within the centre. However, in 2011, Dubai expanded its jurisdiction to allow parties to opt in to the DIFC courts even when their dispute lacked a substantive connection to the DIFC.⁵⁴

The emergence of a parallel common law system and the subsequent expansion of the DIFC's jurisdiction have introduced a novel dynamic into the UAE's legal landscape. This development has prompted debate about the long-term implications for coherence within the national legal framework and has encouraged other emirates, such as Abu Dhabi, to adopt similar models through the Abu Dhabi Global Market (ADGM).⁵⁵

⁴⁷ The provisional Constitution of 1971 was adopted as the permanent Constitution in 1996 with minor amendments. ⁵⁰ Federal Law No. 10 of 1973 Concerning the Federal Supreme Court (UAE) art 33.

⁴⁸ These are the Cassation Chamber of the Federal Supreme Court, Abu Dhabi Court of Cassation, Dubai Court of Cassation, and Ras al-Khaimah Court of Cassation.

⁴⁹ In an effort to promote a more uniform legal regime, the UAE government passed Federal Law No. 10 of 2019 Regarding the Regulation of Judicial Relations Between Federal and Local Judicial Authorities. This law mandates, inter alia, the establishment of a committee of senior appellate judges who are charged with the task of unifying conflicting judicial principles espoused by two or more Courts of Cassation (arts 14 and 15).

⁵⁰ Federal Law No. 8 of 2004 Regarding Financial Free Zones (UAE).

⁵¹ *ibid* art 3(2).

⁵² Dubai Law No. 9 of 2004 In Respect of the Dubai International Financial Centre (UAE) art 4.

⁵³ *ibid* arts 6–7.

⁵⁴ Dubai Law No. 16 of 2011 Amending Certain Provisions of Law No. 12 of 2004 Concerning the Dubai International Financial Centre (UAE) art 5(A)(2).

⁵⁵ Abu Dhabi Law No 4 of 2013 Concerning Abu Dhabi Global Market (UAE) arts 12–13.

It is submitted that the availability of multiple systems of adjudication may encourage domestic ‘forum shopping’,⁵⁶ a phenomenon well-discussed in legal scholarship.⁵⁷ The disparity in procedural rules across jurisdictions, such as language of proceedings, evidentiary rules, and limitation period, may incentivise litigants to choose the forum they perceive as most advantageous, with potential implications for the consistency of legal outcomes.⁵⁸

⁵¹ Federal Law No. 6 of 1978 Concerning the Establishment of Federal Courts (UAE).

⁵² Abu Dhabi Law No. 23 of 2006 Concerning the Establishment of a Judicial Authority in the Emirate of Abu Dhabi (UAE).

⁵³ It is worth noting that, unlike the practice in common law jurisdictions, it is possible to appeal in relation to findings of fact and law. The Court of Appeal hears the dispute afresh, and the parties can file further submissions and evidence (Federal Decree Law No. 42 Promulgating the Civil Procedure Code art 167).

Divergence in substantive law provides an additional incentive for forum shopping.⁶⁵ Since the common law is the principal source of DIFC laws, the jurisprudence of other common law jurisdictions may be relied on as persuasive authority on relevant legal issues. In fact, there is an express reference to the application of the laws of England and Wales under DIFC law.⁶⁶ Furthermore, ADGM’s commitment to distinguish itself from the DIFC and the mainland regime is underscored by its policy of applying English common law and equity, as well as selected English statutes, directly.⁶⁷ Consequently, litigants—especially foreign parties—may prefer DIFC or ADGM courts when federal laws appear less familiar or aligned with their expectations.

Notwithstanding the attractiveness of the DIFC and ADGM, the past decade has witnessed a proliferation of new federal legislation and regulatory schemes in the UAE. For example, the new laws governing arbitration,⁶⁸ commercial companies,⁶⁹ electronic transactions,⁷⁰ and civil procedure⁷¹ are a testament to the federal government’s ongoing commitment to modernising and increasing public and foreign investor confidence in the mainland legal and regulatory framework.

As a final consideration, the coexistence of parallel court systems also has implications for procedural efficiency.⁷² Case law⁵⁹ and institutional developments⁶⁰ indicate instances of jurisdictional tension between onshore and offshore courts.⁶¹ Ambiguity regarding the application of federal law in certain disputes, combined with offshore courts’ ability to assume jurisdiction through opt-in mechanisms, may give rise to interpretive inconsistencies or divergent approaches rooted in differing legal traditions.⁶² Such scenarios can contribute to uncertainty for litigants and practitioners navigating the UAE’s multi-layered judicial landscape.

⁵⁶ The *Encyclopaedic Australian Legal Dictionary* (online 1 July 2020) defines ‘forum shopping’ as:

Selection by a plaintiff of the jurisdiction or forum best suited to the plaintiff’s needs by reason of commercial, legal, or personal advantage, and irrespective of the suitability or strength of the forum’s connection to the facts of the case.

⁵⁷ See generally Friedrich K Juenger, ‘Forum Shopping, Domestic and International’ (1989) 63 *Tulane Law Review* 553; Pamela K Bookman, ‘The Unsung Virtues of Global Forum Shopping’ (2016) 92(2) *Notre Dame Law Review* 579.

⁵⁸ Franco Ferrari, ‘Forum Shopping Despite International Uniform Contract Law Conventions’ (2002) 51(3) *International and Comparative Law Quarterly* 689, 707.

⁵⁹ *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* [2014] DIFC CA 5, November 3 2014; Dubai Court of First Instance, Commercial Case No. 1619/2016, 15 February 2017. For a brief discussion, see Gordon Blanke, ‘Dubai Courts v DIFC Courts: Just a Jurisdictional Stand-off or An Outright Declaration of War?’, *Practical Law Arbitration Blog* (Blog Post, 12 June 2017) <<http://arbitrationblog.practicallaw.com/dubai-courts-v-difc-courts-just-a-jurisdictional-stand-off-or-an-outright-declaration-of-war/>>.

⁶⁰ Dubai Decree No. 19 of 2016 on Forming the Judicial Committee of the Dubai Courts and the DIFC Courts (UAE) (Decree No. 19). According to Decree No. 19 art 2, the ‘Judicial Committee’ is responsible for, inter alia, the determination of jurisdictional disputes in relation to conflicts of jurisdiction between the Dubai and DIFC courts, and conflicting judgments of the Dubai and DIFC courts, involving the same parties and bearing on the same subject-matter.

⁶¹ For further discussion, see Andrew Bodnar and Martin Kenney, ‘Jurisdiction and the Dubai Courts: Self-Immolation or Order Out of (Potential) Chaos?’ (2018) 19(2) *Business Law International* 125; Deirdre Walker and Aarti Thadani, *The Dubai Judicial Tribunal: A Claw-back of Jurisdiction?* (Norton Rose Fulbright International Arbitration Report, Issue 10, May 2018) 27.

⁶² See *Gavin v Gaynor* [2015] DIFC CFI 17, 3 April 2016; Stuart Paterson and Joseph Bentley, ‘Gavin v Gaynor: Important Further Clarification on DIFC Court Jurisdiction and Identifying Place of Arbitration’, *Arbitration Notes* (Blog Post, 20 April 2016) <<https://hsfnotes.com/arbitration/2016/04/20/gavin-v-gaynor-important-further-clarification-on-difc-court-jurisdiction-and-identifying-place-of-arbitration/>>; *Sky News Arabia FZ-LLC v Kassab Medical (FZ) LLC* [2016] DIFC CA 10, 12 July 2017. In that case, the DIFC Court of Appeal did not rule on the issue of governing law but remitted the question back to the Court of First

ANTICIPATED FUTURE BREACH IN THE UAE CONTEXT

A. Property Market Crash and Arrested Development

The 2007–08 financial crisis and global economic downturn revealed several limitations inherent in the UAE's developing legal and regulatory framework. Dubai, in particular, experienced pronounced effects.⁷⁷ Prior

⁶⁵ As a side point, UAE law recognises the principle of freedom of contract. Therefore, in theory, an express choice of law clause would be recognised and upheld by UAE courts, unless the provisions of the chosen law are contrary to Islamic Sharia law or UAE public order and morals (UAE Civil Code arts 25–28 and 257).

⁶⁶ Dubai International Financial Centre Law No 3 of 2004 – Law on the Application of Civil and Commercial Laws in the DIFC (UAE) pt 2 s 8(2)(e).

⁶⁷ Application of English Law Regulations 2015 (UAE).

⁶⁸ Federal Law No. 6 of 2018 on Arbitration (UAE).

⁶⁹ Federal Decree Law No. 32 of 2021 on Commercial Companies (UAE).

⁷⁰ Federal Decree Law No. 46 of 2021 on Electronic Transactions and Trust Services (UAE).

⁷¹ Federal Decree Law No. 42 of 2022 Promulgating the Civil Procedure Code (UAE).

⁷² Efficiency in the context of litigation means that ‘the proceedings are, or ought to be, conducted in such way as to avoid unnecessary cost and delay.’ See Markus Petsche, ‘What’s Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of Controversial Practice’ (2011) 45(4) International Lawyer 1005, 1015–17.

to the financial turmoil, the 2003–08 oil boom spurred economic activity in the region, and the emirate witnessed six years of rapid increases in the real estate sector.⁷⁸ The attractiveness of Dubai as an investment destination drew hundreds of foreign investors seeking to capitalise on high-risk investments in a property market that, at the time, was still developing in terms of its regulatory structure. However, by late 2008, the housing bubble burst, as reports claimed that property prices fell by a staggering 20–50% from their peak in early 2008.⁶³ Calamity in the market ensued, and demand for property plummeted as prospective purchasers adopted a ‘waitand-see’ approach. Consequently, Dubai’s mega-projects came to a grinding halt.

It was reported that an estimated US\$364 billion in construction projects across the UAE had been put on indefinite hold or scrapped entirely due to falling demand and deteriorating market conditions.⁶⁴ Fearing that their investments were doomed for failure, investors sought to escape their contractual responsibilities. As a result, disputes involving off-plan property sale contracts between purchasers and property developers flooded the dockets of Dubai courts. A recurring complaint raised by the purchasers was the anticipated, substantial delay in completion of the construction projects, as well as their apprehension about the developers’ financial solvency and ability to perform. Simply put, the purchasers were confronted with what they perceived as a prospective breach.

UAE jurisprudence, as mentioned at the start of this article, does not formally recognise the doctrine of anticipatory breach. Thus, the fundamental issue the insecure purchasers faced was whether they had recourse to immediate legal remedies under the current statutory regime. As will be highlighted in the next section, the bursting of the real estate bubble triggered judicial activism, as Dubai courts recognised the availability of legal redress for anticipated future breach in circumstances that did not accord with existing law.

B. In Search of Solutions for Prospective Breach

This section examines how the current UAE regime deals with anticipated future breach and analyses the approach taken by the Dubai courts to address this problem in the context of construction disputes. Three

Instance. ⁷⁷ In an effort to contain the ripple effect of the financial turmoil, the government of Dubai passed Decree No 57 of 2009 Establishing a Tribunal to Decide the Disputes Related to the Settlement of the Financial Position of Dubai World and its Subsidiaries (Decree 57). In a nutshell, Decree 57 established a specialist three-member tribunal, the Dubai World Tribunal (DWT), to preside over complex

⁶³ *ibid.*

⁶⁴ *ibid.*

illustrative judgments of the Dubai courts have been selected for analysis in which UAE mainland law was the applicable law, and the availability of remedies for prospective breach was directly in issue. As will be shown, only in limited circumstances were the courts willing to uphold the insecure purchaser's claim for judicial relief. But before proceeding to discuss those cases, it would be prudent to first consider the potential solutions a party facing a prospective breach could resort to under the current statutory regime.

1. Potential Courses of Action

(a) Accelerating the Maturity of an Unaccrued Obligation: UAE Federal Law No. 5 of 1985 on Civil Transactions (Civil Code) permits contracting parties to agree to defer performance and enforceability of their promissory obligations to a future specified time or event.⁶⁵ The recognition of deferred obligations is crucial, as commercial contracts are typically executory in nature (e.g., construction contracts, contracts for the manufacture and supply of goods, and charterparties). As a general rule, where a contractual term or obligation is time-delayed, a party cannot enforce it or compel performance before the appointed time. However, UAE Civil Code Article 431 provides:

The benefit of a time-delayed obligation is forfeited in the following circumstances:

1. If a court order of bankruptcy, insolvency, or interdiction is rendered against the debtor.
2. If the debtor fails to provide the securities or assurances agreed upon to the creditor.

insolvency and debt restructuring matters involving Dubai World Corporation and its subsidiaries, which by November 2009 had incurred nearly US\$ 60 billion in debt. For a recent study on DWT, see Jayanth K Krishnan and Harold Koster, 'An Innovative Matrix for Dispute Resolution: The Dubai World Tribunal and the Global Insolvency Crisis' [2016] (2) *Journal of Dispute Resolution*.⁷⁸ Husam-Aldin al-Malkawi and Rekha Pillai, 'The Impact of Financial Crisis on UAE Real Estate and Construction Sector: Analysis and Implications' (2013) 29(2) *Humanomics* 115, 116.

3. If the value of the securities or assurances guaranteeing performance has significantly depreciated because of the debtor's conduct or an extraneous cause, unless the debtor proceeds to supplement them.

Thus, where Article 431 applies, it has the profound effect of accelerating the maturity of an unaccrued contractual obligation. That is to say that, if the defaulting party is unable or refuses to perform, or cannot revive the benefit of the deferred obligation, the aggrieved party may commence legal proceedings seeking relief in court.⁶⁶

Notwithstanding its potential, the excepted circumstances under Article 431 are exhaustive.⁶⁷ Therefore, a party concerned about the financial position and the ability of the other party to perform cannot resort to Article 431 before that party has been declared bankrupt or insolvent by virtue of a court judgment.

(b) Proscription of Unilateral Conduct: UAE law explicitly prohibits unilateral acts in relation to legally binding contracts. UAE Civil Code Article 267 provides:

If a contract is valid and binding, it shall not be permissible for either of the contracting parties to revoke, vary, or rescind it except by mutual consent, court order, or a legal provision (emphasis added).

Thus, Article 267 makes plain that, *prima facie*, an aggrieved party cannot unilaterally rescind (i.e., discharge) a valid contract. UAE law instead recognises four means by which a contract may be lawfully put to an end: an

⁶⁵ UAE Civil Code art 429.

⁶⁶ Abu Dhabi Judicial Department, المذكرة الإيضاحية لقانون المعاملات المدنية [Explanatory Memorandum to Civil Transactions Code (Pt 1)] (Abu Dhabi, 2017) arts 429–33, 655–65 (Explanatory Memorandum).

⁶⁷ UAE Civil Code art 30 provides: Exceptions may neither be applied by analogy nor receive expanded interpretation.

⁸⁴ *ibid* arts 268–70.

agreement to rescind,⁸⁴ a rescission clause in the contract,⁶⁸ judicial rescission,⁶⁹ and rescission by operation of law.⁸⁷ It should be pointed out that the preclusion of unilateral (or self-help) rescission is in marked contrast to the position in common law jurisdictions.⁷⁰

A note on terminology is imperative here. UAE law uses the Arabic word '*faskh*' to denote the act of putting an end to a contract. According to Article 274 of the UAE Civil Code, *faskh* operates retroactively, restoring the parties to their pre-contractual positions.⁷¹ Therefore, the term 'rescission' in common law parlance, rather than termination, would be the proper translation of *faskh*.

(c) Seeking Judicial Rescission and Damages: UAE Civil Code Article 272 sets up the basic remedial regime for a party aggrieved by a breach of contract. It provides:

- 1 In bilateral contracts, if one of the parties does not perform their contractual obligations, the other party may, after notifying the debtor, request performance of the contract or its rescission.
- 2 The judge may order the debtor to perform the contract forthwith or may defer performance to a specified time, and he may order rescission with damages, in any case, if deemed appropriate.

To avail of the rights under Article 272, the onus is on the aggrieved party to satisfy three general preconditions.⁷² First, the contract in question must be bilateral, i.e., the promises are reciprocal, and the performance obligations are correlative. Secondly, the aggrieved party must themselves be willing and able to perform their part of the agreement.⁷³ Thirdly, and most significantly, there must be an *actual* breach of contract, i.e., the time for performance has arrived, and the other party has failed to perform as agreed. Therefore, under a strict interpretation of Article 272, a party anticipating a future breach must wait for an actual breach to materialise before seeking judicial relief.

It is worthy of note that trial courts have wide discretion in determining the appropriateness of a particular remedy sought by an aggrieved party. Thus, it is not uncommon for a court to reject a claim for rescission even when the substantive and procedural requirements are met. Moreover, trial judges have the power to grant—on their own volition—an additional period for performance in favour of a defaulting party. However, for commercial contracts governed by UAE *Federal Law No. 50 of 2022 on Commercial Transactions*, an aggrieved party may not be compelled to accept late performance from a defaulting party if the agreed time for performance has expired, unless there is an agreement to the contrary.⁷⁴

⁶⁸ *ibid* art 271.

⁶⁹ *ibid* art 272.

⁸⁷ *ibid* art 273.

⁷⁰ See, eg, *Vitol SA v Norelf Ltd* [1996] AC 800, 811 (Lord Steyn).

⁷¹ UAE Civil Code art 274 provides:

If a contract is rescinded (by a judicial order or mutual agreement, or is automatically rescinded by a supervening *force majeure*) the parties shall be restored to their pre-contractual position. In the event this was not possible, compensation shall be awarded instead.

⁷² Explanatory Memorandum (n 82) art 272, 369–72; Mohammed Abu-Zaid, 'انحلال الرابطة العقدية بالفسخ، أو الانفساخ، أو التفاسخ - على ضوء قضاء محكمة تمييز دبي' [Unwinding the Contractual Bond by Judicial Rescission, Rescission by Force of Law, or Rescission by Mutual Consent—In Light of the Jurisprudence of the Dubai Court of Cassation] (January 2011) 5 *Al Ma'had Magazine* 34, 35–39 <<http://www.dji.gov.ae/ar/Pages/BookDetails.aspx?BookId=19>>.

⁷³ Dubai Court of Cassation, Petition No 40/2013 (Real Estate), 16 June 2013; Dubai Court of Cassation, Petition No 102/2007 (Commercial), 19 June 2007.

⁷⁴ UAE Commercial Law art 78.

(d) Right of Suspension and Defence of Non-Performance: UAE law recognises a general right of suspension embedded in binding contracts.⁷⁵ Pursuant to UAE Civil Code Articles 414⁷⁶ and 415,⁷⁷ a party may withhold performance of an obligation if the other party has failed to perform a corresponding obligation. In bilateral contracts, the application of the right of suspension is referred to as the ‘defence of non-performance’. UAE Civil Code Article 247 thus provides:

In bilateral contracts, if the performance of the parties’ correlative obligations has fallen due, a party may withhold performance of their obligation if the other party does not perform that which they are obliged to do.

The right of suspension (or the defence of non-performance) is the only self-help solution that is explicitly sanctioned by UAE law. The remedy is subject to three limitations.⁹⁶ First, the parties’ corresponding obligations must be due, i.e., the time fixed for performance has arrived. Accordingly, if the parties have agreed to an order of performance, the party obliged to perform in advance cannot invoke the defence of non-performance against the other party whose performance has been deferred. Secondly, where the defaulting party has performed a substantial part of their obligations and what remains is trivial and not detrimental to the aggrieved party’s interest, the aggrieved party in such circumstances will be precluded from exercising their right to suspend performance. Thirdly, a trial court may be called upon to determine whether the circumstances justified recourse to suspension of performance.

The critical point to be made here is that, based on the literal wording of Article 247, the potency of the right of suspension is significantly diluted where the parties have agreed to an order of performance. In the context of prospective breach, an aggrieved party who seeks to avail of the defence of non-performance would have to establish that the defaulting party was under a duty to perform in advance or concomitantly.

2. Dubai Courts’ Pragmatic Approach

Having outlined the relevant provisions of the UAE Civil Code in relation to the problem of anticipated future breach, it is now possible to turn to the construction cases alluded to above in which the judicial outcomes diverged from what might be expected under a strict reading of the applicable law.

(a) *Jouri Towers Case*.⁷⁸ A property developer and purchaser entered into an off-plan property sale contract on 12 March 2008. The contract stipulated that the purchase price was subject to a payment schedule and that the target date for completion of the construction work was the second quarter of 2010, which could be extended for an additional two quarters. Therefore, the latest date agreed for completion of the building works was 1 January 2011. On 6 June 2010, a status report published by the Dubai Land Department revealed that only 5.5% of the construction project was completed. Thereafter, on 5 July 2010, the purchaser commenced legal proceedings in the Dubai courts seeking judicial rescission of the contract of sale.⁷⁹

⁷⁵ Explanatory Memorandum (n 82) arts 414–15, 633–40. In this article, the terms ‘suspension’ and ‘withholding’ of performance are used interchangeably.

⁷⁶ UAE Civil Code art 414 provides:

A party who undertakes to perform any obligation may decline performance thereof where the other party has not performed the corresponding obligation.

⁷⁷ *ibid* art 415 provides:

Any party to a financial commutative contract may generally retain the object of the contract while it is in their possession until they have received the consideration due. ⁹⁶ Explanatory Memorandum (n 82) art 247, 335–36.

⁷⁸ Dubai Court of Cassation, Petition No. 235/2011 (Real Estate), 13 November 2011.

⁷⁹ As a procedural point, UAE mainland law permits an aggrieved party to seek judicial relief even though their legal right may not have matured at the time of filing the claim. UAE Civil Procedure Code art 2 provides:

No request or plea from an individual shall be accepted unless that individual has an accrued and legitimate interest. However, an unaccrued (or potential) interest shall be sufficient if the purpose of the request is a precaution against an imminent loss or to affirm a right of which evidence may be lost when put in issue.

Before the Court Appeal,⁸⁰ the developer (as the appellant) argued that it was not in actual breach of its obligations according to the express terms of the agreement and that the purchaser's action was premature. The developer further contended that the target date was implicitly extended by virtue of the agreed terms. But expert testimony indicated that the estimated completion date was 20 December 2011. The court rejected the developer's assertions and rescinded the contract in favour of the purchaser. The decision rested primarily on the significantly low percentage of completion, which indicated that it was not feasible for the developer to complete construction by the extended target date (i.e., 1 January 2011).

On appeal before the Court of Cassation, the developer (as petitioner) argued that the lower court erred in applying the relevant legal principles, as the preconditions for rescission were not satisfied, namely, the purchaser did not establish an actual breach of contract. The Court of Cassation dismissed the developer's contention. It emphasised that whether an alleged delay in performance warranted rescission—a question of fact—fell within the sole discretion of trial courts (Court of First Instance and Court of Appeal)⁸¹ and was not subject to review by the Court of Cassation, provided the outcome rested on objective evidence.⁸²

(b) *Noor Apartments Case*:⁸³ A property developer and purchaser entered into an off-plan property sale contract on 28 May 2008. As is common in such agreements, the purchase price was subject to a payment schedule; however, the parties did not specify a target date for the completion of the building works. On 17 March 2009, the purchaser brought suit in the Dubai courts alleging breach of contract, including failure to commence construction. The Court of First Instance appointed an expert to ascertain the degree of compliance by the parties with their respective obligations and the status of the building works.

The expert report concluded that the developer complied with its statutory and contractual obligations. In particular, the report revealed that construction was ongoing—only 5.5% of the project was completed at that time—and that the estimated completion date was by the end of 2011. Notwithstanding the expert's findings, the Court of First Instance rescinded the contract in favour of the purchaser. However, the developer subsequently appealed to the Court of Appeal, which overturned the lower court's decision on the ground that the factual evidence and surrounding circumstances did not support the rescission of the contract.

The purchaser petitioned the Court of Cassation, contending that the Court of Appeal erred in its judgment by failing to appraise the factual findings properly. The Court of Cassation disagreed and reiterated that rescission on the ground of delay in performance was subject to the discretion of trial courts. The Court of Appeal accordingly based its decision on the evidence submitted to it that showed the solvency of the developer, fulfilment of its statutory duties, and the ongoing building works. The Court of Cassation, therefore, found no error on the part of the Court of Appeal in exercising its discretion.

(c) *Jebel Ali Area Residential Project Case*:⁸⁴ This case concerned an off-plan property sale of seven residential units entered into on 18 May 2008. According to the agreed terms, the purchase price was subject to a payment schedule, with a target completion date of 31 December 2009. Before the imminent crash of the housing market, the purchaser paid 25% of the purchase price but withheld making further payments from November 2008 onwards. Construction commenced on 10 December 2008 due to delays in finalising the construction plans. In January 2009, the purchaser visited the construction site and observed that building operations were proceeding at a significantly slower pace than expected. Thereafter, on 6 August 2009,

⁸⁰ The Court of First Instance held that the contract in question was void pursuant to Dubai Law No. 13 of 2008 Regulating the Interim Real Property Register in the Emirate of Dubai (UAE) art 3. However, the Court of Appeal overturned this decision.

⁸¹ See n 53.

⁸² See also Dubai Court of Cassation, Petition No. 52/2012 (Real Estate), 7 October 2012; Dubai Court of Cassation, Petition No. 302/2011 (Real Estate), 20 November 2011. In both these cases, the Dubai Court of Cassation upheld the lower courts' decision to rescind the off-plan property sale agreement on closely similar facts.

⁸³ Dubai Court of Cassation, Petition No. 105/2011 (Real Estate), 11 December 2011.

⁸⁴ Dubai Court of Cassation, Petition No. 327/2013 (Real Estate), 29 December 2013.

anticipating a significant delay in completion and delivery of the units, the purchaser commenced legal action in the Dubai courts seeking judicial rescission of the contracts.

At trial, the purchaser asserted that the developer was in breach of its contractual obligations, thereby warranting the rescission of the contracts in dispute. The developer, however, demurred and brought a crossaction alleging that it was the purchaser who had breached the contracts by unlawfully withholding payment of instalments already due. The Court of First Instance dismissed the developer's cross-claim and rescinded the contracts. The Court of Appeal subsequently affirmed the judgment of the lower court.

On appeal before the Court of Cassation, the developer (as petitioner) argued that the lower courts erred in the application of the law, as the preconditions for rescission were not met. Crucial to the developer's contention was that the purchaser's failure and refusal to pay outstanding instalments due should have disentitled the purchaser from benefiting from an order of rescission.⁸⁵ The Court of Cassation held otherwise; it reiterated that whether a breach of contract had occurred and whether an alleged breach justified rescission were matters of fact, within the purview of the trial courts and not subject to review.

Notably for the present discussion, the Court of Cassation intimated that a purchaser obliged to perform in advance may, nevertheless, withhold payment of any instalments due if there were 'serious reasons' for fearing the developer's inability to perform its executory obligations (i.e., to deliver the property on time). Thus, in the present case, the insecure purchaser's suspension of payment in anticipation of an impending delay was lawful and justified.⁸⁶

3. Implications and Critique

There is much to be said about the construction cases above, but an important observation regarding UAE case law needs to be made first. From an institutional perspective, the UAE does not maintain a comprehensive official case-reporting system covering all litigated matters. The public, however, can access some UAE court judgments via the respective courts' official websites.⁸⁷ Furthermore, unlike the practice in common law jurisdictions, the decisions of the Courts of Cassation tend to be concise and do not typically contain extensive discussion of the material facts or detailed reasoning. It is also worth noting that appellate judgments seldom contain opinions of dissenting judges, nor any trace of internal discussion or doubt. Thus, these features should be borne in mind when undertaking a critical analysis of UAE case law.

In this author's assessment, the approach taken by the Dubai courts in the cases surveyed appears to reflect an implicit acknowledgement of the challenges posed by anticipated future breach. At a minimum, the courts recognised that purchasers faced circumstances indicative of prospective non-performance, particularly delays in completion and delivery, and that some form of relief was appropriate. The courts, therefore, adapted the law to meet the needs of the aggrieved parties and should be applauded for doing so. Nevertheless, the lack of critical discussion of the nuanced legal issues raised by the particular facts, and the absence of a clear legal basis for the relief granted, create analytical challenges regarding the decisions' underlying rationale.

A point of tension arises because these outcomes do not neatly align with existing statutory provisions. Firstly, it will be recalled that to request judicial rescission (UAE Civil Code Article 272) or invoke the defence of non-performance (UAE Civil Code Article 247), an aggrieved party must first establish an actual failure to perform on the part of the other party.⁸⁸ However, in none of the cases discussed was the primary contractual obligation

⁸⁵ See n 89 and accompanying text. Upon rescission, the purchaser received back 2,388,662 AED (approx. US\$650,400) of the purchase price paid plus 5% interest.

⁸⁶ See also Dubai Court of Cassation, Petition No. 434/2013 (Real Estate), 9 February 2014; Dubai Court of Cassation, Petition No. 339/2013 (Real Estate), 5 January 2014; Dubai Court of Cassation, Petition No. 200/2013 (Real Estate), 6 October 2013; Dubai Court of Cassation, Petition No. 95/2013 (Real Estate), 30 June 2013; Dubai Court of Cassation, Petition No. 40/2013 (Real Estate), 16 June 2013.

⁸⁷ The UAE Federal Supreme Court does not publish its decisions on its web portal.

⁸⁸ See nn 90–96 and accompanying text.

of developers due for performance (i.e., delivery of the property), especially where the parties have agreed on a target date for completion of the development. Secondly, the acceleration of liability mechanism under Article 431 of the UAE Civil Code could not have assisted the insecure purchasers, as the developers had not been declared insolvent at the time judicial rescission was sought or payment withheld.⁸⁹ Therefore, under strict application of the governing law, both the suspension of payment of instalments due and the claim for rescission should have been deemed premature.

Moreover, the Court of Cassation did not address the broader issue of how courts should assess the seriousness and certainty of anticipated delay, warranting judicial rescission. The opposite conclusions reached by the Court of Appeal in *Jouri Towers* and *Noor Apartments*—two cases that shared similar facts—highlight the interpretive uncertainties involved. If the off-plan sale agreement contained a target completion date and evidence showed it would be factually impossible for the developer to complete construction by that date, a court might be willing to rescind the contract due to the certainty of the prospective breach. Conversely, if the contract is silent as to the projected completion date of the development, a court might be reluctant to order rescission even though the purchaser may be facing a significant delay in performance.

A further critique concerns the Dubai Court of Cassation's flexible interpretation of the right of suspension and the defence of non-performance under Articles 247, 414, and 415 of the UAE Civil Code. An insecure purchaser seeking to withhold payment of instalments due would be well advised to exercise caution, as it is unclear what circumstances would constitute 'serious reasons' for fearing a future breach. The Court of Cassation held that this was not a matter of law but a finding of fact, and that trial courts had discretion to determine it based on the evidence submitted. However, without authoritative guidance and clarification, *post hoc* determinations of 'serious reasons' may lead to divergent outcomes across cases. It is worth noting that the Dubai Court of Cassation, on a separate occasion, opined that a property developer's failure to commence construction within six months of receiving approval to sell the units off-plan might be sufficient.⁹⁰

Finally, the overall impact of the Dubai courts' pragmatic approach on the current UAE regime is called into question. On the one hand, there is a long line of construction-related cases in which the Dubai Court of Cassation has reiterated the proposition that, where there are 'serious reasons' to fear that a developer will not perform in conformity with its express obligation regarding the delivery of the property, an insecure purchaser may withhold payment of any instalments due forthwith.¹¹⁰ Therefore, it would appear that this is an established principle within the jurisprudence of the Dubai Court of Cassation. On the other hand, because there is no rule of binding precedent nor a comprehensive case reporting system, it remains uncertain how widely this principle has been applied beyond the context of construction disputes.

In light of the preceding findings, it is submitted that the current UAE statutory regime does not provide a party faced with prospective breach with solutions that are functionally equivalent to the doctrine of anticipatory breach. Nevertheless, it might be argued that this does not present a 'real' gap in the legal system, given that the sample of construction cases demonstrates that some local courts have shown a proactive resolve in adapting the law to treat novel problems, and thus should be allowed to develop this area of contract law. Admittedly, as mentioned above, it is through the common law courts that the doctrine of anticipatory breach was first conceived.⁹¹ However, it is precisely because the mainland UAE regime does not operate as a common law jurisdiction that the development of legal doctrine through local courts would be less than ideal.

In this author's view, federal legislative reform is the more appropriate route to effect legal change in the UAE for three reasons. First, in the context of civil law jurisdictions, legislative intervention would achieve greater legal certainty regarding the accessibility of law (relevant substantive legal principles) to the public and the legal

⁸⁹ See nn 81–83 and accompanying text.

⁹⁰ Dubai Court of Cassation, Petition No. 179/2012 (Real Estate), 13 January 2013. ¹¹⁰ See n 105.

⁹¹ For a critique of the common law method in the development of the doctrine of anticipatory breach, see Mustill (n 16) 4–12. ¹¹² See generally John Eldridge, 'Contract Codification and 'Certainty'' (2018) 35 *Journal of Contract Law* 146, 152–67; Ian Macneil, 'Uncertainty in Commercial Law' (2009) 13(1) *Edinburgh Law Review* 68, 69–72.

profession, as well as the predictability of law application (i.e., the outcomes of adjudicative processes).¹¹² Second, it would extend the recognition of the concept of anticipatory breach and the availability of legal relief beyond just construction disputes. Third, legal development through legislative reform would improve the competitive standing of the mainland legal regime within the domestic competitive market for law.⁹²

CONCLUSION

The purpose of this article was to investigate how UAE mainland law addresses anticipated future breach of contract. The analysis demonstrated that the basic remedial options under the current statutory regime do not assist a party confronted with a prospective breach. Generally speaking, UAE law does not provide a right to rescind a contract for breach unilaterally; therefore, contracting parties would need to expressly include a clause permitting either party to rescind without court intervention. Furthermore, according to the literal wording of UAE Civil Code Article 272, an aggrieved party must establish an *actual* failure to perform to claim damages and/or judicial rescission of the contract. Similarly, an aggrieved party wishing to invoke the right of suspension (UAE Civil Code Articles 414 and 415) and the defence of non-performance (UAE Civil Code Article 247) must show that the defaulting party was obliged to perform in advance or concomitantly. Moreover, the acceleration of liability mechanism under Article 431 of the UAE Civil Code is of little practical value in this respect, as it is only triggered in limited circumstances (for example, upon the issuance of an insolvency order against the defaulting party). Thus, it would appear that, unlike in common law jurisdictions, a party faced with a prospective breach has no expeditious, cost-effective means to resolve the issue other than waiting for an actual breach to materialise.

Notwithstanding the absence of explicit statutory treatment, there is a line of construction-related disputes in which some Dubai onshore courts have shown a pragmatic disposition in adapting the law to afford relief to a party anticipating a future breach. For instance, the Dubai Court of Cassation has adopted a more flexible interpretation of UAE Civil Code Articles 247, 414, and 415, thereby enabling insecure purchasers, who have ‘serious reasons’ to doubt the developers’ ability to render timely performance, to withhold payment of any instalments due forthwith. However, it was argued that the Dubai courts’ flexible and pragmatic approach in the sampled construction cases raises more questions than answers and does not provide clear guidance to future courts, parties, or their legal advisers. It was further contended that legislative reform would be the ideal course to bring about change in this under-treated area of law and to promote legal certainty.

In sum, this article has demonstrated that UAE mainland law does not presently provide solutions functionally equivalent to the doctrine of anticipatory breach, thereby constituting a notable gap in the legal framework. Further research is required to determine which conceptual model of anticipatory breach⁹³ and the regime of remedies⁹⁴ would be most appropriate for the UAE context.

⁹² See nn 56–76 and accompanying text.

⁹³ For a discussion on the different conceptual frameworks for analysing anticipatory breach, see Liu (n 6) 26–39.

⁹⁴ Compare the remedial options available to an aggrieved party under English law (see *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788, 799–805), the CISG (arts 71(1) and 72), and the PICC (arts 7.3.3 and 7.3.4).