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**Provisional Sums and Nominated Subcontracts in  
Construction Law; A Comparative Analysis of the  
Rights and Obligations of the Employer Under UAE  
and Common Laws**

المبالغ المؤقتة وترسية العقود من الباطن في قانون التشييد؛ تحليل مقارن  
لحقوق والتزامات صاحب العمل بموجب قوانين الإمارات العربية المتحدة  
والقانون العام

By

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## **ABSTRACT**

Provisional sums are included within construction contracts to allow the employer, at its discretion, to select and nominate its choice of subcontractor to the contractor. Thereafter, the contractor remains generally liable for the performance of the nominated subcontractor.

Provisional sums and nomination has caused significant legal issues under English common law, leading to its demise, whilst in the UAE employers continue to utilize the method extensively.

A comparison of the legal treatment suggests that the UAE has a robust law which allocates liability of a nominated subcontractor's defective performance to the contractor, however legal decisions under English common law have ruled contrary to this, holding the employer liable for the nominated subcontractor's default or repudiation or preventing recourse against the nominated subcontractor.

The importance of an unambiguous and comprehensive contract defining a clear mechanism of administration and remedies is of critical importance otherwise the court or arbitration may be left to decide the parties' intentions. Despite this, widely used contracts such as FIDIC are surprisingly silent regarding rights or obligations following objection or repudiation of a nominated subcontractor.

There are other issues such as the employer's rights and obligations regarding direct payment to a nominated subcontractor in the event of the contractor's insolvency, design liabilities under a provisional sum, delays caused by the nominated subcontractor, duties to properly disclose information and prevent misrepresentation in the nomination, unjust enrichment, pre-nomination discussions and objection to nomination by the contractor. The treatment may vary depending on the relevant legal jurisdiction.

This dissertation seeks to carry out a comparative analysis of the employer's rights and obligations in relation to these and other issues when using provisional sums and nomination under UAE and common law.

## نبذة مختصرة

تدرج المبالغ المؤقتة في عقود التشييد للسماح لصاحب العمل، وفقا لتقديره، باختيار وترشيح اختياره لمقاول الباطن للمقاول العام. وبعد ذلك، يظل المقاول العام مسؤولا بصفة عامة عن أداء المتعاقد من الباطن المرشح.

وقد تسببت المبالغ المؤقتة والترشيحات في قضايا قانونية كبيرة بموجب القانون العام الإنكليزي، مما أدى إلى زواله، في حين واصل أصحاب العمل في الإمارات استخدام هذه الطريقة على نطاق واسع.

وتشير المقارنة بين المعاملة القانونية إلى أن دولة الإمارات العربية المتحدة لديها قانون قوي يخصص المسؤولية عن الاداء السيء والمعيب لمقاول الباطن المرشح للمقاول العام، إلا أن القرارات القانونية بموجب القانون العام الإنكليزي حكمت خلافا لذلك، مما يجعل صاحب العمل مسؤولا عن تعثر المقاول من الباطن المرشح أو رفضه أو منع اللجوء ضد المقاول من الباطن المرشح.

ويكتسب وجود عقد لا لبس فيه أو غموض وشامل يحدد آلية واضحة للإدارة وسبل الانتصاف أهمية حاسمة وإلا فإن المحكمة أو التحكيم قد يتركان لتقرر نوايا كلا من الطرفين. على الرغم من ذلك، العقود المستخدمة على نطاق واسع مثل فيديك أغفلت بشكل غريب ما يتعلق بالحقوق أو الالتزامات بعد اعتراض المقاول العام أو تنصل المقاول من الباطن المرشح.

وهناك مسائل أخرى مثل حقوق صاحب العمل والتزاماته فيما يتعلق بالدفع المباشر لمتعاقد من الباطن المرشح (مقاول الباطن) في حالة إفسار أو إفلاس المتعاقد (المقاول العام)، والتزامات التصميم تحت بند المبالغ المؤقتة، والتأخير الذي يسببه المقاول من الباطن المرشح، والواجبات المتعلقة بالإفصاح عن المعلومات علي النحو الواجب، ومنع سوء التمثيل في اختيار وترشيح المقاول من الباطن، والإثراء غير العادل، والمناقشات السابقة للترشيح، واعتراض المقاول العام على ترشيح صاحب العمل لمقاول الباطن. المعالجه لما سبق قد تختلف وفقا للولاية القانونية ذات الصلة.

تهدف هذه الأطروحة إلى إجراء تحليل مقارنة لحقوق صاحب العمل والتزاماته فيما يتعلق بهذه القضايا وغيرها من القضايا عند استخدام المبالغ المؤقتة وحق الترشيح والترسية لمقاول الباطن بموجب قانون الإمارات العربية المتحدة والقانون العام.

## **DEDICATION**

I dedicate this dissertation to my darling wife, Alexandra, and Ginger whose support, patience and understanding during the preparation of my dissertation has been truly astonishing.

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### **Civil Law**

Belgium Civil Law Article 1798

French Civil law Article 75 to 1334



## ABBREVIATIONS

DAB	Dispute Adjudication Board
BoQ	Bills of Quantities
CA	Contract Administrator (e.g. Engineer, Architect)
FIDIC RB 87	FIDIC Conditions of Contract for Works of Civil Engineering Construction Part I General Conditions (4th edn, Federation Internationale Des Ingenieurs-Conseils International, 1987 Reprinted 1992 with further amendments)
FIDIC RB 99	FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, (1 <sup>st</sup> edn, Federation Internationale Des Ingenieurs-Conseils International, 1999)
HGCRA	Housing Grants, Construction and Regeneration Act 1996
JCT	Joint Contracts Tribunal
ICE	Institution of Civil Engineers
LADs	Liquidated and Ascertained Damages
MEP	Mechanical, Electrical and Plumbing
NEC3	New Engineering Contract
NRM2	RICS New Rules of Measurement 2
PC	Prime Cost
RERA	Real Estate Regulatory Authority
RICS	Royal Institution of Chartered Surveyors
SCL	Society of Construction Law
SIA	Singapore Institute of Architects

SMM7	Standard Method of Measurement 7
UAE	United Arab Emirates
UAE CTC	United Arab Emirates – Civil Transactions Code
UK	United Kingdom
US	United States of America

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# 1. INTRODUCTION

## 1.1 Provisional Sums and Nomination – An Overview

A contract between an employer and a contractor may include provisional sums for certain work, goods, materials, plant, services or contingencies.<sup>1</sup>

Such sums may subsequently be expended, at the total discretion of the employer or contract administrator (CA)<sup>2</sup>, by instructing nomination to the contractor. The contractor is contractually bound to enter into sub-contract agreement with the nominated entity and thereafter is generally liable towards the employer for its performance<sup>3</sup>, unless the contractor raises reasonable grounds of objection to the nomination.

The provisional sum is substituted by the nominated sum, upon which the contractor is paid predetermined overheads, profit, attendance and builders work<sup>4</sup> and the contract sum is adjusted accordingly.

Standard forms of contract such as ICE<sup>5</sup> and FIDIC<sup>6</sup>, the latter of which is used extensively in the UAE<sup>7</sup>, contain provisional sums and nomination. However under English common law significant demise in use has caused provisions to be omitted from JCT contracts.<sup>8</sup>

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<sup>1</sup> *FIDIC Conditions of Contract for Works of Civil Engineering Construction Part I General Conditions* (4th edn, Federation Internationale Des Ingenieurs-Conseils International, 1987 Reprinted 1992 with further amendments) referred to in this paper as “FIDIC RB 87” and

*FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer*, (1<sup>st</sup> edn, Federation Internationale Des Ingenieurs-Conseils International, 1999) referred to in this paper as “FIDIC RB 99.”

<sup>2</sup> The contract administrator (CA) refers to the person appointed by the employer to act as the engineer or architect or contract administrator. The CA is referred to in FIDIC and ICE engineering contracts as the “Engineer” and JCT forms of contracts the “Architect/Contract Administrator.”

<sup>3</sup> Devin S Linn, *A Leapfrog Attempted: Unjust Enrichment, Implied Contract and Quistclose Trust – Recent Development on Direct Payment Claims By Nominated Subcontractors* [2014] I.C.L.R. 159 International Construction Law Review.

<sup>4</sup> Against the provisional sums stated in the contract, the contractor is required to add a percentage or item for overheads and profit which is applied to the instructed nominated sum. Certain works such as MEP may also require an allowance for builders work to be added.

<sup>5</sup> ICE is the Institution of Civil Engineers ICE Conditions of Contract (7<sup>th</sup> edn, Thomas Telford, London, 1999)

<sup>6</sup> FIDIC refers to FIDIC RB 99 and FIDIC RB 87.

<sup>7</sup> Edward Sunna and Omar Al Saadoon, FIDIC Secretariat, *FIDIC in the Middle East*

<http://fidic.org/sites/default/files/FIDIC%20in%20the%20Middle-East.pdf> Accessed 28<sup>th</sup> October 2016.

No specific statutory provisions exist to govern provisional sums or nomination under UAE law or common law, however subcontracting is included under UAE Muqawala<sup>9</sup> and in general common statutory and case law.

The employer's reasons for using this method appear to align with objectives and priorities related to control of cost, quality and time, however the method raises many legal issues and consequences, depending upon the contract agreement between the parties and how adequately this is supported by the relevant governing law.

This dissertation aims to research, analyse and discuss these issues, outlined in Chapter 1.2, from the perspective of a comparative analysis of the employer's rights and obligations under UAE civil law and common law jurisdictions such as England.<sup>10</sup>

## 1.2 Issues

As mentioned in Chapter 1.1, the employer's rights and obligations are significantly affected by provisional sums and nominated subcontracts and the consequences depend upon the treatment under the relevant governing law. This Chapter outlines the issues raised considering the potential legal impact under UAE civil law<sup>11</sup> and common law.

Commentators and writers have expressed opinions regarding the use of this method for subcontractor selection by the employer.

According to Uff, nomination causes specific difficulties<sup>12</sup> while Dr Sinjakli<sup>13</sup> claims "nomination has produced so many problems in building contracts that one might wonder why it is used." Totterdill highlights that imposing a subcontractor on the contractor can

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<sup>8</sup> John Murdoch and Will Hughes, *Construction Contracts Law and Management* (4th edn, Taylor & Francis, Abingdon, Oxon, 2008) mentions "in recent years the procedure (nomination) has become less popular with clients (partly, it appears, due to its complexity and partly because of the client's potential liability for subcontractor defaults)..." This relates particularly to JCT (Joint Contracts Tribunal) contracts. Page 283.

<sup>9</sup> James Whelan, Marjorie J Hall, *The Civil Code of the United Arab Emirates, The Law of Civil Transactions of the State of the United Arab Emirates, Law No. 5 of 1985*, Translated from Arabic to English (Graham & Trotman, London, 1987) is referred to within this paper as "UAE CTC". UAE CTC Article 872 to 874 refers to Muqawala as a contract where one party undertakes to make a thing or perform work.

<sup>10</sup> English law includes the Law of England and Wales.

<sup>11</sup> UAE is a civil law jurisdiction with the exception of the DIFC (Dubai International Financial Centre) which is a common law judiciary.

<sup>12</sup> John Uff, *Construction Law and Practice relating to the Construction Industry* (11th edn, Sweet & Maxwell, London, 2013) Page 317.

<sup>13</sup> Dr Adil Sinjakli, *Nominated Sub-Contractors Under UAE Construction Law*, Arab Law Quarterly [2003] Kluwer Law International.



cause difficulties<sup>14</sup>, however nomination allows works to commence prior to completion of designs according to Fong.<sup>15</sup> Keating cautions it is best avoided<sup>16</sup>, whilst Murdoch<sup>17</sup> advises it is “now rarely employed in practice” warning it profoundly alters the balance of risk between the contracting and subcontracting parties, where the employer gains “benefit of two opposing concepts” by choosing the specialist and negotiating the terms and design without direct contract using standard form contracts which are “incomplete or unsatisfactory.”

Abrahamson<sup>18</sup> affirms that adverse court decisions have forced the industry to retrospectively respond to the “dangers of nominated sub-contracting...”, an opinion also held by Adriaanse<sup>19</sup> who attributes this to the decline in nomination.

These opinions have mostly derived under English common law, corresponding with demise in use, compared to the UAE where widespread application occurs although published literature and opinion is limited. Whether this disparity is manifested in the law governing the process or consequent upon how effectively the employer’s rights and obligations are contractually defined and supported by the relevant governing law is discussed throughout this dissertation.

Despite imposition of the employer’s selected subcontractor upon the contractor, privity of contract prevents the employer’s direct recourse against a nominated subcontractor for defective works or performance, compelling the employer to resort to alternative remedies such as collateral warranties or a tortious claim. However this does not always prevent direct recourse or protect the employer from a nominated subcontractor’s direct action or even cause the contractor to be absolved from liability for the nominated subcontractor’s default.

During the selection process and pre-nomination discussions between the employer, CA and prospective nominated subcontractor, which commonly excludes the contractor, certain terms

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<sup>14</sup> Brian. W. Totterdill, *FIDIC User’s Guide A Practical guide to the 1999 Red and Yellow Books* (Thomas Telford Publishing, 2008). Page 147.

<sup>15</sup> Chow Kok Fong, *Law and Practice of Construction Contracts*, (3<sup>rd</sup> edn, Sweet & Maxwell Asia, Singapore, 2004).

<sup>16</sup> Stephen Furst, Sir Vivian Ramsey, Adrian Williamson and John Uff, *Keating on Construction Contracts*, (8<sup>th</sup> edn, Sweet & Maxwell, London, 2006). Paragraph 12-051 (f). References from this book are referred to throughout this paper as “Keating.”

<sup>17</sup> Murdoch and Hughes (n 8) Page 33.

<sup>18</sup> Max. W. Abrahamson, *Engineering Law and the I.C.E. Contracts* (4<sup>th</sup> edn, Taylor & Francis, Abingdon, Oxford, Reprinted 1996). Page 224.

<sup>19</sup> John Adriaanse, *Construction Contract Law*, (3<sup>rd</sup> edn, Palgrave Macmillan, London, 2010) Page 244 and 256.

may be agreed which create binding obligations between an unwary employer and the prospective nominated subcontractor.

An offer is generally made to the employer or CA by the prospective subcontractor but not directly to the contractor. In the absence of a valid offer, is a legally binding contract executed between the nominated subcontractor and contractor? If not, does this provide the nominated subcontractor with recourse against the employer?

Furthermore, before appointing the contractor the employer may engage a specialist, who may subsequently be novated to the contractor. If however the contractor subsequently objects to the nomination, is the employer liable for unjust enrichment, where the specialist has executed design and works on the basis of being nominated? Can the employer subsequently directly employ the specialist if such works have been prescribed under a provisional sum on the basis that they are at the employer's discretion to expend?

Surprisingly, in FIDIC no contractual provisions prescribe the process following a contractor's objection to nomination or where liability lies for any increased cost, delays, further objection, re-nomination, executing the works or remedies in the event that the contractor's objection is not accepted by the employer. The time to accept, undertake due diligence or raise objection to nomination is not specified either.

Are the employer and CA required, prior to nomination, to ensure that the nominated subcontractor is qualified, possesses adequate resources and is financially capable to execute the works? If fraudulent or innocently misrepresented information is provided by any entity to the contractor during this process, what is the treatment under UAE and common law?

Whether a provisional sum is defined or undefined determines whether the contractor should allow time, attendance and risk. However these works are commonly distinguished by several words and from this little information the contractor must make assessment in the knowledge that expenditure remains at the employer's discretion. Nonetheless, this does not remove the employer's obligation to instruct nomination without undue delay in accordance with the contract programme. If provisional sums are essential for completion of the works, is the contract frustrated if instruction is not given to expend such sums?

Once instructed, the nominated amount substitutes the provisional sum, however if the nominated amount significantly exceeds the provisional sum, can this be beyond that

contemplated by the parties when entering into contract? Similarly, would the employer's professional team owe a duty of care to the employer for under-estimating the provisional sum, risking the financial viability of the project?

A design obligation within a nomination must be expressly stated within a provisional sum, however, where not stated, does the contractor waive all rights if no objection is made and a nominated subcontract is executed containing the design obligation? A critical interface of liability is created between the employer's designer and that of the nominated subcontractor, particularly where reliance is placed upon designs for systems or elements. Does the employer have recourse against a nominated subcontractor's defective design or under UAE decennial liability for defective design or construction which causes partial or total structural collapse when this mandatory law is silent regarding liability of subcontractors?

The employer may pay a nominated subcontractor directly under discretionary contractual rights if the contractor defaults in payment to a nominated subcontractor. Does this action bind the employer to future payments or create reciprocal rights for the subcontractor to pursue payment directly from the employer?

Following a contractor's insolvency, the employer may be tempted to pay a nominated subcontractor directly, however is this action of leapfrogging the queue of other debtors permitted under insolvency laws of the applicable legal jurisdiction? If payment is made to the nominated subcontractor after the contractor's insolvency, is this considered a debt discharged with the contractor?

Prior to termination of a nominated subcontractor's employment, the contractor may need to obtain express permission from the employer or CA. Who is responsible for the consequences of any extended time for completion, any increase in cost for a replacement subcontractor or for selecting the replacement subcontractor and who is responsible for the delay if this decision is withheld? These issues may arise following a nominated subcontractor's insolvency or repudiation.

As the above demonstrates, there are many construction and general law matters raised by the employer's rights and obligations in respect of provisional sums and nomination which merit further discussion, analysis and comparison under UAE law and common law in Chapter 4.

This follows an outline of provisional sums and subcontracting in Chapters 2 and 3 respectively.

### **1.3 Research Scope and Methodology**

The research covers the employer's rights and obligations and legal issues presented by provisional sums and nomination of subcontracts for works or services, comparing treatment under UAE civil law and common law, in particular English law, including the equivalent provisions in standard forms of contract. The research does not extend to nomination of suppliers for which specific law exists.

The research is a literary review and analysis using literature outlined in Chapter 1.5 to examine, discuss and carry out a comparative analysis of the issues raised in Chapter 1.2 under the different legal jurisdictions, with the aim and objective of answering the points raised in Chapter 1.6.

### **1.4 Outline of Dissertation**

The dissertation is divided into seven Chapters. Chapters 1.1 and 1.2 introduce provisional sums and nomination and outline key legal and contractual issues which affect the employer's rights and obligations under UAE and common law. Chapter 1.5 summarizes the literary review which is undertaken throughout the dissertation followed, in Chapter 1.6, by the purpose and aims of the research. Chapter 2 discusses provisional sums, the types and reasons for use, followed by Chapter 3 which describes the different types of subcontracting.

Chapter 4 discusses and carries out a comparative analysis of the legal issues raised in Chapter 1.2 and Chapter 5 discusses alternative measures used to mitigate employer risk.

Chapter 6 describes the findings from the research, drawn to a conclusion in Chapter 7.

### **1.5 Literature Review**

A literature review takes place throughout this dissertation including a comparison, discussion and analysis regarding the employer's rights and obligations under UAE and common law from relevant articles within books, academic papers, law reviews, electronic articles, common law cases and statutory law, UAE civil law and cases and standard forms of contract.

Whilst expansive common law literature and case law exists regarding nominated subcontractors, the same is very limited under UAE civil law. Literary sources for provisional sums under common law are limited and even more so under UAE law.

## **1.6 Aims and Objectives**

This dissertation aims to compare the employer's rights and obligations under provisional sums and nominated subcontracts in UAE civil and common law jurisdictions to establish:

- i. Whether UAE and common law provide a robust legal framework to respond to the legal and contractual issues in Chapter 1.2?
- ii. Are there ambiguities or gaps in the law which cause in-effective legal treatment when using this method?
- iii. Why are provisional sums and nominated subcontracts used under UAE law whilst use has diminished under English common law?
- iv. How does the choice of standard forms of contract affect the legal consequences of using provisional sums and nomination under the different legal jurisdictions?

## 2. PROVISIONAL SUMS

This Chapter describes provisional sums, reasons for use, defined and undefined provisional sums, standard form of contract containing these provisions and a differentiation between provisional sums and prime costs.

### 2.1 Defined or Undefined Provisional Sums

Whether provisional sums are defined or undefined affects the employer's liability for time and cost.

#### 2.1.1 Defined Provisional Sums

A contractor must allow time for completing works under "defined" provisional sums including costs of attendance<sup>20</sup>, builders' works<sup>21</sup>, overheads and profit.

According to RICS<sup>22</sup> NRM 2<sup>23</sup>, defined provisional sums are used where designs are incomplete, although the character, quantity and scope, including restrictions and construction interfaces, should be stated.<sup>24</sup> Lord Justice May goes further by describing such sums as a "round figure guess" for works which are "truly provisional."<sup>25</sup>

The BoQ<sup>26</sup> generally contains provisional sum works as a brief headline description.<sup>27</sup> The contractor's programme should allow for time<sup>28</sup> although it is arguable whether the level of information stated by RICS NRM 2 is provided in reality, particularly when no design exists, which leaves the contractor to assess unknown risk.

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<sup>20</sup> Attendance is the support provided by the contractor to the nominated subcontractor such as preliminary items of plant, welfare and temporary works.

<sup>21</sup> Builders works are works such as forming holes, channels or miscellaneous works to facilitate the nominated subcontractor's works.

<sup>22</sup> Royal Institution of Chartered Surveyors. RICS.org/uk.

<sup>23</sup> NRM 2 is the New Rules of Measurement 2 Detailed Measurement of Building Works (RICS, 2012) Paragraph 2.9.1.2. An internationally recognised standard on the preparation of a Bill of Quantities (BoQ).

<sup>24</sup> Wragg Lawrence Graham & Co., *Back to Basics: Provisional Sums*, 20<sup>th</sup> July 2015, <http://www.wragge-law.com/insights/back-to-back-provisional-sums/> Accessed 13th January 2016.

<sup>25</sup> *Midland Expressway Limited v Carillion Construction Limited & Ors* [2006] EWCA Civ 936.

<sup>26</sup> BoQ means Bills of Quantities. The primary purpose of the BoQ is to provide a breakdown of the contract price which is subsequently used for payment, valuing variations and cashflow.

<sup>27</sup> Murdoch and Hughes (n 8) Page 146. The contractual status of the BoQ depending upon the form of contract. Under JCT contracts, the BoQ defines the contractor's scope in terms of quality and quantity. Under an ICE (or FIDIC) contract, a BoQ represents an "estimate" of the works to be undertaken and does not necessarily constitute all the contractor's obligations or scope of works.

<sup>28</sup> SCL Protocol is *The Society of Construction Law Delay and Disruption Protocol*, (October 2012) [www.scl.org.uk](http://www.scl.org.uk).

## 2.1.2 Undefined Provisional Sums

The contractor allows no time or attendance for undefined provisional sums where details of works<sup>29</sup> are not provided. According to Lord Justice May<sup>30</sup>, “... the parties decide not to price it accurately when they enter into their contract.”

The employer bears the risk of extension of time and the additional cost for executing undefined provisional sum works<sup>31</sup> which Suttie<sup>32</sup> argues offers little overall advantage. The SCL Protocol<sup>33</sup> recommends that the contractor’s programme identifies these works with zero duration, which is subsequently updated if expenditure is nominated, however Hok<sup>34</sup> insists that ill-defined works cause difficulties, particularly if the employer decides to engage direct works contractors to execute the works.<sup>35</sup> Diab advises that unforeseen works<sup>36</sup> or contingencies are included under provisional sums, however this is ill-advised according to Totterdill<sup>37</sup>, as discussed in Chapter 4.5.

## 2.2 Why Use Provisional Sums?

Reasons for using provisional sums generally depend upon the employer’s objectives or the guidance of his professional advisors.<sup>38</sup>

At tender stage, when full details of work cannot be provided, provisional sums are used, according to Adriaanse.<sup>39</sup> This conflicts with NEC<sup>40</sup> which maintains that construction should not commence without a complete design, particularly for specialist works, otherwise cost

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<sup>29</sup> Jack Ramus, Simon Birchall and Phil Griffiths, *Contract Practice for Surveyors*, (4<sup>th</sup> edn, Butterworth-Heinemann, Oxford, 2007) Page 236.

<sup>30</sup> *Midland Expressway Limited* (n 25).

<sup>31</sup> Ramus, Birchall, Griffiths (n 29).

<sup>32</sup> Iain Suttie, *Do Provisional Sums always add up?* 20<sup>th</sup> November 2013. [www.blplaw.com](http://www.blplaw.com) Accessed 21<sup>st</sup> November 2015.

<sup>33</sup> See Footnote 28.

<sup>34</sup> Gotz-Sebastian Hok, Siobhan Fahey, *Observations on the FIDIC Construction Subcontract 2011 Part 1* [2015] I.C.L.R 325 International Construction Law Review. Page 9.

<sup>35</sup> Suzannah Newbould, *Letters of Law: “P” is for Provisional Sums and Prime Costs*, (DLC Piper Publications, 7<sup>th</sup> August 2015) <https://www.dlapiper.com/en/dubai/insights/publications/2015/08/letters-of-the-law-p-is-for-provisional-sums/>. Accessed 21<sup>st</sup> November 2015.

<sup>36</sup> George Diab, Tasia Hutama, *Managing the Scheduling Risk of Provisional Sums*, Accessed 21<sup>st</sup> November 2015 Blue Visions.

<sup>37</sup> Totterdill, (n 14) Page 227.

<sup>38</sup> Samer Hisham Skaik, *Contract Nominations*, 5<sup>th</sup> January 2009 [www.cmguide.com](http://www.cmguide.com) Accessed 18<sup>th</sup> January 2016.

<sup>39</sup> Adriaanse, (n 19).Page 245 Adriaanse refers to Emden and Hudson.

<sup>40</sup> NEC3 is the New Engineering Contract 3, ICE Publishing. NEC states if an element of work cannot be defined in sufficient detail when the contract is executed then the contractor should not be expected to include programme or preliminary costs for such works.

uncertainty and co-ordination problems could arise. However Latham advocates early engagement of the specialist<sup>41</sup> alongside the employer's design team, perhaps before the contractor's appointment, with subsequent option of novation to the contractor.<sup>42</sup>

The method allows the employer to maintain control over the subcontractor selection, imposing this choice upon the contractor.<sup>43</sup> However Chao-Duivis<sup>44</sup> warns against coercing the contractor to accept, particularly if the nominated entity subsequently defaults.<sup>45</sup>

Selection may also be made based upon the employer's previous commercial transactions<sup>46</sup> with the nominated subcontractor, certain quality objectives or competitive price.<sup>47</sup>

According to Lord Justice May<sup>48</sup>, a "truly provisional" sum "may or may not be carried out at all..." which leaves the employer's discretion towards expenditure very broad, particularly where such works may be essential for completion of the works<sup>49</sup> or the sum relates to contingencies.<sup>50</sup>

The contractor must assess and price any risk, whilst the employer carries the risk to achieve cost, quality and time objectives within the provisional sum, however projects may achieve significant diversification from a specialist's involvement.

### **2.3 Provisional Sums and Prime Costs**

Provisional sums and prime costs are often used interchangeably however a provisional sum "...may be used" at the CA or employer's discretion whereas a Prime Cost (PC) "... will be used" with the consent of the CA or employer according to Keating.<sup>51</sup>

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<sup>41</sup> Sir Michael Latham, *Constructing The Team*, (HMSO, London, July 1994) - the "Latham Report". Page 28, item 4.19 states that there are significant benefits to applying the specialist subcontractor's expertise during the design process followed by construction.

<sup>42</sup> Refer to Chapter 4.2.

<sup>43</sup> Murdoch and Hughes (n 8) Page 268 states the employer insistence upon installation of plant and "leaving the contractor no choice in the matter" is one of the employer's reasons for using nomination.

<sup>44</sup> Professor M.A.B. Chao-Duivis, *Subcontracting in Europe: the results of a questionnaire* [2013] I.C.L.R. 318 International Construction Law Review. Page 4 - under Swiss and German civil law coercive action may be contrary to good faith.

<sup>45</sup> Refer to Section 4.8.1.

<sup>46</sup> Murdoch and Hughes (n 8) Page 33.

<sup>47</sup> Abrahamson, (n 18) Page 223.

<sup>48</sup> *Midland Expressway Limited* (n 25).

<sup>49</sup> Refer to Chapter 4.9.

<sup>50</sup> Refer to Chapter 4.5.

<sup>51</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 20-261 provides the ICE definition of a Prime Cost and Provisional Sum.



The contractor should allow for time, attendance and contribution for both prime costs and provisional sums, unless an undefined provisional sum.<sup>52</sup>

A PC cost for tiles, including labour, wastage and fixing material, is substituted with the actual selected cost, as in *Tuta Products*.<sup>53</sup>

## 2.4 Provisional Sums Within Lump Sum and Re-measurement Contracts

A provisional sum will be adjusted irrespective of whether a lump sum or re-measurement contract as ruled in *Midland Expressway*.<sup>54</sup>

UAE law<sup>55</sup> differentiates between re-measurement<sup>55</sup> and lump sum contracts. If quantity increases substantially under the former, the contractor must notify the employer immediately, after which the employer may withdraw from the project, otherwise the contractor risks any quantity change.<sup>56</sup> Whether notification should be given prior to executing the works and what is “substantial” is unclear.

When quantities increase more than 30% under Dubai Government contracts, contract rates may be adjusted<sup>57</sup> and similarly under FIDIC 1987 RB if the effective contract value changes more than 15%.<sup>58</sup>

The contractor must obtain employer approval for variations in lump sum contracts<sup>59</sup> under UAE law<sup>60</sup> and payment shall be based upon fair price.<sup>61</sup>

Under common law, a lump sum price remains fixed irrespective of whether a good or bad bargain.<sup>62</sup> This may be implied even if it is not stated in the contract.<sup>63</sup>

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<sup>52</sup> See Chapter 2.1.2.

<sup>53</sup> *Tuta Products v Hutcherson Bros* [ 1972] 46 ALJR 549 (Australia HC).

<sup>54</sup> *Midland Expressway Limited* (n 25).

<sup>55</sup> UAE CTC Article 886 (1) and (2).

<sup>56</sup> Edward Sunna, *FIDIC In The Middle East*, Law Update 193, 20 (1<sup>st</sup> April 2007).

<sup>57</sup> Nabeel Akram, BUID MSc CLDR Class notes 30<sup>th</sup> May 2015, Item 2.2.7 (b) Page 7 refers to Dubai Government Contracts.

<sup>58</sup> FIDIC RB 87 Sub-Clause 52.3.

<sup>59</sup> Union Supreme Court, 573/Judicial Year 2 18<sup>th</sup> December 2008.

<sup>60</sup> UAE CTC Article 887 (1) and (2).

<sup>61</sup> Dubai Court of Cassation 44/2008.

<sup>62</sup> Murdoch and Hughes (n 8) Page 32.

<sup>63</sup> *Sharpe v San Paulo Railway Co.* [1873] L.R.8.

## 2.5 Provisional Sums Within Standard Forms of Contracts

According to Lord Justice May<sup>64</sup>, provisional sums are generally understood by the construction industry however the “precise meaning and effect depends on the terms of the individual contract.”

This suggests that a clear and unambiguous contractual mechanism<sup>65</sup> is required for administering provisional sums.

FIDIC 1987 RB<sup>66</sup>, FIDIC 1999 RB<sup>67</sup>, and ICE<sup>68</sup> contain provisional sums and nomination, the former two being widely used in the UAE, whereas NEC3 and JCT<sup>69</sup>, widely used under English common law, exclude such provisions.

The CA is provided discretionary powers to instruct a provisional sum under FIDIC<sup>70</sup> and ICE<sup>71</sup>, wholly or partly, for work, supplies or services from a nominated subcontractor<sup>72</sup> stated in the contract or instructed and valued<sup>73</sup> as a variation.<sup>74</sup> A provisional sum must be stated under FIDIC 1987 RB to facilitate nomination.<sup>75</sup>

The contractor must include time for execution of provisional sums in its programme<sup>76</sup>, however where instructed by variation, the contractor could claim extension of time and costs.<sup>77</sup>

ICE<sup>78</sup>, in stark contrast to FIDIC, contains extensive provisions following objection or termination which are discussed in Chapter 4.

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<sup>64</sup> *Midland Expressway Limited* (n 25).

<sup>65</sup> Practicallaw.com, *Ask the Team; What are provisional sums*, Practicallaw.com Accessed 15<sup>th</sup> August 2016.

<sup>66</sup> FIDIC RB 87 Clause 58 and 59.

<sup>67</sup> FIDIC RB 99 Clause 5 and Sub-Clause 13.5.

<sup>68</sup> ICE 7<sup>th</sup> Edition Clause 58 and 59.

<sup>69</sup> Sarah Lupton, *JCT Standard Forms of Building Contracts, 2005 editions: Part 1*, [2006] I.C.L.R. International Construction Law Review. Page 3 states that all JCT forms since JCT05 remove nomination provisions due to “little use”, although under JCT05 a provisional sum may be added as an option.

<sup>70</sup> FIDIC RB 99 Sub-Clause 13.5 (a) and (b).

<sup>71</sup> ICE 7<sup>th</sup> edn Sub-Clause 58

<sup>72</sup> FIDIC RB 99 Sub-Clause 5.1 (a).

<sup>73</sup> FIDIC RB 99 Sub-Clause 13.3.

<sup>74</sup> FIDIC RB 99 Sub-Clause 5.1 (b).

<sup>75</sup> FIDIC RB 87 Sub-Clause 58.1 and 59.1

<sup>76</sup> FIDIC RB 99 Sub-Clause 8.3 (b).

<sup>77</sup> FIDIC RB 99 Sub-Clause 13.3 and 13.5.

<sup>78</sup> ICE 7<sup>th</sup> edn Sub-Clause 59.2.

The significance of a comprehensive and unambiguous contract for administering provisional sums and nomination and allocating the risks associated with the issues outlined in Chapter 1.2 are discussed throughout this dissertation.

### 3. SUBCONTRACTING

Whether a subcontractor is nominated, domestic or named could affect the employer's contractual and legal rights and obligations.

Contractors may not possess all resources or specialisms required for the works and therefore engage subcontractors<sup>79</sup>, however once subcontracted, the contractor is generally liable to the employer for the subcontractor's performance, although exceptions can arise.<sup>80</sup>

UAE law contains limited provisions within Muqawala<sup>81</sup> for subcontracting, although parties have the freedom to contract provided it does not contravene mandatory law.<sup>82</sup> This latter principle applies under common law, although no specific statutory legislation covers subcontracting.

#### 3.1 Domestic Subcontracts

The contractor may select and employ "domestic" subcontractors under standard forms of contract, subject to the CA's approval, which should not be unreasonably withheld<sup>83</sup>, and providing it is not for the whole of the works.<sup>84</sup> By contrast, ICE<sup>85</sup> requires no consent unless the whole of the works is subcontracted.<sup>86</sup>

According to Abrahamson<sup>87</sup>, the contractor is liable for any acts or omissions by the subcontractor<sup>88</sup> and Professor Masadeh asserts that the contractor remains vicariously liable for the subcontractor's "failure, default or negligence."<sup>89</sup>

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<sup>79</sup> Archer & Marks, *Subcontracting in United Arab Emirates*, [www.archermarks.com](http://www.archermarks.com) Accessed 14<sup>th</sup> January 2016.

<sup>80</sup> Refer to Chapter 4.

<sup>81</sup> Article 872 of the UAE CTC provides that a party undertakes to make a thing or perform work "in consideration which the other party undertakes to provide."

<sup>82</sup> UAE Law CTC Article 31.

<sup>83</sup> Uff (n 12). Page 138 the architects decision must not be unreasonably upheld.

<sup>84</sup> FIDIC RB 99 Sub-Clause 4.4.

<sup>85</sup> FIDIC RB 99 Sub-Clause 4.4 (b). ICE 7<sup>th</sup> edn provides for the same obligation under Sub-Clause 59 (3) for nominated subcontractors.

<sup>86</sup> Uff (n 12).Page 318.

<sup>87</sup> Abrahamson, (n 18) Page 221. The subcontractor's act or omissions would include those of the subcontractor's agents or employees.

<sup>88</sup> The subcontractor's act or omissions would include those of the subcontractor's agents or employees.

<sup>89</sup> Professor Aymen Masadeh, *Vicarious performance and privity in construction contracts* [2014] I.C.L.R. 108 International Construction Law Review.

Under UAE law, unless agreed otherwise or the works require execution by a certain individual or entity, the contractor may subcontract all the works<sup>90</sup> however the contractor remains liable for all subcontracted works.<sup>91</sup>

Under English common law, the contractor remains liable for the performance a domestic subcontractor, as in *Birse*<sup>92</sup>, which *Abrahamson*<sup>93</sup> pronounces causes the least contractual pitfalls for the employer.

### 3.2 Named Subcontractors

JCT<sup>94</sup> and NEC3 provide a list of named subcontractors from which subcontractors are chosen and become domestically engaged by the contractor. FIDIC RB 99<sup>95</sup> allows the naming of subcontractors under a provisional sum subject to the contractor's acceptance.

The contractor requires no prior approval for the subcontractor but remains liable for the subcontractor's delay or defective works<sup>96</sup> once engaged, with the exception of defective design.<sup>97</sup>

The contractor may propose alternative named subcontractors subject to the employer's agreement<sup>98</sup> however, according to Ramus, where a list of named subcontractors is provided<sup>99</sup>, the contractor should arrange competitive tendering, thus suggesting the contractor has no right to select which named subcontractor it would prefer from the list.

Under UAE law<sup>100</sup> and common law, liability for a named subcontractor's performance generally rests with the contractor, although employer obligations could be created in pre-selection negotiations.<sup>101</sup>

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<sup>90</sup> UAE CTC Article 890 (1).

<sup>91</sup> UAE CTC Article 890 (2).

<sup>92</sup> *Birse Construction Ltd v Eastern Telegraph Co. Ltd* [2004] EWHC 2512.

<sup>93</sup> *Abrahamson*, (n 18) Page 233.

<sup>94</sup> JCT Standard Form of Building Contract 2011 (SBC11), JCT Intermediate Building Contract (ICD11), JCT Major Project Contract (MP11), JCT Standard Building Contract (JCT05) (superseded by SBC11).

<sup>95</sup> FIDIC RB 99 Sub-Clause 5.1 (a).

<sup>96</sup> *Furst, Ramsey, Williamson, Uff* (n 16) Paragraph 12-051. JCT 05.

<sup>97</sup> The contractor may be relieved from liability for a named subcontractor's defective design under JCT ICD11 and JCT 05.

<sup>98</sup> Brian E. Rawling, *Nominated or Named?*, HKIS Newsleter 10 (5)b June 2001.

<http://www.hkis.org.hk/ufiles/name11.pdf> Accessed 18th January 2016. Rawling, *Nominated or Named?* (n 99).

<sup>99</sup> *Ramus, Birchall, Griffiths* (n 29) Page 237.

<sup>100</sup> UAE CTC Article 890 (2).

<sup>101</sup> Refer to Chapter 4.3.

Dr Sinjakli<sup>102</sup> favours named subcontracting to nomination in order to maintain the contractor's liability for the subcontractor's performance<sup>103</sup> however Murdoch criticises standard forms of contracts, which result in the employer's liability for delay or cost from "relisting" another named subcontractor in the event of repudiation, unless defective works have been executed.<sup>104</sup> The CA's approval may also be required prior to the subcontractor's termination, failing which, the contractor waives any right to an extension of time or cost, although JCT05 allows such claims against the employer if parties fail to enter into subcontract agreement.

### 3.3 Nominated Subcontractors

Subject to the contractor's grounds for objection<sup>105</sup>, subcontractors are selected and nominated at the employer's or CA's discretion under a provisional sum<sup>106</sup> or instructed under a variation.<sup>107</sup> Thereafter the contractor becomes liable for the acts or omissions of said subcontractor<sup>108</sup> as if they were their own.<sup>109</sup>

As mentioned in Chapter 1.2, the method of nomination is widely used by UAE construction contracts, particularly under FIDIC contracts. However, according to Keating, use of nomination provisions have reduced under ICE<sup>110</sup>, disappeared from JCT and diminished under English common law.

Nominated subcontracts are governed under Muqawala<sup>111</sup> in UAE law. Government contracts hold the contractor culpable for "acts and defaults" of nominated subcontractors<sup>112</sup>, in the same way as FIDIC.<sup>113</sup>

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<sup>102</sup> Sinjakli, *Nominated Subcontractors Under UAE Construction Law* (n 13)

<sup>103</sup> Construction Management Guide, *Nominated Subcontractors on International Projects*, 10<sup>th</sup> September 2008. <http://www.cmguide.org/archives/30> Accessed 3rd January 2016.

<sup>104</sup> Murdoch and Hughes (n 8) Page 272 and 300.

<sup>105</sup> Refer to Chapter 4.6 to 4.8.

<sup>106</sup> FIDIC RB 99 Sub-Clause 5.1 (a) or FIDIC 1987 RB Sub-Clause 58.1 and 58.2

<sup>107</sup> FIDIC RB 99 Sub-Clause 5.1 (b) states that the Engineer may instruct the Contractor to employ a subcontractor nominated under Clause 13 [Variations and Adjustments] or FIDIC 1987 RB Sub-Clause 58.2

<sup>108</sup> Sinjakli, *Nominated Subcontractors Under UAE Construction Law* (n 13) states that under FIDIC 1987 RB nominated subcontractors are equivalent to the contractor's domestic subcontractor in respect of liability towards the employer.

<sup>109</sup> FIDIC RB 99 Sub-Clause 4.4.

<sup>110</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-051 (f)

<sup>111</sup> UAE CTC Article 872 to 896.

<sup>112</sup> Nabeel Akram, BUID MSc CLDR Class notes 30<sup>th</sup> May 2015, Item 2.2.7 (b) Page 7 refers to Dubai Government Contracts.

<sup>113</sup> FIDIC RB 99 Sub-Clause 4.4 and FIDIC 1987 RB Sub-Clause 4.1.

Teo<sup>114</sup> suggests that contractor's profit on nominated subcontracts compensates for the lost opportunity under domestic subcontracts. Nonetheless, other factors such as the risk of the unknown nominated subcontractor, its performance history and availability of resources should be considered also.

Chao-Davis mentions that English law does not generally distinguish between nominated and other subcontractors unless the contractor is given no right to object.<sup>115</sup> This is discussed in Chapter 4.6.

### 3.3.1 Employer's Direct Contractors

The employer may directly employ contractors for certain works and the contractor should provide opportunity for these contractors.<sup>116</sup> These works must not be contained within the contractor's contract<sup>117</sup> otherwise loss of profit and damages for breach of contract may be claimed<sup>118</sup> including contravention of good faith.<sup>119</sup>

Delays or disruption caused by direct contractors may entitle the contractor to an extension of time and cost unless, according to Keating, these contracts are well administered to avoid these issues in John Laing.<sup>120</sup>

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<sup>114</sup> Eric Teo, *United Arab Emirates: Bridging the contractual gap between an employer and a sub-contractor*, Al Tamimi & Co. Law Update 16<sup>th</sup> July 2010. <http://altamimi.newsweaver.ie/Newsletter/hmuzar5ba81> Accessed 3rd January 2016.

<sup>115</sup> Chao-Duivis, *Subcontracting in Europe* (n 44).

<sup>116</sup> FIDIC RB 99 Sub-Clause 4.6 (b)

<sup>117</sup> FIDIC RB 99 Sub-Clause 13.1 (d).

<sup>118</sup> *Amec Building v Cadmus Investments Co. Ltd* [1996] 51 Con LR 105.

<sup>119</sup> UAE CTC Article 246 (1).

<sup>120</sup> *Great Eastern Hotel v John Laing Construction* [2005] 99 Con LR 45.

#### **4. COMPARATIVE ANALYSIS OF THE LEGAL ISSUES WHICH AFFECT THE EMPLOYER'S RIGHTS AND OBLIGATIONS UNDER PROVISIONAL SUMS AND NOMINATED SUBCONTRACTS UNDER UAE AND COMMON LAW**

The issues outlined in Chapter 1.2, which affect the employer's rights and obligations when using provisional sums and nomination, are discussed and analysed in this Chapter, comparing treatment under UAE and common law.

##### **4.1 Validity of the Proposed Nominated Subcontractor's Offer?**

Once expenditure of a provisional sum is instructed by letter of nomination to the contractor, unless the contractor raises a valid reasonable objection, the contractor and the nominated subcontractor must enter into a legally binding agreement enforceable by law.<sup>121</sup> However does this subcontract create a legally binding agreement because the offer is generally made to the employer and then nominated to the contractor, with no corresponding or mirroring acceptance from the contractor? Furthermore do these conditions create an implied contract between the employer and subcontractor, for which the nominated subcontractor may bring action against the employer? These issues are discussed below.

To be a legally binding contract, the agreement requires offer and acceptance, consideration<sup>122</sup>, intention to create legal relations and be bound by the agreement<sup>123</sup>, contractual capacity, lawful object, genuineness of assent<sup>124</sup> and must be in writing or proper form.<sup>125</sup> UAE law also requires good faith.<sup>126</sup>

An offer is made to the employer by the prospective subcontractor and, unless the employer enters into direct contract with the said subcontractor which is subsequently novated to the contractor<sup>127</sup>, there is generally no actual corresponding acceptance. Any subsequent review

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<sup>121</sup> Edwin Peel, *The Law of Contract*, (13<sup>th</sup> edn, Sweet & Maxwell, London, 2011). Page 1 chapter 1-001.

<sup>122</sup> *ibid* Page 166 states that a deed does not require consideration and no contract is required for a deed to be effective under common law.

<sup>123</sup> UAE CTC Article 125.

<sup>124</sup> Genuineness of assent means consent must be obtained without misrepresentation, duress or undue influence.

<sup>125</sup> Dr Tareq Al Tawil, *Contract Law*, British University in Dubai, Lecture Notes 11<sup>th</sup> October 2014.

<sup>126</sup> UAE CTC Article 246 (1).

<sup>127</sup> See Chapter 5.2..



of the proposed subcontractor's offer and subsequent negotiation<sup>128</sup> occurs with the employer and CA, generally excluding the contractor, the implications of which are discussed in Chapter 4.3.<sup>129</sup>

The nomination incorporates the subcontractor's offer, however this is not an offer to the contractor and it is common that no such offer is made.

If the prospective subcontractor executes pre-nomination works, such as design, in expectation of being nominated, unless agreed otherwise the employer could be liable, as in *British Steel*.<sup>130</sup> This liability could also result if the contractor raises reasonable objection to a nomination.<sup>131</sup>

The parties' intentions are important in such circumstances. Under UAE law, providing there is no conflict with public policy, customary practice may be considered.<sup>132</sup> If ambiguity exists, the "mutual intentions of the parties" will be sought including previous dealings, nature of the transaction "without stopping at the literal meaning of the words..."<sup>133</sup> and pre-contractual negotiations including good faith.<sup>134</sup>

In common law<sup>135</sup>, terms are implied through "business efficacy<sup>136</sup>, custom<sup>137</sup> or statute" where objective intent to be bound by the offer exists, however preliminary negotiations were excluded in *Davis*<sup>138</sup> although were considered in *ICS*.<sup>139</sup> Only immaterial differences and true intent were interpreted in *Tekdata*<sup>140</sup>, providing no improvement was made to the contract.<sup>141</sup>

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<sup>128</sup> Uff (n 12). Page 176 refers to the invitation to tender as an "offer to negotiate" which once accepted creates a legally binding and enforceable contract.

<sup>129</sup> Refer to Chapter 4.3.

<sup>130</sup> *British Steel v Cleveland Bridge* [1981] 24 BLR 94. The contract was not signed by the Parties however despite this, the Court ruled that because the works were executed and it was intention for the parties to sign a contract then there was an obligation to pay a reasonable sum in Quantum Meruit.

<sup>131</sup> See Chapter 4.18 – unjust enrichment.

<sup>132</sup> UAE CTC Article 1.

<sup>133</sup> UAE CTC Article 258 (1) and (2). The intentions and true meanings are sought by the Court not just the words and form.

<sup>134</sup> UAE CTC Article 246 Good faith relates to the performance of the contract and not the formation of the contract.

<sup>135</sup> *Storer v Manchester City Council* [1974] 1 WLR.

<sup>136</sup> *Maggs Builders v Marsh* [2006] BLR 395 in which the Parties' conduct was considered.

<sup>137</sup> *William Lacey v Davis* [1957] 1 WLR 932.

<sup>138</sup> *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.

<sup>139</sup> *ICS v West Bromwich Building Society* [1998] 1 WLR 896.

<sup>140</sup> *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Div 1209.

<sup>141</sup> *Trollope and Colls v NW Metropolitan Hospital Board* [1973] 1 WLR 601.

Supplementary rules may be applied by the court under UAE law for non-agreed immaterial<sup>142</sup> terms but not for essential contractual obligations<sup>143</sup>, where the contract may be rendered invalid or create a counteroffer.<sup>144</sup> The same applies under common law<sup>145</sup>, as in *Peerless*<sup>146</sup>, although according to Uff<sup>147</sup>, the parties' conduct and intention validated the contract in *RTS Flexible Systems*<sup>148</sup>, despite the lack of essential terms.

An offer may also expire in time, thus rendering a contract invalid<sup>149</sup>, although, where agreement cannot be reached, a subcontractor's offer may lapse in reasonable time under common law<sup>150</sup> and also under UAE law, according to the judge's decision, revocation<sup>151</sup> or counteroffer under the orthodox theory.<sup>152</sup>

A contract may therefore be implied by the parties' intentions and customary practice associated with provisional sums, which are considered to be well understood by the industry as held in *Expressway*<sup>153</sup>, although a legally compliant offer or acceptance does not strictly exist between the contracting parties.

Notwithstanding this, an absolute and unconditional acceptance<sup>154</sup> is required by the entity to whom the offer is directed, thus mirroring the offer. Eltom<sup>155</sup> refers to Dubai Court of Cassation<sup>156</sup> where a valid offer and acceptance is required otherwise the contract will be "unlawful in its essence and form" and thus void.

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<sup>142</sup> Immaterial items are those terms and conditions which do not go to the root of the contract agreement.

<sup>143</sup> UAE CTC Article 141 (1). The parties commonly expressly exclude this law to prevent the court determining their intentions.

<sup>144</sup> UAE CTC Article 874 and 141.

<sup>145</sup> *Mitsui Babcock Energy v John Brown Engineering* [1996] 51 Con LR 129 in which a term regarding LAD's and performance tests was left to be agreed but the contract was nonetheless held to be valid.

<sup>146</sup> "Peerless" is the case of *Raffles v Wichelhaus* (1864) 159 ER 375. Ambiguity was ruled to go to the root of the contract.

<sup>147</sup> Uff (n 12). Page 178.

<sup>148</sup> *RTS Flexible Systems Ltd v Molkerei Alois Muller GMBH* [2010] BLR 337.

<sup>149</sup> *Trollope & Colls v Atomic Power Construction* [1963] 1 WLR 333.

<sup>150</sup> *Ramsgate Victoria Hotel v Montefiore* [1866] LR1 Ex 109.

<sup>151</sup> UAE CTC Article 139 (1). The time stated for acceptance in the offer is binding or if not stated depends upon all circumstances surrounding transaction. Revocation is the withdrawal of an offer.

<sup>152</sup> Orthodox theory means that any acceptance which changes the offer represents a counteroffer and the contract could be void.

<sup>153</sup> *Midland Expressway Limited* (n 25).

<sup>154</sup> UAE CTC Article 125, 129 and 141.

<sup>155</sup> Omer Eltom, *The Emirates Law in Practice*, (Future Bookshop, Dubai, UAE, 2009). Page 23.

<sup>156</sup> Dubai Court of Cassation Case 329/2003.

UAE law recognises the validity of an offer to others with consideration<sup>157</sup>, however silence following an offer may be deemed acceptance, evidenced by previous dealings or if benefit is derived by the offeree.<sup>158</sup> The employer should therefore be wary of a prospective nominated subcontractor's offer from which the employer has derived benefit prior to nomination.

The CA should also avoid formalising any agreement which may imply acceptance by the employer unless authorised to do so<sup>159</sup>, particularly accepting a tender when there is likelihood the contractor could raise a valid objection, which could make the employer liable for breach of contract. If a tender is accepted by the employer, this acceptance should be subject to express conditions stating the acceptance becomes invalid upon objection by the contractor or following execution of a nominated subcontract with the contractor.<sup>160</sup>

Both UAE law and common law prescribe that there must be unequivocal offer and acceptance, however, unless customary practice or intention<sup>161</sup> is recognised by the courts, it is questionable whether the nominated subcontract is actual binding, in which case a prospective nominated subcontractor may raise a claim against the employer for any derived benefit, unless expressly prescribed otherwise.<sup>162</sup>

## 4.2 Privity of Contract

Per Abrahamson, privity of contract creates one of the employer's largest "dangers" because no contractual recourse exists between the employer and the nominated subcontractor for the latter's default.<sup>163</sup> This Chapter discusses whether direct recourse is prevented or, conversely, whether the employer is exposed to direct action from the nominated subcontractor.

Privity of contract under common law and UAE law<sup>164</sup> provides that rights<sup>165</sup> can be conferred and obligations imposed only on parties to a contract<sup>166</sup> and only a "...party to a contract can sue on it."<sup>167</sup>

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<sup>157</sup> UAE CTC Article 134 (2).

<sup>158</sup> UAE CTC Article 135 (1) and (2).

<sup>159</sup> See Chapter 4.12.

<sup>160</sup> Abrahamson, (n 18) Page 232.

<sup>161</sup> See Footnote 133 and 140.

<sup>162</sup> Newbould, Letters of Law (n 35).

<sup>163</sup> Abrahamson, (n 18) Page 224.

<sup>164</sup> Sinjakli, *Nominated Subcontractors Under UAE Construction Law* (n 13).

<sup>165</sup> UAE CTC Article 250 and 252 states that "A contract may not impose an obligation upon a third party but it may vest a right in him."

<sup>166</sup> Peel, (n 121). Page 615, Paragraph 14-004.

Recourse can only be sought by the employer through the contractual chain via the contractor<sup>168</sup>, however direct contractual rights may be established by collateral warranty<sup>169</sup> or novation<sup>170</sup>, although this fails to relieve the contractor of its performance obligations towards the employer.

According to Sinjakli<sup>171</sup>, the subcontractor cannot bring direct action against the employer<sup>172</sup>, referring to rulings in Dubai<sup>173</sup> and Abu Dhabi<sup>174</sup>, however in Belgium, a subcontractor has a direct right of action against an employer<sup>175</sup> whilst no direct reciprocal rights exist for an employer against a subcontractor.<sup>176</sup>

Abrahamsom<sup>177</sup> disapproves of the employer's lack of recourse under earlier forms of JCT<sup>178</sup> under common law, where extension of time was awarded for a nominated subcontractor's delays which prevented the employer from recovering liquidated damages from the contractor and, in turn, averted the contractor's recovery from the nominated subcontractor, leaving the nominated subcontractor released from any liability for its inexcusable delays.

Professor Masadeh<sup>179</sup> criticizes the decision under Dubai Court of Cassation Case 266/2008<sup>180</sup>, where the employer was held responsible for delays caused to the contractor by a subcontractor selected by the employer or CA, despite the law explicitly stating that the contractor is liable for the subcontractor's performance.<sup>181</sup>

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<sup>167</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) cites *Dunlop Pneumatic Tyre Company v Selfridge & Co. Ltd* [1915] AC 847.

<sup>168</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-051 (f).

<sup>169</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) refers to UAE CTC Article 124 and 276 to 278 under which a warranty is enforced "as a unilateral act under one of the sources of obligations under UAE law."

<sup>170</sup> See Chapter 5.2..

<sup>171</sup> Sinjakli, *Nominated Subcontractors Under UAE Construction Law* (n 13)

<sup>172</sup> UAE CTC Article 891 states that unless an assignment is made against the employer, the subcontractor cannot bring action against the employer.

<sup>173</sup> Dubai Court of Cassation case 281/95 dated 6<sup>th</sup> July 1996.

<sup>174</sup> Federal Supreme Court of Abu Dhabi case 273/229/19 dated 30<sup>th</sup> May 1999.

<sup>175</sup> Belgium Civil Code Article 1798.

<sup>176</sup> Chao-Duivis, *Subcontracting in Europe* (n 44) Page 2.

<sup>177</sup> Abrahamson, (n 18) Page 224

<sup>178</sup> Uff (n 12). Page 322 JCT 63 Standard Form of Building Contract Clause 23 (g) and JCT 80 Standard Form of Building Contract Sub-Clause 25.3.7.

<sup>179</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) Page 2

<sup>180</sup> Dubai Court of Cassation Case 266/2008.

<sup>181</sup> UAE CTC Article 890 (2).

In the common law case of *Rotegear*<sup>182</sup>, pre-nomination discussions, excluding the contractor, regarding the time for completion established a contract between the employer and subcontractor, although in *Hampton*<sup>183</sup> by contrast, a nomination failed to create a contract thus preserving privity on direct payment.

Despite the non-conforming ruling mentioned above, UAE law tends to preserve privity of contract, however common law decisions against the employer have accentuated the importance of well-defined and unambiguous contract provisions. The employer may otherwise arrange alternative contractual remedy, outlined in Chapter 5, to safeguard its rights against a defaulting nominated subcontractor, or raise an action in tort, however the latter is a retroactive legal remedy which provides less certainty of outcome for the employer.

#### **4.3 Employer's Pre-Nomination Discussions and Negotiations With Proposed Nominated Subcontractor**

Pre-nomination negotiations commonly take place between the employer, CA and prospective nominated subcontractor, excluding the contractor, however such deliberations could bind the employer as discussed below.

In common law, *Gloucestershire*<sup>184</sup> held that if “design, materials, specification, quality and price were fixed...without any reference to the contractor...” the employer implies acceptance to waive the contractor’s liability for “warranty of quality.”

This however contradicts with the contractor’s general liability towards the employer, for acts or omissions of subcontractors.<sup>185</sup>

Teo<sup>186</sup> asserts that even though no contract exists, a tortious action may be brought by the nominated subcontractor<sup>187</sup> attempting to validate pre- and post-nomination correspondence exchanged between an employer and a nominated subcontractor. Such pre-nomination discussions may bind the employer as in *Rotegear*.<sup>188</sup>

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<sup>182</sup> *Hong Kong Housing Authority v Rotegear Corporation Ltd* [2009] HKCFI 625.

<sup>183</sup> *Hampton v Glamorgan County Council* [1917] AC 13.

<sup>184</sup> *Gloucestershire County Council v Richardson* [1969] AC 480. Abrahamson, (n 18) Page 226 states that this related to a PC sum for supply by a nominated supplier. No right to object existed under said contract.

<sup>185</sup> Refer to Section 3.

<sup>186</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115).

<sup>187</sup> Refer to Chapter 5.3 for liability in tort.

<sup>188</sup> Refer to Footnote 182.

A contractual exclusiveness clause could nullify any statement made during pre-contractual negotiations. In comparison, an exclusive remedies clause constrains the remedy available to parties. According to Tamimi<sup>189</sup> these clauses must not conflict with mandatory UAE law<sup>190</sup> or result in unjust enrichment<sup>191</sup>, even though Bunni states that FIDIC contractual conditions are not exclusive of remedies.<sup>192</sup>

Providing the provision is lawful and unambiguous<sup>193</sup>, and the parties possess equal bargaining power<sup>194</sup>, common law generally enforces such clauses, however it “will be construed against the party seeking to rely upon it”.<sup>195</sup> An integration clause prevents subsequent addition of terms<sup>196</sup> compared to the parole evidence rule which prevents the court using spoken or written statements as evidence, or to add to, alter or contradict the terms of the contract.<sup>197</sup>

Nonetheless, at this stage of pre-nomination discussions, there is no express contract between the employer and nominated subcontractor.

However such discussions may agree to terms which contradict the main contract or are unlawful.<sup>198</sup> Uff stresses that the parties’ intentions relating to nominated subcontractor’s liability should be clearly stated in the contract<sup>199</sup> although these were ignored in Gleeson.<sup>200</sup>

The contractor could raise reasonable objection or renegotiate terms, however the nominated subcontractor may not agree to renegotiate agreed terms. If particularly onerous conditions are created for the contractor, this could result in a contract of adhesion.

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<sup>189</sup> Omar Al Sadoon, Eric Teo and Zane Anani, *Surviving the slowdown – a current analysis of the UAE Construction Industry*, 1<sup>st</sup> January 2009, Westlaw Middle East.

<sup>190</sup> UAE CTC Article 318 and 319.

<sup>191</sup> Refer to Chapter 4.18.

<sup>192</sup> Nael Bunni, *A Comparative Analysis of the Claim & Dispute Resolution Provisions of FIDIC’s 1999 Major Forms of Contract Against its Earlier Forms* (January 2006).

<sup>193</sup> Euan Lloyd, *Exclusive Remedies Clauses: UAE Law and Common Law*, May 2013.

<http://www.tamimi.com/en/magazine/law-update/section-5/may-5/exclusive-remedies-clauses-uae-law-and-the-common-law.html> Accessed 5th December 2015. Contra proferentum may apply where ambiguous terms exist.

<sup>194</sup> Uff (n 12). Page 192 refers to the case of *Smith v E.S. Bush* [1990] A.C. 831.

<sup>195</sup> *ibid* Page 189

<sup>196</sup> *Exonmobil Sales and Supply Corporation v Texaco Ltd* [2003] EWHC1964 Comm.

<sup>197</sup> Peel, (n 121). Page 217 refers to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] A.C. 1101.

<sup>198</sup> The Unfair Contract Terms Act 1977 (UCTA 1977). Statutory provision prevents exclusion of liability for death or injury by negligence and requires the exercise of reasonable skill and care in contract or tort although exclusion for other loss from negligence must be fair and reasonable.

<sup>199</sup> Uff (n 12). Page 323.

<sup>200</sup> *M.J. Gleeson (Contractors) Ltd v Hillingdon London Borough* [1970] 215 EG 165.

UAE law<sup>201</sup> permits contracts where terms are non-negotiable, however a court may rebalance the parties' agreement by amending or exempting the weaker party from onerous obligations, particularly if there was no choice given to enter into contract.<sup>202</sup> This could be relevant if the contractor is provided no particular grounds for objection. English law limits unreasonable terms<sup>203</sup>, whereas Australian law contains no such legislation.<sup>204</sup>

The employer and CA<sup>205</sup> should be aware that pre-nomination discussions could lead to binding obligations and therefore the validity of such discussions should either be excluded or expressly defined and subject to conclusion of the nominated subcontract. Furthermore the employer and CA should avoid agreeing conditions which contradict the main contract, otherwise UAE law may rebalance the onerous terms and common law may consider these as unreasonable, unless the contractor does not raise reasonable objection prior to this.

#### **4.4 Brevity and Sufficiency of Information With Provisional Sums**

Brief wording outlines the type of works contained under provisional sums but does not describe the works until nomination is instructed, according to Keating.<sup>206</sup> Nonetheless, the contractor must make allowance for time and cost for defined works.

This Chapter discusses how this brevity of information can affect the sufficiency of information provided to the contractor and whether this gives rise to a contractor's subsequent right to claim against the employer.

Under FIDIC 1999 RB the contractor must be "satisfied" with the "correctness and sufficiency" of his price<sup>207</sup>, which includes provisional sums.

However this may be difficult if complete information is not provided to the contractor. This is acknowledged by Murdoch who states that commencing works with incomplete design is

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<sup>201</sup> UAE CTC Article 145 and 248.

<sup>202</sup> Eltom (n 156). Page 35 refers to Iz'an – adhesion contract under UAE CTC Article 248.

<sup>203</sup> The Unfair Contract Terms Act 1977.

<sup>204</sup> RICS COBRA AUBEA 2015, *Contract provisions can be penal even when there is no breach of contract*, 8<sup>th</sup> to 10<sup>th</sup> July 2015. RICS.org.

<sup>205</sup> See Chapter 4.12.

<sup>206</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-038.

<sup>207</sup> FIDIC RB 99 Sub-Clause 4.11 requires the contractor to be satisfied with its price for the execution, completion and remedying defects.

bad practice<sup>208</sup>, whilst, in contrast, Rawling<sup>209</sup> considers unknown liabilities should be priced by the contractor irrespective of limited information being available.

Ramus<sup>210</sup> maintains that a provisional sum should be sufficiently defined, otherwise the employer may face time and cost claims depending upon the contractual risk allocation. In particular, under the JCT 2005 form of standard contract, which gives the option for a provisional sum to be added, a variation could arise if insufficient information or description is provided for a defined provisional sum in a BoQ.<sup>211</sup>

There appears to be no equivalent clause in any other standard form of contract. It is also unclear if any remedy is available to the contractor due to the lack of information, although a variation commonly gives rise to an extension of the time for completion and associated additional preliminaries costs. The implications of significant increases in quantity are discussed in Chapter 4.10.

According to CMG<sup>212</sup>, insufficiently described works only become evident after nomination which may cause delay and disruption due to sequencing and interfacing difficulties with other works. However Lord Justice May<sup>213</sup> acknowledges that provisional sums are effectively inaccurate estimates, which could suggest that it is acceptable for the contract to contain imprecise or non-detailed information.

UAE law requires that the contract states the subject matter<sup>214</sup> and particulars<sup>215</sup> and the contractor should provide plant and equipment unless customary or agreed otherwise.<sup>216</sup> As mentioned in Chapter 4.1, terms under common law<sup>217</sup> may be implied by custom<sup>218</sup> or through “business efficacy.”<sup>219</sup> Customary practice may require the contractor to use its professional experience to allow for programming, attendance and co-ordination even though little or no information is available to assist with this obligation.

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<sup>208</sup> Murdoch and Hughes (n 8) Page 92.

<sup>209</sup> Rawling, *Nominated or Named?* (n 99).

<sup>210</sup> Ramus, Birchall, Griffiths (n 29) Page 237.

<sup>211</sup> Ramus, Birchall, Griffiths (n 29) Page 112 (f).

<sup>212</sup> Construction Management Guide, *Nominated Subcontractors on International Projects*, 10<sup>th</sup> September 2008 <http://www.cmguide.org/archives/30> Accessed 3rd January 2016.

<sup>213</sup> *Midland Expressway Limited* (n 25).

<sup>214</sup> UAE CTC Article 129.

<sup>215</sup> UAE CTC Article 874.

<sup>216</sup> UAE CTC Article 876.

<sup>217</sup> *Storer v Manchester City Council* [1974] 1 WLR.

<sup>218</sup> *William Lacey v Davis* [1957] 1 WLR 932.

<sup>219</sup> *Maggs Builders v Marsh* [2006] BLR 395 in which the Parties’ conduct was considered.



Unless customary practice is recognised by the arbitrator or courts in the same way that Lord Justice May<sup>220</sup> stated that provisional sums are understood by the construction industry, customary practice suggests that little or no information may be sufficient information for provisional sums. In the event of ambiguity, the principle of *contra proferentum*<sup>221</sup> could be applied under common law which may rule against the drafter of the contract, commonly the CA or employer, as in the US case of WPC Enterprises.<sup>222</sup>

Under FIDIC<sup>223</sup>, all relevant site information must be made available, which the contractor must suitably interpret<sup>224</sup> particularly relating to physical conditions for piling or shoring works. Where these enabling works are contained under a provisional sum, failure by the employer to provide this information may contravene its contractual obligations.<sup>225</sup>

If the employer provides information, it may warrant the sufficiency of this information as in Bacal<sup>226</sup>, creating an implied warranty between the employer and subcontractor, however, in Co-Op<sup>227</sup>, no warranty resulted from the failure to provide information.

Therefore, little or no information provided under a provisional sum may create obligations for the employer unless the responsibilities for providing such information are clearly defined within the contract. It appears under common law that it is well understood and customary to provide only a brief description and the same could be applied under UAE law. However under both laws, if information is purposely or innocently concealed, an action for misrepresentation may be brought.<sup>228</sup>

#### 4.5 Provisional Sums Used as Contingencies

Provisional sums may contain contingencies.<sup>229</sup>

Unless specifically stated, a contingency is likely to be undefined<sup>230</sup>, entitling the contractor to additional time, contribution and cost for such works, hence increasing the employer's risk

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<sup>220</sup> *Midland Expressway Limited* (n 25).

<sup>221</sup> Uff (n 12). Page 255

<sup>222</sup> Hok, Fahey, *Observations on the FIDIC Subcontract 2011* (n 34) refers to the US case on page 8 of *WPC Enterprises Inc v United States* [1963] 323 F.2d 874, 877, 163 Ct. Cl 1,6.

<sup>223</sup> FIDIC RB 99 Sub-Clause 4.10 Site Data. FIDIC 1987 RB Sub-Clause 11.1.

<sup>224</sup> FIDIC RB 99 Sub-Clause 4.10.

<sup>225</sup> FIDIC RB 87 Sub-Clause 12.1.

<sup>226</sup> *Bacal Construction (Midlands) Ltd v Northampton Development Corporation* [1975] 8 BLR.

<sup>227</sup> *Co-operative Insurance Society Ltd v Henry Boot Scotland Ltd and ors* [2002] EWHC 1270 (TCC).

<sup>228</sup> Refer to Chapter 4.13.

<sup>229</sup> FIDIC RB 87 Sub-Clause 58.1 and ICE 7<sup>th</sup> edn Sub-Clause 1 (1) (l).

and obligations. Totterdill<sup>231</sup> affirms that provisional sums can only be spent for the stated purpose and should not include contingencies. Contingencies can be reduced by completing designs prior to tender or commencing works to reduce cost and time uncertainty.

Even though additional time and cost may be incurred, varying the works under the contractual variation procedure provides a clearer mechanism for adding unforeseen expenditure rather than allowing an undefined provisional sum.

#### **4.6 Contractor's Right to Object to Nomination**

Standard forms of contract generally contain rights for the contractor to raise reasonable objection to an instructed nomination.<sup>232</sup>

FIDIC RB 99<sup>233</sup> and similarly ICE<sup>234</sup> permit “reasonable” objection to be raised in writing “as soon as practicable” with supporting particulars if “there are reasons to believe” the subcontractor lacks “competence, resources or financial strength”; the contractor is not indemnified from the nominated subcontractor's<sup>235</sup> negligence or misuse of contractor's equipment, there is no undertaking allowing the contractor to discharge<sup>236</sup> its obligations or indemnification against the contractor failing to fulfil its obligations and liabilities under the main contract.

These reasonable grounds are “amongst other things” under FIDIC RB 99, therefore broadening the contractor's justification for objection, although what defines “reasonable” is not mentioned. Keating<sup>237</sup> suggests reasonable grounds include a proposed nominated subcontractor's poor reputation whilst Eggleston<sup>238</sup> suggests an unsatisfactory safety record, inadequate insurance and previous commercial disputes.<sup>239</sup> Being claims-orientated<sup>240</sup> is a

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<sup>230</sup> Refer to Chapter 2.1.2 Undefined Provisional Sums.

<sup>231</sup> Totterdill, (n 14) Page 227.

<sup>232</sup> FIDIC RB 99, FIDIC 1987RB, ICE 7<sup>th</sup> edn.

<sup>233</sup> FIDIC RB 99 Sub-Clause 5.2.

<sup>234</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (1).

<sup>235</sup> This includes the nominated subcontractor's agents or employees.

<sup>236</sup> Uff (n 12). Page 205 states that discharge of a contract may be achieved by performance of all obligations, frustration of the contract, fundamental breach or recovery of damages for a party's failure to perform or by express agreement.

<sup>237</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 20-263.

<sup>238</sup> Brian Eggleston, *The ICE Conditions of Contract* (7<sup>th</sup> edn, Blackwell Science Ltd, Oxford, 2001) Page 328 suggests that an employer's claim in negligence against a subcontractor may be in vain if there is insufficient financial resources or the insurance is not in place as a remedy.

<sup>239</sup> This may include historical or current disputes.

borderline ground which could be addressed by unambiguous subcontract conditions and documents according to Eggleston.

For the above reasons, a nominated subcontract is generally back to back<sup>241</sup> to ensure the contractor complies with its obligations under the main contract.<sup>242</sup> It is however questionable how readily the employer would accept grounds for objection, particularly if the employer has fulfilled key objectives by the nomination<sup>243</sup> and if the contractor's objection is considered unreasonable.<sup>244</sup>

Despite this, the contractor is entitled to carry out due diligence prior to accepting a nomination, although, if appointment is coerced by the employer, Totterdill<sup>245</sup> warns this could cause claims from the contractor if performance subsequently falls short.<sup>246</sup>

Due diligence could include verifying that the nominated price represents the market price for such works to prevent potential issues such as insolvency<sup>247</sup> or abandonment of the works<sup>248</sup> by the nominated subcontractor which could lead to the contractor's liability for delays, additional costs or defective works. A contractually compliant time for completion, unambiguous terms and attendance requirements all need to be verified, particularly where pre-nomination discussions have excluded the contractor.<sup>249</sup>

Under ICE<sup>250</sup>, the nominated subcontractor must provide performance security otherwise the contractor may object, however Eggleston<sup>251</sup> highlights that what represents acceptable security is not stipulated.

Intellectual property rights or business policies may restrict disclosure of the nominated subcontractor's sensitive business information to the contractor, which could be a cause for

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<sup>240</sup> Eggleston (n 237) Page 326 considers this is acceptable particularly if the question forms part of the subcontractor's pre-qualification submission.

<sup>241</sup> See Chapter 4.20.

<sup>242</sup> Construction Management Guide, *Nominated Subcontractors on International Projects*, 10<sup>th</sup> September 2008 <http://www.cmguide.org/archives/30> Accessed 3rd January 2016.

<sup>243</sup> Refer to Chapter 2.2.

<sup>244</sup> Abrahamson, (n 18) Page 239 suggests the contractor will be liable for delays if objection is not reasonable.

<sup>245</sup> Totterdill, (n 14) Page 149.

<sup>246</sup> See Chapter 4.8.1.

<sup>247</sup> See Chapter 4.16.

<sup>248</sup> Rawling, *Nominated or Named?* (n 99).

<sup>249</sup> See Chapter 4.3.

<sup>250</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (1) (d) defines that performance security should be provided "for performance of the sub-contract..."

<sup>251</sup> Eggleston (n 237). Page 326 states that whether the demand should be on demand and what amount is not mentioned.

objection, however information which is innocently or fraudulently misrepresented or remains undisclosed due to silence may be unlawful.<sup>252</sup>

Even though the contractor's "reasons to believe" may give rise to subjective reasons for objection, reasonable proof is required although the degree of such proof is not stated.

Importantly, Abrahamson<sup>253</sup> notes that the contractor's act of entering into sub-contract, waives any subsequent rights to objection, which was also held in the case of Rikards<sup>254</sup>, where a party could not invoke their contractual rights retrospectively.

A non-waiver clause would prevent a party from waiving its future rights if a breach was allowed to occur, however notably, in the recent case of ZVI Construction Co. LLC,<sup>255</sup> the parties' actions, words or conduct was held to be the parties' intention to vary or modify the contract despite the existence of a non-waiver clause in the contract.

Whilst Totterdill<sup>256</sup> supports the early participation of a specialist subcontractor in the design process, the employer may become liable due to the contractor's objection, particularly if this prevents novation or assignment<sup>257</sup>, which requires tripartite agreement. In such a case the employer's options may be limited to termination of the specialist's employment or direct employment, which could initiate a contractor's claim for additional attendance, delay or disruption and loss of profit for works omitted under a provisional sum. Whether loss of profit would be paid on an un-instructed provisional sum given the employer's discretion to expend such sums is unclear.

#### **4.7 Time to Object to nomination**

The specific time within which the contractor should raise objection to nomination is not generally stated in standard forms of contract.

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<sup>252</sup> See Chapter 4.13 Misrepresentation

<sup>253</sup> Abrahamson, (n 18).

<sup>254</sup> *Charles Rickards v Oppenheim* [1950] 1 KB 616.

<sup>255</sup> Eversheds International, *Wave Goodbye to your non-waiver clause?*

[http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Commercial\\_dispute\\_resolution/Wave\\_Goodbye\\_to\\_your\\_Non-Waiver\\_Clause](http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Commercial_dispute_resolution/Wave_Goodbye_to_your_Non-Waiver_Clause) Accessed 4th November 2016 refers to the common law case of *ZVI Construction Co. LLC v The University of Notre Dame (USA)* [2016] EWHC 1924 (TCC), [2016] WLR (D) 465.

<sup>256</sup> Totterdill, (n 14) Page 147.

<sup>257</sup> Refer to Chapter 5.2. Tri-partite agreement is between the employer, contractor and nominated subcontractor.

FIDIC RB 99<sup>258</sup> states “as soon as practicable” whilst FIDIC RB 87<sup>259</sup> mentions no time, however consent or approval “shall not unreasonably be withheld or delayed.”<sup>260</sup>

According to Tweeddale<sup>261</sup>, if no time or “condition precedent” wording exists, the intent of the parties will be examined. In *Eagle Star*<sup>262</sup> it was held that, unless the time and consequences for failure to issue notice was stated, then a condition precedent is unlikely to exist.

Under UAE law, if delay to raise objection is unreasonable, this may be contrary to good faith<sup>263</sup>, although each contracting party must perform their respective obligations under the contract.<sup>264</sup>

Unless the parties agree otherwise, absence of any precise time provision for objection leaves ambiguity in contracts leaving the court or arbitrator to determine the parties’ intentions.

#### **4.8 Employer’s Rights, Obligations and Options Following the Contractor’s Objection to Nomination**

Following the contractor’s objection to nomination, the options available to the employer and CA vary according the applicable contract or law.

Whilst ICE<sup>265</sup> contains a comprehensive contractual mechanism for these eventualities, surprisingly FIDIC<sup>266</sup> contains none. Published literature regarding this deficiency is scarce, which may suggest that few issues may have arisen particularly as FIDIC apportions full liability of the nominated subcontractor’s performance with the contractor.<sup>267</sup> Nonetheless the following analysis highlights that there are still areas of ambiguity or uncertainty which would require clear legal provisions to address.

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<sup>258</sup> FIDIC RB 99 Sub-Clause 5.2.

<sup>259</sup> FIDIC RB 87 Sub-Clause 59.2.

<sup>260</sup> FIDIC RB 87 Sub-Clause 1.5 and FIDIC RB 99 Sub-Clause 1.3.

<sup>261</sup> Andrew Tweeddale, *The courtesy trap – FIDIC’s sub-clause 20.5 – amicable settlement and Emirates Trading*, [2016] I.C.L.R. 75 International Construction Law Review. Page 14

<sup>262</sup> *Eagle Star Insurance Company Ltd v Cresswell* [2004] EWCA Civ 602.

<sup>263</sup> UAE CTC Article 246 (1).

<sup>264</sup> UAE CTC Article 243 (2).

<sup>265</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (1) and (2).

<sup>266</sup> FIDIC RB 87 and FIDIC RB 99.

<sup>267</sup> Refer to Chapter 3.1.FIDIC RB 99 Sub-Clause 4.4.

In addition, despite ICE's comprehensive provisions, Eggleston<sup>268</sup> raises certain concerns. Whilst provisions allow the contractor to refuse to enter into subcontract<sup>269</sup>, the same sub-clause fails to mention the contractor's express right to raise reasonable objection.<sup>270</sup> Importantly this may have to be implied into the contract<sup>271</sup>, essentially leaving it to the court or arbitrator to determine the parties' intentions. Nonetheless, the ICE provisions present a suitable reference point from which to compare the shortcomings under FIDIC and the subject legal jurisdictions relating to objection.

#### **4.8.1 Employer and CA Rejection of Contractor's Objection to Instructed Nomination**

Unless the contractor's objection to nomination is based upon reasonable grounds, the contractor must comply with the nomination instruction<sup>272</sup>, however what is reasonable for the contractor may not be so for the employer.<sup>273</sup>

If the contractor's objection is challenged by the CA or employer, whether instruction can be issued by the CA forcing the contractor to comply with the nomination is unclear, although Totterdill suggests there could be contractual and legal consequences for the employer should the nominated subcontractor subsequently default in performance.<sup>274</sup> The contractor could also be placed in contractual default by failing to proceed "with due expedition and without delay"<sup>275</sup>, potentially leading to a "Notice to Correct" and ultimately, termination of the contractor's employment.<sup>276</sup> The aforementioned potentially leads to contractual deadlock in which each party has express rights.

The engineer may instruct the contractor to enter into nominated subcontract under ICE<sup>277</sup> even when subcontract terms contravene the main contract, providing the employer's prior approval is obtained by the engineer to excuse the contractor from contractual compliance.<sup>278</sup>

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<sup>268</sup> Eggleston (n 237). Page 329.

<sup>269</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (2)

<sup>270</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (2) does not expressly mention the contractor's right to raise reasonable objection but does mention the contractor's declination to enter into subcontract agreement with a nominated subcontractor.

<sup>271</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (1)

<sup>272</sup> FIDIC RB 99 Sub-Clause 3.3, FIDIC RB 87 Sub-Clause 2.5.

<sup>273</sup> Eggleston (n 237). Page 328.

<sup>274</sup> Totterdill, (n 14) Page 147.

<sup>275</sup> FIDIC RB 99 Sub-Clause 8.1.

<sup>276</sup> FIDIC RB 99 Sub-Clause 15.1.

<sup>277</sup> ICE 7<sup>th</sup> edn Sub-Clause 59A (3).

<sup>278</sup> Abrahamson, (n 18) Page 225.

If no prior approval is obtained, the engineer's actions could still bind the employer in certain cases.<sup>279</sup>

If disagreement arises over objection, works must still proceed.<sup>280</sup> The disagreement should be referred for resolution under the applicable contractual process, such as obtaining a CA's decision or, if applicable under the contract, that of a Dispute Adjudication Board (DAB). Despite the CA being required to issue an impartial or fair determination<sup>281</sup>, the ability to issue such a determination when the initial nomination has been instructed by the CA would, it is suggested, be difficult without prejudice. If these interim steps fail, the dispute should be referred to the mechanism stipulated under the contract such as arbitration or litigation.

If nomination is essential for immediate progress or completion of the works, it is questionable how it may be possible to proceed<sup>282</sup>, particularly when the performance of the contract depends upon a nominated activity such as piling which is critical to further performance of the contract. In such circumstances, it is contentious whether a contractor's right to object would prevail over the contractor's obligation to comply with an engineer's nomination instruction<sup>283</sup>, particularly if the grounds for objection are questionable.

Under UAE law<sup>284</sup>, Tamimi<sup>285</sup> highlights that the employer may withhold or suspend performance<sup>286</sup> if the contractor fails to perform its contractual obligations. This could, it is suggested, include failing to conform with a nomination instruction, compelled by specific performance<sup>287</sup>, particularly for specialist works or works required to be executed by a particular person.

Specific performance could be awarded if performance is essential, however if this is inadequate damages will be awarded.<sup>288</sup> The contract may also be cancelled and damages

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<sup>279</sup> See Chapter 4.12.

<sup>280</sup> FIDIC RB 99 Sub-Clause 20.4 provides that unless the Contract has been "abandoned, repudiated or terminated" the Works shall proceed.

<sup>281</sup> Refer to Chapter 4.12.

<sup>282</sup> See Chapter 4.9.

<sup>283</sup> FIDIC RB 99 Sub-Clause 3.3.

<sup>284</sup> UAE CTC Article 247 and 414.

<sup>285</sup> Al Tamimi, *Highlights of the laws of the United Arab Emirates, the People's Republic of China and the common law applicable to construction contracts – Part 2* 1<sup>st</sup> September 2011 [www.westlawgulf.com](http://www.westlawgulf.com) Accessed 13<sup>th</sup> January 2016.

<sup>286</sup> Dubai Court of Cassation Case 154/2004.

<sup>287</sup> UAE CTC Article 338 and 339. Specific performance is the primary remedy under UAE law.

<sup>288</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89).

paid<sup>289</sup> although Teo recommends, if no fundamental breach occurs, this action should be considered carefully.<sup>290</sup>

By contrast, the primary remedy under English common law is damages. Specific performance is discretionary and an equitable remedy where damages would not sufficiently compensate the plaintiff according to Uff.<sup>291</sup>

Whilst the employer controls and imposes selection of its subcontractor on the contractor<sup>292</sup>, this contravenes the law regarding good faith in civil law jurisdictions such as Germany and Switzerland<sup>293</sup> if the subcontractor subsequently defaults. Nonetheless, under UAE and common law the contractor is generally liable for the actions of subcontractors, however an instruction which compels the contractor and ignores the contractor's right to object could cause the employer to be liable under the law.

According to Eltom<sup>294</sup>, duress occurs when a party coerces the other party to perform an act or enter into contract without their consent by threat, force or fear, the effects of which may be material or moral. Under UAE law<sup>295</sup> this can cause nullification of the contract<sup>296</sup>, however, if the coerced party by their actions continue to perform their obligations, then the contract will be deemed to be valid and binding.

Under common law, the court must decide upon the coercive effect each on a case by case basis, however the contract may be voidable as in *D&C Builders*.<sup>297</sup>

The employer has a right to nominate its chosen subcontractor and the contractor must engage into nominated subcontract with said entity unless reasonable grounds exist to object. The employer should however guard against coercively forcing the nomination upon the contractor, which could, under UAE and common law, be unlawful, particularly if reasonable grounds exist to object.

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<sup>289</sup> UAE CTC Article 272.

<sup>290</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115).

<sup>291</sup> Uff (n 12). Page 220.

<sup>292</sup> Murdoch and Hughes (n 8) Page 268 states that installation of specialist equipment can be stated by the employer "leaving the contractor no choice in the matter" which is one of the employer's reasons for using nomination.

<sup>293</sup> Chao-Duivis, *Subcontracting in Europe* (n 44). Page 4 under Swiss and German civil law- it is contrary to good faith.

<sup>294</sup> Eltom (n 156) Page 31.

<sup>295</sup> UAE CTC Article 179 and 182.

<sup>296</sup> Dubai Court of Cassation petition 203/1995.

<sup>297</sup> *D&C Builders v Rees* [1966] 2 QB 617.



#### **4.8.2 Re-Nomination**

Which party is responsible for re-nomination and any delay or associated cost following an objection by the contractor?

FIDIC contains no provisions covering this situation, however ICE<sup>298</sup> requires the employer to pay the re-nominated price and take responsibility for any delay, providing the contractor's objection is not unreasonably delayed.<sup>299</sup>

These re-nomination provisions overcome the legal issues raised in the case of *Bickerton*.<sup>300</sup> Although this case relates to re-nomination following a nominated subcontractor's repudiation and not specifically to objection, it was held that the contractor had no right or obligation to interfere in the process of reselection of a nominated entity.<sup>301</sup>

Literature and case law relating to this matter is otherwise very scarce, however in the case of *Fairclough*<sup>302</sup>, the contractor's objection was accepted after the re-nominated subcontractor's time for completion extended beyond that of the main contract.

Liability for time and cost of re-nomination depends upon the contractual provisions, in the absence of which it appears that the employer may be liable under common law whereas under UAE the contractor would be liable for the subcontractor's default. FIDIC also follows the latter position.

#### **4.8.3 Employer's Indemnification of Contractor against Nominated Subcontractor's Default**

Objection may be raised by the contractor if the nominated subcontract fails to contain an indemnification<sup>303</sup> clause against "any breach, default or negligence" caused by the

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<sup>298</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (2) (a).

<sup>299</sup> Refer to Chapter 4.7.

<sup>300</sup> *North West Metropolitan Regional North West Metropolitan Regional Hospital Board v T.A. Bickerton & Sons* [1970] 1 All Er 1039.

<sup>301</sup> Murdoch and Hughes (n 8) Page 294. The wording under JCT 63.

<sup>302</sup> *Fairclough Building Ltd v Rhuddlan DC* [1985] 30 BLR 26. This case relates to re-nomination following repudiation by the nominated subcontractor.

<sup>303</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115).

nominated subcontractor<sup>304</sup> or its failure to fulfil liabilities or obligations which cause the contractor to fail in its liabilities or obligations under the main contract.<sup>305</sup>

Indemnification allows the contractor to recover damages from the nominated subcontractor but provides no direct equivalent recourse for the employer in the event of “defective performance.”<sup>306</sup> An insurable indemnity compensates the contractor for losses incurred but cannot enrich the claimant as ruled by the Dubai Court of Cassation.<sup>307</sup>

The nominated subcontractor’s insurance may additionally insure the contractor for the former’s defective work<sup>308</sup>, preventing subrogation<sup>309</sup> which may similarly be arranged between the contractor and employer. FIDIC 1999 RB<sup>310</sup> however limits any party’s claim for “loss of any contract or for any indirect or consequential loss or damage...” upto a maximum of the contract price.

Indemnity does not remove the contractor’s obligations towards the employer, however Totterdill<sup>311</sup> suggests that the employer should indemnify the contractor for the nominated subcontractor’s defective performance if the nominated subcontractor fails to indemnify the contractor. However Eggleston<sup>312</sup> claims that this breaks the contractual chain of responsibility and cites Bickerton<sup>313</sup>, where the employer indemnified the contractor against a nominated subcontractor’s default, causing the latter to avoid liability and release the contractor from liability for performance of the nominated subcontractor.

If objection is raised due to failure of the nominated to indemnify the contractor, the employer should consider the risk of indemnifying the contractor for the nominated subcontractor’s default, otherwise objection may be expressly permitted under the contract.

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<sup>304</sup> Or the subcontractor’s employees or agents – FIDIC Sub-Clause 5.2 (b).

<sup>305</sup> FIDIC RB 99 Sub-Clause 5.2 (c) (i) and (ii).

<sup>306</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) Page 4.

<sup>307</sup> Dubai Court of Cassation Petition 272 to 289 1993 quoted by Eltom (n 156) who states on page 273 that the party should only be put back to the position they were in before the loss occurred.

<sup>308</sup> The contractor commonly additionally insures the employer under the contractor’s insurance.

<sup>309</sup> Subrogation would prevent the insurer paying a claim and pursuing recovery against an additional insured party who may be responsible for the loss.

<sup>310</sup> FIDIC RB 99 Sub-Clause 17.6 Limitation of liability.

<sup>311</sup> Totterdill, (n 14) Page 147 and 148.

<sup>312</sup> Eggleston (n 237) Page 323.

<sup>313</sup> *North West Metropolitan Regional Hospital Board v T.A. Bickerton & Sons* [1970] 1 All Er 1039.

#### 4.8.4 Instruct a Variation

Following objection, ICE<sup>314</sup> permits the subject provisional sum works to be omitted by a variation, however FIDIC is silent on such matters.

Variation clauses generally allow the CA to omit works, providing the works are not awarded to another contractor.<sup>315</sup> Eggleston agrees that the contractor may have no claim if works can be permanently omitted, otherwise the employer may be liable for loss of profit as in Carr.<sup>316</sup>

Under the variation provisions in FIDIC RB 99<sup>317</sup>, the engineer may instruct employment of a subcontractor who thereafter becomes the contractor's responsibility.<sup>318</sup> Any instruction to vary the works should be given in a timely manner otherwise the contractor may be entitled to an extension of time and additional cost resulting from delayed instruction.

Despite the right to vary, this should not extend beyond that contemplated<sup>319</sup> by the parties when executing the contract as in Blue Circle.<sup>320</sup> Although this case referred to additional varied works and the current discussion relates to omission of works, the fact that the works are stipulated by a provisional sum would suggest that these works would have been contemplated by the parties at the time of executing the contract.

The CA may only vary the works and cannot amend the contract<sup>321</sup>, the latter of which may only occur if the contracting parties bilaterally agree.<sup>322</sup> In Stockport<sup>323</sup>, the CA was liable for amending the contract and the employer was not bound by the CA's actions.

Nonetheless, to avoid potential recourse from the contractor, the employer may be advised to seek alternatives discussed in this Chapter, in the event of objection.

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<sup>314</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (2) (b).

<sup>315</sup> FIDIC RB 99 Sub-Clause 13.1 (d) and FIDIC 1987 RB Sub-Clause 51.1 (b).

<sup>316</sup> *Carr v J.A. Berriman Pty* [1953] 89 Con LR 327. Works were omitted and undertaken by another contractor contrary to the variation clause.

<sup>317</sup> FIDIC RB 99 Sub-Clause 13.5 (b).

<sup>318</sup> FIDIC RB 99 Sub-Clause 13.1 (e). FIDIC RB 87 contains nomination provided the contract contains such works under a provisional sum.

<sup>319</sup> *Non haec in oedera veni*

<sup>320</sup> *Blue Circle v Holland Dredging* [1987] 37 BLR 40. ICE 5<sup>th</sup> edn contract in which an island was instructed as a variation.

<sup>321</sup> FIDIC RB 99 Sub-Clause 3.1.

<sup>322</sup> Totterdill, (n 14) Page 222. Bi-lateral agreement of both parties are required.

<sup>323</sup> *Stockport Metropolitan Borough Council v O'Reilly* [1978] 1 Lloyd's Rep 595.

#### **4.8.5 Instruct the Contractor to Execute the Works**

Alternatively, following objection, the employer or CA may instruct the contractor to execute the works using domestic subcontractors of its choice or in house resources, in accordance with ICE provisions.<sup>324</sup> FIDIC is again silent regarding such matters.

Eggleston<sup>325</sup> supports this approach for overcoming objection, although Abrahamson<sup>326</sup> warns that an inflated price may be charged or the contractor may refuse to undertake the works. The contractor would be obliged to obtain the CA's or employer's approval for the domestic subcontractor and may be entitled to an extension of time for delays as a consequence of the nomination process.

The employer should also consider apportioning domestic design liability to the contractor if the nomination contains such obligations, which may include increasing the contractor's professional indemnity insurance for design.

This appears to be the most efficient method of overcoming objection, providing the contractor and employer reach agreement on any additional time or cost. Many of the commentators mentioned in Chapter 1.2, tend to support the contractor's engagement of its subcontractors to overcome the issues discussed throughout Chapter 4.

#### **4.8.6 Omit the Provisional Sum and Employ a Direct Works Contractor**

According to Newboul<sup>327</sup>, omitting the contractor's works under a provisional sum and awarding to another contractor should be exercised with caution to avoid a breach of contract and an employer's liability for loss of profit. Notwithstanding this, does the employer's discretion to expend provisional sums suggest that the employer has a right to exercise such action?

Under common law in *AMEC*<sup>328</sup>, the act of omitting a provisional sum and awarding to another party entitled the contractor to claim loss of profit. In *Carr*<sup>329</sup>, the same action by the employer caused a repudiatory breach entitling the contractor to terminate the contract.<sup>330</sup>

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<sup>324</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (2) (d) and (e).

<sup>325</sup> Eggleston (n 237). Page 330.

<sup>326</sup> Abrahamson, (n 18) Page 225.

<sup>327</sup> Newboul, *Letters of Law* (n 35)

<sup>328</sup> *AMEC Building v Cadmus Investments Co. Ltd* [1996] 51 Con LR 105.

ICE<sup>331</sup> allows works to be omitted after objection and undertaken at that time or a future date. The contractor is paid contribution<sup>332</sup>, which prevents the employer's breach of contract although the contractor must be compensated. FIDIC RB 99<sup>333</sup> allows work to be omitted by variation "unless it is to be carried out by others" however Totterdill stresses that a variation instruction is not permitted "unless it is necessary for the Permanent Works."<sup>334</sup> Fundamentally, if works within a provisional sum are essential for the works this conflicts with the employer's discretionary option to expend such sums which is discussed in Chapter 4.9.

The employer should also consider the risk of claims for delay and disruption emanating from directly employed contractors plus co-ordination and construction interface issues. This is particularly relevant because no privity of contract exists between the contractor and the employer's directly employed contractors<sup>335</sup> and the contractor has no contractual control over or recourse against these contractors.

FIDIC RB 99<sup>336</sup> provides that "any delay, impediment or prevention by or attributable to ... the Employer's other contractors on the Site" entitle the contractor to an extension of time and cost however the contractor must extend cooperation to other contractors<sup>337</sup> including attendance and temporary works unless unforeseeable.

Under UAE law, omission of works and employment of a direct contractor could contravene good faith which may also entitle the contractor to loss of profit.<sup>338</sup>

Unless express contractual terms permit the appointment of direct works contractors to undertake works following objection, the employer may risk claims from the contractor under UAE and common law.

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<sup>329</sup> *Carr v JA Berriman Pty Ltd* [1953] 89 CLR 327.

<sup>330</sup> *Commissioner for Roads v Reed & Stuart* [1974] 12 BLR 55.

<sup>331</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (2) (c).

<sup>332</sup> The BoQ or Appendix to Tender contains the amount added by the contractor for overheads and profit which shall be paid to the contractor.

<sup>333</sup> FIDIC RB 99 Sub-Clause 13.1 Right to Vary.

<sup>334</sup> Totterdill, (n 14) Page 222.

<sup>335</sup> Abrahamson, (n 18) Page 223.

<sup>336</sup> FIDIC RB 99 Sub-Clause 8.4 (e).

<sup>337</sup> FIDIC RB 99 Sub-Clause 4.6. Other contractors only give rise to the contractor's entitlement to a variation for additional services extension of time if "Unforeseeable Cost" i.e. cost which was not foreseeable by the contractor, is sustained.

<sup>338</sup> UAE CTC Article 246.

#### 4.9 Provisional Sums and Nomination – Essential for the Works?

Notwithstanding the employer's discretion to expend provisional sums, are the employer's rights and obligations affected if expenditure of these sums is essential for completion of the works? This is discussed below.

Provisional sums incorporate a wide variety of works ranging from low value works such as a gate barrier to high value works such as MEP<sup>339</sup> which may be considered optional or essential for completion of the works.

A provisional sum is also a "round figure guess" for "truly provisional"<sup>340</sup> works according to Lord Justice May. This suggests it is acceptable to include hypothetical sums for works for which design is incomplete, however should this include works which are clearly essential for completion of the whole of the works? Lord Justice May points out that the process is well understood by the industry, however, in order to complete a project, expenditure of certain provisional sums may be an essential criteria and not discretionary.

The contractual and legal consequences of a provisional sum could, in the above circumstances, it is suggested, be compared to that of a variation where works may not be specifically defined in the contract but are, nonetheless, essential for the works<sup>341</sup> and may be implied as in *Williams*.<sup>342</sup> FIDIC RB 99<sup>343</sup> permits a subcontractor to be nominated by instructing a variation although, if it is not deemed essential for the works or beyond the intention of the parties when entering into contract, the contractor could object to the variation<sup>344</sup> and thus, the nomination.

It could be argued that a defined provisional sum is prescribed at tender whereas a variation is obviously not, however this still does not answer whether a provisional sum can be included where works are clearly essential?

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<sup>339</sup> MEP is Mechanical, electrical and plumbing which is a package of subcontract works.

<sup>340</sup> *Midland Expressway Limited* (n 25).

<sup>341</sup> *Totterdill*, (n 14) Page 222.

<sup>342</sup> *Williams v Fitzmaurice* [1858] 157 ER 709.

<sup>343</sup> FIDIC RB 99 Sub-Clause 5.1 (b) and 13.5.

<sup>344</sup> *Non haec in foedera* is not what was promised to be done as in the English case of *Blue Circle Industries Plc v Holland Dredging Co. (UK) Ltd* [1987] 37 BLR 40.

Delay in nomination of essential works could breach express or implied terms causing the employer to be liable for damages.<sup>345</sup> A nomination should also allow the contractor to discharge its obligations in respect of performance in an expeditious manner, however no obligation exists under common law to facilitate economic working conditions.<sup>346</sup>

Where a provisional sum is essential for the works and no instruction is given to expend the sum, works may become impossible to discharge. Impossibility does not excuse discharge of the contractor's obligations under ICE contracts<sup>347</sup>, however if performance becomes fundamentally different, this may frustrate the contract, although Uff maintains this is rare.<sup>348</sup>

A supervening event under UAE law<sup>349</sup> causing frustration or force majeure<sup>350</sup> must render full or partial performance impossible, for reasons beyond either party's control, leading to cancellation or suspension of that party's obligations. The hardship theory<sup>351</sup> relates to exceptional and unforeseen events of a general nature<sup>352</sup> which renders performance of an obligation oppressive and threatens grave loss, not necessarily impossible. The parties are reinstated<sup>353</sup> to the same financial position prior to executing the contract<sup>354</sup> or a party which derives losses from an extraneous cause outside of his control is excused from its obligations.<sup>355</sup> FIDIC RB 99<sup>356</sup> also contains provision for force majeure.

Under common law, Murdoch refers to frustration caused by an external event which makes performance "radically different from what was originally envisaged"<sup>357</sup> with losses awarded according to statute.<sup>358</sup>

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<sup>345</sup> Furst, Ramsey, Williamson, Uff (n 16). Paragraph 12-035 refers to *Fairclough Building Ltd v Rhuddlan BC* [1985] 30 BLR 26.

<sup>346</sup> Lexology, *Nominated Subcontractors*, 30<sup>th</sup> July 2014 Herbert Smith Freehills LLP. <http://www.lexology.com/library/detail.aspx?g=10ddb5c4-8654-4917-a39d-fb1dcea7b784> Accessed 13<sup>th</sup> January 2016.

<sup>347</sup> ICE 7<sup>th</sup> edn Clause 13.

<sup>348</sup> Uff (n 12). Page 206.

<sup>349</sup> UAE CTC Article 273 includes reasons such as illness or death, destruction of the contract subject matter or supervening illegality whereby a public policy is introduced which makes the performance of the contract illegal.

<sup>350</sup> UAE CTC Article 893.

<sup>351</sup> UAE CTC Article 249 is also called the doctrine of intervening contingencies.

<sup>352</sup> UAE Federal Case 24/15 5.10.1993 held that impossibility or difficulty related to events beyond both parties' control denied the claimant recourse based upon losses being of general nature

<sup>353</sup> UAE CTC Article 274.

<sup>354</sup> UAE Union Supreme Court 213/Judicial Year 23.

<sup>355</sup> UAE CTC Article 287. Extraneous causes include force majeure, natural disaster, act of a third party or party suffering loss.

<sup>356</sup> FIDIC RB 99 Sub-Clause 19.1.

<sup>357</sup> Murdoch and Hughes (n 8) Page 344.

However, the above events result from extraneous causes which differ from that which is made impossible by the other party. In *Davis*<sup>359</sup>, performance of the works was held to be difficult rather than impossible and did not frustrate the contract. However, impossibility excused the contractor's performance in *Turrif*<sup>360</sup> but did not in *Thorn*.<sup>361</sup>

If the employer fails to instruct works under a provisional sum which are clearly essential for completion of the works, this may cause discharge of the work to be impossible or frustrated. It is questionable why works which are essential, are expended at the employer's discretion and included under provisional sums. It is argued that such works should be included within the contractor's scope of work at tender, which will mitigate the employer's risk of additional cost and time, to avoid delay or disruption to work which the interfaces with uninstructed works.

#### **4.10 Nomination of Amount Significantly Different to Provisional Sum**

A provisional sum is subsequently adjusted by the actual nominated amount instructed. Whilst Lord Justice May describes a provisional sum as a "round figure guess"<sup>362</sup>, can a nomination be instructed for any amount or even significantly in excess of that intended by the parties at tender?

Keating states that the provisional sum will be adjusted by the actual instructed expenditure, which may be nominated at a higher or lower amount.<sup>363</sup>

Where nomination is significantly higher than a provisional sum, the employer's budget, funding requirements, or even commercial viability of the project, may be jeopardised. The employer may claim in negligence against its professional team if reliance has been placed on the team to set provisional sums.<sup>364</sup>

Although nominated amounts may also decrease, an increase could allow the contractor to suspend works or terminate the contract under FIDIC RB 99<sup>365</sup> if reasonable evidence of the

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<sup>358</sup> Law Reform (Frustrated Contracts) Act 1943.

<sup>359</sup> *Davis Contractors v Fareham UDC* [1956] AC 696.

<sup>360</sup> *Turrif v Welsh Water Authority* (1979) [1995] ConL. YB. 122.

<sup>361</sup> *Thorn v Corporation of London* (1876) 1 App Cas 120.

<sup>362</sup> *Midland Expressway Limited* (n 25).

<sup>363</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 4-035.

<sup>364</sup> Refer to Chapter 4.12.

<sup>365</sup> FIDIC RB 99 Sub-Clause 2.4 Failure to provide such financial information to the contractor entitled the contractor to suspend works under Sub-Clause 16.1 or terminate the contract under Sub-Clause 16.2 (a).



ability to pay the revised contract price is not provided by the employer. This could also fall under the contractor's grounds "among other things" for raising reasonable objection to the nomination.<sup>366</sup>

Standard forms of contract such as FIDIC RB 99 provide for the award of extension of time<sup>367</sup> and costs for any substantial variation in the quantity of work, however, the extent to which "substantial" refers is not defined, nor whether this is applicable to provisional sums. This clause does not appear to relate to a significant change in monetary value which could result, for example, from an upgrade in specification, with no corresponding change in quantity.

Typically a provisional sum provides little or no design detail and therefore it would be difficult to prove that any increase in value of works resulted in an extension to the time for completion or additional cost, particularly as a defined provisional sum requires the contractor to include time and cost.<sup>368</sup> This reasoning is also supported in principle by FIDIC 1987 RB<sup>369</sup> which excludes provisional sums from the repricing of works if the contract value increases by 15% or more.

The research found a distinct lack of literature or law to support the above discussion. Even though the contractor would receive compensation based upon any incremental percentage contribution added to the nominated sum, the employer's rights and obligations are otherwise unclear whether any amount can be nominated and still be construed within that intended by the parties at the time of signing the contract.

#### **4.11 Employer's or CA's Direct Instructions to Nominated Subcontractor**

A nominated subcontractor is contractually obliged to follow the instructions of the contractor, however, if direct instruction is given by the employer or CA, does this create a binding obligation for the employer or excuse the contractor from its obligations?

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<sup>366</sup> FIDIC RB 99 Sub-Clause 5.2 and discussed in Chapter 4.6.

<sup>367</sup> FIDIC RB 99 Sub-Clause 8.4 (a)

<sup>368</sup> Refer to Section 2.1.2.

<sup>369</sup> FIDIC RB 87 Sub-Clause 52.3.

The CA is authorised to give instructions, to the extent and limit prescribed within the main contract and service agreement with the employer and such instructions may bind the employer<sup>370</sup> as in *Wallis*.<sup>371</sup>

In the UAE, the employer's direct instructions did not bind the employer as ruled by the UAE Federal Court.<sup>372</sup> In contrast, in *Yee Sang Metal Supplies*<sup>373</sup>, the employer was bound by a direct written guarantee to a subcontractor confirming direct payment if the contractor abandoned the works.

Contractually, the contractor should confirm in writing to the CA any direct instruction given to a nominated subcontractor. Under the FIDIC subcontract<sup>374</sup>, unless the CA instructs the contractor, the subcontractor may refuse to execute such works, although the main contract may be terminated if a subcontractor refuses to obey the engineer's instructions according to *Abrahamson*.<sup>375</sup>

Depending upon the relevant contract provisions, the contractor is generally liable for the performance of its nominated subcontractors. Therefore a nominated subcontract would commonly contain express provisions to follow in the event of direct instruction.

Ambiguity between the subcontract and main contract obligations could be avoided by an express term clarifying the contractual procedure in such cases. Nonetheless, the employer and CA should always follow the contractual protocol of issuing instruction through the contractor otherwise the employer may be bound by its instruction to the nominated subcontractor, particularly under common law.

#### **4.12 Employer's professional team duty of care**

The CA and employer's professional team may recommend use of provisional sums and also possess authority to fix sums, conduct pre-nomination discussions, instruct nomination and re-nomination, if applicable.

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<sup>370</sup> *Abrahamson*, (n 18) Page 223

<sup>371</sup> *Wallis v Robinson* [1862] 130 R.R. 841.

<sup>372</sup> Federal Court decision in Petition No. 307 of 11 The contractor remained liable to pay the subcontractor and the employer was absolved of responsibility.

<sup>373</sup> *Yee Sang Metal Supplies Co. v Defag Construction Co and Or* [1969] HKCFI 12, HCA 2212.

<sup>374</sup> FIDIC Subcontract 2011 Sub-Clause 2.3.

<sup>375</sup> *Abrahamson*, (n 18) Page 221.

Acting outside this authority or disregarding obligations of duty of care could, however, have a binding effect on the employer<sup>376</sup>, although it is also important for CA's to understand the provisional sum and nomination process, including its advantages and pitfalls.<sup>377</sup>

The CA is not only a determinator, certifier and administrator and empowered to provide "fair determination"<sup>378</sup>, but also acts as an agent for the employer. Under FIDIC RB 99<sup>379</sup> the engineer acts for the employer compared to FIDIC 1987 where the engineer should act impartially.<sup>380</sup>

According to Uff, an agent with ostensible authority must act with reasonable skill and care and binds the principal even without the principal's authority, unless a breach of warranty of authority or misrepresentation occurs<sup>381</sup>, where the agent will be liable towards the third party.<sup>382</sup>

Uff highlights the importance of a third party, such as a prospective nominated subcontractor, being aware that they are dealing with an agent, otherwise, it is suggested that the CA or employer could be sued by a prospective nominated subcontractor upon becoming aware of the agency. The CA may advise the potential nominated subcontractor that there is implied warranty of authority.

According to Keating<sup>383</sup>, the CA is not acting as the employer's agent when it negotiates nominated subcontract terms without the employer<sup>384</sup> because the employer is not party to the subcontract. Notwithstanding this, Uff asserts that when an agent arranges a contract on behalf of the principal with a third party, the contract binds the employer.<sup>385</sup>

The engineer owes a duty of care towards the employer, as in Sutcliffe<sup>386</sup>, to protect the employer's interest when certifying payment but should also be impartial, as held in Davy

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<sup>376</sup> Refer to Chapter 4.1 and 4.3.

<sup>377</sup> Abrahamson, (n 18) Page 234.

<sup>378</sup> FIDIC RB 99 Sub-Clause 3.5.

<sup>379</sup> FIDIC RB 99 Sub-Clause 3.1 (a) states that "the Engineer shall be deemed to act for the Employer."

<sup>380</sup> FIDIC RB 87 Sub-Clause 2.6.

<sup>381</sup> Eltom (n 156). Page 69. The misrepresentation may be innocent or fraudulent.

<sup>382</sup> Uff (n 12). Page 231 states that if the third knows, the third party and principal may sue each other, whereas if no agency is declared the third party or undisclosed principal can sue under the contract.

<sup>383</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-034.

<sup>384</sup> *Leslie & Co. Ltd v Managers of Metropolitan Asylum District* [1901] 68 JP 86, CA.

<sup>385</sup> Uff (n 12). Page 198

<sup>386</sup> *Sutcliffe v Chippendale & Edminson* [1971] 18 BLR 149.

Offshore.<sup>387</sup> This does not however extend to following the rules of natural justice<sup>388</sup> as in Amec.<sup>389</sup>

The CA should not act beyond its authority such as amending the contract which may only be executed between the contracting parties<sup>390</sup> as in Stockport.<sup>391</sup>

A CA's duty of care may extend to the employer's reliance upon the CA to ensure that any nomination meets the employer's quality and time objectives and also to avoid objection by the contractor.<sup>392</sup> Under common law, Hedley Byrne<sup>393</sup> established that a person possessing special skill assumes responsibility where reliance is placed upon such advice including foreseeable third parties, based upon the test in Bolam.<sup>394</sup> This includes damages for economic loss such as loss of profit or income.

Under UAE law, the CA also owes a duty of care to the employer and is liable to make good the harm for any unlawful act of omission<sup>395</sup> including compensation, loss of profit and economic loss.<sup>396</sup>

The employer may seek recovery of damages from any one of the professional team however net contribution clauses limit individual liability in a group action thus reflecting the relevant party's liability<sup>397</sup> as in Vesta<sup>398</sup>. UAE law<sup>399</sup> provides that other liable parties in a legal suit will be discharged if one pays the liability in full.

The employer may also obtain professional indemnity insurance against failure in performance, acts, and omissions of his professional team.

The employer may be liable for acts of the CA or its professional team, particularly during pre-nomination negotiations and giving instructions to the nominated subcontractor whilst

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<sup>387</sup> *Davy Offshore Ltd v Emerald Field Contracting Ltd* [1992] 55 BLR 22.

<sup>388</sup> Natural justice is the right to a fair hearing with no bias.

<sup>389</sup> *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291.

<sup>390</sup> Under most standard forms of contract the CA (Engineer) has no authority to amend the contract such as FIDIC RB 99 Sub-Clause 3.1.

<sup>391</sup> *Stockport Metropolitan Borough Council v O'Reilly* [1978] 1 Lloyd's Rep 595.

<sup>392</sup> Abrahamson, (n 18) Page 232.

<sup>393</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

<sup>394</sup> *Bolam v Friern Hospital* [1957] 1 WLR. 582. The test is that of an ordinary skilled professional.

<sup>395</sup> UAE CTC Article 282.

<sup>396</sup> Abu Dhabi Court of Cassation 721/Judicial Year 3.

<sup>397</sup> Law Reform (Contributory Negligence) Act 1945.

<sup>398</sup> *Vesta v Butcher* [1989] AC 852.

<sup>399</sup> UAE CTC Article 451.

acting as the employer's agent. It is important that unambiguous limits of authority are established with the CA and that professional indemnity insurance is obtained by the employer to provide some remedy against professional negligence or acting beyond its authority.

#### **4.13 Misrepresentation by Employer, CA or Nominated Subcontractor**

Nomination effectively imposes the employer's chosen subcontractor on the contractor subject to latter's right to object. As a result of this imposition, is the CA or employer under any obligation or duty to verify the proposed subcontractor's competence, financial stability, resource strength or even to establish that the offer represents a commercially viable price for executing such works?

Furthermore, does this obligation or duty extend to the nominated subcontractor, CA or employer to disclose information to facilitate the contractor in its due diligence or does this responsibility rest fully with the contractor? The following discusses these questions.

Standard forms of contracts do not tend to contain express terms placing obligations on the employer or CA to provide such information, except in the case of physical conditions discussed in Chapter 4.13.2.

UAE law requires parties to act in good faith<sup>400</sup>, which could include reasonable disclosure of facts which may materially affect performance.

Parties are free to contract under UAE law<sup>401</sup> and common law<sup>402</sup> and courts tend not to alter these freely negotiated rights, whether beneficial or otherwise. These must not contravene mandatory provisions of law held in Dubai Court of Cassation Case 205/2005<sup>403</sup> and parties must have "truly and genuinely" consented to enter into a binding agreement with no evidence of misrepresentation.<sup>404</sup> Statutory legislation also prevents misrepresentation under common law.<sup>405</sup>

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<sup>400</sup> UAE CTC Article 246 (1).

<sup>401</sup> UAE CTC Article 257.

<sup>402</sup> *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 1632 (TCC).

<sup>403</sup> Dubai Court of Cassation Case 205/2005.

<sup>404</sup> UAE CTC Article 185 to 192.

<sup>405</sup> Misrepresentation Act 1967.

Misrepresentation may be fraudulent, negligent or innocent and the legal treatment under UAE and common law is discussed below in respect of information disclosure under the nomination process.

#### **4.13.1 Fraudulent Misrepresentation**

Fraudulent misrepresentation occurs when a party knowingly deceives the other party and the innocent party relies upon a factual representation made prior to or upon execution of the contract.<sup>406</sup>

Under UAE law<sup>407</sup>, gross misrepresentation<sup>408</sup> is deceit by “trickery of word or deed” of a significant term upon which consent is based.<sup>409</sup> However, gross cheating<sup>410</sup> provides insufficient grounds to cancel a contract unless accompanied by misrepresentation<sup>411</sup> as held in Dubai Court of Cassation Case 3/2009.<sup>412</sup> Deliberate silence may also result in a misrepresented statement<sup>413</sup> and can be remedied by cancelling the contract.<sup>414</sup>

Importantly, if the misrepresented victim continues to discharge the contract, this action implies consent thus nullifying any claim for misrepresentation<sup>415</sup>, although the period for which the victim must conform is unclear under UAE law.

Under English law, fraudulent misrepresentation was ruled in *Smith*<sup>416</sup> however, unlike UAE law, punitive damages are prohibited<sup>417</sup> although damages for fraudulent and innocent misrepresentation are similar.<sup>418</sup> In contrast, US law permits punitive damages, as ruled in *Krysa*.<sup>419</sup>

A nominated subcontractor may fraudulently misrepresent previous performance, financial standing or resource levels. Equally, silence could deliberately conceal material facts upon

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<sup>406</sup> Uff (n 12). Page 195.

<sup>407</sup> UAE CTC Article 185.

<sup>408</sup> UAE CTC Article 185 to 192. Gross misrepresentation is called *ghubn* under UAE law.

<sup>409</sup> Dubai Court of Cassation 156/2004.

<sup>410</sup> Dubai Court of Cassation 201/2004.

<sup>411</sup> UAE CTC Article 187.

<sup>412</sup> Dubai Court of Cassation 3/2009.

<sup>413</sup> UAE CTC Article 186.

<sup>414</sup> UAE CTC Article 187.

<sup>415</sup> UAE CTC Article 192.

<sup>416</sup> *Smith v Land and House Property Corp* (1884) LR 28 Ch D 7.

<sup>417</sup> Peel, (n 121). Page 1000, Paragraph 20-020.

<sup>418</sup> Uff (n 12). Page 441.-

<sup>419</sup> *Krysa v Payne* [2005] 176 S.W. 3d 150 Mo App. W.D.

which the contractor may rely at time of entering into subcontract. A severability clause could permit a contract to continue to be effective and binding, even though part of a contract is void or unenforceable, however this would not apply where fraudulent misrepresentation exists.

Under both UAE and common law, the nominated subcontractor, CA or employer could be sued by the contractor for fraudulent misrepresentation and should therefore take appropriate steps to ensure that misrepresentations are not fraudulent.

#### **4.13.2 Innocent or Negligent Misrepresentation**

An employer, CA or nominated subcontractor may genuinely or innocently believe a certain fact to be true which, following nomination, is found to be misrepresented.

UAE law does not recognise innocent misrepresentation, however English law<sup>420</sup> contains statutory grounds for recovery of damages, even though the defendant may genuinely believe the representation to be true.<sup>421</sup>

As discussed in Chapter 4.12, Adriaanse<sup>422</sup> warns professionals against negligent statements giving rise to tortious claims under Hedley Byrne<sup>423</sup>, including recovery of economic loss.<sup>424</sup> The same applies under UAE law.<sup>425</sup>

Where the contractor has no right to object to a nomination, Rawling<sup>426</sup> states that a warranty at law is created which effectively provides the employer's endorsement for the subcontractor's competence to execute the works. It is argued that this warranty may relieve the contractor in the event of any misrepresentation made by the subcontractor.

In Pearson<sup>427</sup>, the employer was held liable for concealing site conditions and innocently misrepresenting information in Morrison-Knudsen.<sup>428</sup> However, Murdoch<sup>429</sup> maintains that

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<sup>420</sup> Misrepresentation Act 1967.

<sup>421</sup> *Howard Marine Dredging v Ogden* [1978] QB 574.

<sup>422</sup> Adriaanse, (n 19).Page 278.

<sup>423</sup> *Hedley Byrne v Heller* [1964] AC 465.

<sup>424</sup> *Esso Petroleum v Mardon* [1976] QB 801.

<sup>425</sup> Abu Dhabi Court of Cassation 721/Judicial Year 3.

<sup>426</sup> Rawling, *Nominated or Named?* (n 99).

<sup>427</sup> *S. Pearson & Son v Dublin Corporation* [1907] AC 351.

<sup>428</sup> *Morrison Knudsen International Co. IN. v Commonwealth of Australia* [1972] 13 BLR 114.

<sup>429</sup> Murdoch and Hughes (n 8)

the contractor remains responsible for sufficiency of its price for existing physical conditions<sup>430</sup> unless unforeseeable.<sup>431</sup>

A product's performance was exaggerated and misrepresented in GLC<sup>432</sup> which was subsequently relied upon by the employer. In IBA<sup>433</sup> the employer sued the contractor and nominated subcontractor for negligent design statements regarding a mast which subsequently collapsed. Under UAE decennial liability, strict liability for the designer, contractor and supervisor exists for structural failures or matters affecting safety, discussed further in Chapter 4.14.3.

Under UAE law<sup>434</sup> a party cannot exercise a right if it disproportionately harms the other party or intentionally infringes upon another's rights, is contrary to local laws, customs<sup>435</sup> or morals or causes intentional damage by malice or bad faith.

Whilst UAE law does not recognise innocent misrepresentation, the contractor may bring a claim in tort or for failure of good faith against negligent representations. It is however unclear whether an action can be brought in tort whilst a contract exists under UAE law.<sup>436</sup> Under English law a claim may be brought by the contractor for innocent misrepresentation caused by the nominated subcontractor, employer or CA.

It is argued that whilst little literature or case law exists regarding misrepresentation of nomination particulars or process, there may be situations which arise where the contractor could bring a claim for misrepresentation under both UAE and common law.

#### **4.14 Design Liability Under Provisional Sums and Nomination**

Provisional sums may contain design obligations which give the employer the opportunity to engage design specialists and broaden the design expertise beyond that of the employer's design team with an entity which can also construct the particular works.

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<sup>430</sup> FIDIC RB 99 Sub-Clause 4.11.

<sup>431</sup> FIDIC RB 99 Sub-Clause 4.12. Unforeseeable is defined as that not foreseen by an experienced contractor, however "experienced" is open to interpretation.

<sup>432</sup> *Greater London Council v Ryarsh Brick Co.* [1985] 4 Con LR 85.

<sup>433</sup> *Independent Broadcasting Authority v EMI Electronics and BICC Construction Ltd* [1980] 14 BLR 1. Uff (n 12). Page 307.

<sup>434</sup> UAE CTC Article 106.

<sup>435</sup> Customs can be private, local, national or international.

<sup>436</sup> Refer to Chapter 5.3.



The interfaces and design obligations between specialists and designs carried out by the employer's design team, the contractor, or other design specialists, should be clearly defined, otherwise issues may arise as discussed below.

#### 4.14.1 Expressly Defined Design Obligations Under Provisional Sums

FIDIC<sup>437</sup> and ICE<sup>438</sup> standard forms of contract require provisional sums with design obligations to be expressly stated within the contract documents. Keating<sup>439</sup> concurs that it is unlikely for a contractor's design liability to be implied within a nominated subcontract and must be expressly stated, which is also confirmed by the decision in *A.R.T. Consultancy*.<sup>440</sup>

Importantly, failure to expressly define design obligations could be grounds for the contractor's reasonable objection, although Abrahamson states that once the nominated subcontract is signed, this action waives any rights to objection.<sup>441</sup>

Lexology<sup>442</sup> contends that a contractor is not liable for a nominated subcontractor's design, which is supported by Murdoch who states that there is no implied liability for these design errors,<sup>443</sup> however the contractor may be liable for material defects. Nonetheless, Teo<sup>444</sup> suggests that the employer is liable for design defects where nominated subcontractor's designs are integrated into the former's design.

A specialist may be engaged even prior to the contractor and the employer may subsequently decide to novate or assign this specialist to the contractor. In *Try Build*<sup>445</sup>, even though specialist roof design obligations were novated, the employer's design engineer was held liable in negligence for defective design. Surprisingly, in *Holland Hannen*<sup>446</sup>, the architect was liable for failing to vary the works to overcome a nominated subcontractor's defective window design.

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<sup>437</sup> FIDIC RB 87 Sub-Clause 59.3.

<sup>438</sup> ICE 7<sup>th</sup> edn.

<sup>439</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-047.

<sup>440</sup> *A.R.T. Consultancy Ltd v Navera Training Ltd* [2007] EWHC 1375. This case held that an express term should state that a design obligation exists under a provisional sum.

<sup>441</sup> Abrahamson, (n 18) Page 226.

<sup>442</sup> Lexology, *Nominated Subcontractors* (n 361).

<sup>443</sup> Murdoch and Hughes (n 8) Page 291 and Page 182 which refers to the Irish case of *Norta Wallpapers (Ireland) v Sisk & Sons (Dublin) Ltd* [1978] IR 114.

<sup>444</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115).

<sup>445</sup> Professor Sarah Lupton, *Design Liability: Delegation and Reliance*, [2012] I.C.L.R. 330 International Construction Law Review. Page 8 *Try Build* where a specialist subcontractor designed the roof and the employer's designer was held negligent for failing to specify the roof edge which became defective.

<sup>446</sup> *Holland Hannen & Cubitts v WHTSO* [1981] 18 BLR 80.

Decennial liability under UAE law imposes strict liability on contractor, designer and construction supervisor, however liability of nominated subcontractors is not specifically mentioned as discussed in Chapter 4.14.4.

The employer could decide to employ the specialist directly, however this may not relieve the employer from the potential issues outlined in Chapter 3.3.1 and 4.8.6. Alternatively, the employer may decide to obtain a collateral warranty from the nominated subcontractor against defective design.<sup>447</sup>

#### **4.14.2 Employer's Designer's Reliance Upon Nominated Subcontractor's Design**

The employer's design team may integrate a nominated subcontractor's design into the overall design for the works as a section or a system, thus placing reliance upon the nominated subcontractor's design.

This reliance has created considerable case law under English common law, although under UAE law, as discussed in Section 3, the contractor generally remains liable for performance of any of its subcontractors<sup>448</sup>, which is also contractually supported by the widely used contracts such as FIDIC.<sup>449</sup>

Despite receiving design approval from the employer's design team, the employer successfully claimed directly against the nominated subcontractor for defective roof design in *Norta Wallpaper*<sup>450</sup> based upon the reliance placed upon the nominated subcontractor's design.

Under UAE law, the designer has a duty of reasonable skill and care towards the employer, which is discussed in Chapter 4.12. In addition, the strict and mandatory provisions of decennial liability apply to the employer's designer<sup>451</sup>, in the event of partial or total structural collapse caused by defective design. In Union Supreme Court decision<sup>452</sup>, the

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<sup>447</sup> Refer to Chapter 5.1.

<sup>448</sup> UAE CTC Article 490 (2).

<sup>449</sup> FIDIC RB 99 Sub-Clause 4.4 and FIDIC RB 87 Sub-Clause 4.1.

<sup>450</sup> *Adriaanse*, (n 19).Page 249 refers to *Norta Wallpapers (Ireland) v John Sisk & Sons (Dublin)* [1977] 14 BLR 49.

<sup>451</sup> UAE CTC Article 881.

<sup>452</sup> Union Supreme Court 336 and 407/Judicial Year 21, 20<sup>th</sup> March 2001.

designer and the contractor had an obligation to achieve a result and were held strictly liable under decennial liability with no proof of fault required.<sup>453</sup>

Professor Aymen<sup>454</sup> points out that this strict joint and several liability of the contractor and design/supervising engineer/CA cannot be passed down to subcontractors or sub-consultant designers under UAE law. It is therefore upto the employer to consider alternative methods to obtain recourse against a defaulting nominated subcontractor as discussed in Chapter 5.

The legal and contractual position also needs to be considered from the perspective of the liability of an employer's designer when relying upon a nominated subcontractor's design.

In the common law case of *Moresk*<sup>455</sup>, it was held that the employer's prior approval was required before the design could be delegated by the CA to the nominated subcontractor, otherwise the designer should have declined the design works, recommended employment of a specialist designer or employed a specialist under the designer's responsibility.<sup>456</sup>

By contrast, in *Merton*<sup>457</sup> the employer's designer was not liable for relying upon the nominated subcontractor's design, however Lupton states that a designer will be liable where reliance is made on unsuitable sources or statements of others, as in *John Allen*<sup>458</sup>, in which the architect delegated and relied upon the subcontractor's design.

Where no delegation of design has occurred, the employer has no recourse to the designer, particularly where expressly stated that the contractor or specialist subcontractors shall design certain elements. Notwithstanding the above, the Judge in *Investors*<sup>459</sup> made it clear that a designer should not rely solely and "blindly ... with no mind of his own" on the specialist designer.

The nominated subcontractor owes a duty of care for reliance upon its design under common law, however the employer's designer should always obtain the employer's approval before

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<sup>453</sup> Refer to Chapter 4.14.4.

<sup>454</sup> Buid Class notes "Defects Liability" accessed 9<sup>th</sup> May 2015 slide 28.

<sup>455</sup> *Moresk Cleaners v Hicks* [1966] 2 Lloyds Rep 338 the judge held "the Architect has no power whatever to delegate his duty to anybody else, certainly not to a contractor who would in fact have an interest which was entirely opposite to the of the building owner..."

<sup>456</sup> Lupton, *Design Liability: Delegation and Reliance* (n 445)

<sup>457</sup> *Merton LBC v Lowe* [1982] 18 BLR 130.

<sup>458</sup> Lupton, *Design Liability: Delegation and Reliance* (n 445) In *Co-Operative Group Ltd v John Allen Associates Ltd* [2010] EWHC 2300 (TCC), the designer relied upon the subcontractor's design beyond the expertise of the designer.

<sup>459</sup> Lupton, *Design Liability: Delegation and Reliance* (n 445). Page 4.

delegating design to others. Under both UAE law and common law, it may be mandatory for certain main contract terms to apply based upon back to back provisions contained within the nominated subcontract. It is important that these are expressly and unambiguously stated, as discussed in Section 4.20.

Unless an employer has a collateral warranty or provision to assign or novate the contract, the employer should pursue any defective design through the contractor, particularly in the case of defective design under UAE decennial liability, however in certain cases direct recourse may be available under common law. The employer may alternatively decide to bring a direct action in tort under both jurisdictions.<sup>460</sup>

#### **4.14.3 Duty of Care or Purpose?**

Whether the design liability is one of duty of purpose or reasonable skill and care has important legal implications.

Under English common law, the contractor has an implied obligation to execute the works in a workmanlike manner with materials of good<sup>461</sup> quality and fit for their intended purpose. However, where the contractor cannot object to nomination, non-negotiable terms or limitation or exclusion clauses exist, no implied warranty of fitness for purpose applies.<sup>462</sup> If the nominated subcontractor is aware that works are for a particular purpose, fitness for purpose is implied.

According to Adriaanse, unless the contract expressly states the contractor's liability is limited to reasonable skill and care, as in *Freyssinet*<sup>463</sup>, the contractor may have accepted a higher liability of fitness for purpose. The Latham Report<sup>464</sup> states that the designer owes a duty of reasonable skill and care, compared to the specialist contractor's fitness for purpose warranty obligation.

No implied fitness for purpose existed where the employer relied upon the specialist subcontractor's advice for selection of subsequently defective material in *University of*

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<sup>460</sup> Refer to Chapter 5.3

<sup>461</sup> *Murdoch and Hughes* (n 8) Page 291.

<sup>462</sup> *Gloucestershire County Council v Richardson* [1969] 1 AC 480.

<sup>463</sup> *PSC Freyssinet v Byrne Brothers (Formwork) Ltd* [1997] 15 CLD 09 24.

<sup>464</sup> Latham, *Constructing The Team* (n 41) Page 28 Item 4.18.

Warwick<sup>465</sup>, although in Greaves<sup>466</sup>, the engineer was liable for an implied duty of purpose, whereas in Turner<sup>467</sup> the duty was only one of reasonable skill.

The engineer was held to have provided no implied warranty for a bridge design which could not be constructed by the contractor in Thorn.<sup>468</sup> However, where detailed design instructions were provided to the builder in Lynch<sup>469</sup>, there was no implied warranty of quality from the builder.

Where a system is designed by a nominated subcontractor which forms part of the works, reliance may be placed on the design being fit for purpose. However in Trevor Bassett<sup>470</sup> a design obligation of reasonable skill and care was held when the fire protection system failed.

Hok<sup>471</sup> suggests that when a fitness for purpose obligation must be achieved this should be expressly stated to avoid such a term being implied as in the FIDIC subcontract.

Under FIDIC RB 87<sup>472</sup> and FIDIC RB 99<sup>473</sup> the works subject to design by the contractor must be expressly stated. The former requires “due care and diligence” whilst the latter, fit for its intended purpose. Lupton<sup>474</sup> recommends expressly defining the contractor’s liability for the specialist’s design, any limitation and whether professional indemnity or direct warranties are required.

#### **4.14.4 Decennial Liability**

Decennial liability under UAE law<sup>475</sup> is a mandatory provision which imposes strict liability<sup>476</sup> on the contractor<sup>477</sup>, designer and supervisor of the works to compensate the employer for any defects which “threaten the safety or stability” or any “total or partial

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<sup>465</sup> *University of Warwick v Sir Robert McAlpine* [1988] 42 BLR.

<sup>466</sup> *Greaves Contractors v Baynham Meikle* [1975] 1 WLR 1095.

<sup>467</sup> *Turner v Garland & Christopher* (1853) referred to by Hudson’s Building Contracts, 4<sup>th</sup> edn, Volume 2, Page 1 on page 293 of Uff (n 12).

<sup>468</sup> *Thorn v London Corporation* [1876] 1 App. Cas. 120.

<sup>469</sup> *Lynch v Thorne* [1956] 1 WLR 303.

<sup>470</sup> *Trevor Bassett Holdings Ltd v ADT Fire and Security* [2012] EWCA Civ 1158.

<sup>471</sup> Hok, Fahey, *Observations on the FIDIC Subcontract 2011* (n 34) Page 8.

<sup>472</sup> FIDIC RB 87 Sub-Clause 7.2 and 8.1. Sub-Clause 8.2 allows the contractor to design.

<sup>473</sup> FIDIC RB 99 RB Sub-Clause 4.1 (c).

<sup>474</sup> Professor Sarah Lupton, *Design Liability*, Lecture Notes, British University in Dubai, 16<sup>th</sup> May 2015.

<sup>475</sup> UAE CTC Article 880 to 883.

<sup>476</sup> Strict liability means that no negligence needs to be proved.

<sup>477</sup> Union Supreme Court, 336 and 407/Judicial year 21, 20<sup>th</sup> March 2001. The strict liability does not require proof of negligence because there is a duty to achieve a result – duty of purpose.

collapse” of a structure. There is no exemption from or limitation of this 10 year liability from handing over the project.

The employer may bring an action against the contractor, designer, or both. However Professor Masadeh highlights that there is no provision covering defective design or construction by the subcontractor and recommends introducing a back to back decennial liability under the subcontract.<sup>478</sup>

Where design obligations are not included in a provisional sum and nomination includes such obligations, the employer may indemnify the contractor against decennial liability; however the contractor will still not be relieved from strict liability.

Actual loss<sup>479</sup> including lost profit and future earnings may be claimed with the exception of claims arising from poor maintenance<sup>480</sup> and providing claims are made within 3 years from the date of collapse or discovery of the defect.<sup>481</sup>

A third party such as a subsequent owner cannot sue a contractor or engineer under decennial liability as no privity of contract exists, however the Strata law<sup>482</sup> allows such action against the developer or employer.

Under English law, an action in contract must be brought within 6 years of the date on which the action accrued<sup>483</sup>, unless it is postponed due to deliberate concealment as in *King*.<sup>484</sup>

Under the Latent Damage Act 1986<sup>485</sup> a claim must be brought within 3 years from discovering the defect, subject to a longstop of 15 years for all claims. Similarly under UAE law, a claim must be made within 3 years of becoming aware of the harm with a longstop period for all claims of 15 years.<sup>486</sup>

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<sup>478</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89).

<sup>479</sup> Union Supreme Court, 125/Judicial Year 1, 2007.

<sup>480</sup> UAE CTC Article 878.

<sup>481</sup> UAE CTC Article 883.

<sup>482</sup> Law No. 27 of 2007 On Ownership of Jointly Owned Properties in the Emirate of Dubai – The Strata Law allows a subsequent owner to sue the developer or employer ten years from the date of completion.

<sup>483</sup> Limitation Act 1980 This extends to 12 years for a contract by deed.

<sup>484</sup> *King v Victor Parsons* [1973] 1 WLR 29. Where deliberate concealment of a defect has occurred, the limitation period is postponed until discovery or it could have been discovered

<sup>485</sup> Latent Damage Act 1986.

<sup>486</sup> UAE CTC Article 298 (1) and (2).

#### 4.14.5 Liability for Nominated Subcontractor's Materials

Although supplier agreements are outside the scope of this dissertation, it is important to consider liability for materials under a nominated subcontract with a design obligation.

Under UAE law, following completion, the contractor remains liable for the quality of materials for 6 months, which differs from the defects liability period of 1 year under most standard forms of contract. The contractor remains liable for providing materials which satisfy the specification or current practice.<sup>487</sup> This follows the general principle under UAE law that the contractor remains liable for acts or omissions of its subcontractors.

According to Keating<sup>488</sup> and Uff<sup>489</sup>, English law implies that goods or materials provided by a nominated subcontractor must be good quality and fixed using reasonable skill and care. Unless agreed otherwise, where the nominated subcontractor places no reliance on the contractor's "skill and judgement"<sup>490</sup> for material selection, fitness for purpose would not generally exist, although partial reliance may arise as in *Cammell Laird*.<sup>491</sup> This liability would not apply where no indemnity is provided by the nominated subcontractor, no rights exist for the contractor to object, or supplier terms exclude or limit liability.<sup>492</sup>

Under English law, Lupton refers to the obligations which exist for materials under statutory provisions of sale of goods<sup>493</sup>, good and services<sup>494</sup> and defective premises.<sup>495</sup> The nominated subcontractor would be liable when it is expressly or impliedly informed regarding the material use and reliance is placed upon the skill and judgement of selection. However in *Young & Marten*<sup>496</sup>, it was held that the contractor was liable for the implied warranty of quality but not for the warranty of fitness for purpose for defective tiles.<sup>497</sup>

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<sup>487</sup> UAE CTC Article 875.

<sup>488</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-043

<sup>489</sup> Uff (n 12). Page 187

<sup>490</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 12-046.

<sup>491</sup> *Cammell Laird v Manganese Bronze* [1934] AC 402 HL.

<sup>492</sup> *Gloucestershire County Council v Richardson* [1969] 1 AC 480.

<sup>493</sup> Sale of Goods Act 1979

<sup>494</sup> Supply of Goods and Services Act 1982

<sup>495</sup> Defective Premises Act 1972

<sup>496</sup> *Young & Marten v McManus Childs* [1969] 1 A.C. 454.

<sup>497</sup> Uff (n 12) Page 321.

Whether the breached term is a condition or warranty affects the remedy. The buyer has right to damages and can void the contract in the former and can claim damages but still has to pay the price in the latter.<sup>498</sup>

#### **4.15 Payment to Nominated Subcontractors**

Under UAE law, payment is made upon delivery of the works unless custom dictates or it is agreed otherwise.<sup>499</sup> Payment upon completion also applies under English common law.<sup>500</sup>

Standard forms of contract generally provide for monthly certification and payment, including payments for nominated subcontractors, which are certified and paid to the contractor under the main contract. Importantly, the employer may make discretionary direct payment to nominated subcontractors in certain circumstances, as discussed below, however privity of contract generally prevents direct payment.

##### **4.15.1 Employer's Right to Pay Nominated Subcontractors**

If the contractor fails to pay an amount which is certified and paid for a nominated subcontractor under the main contract, the employer has discretion to pay the nominated subcontractor directly and deduct the payment from current or future payments due to the contractor.

Prior to this, the contractor should provide “reasonable evidence”<sup>501</sup> that this payment has been made, failing which the next interim payment certificate may be withheld until the contractor complies. It is generally in the employer's interest to pay in a timely manner to support the contractor's cashflow to facilitate the progress the works including payment of overheads, suppliers and subcontractors.

Under common law, the employer's right to direct payment only arises once the CA's certification is issued and “any reasonable cause” for withholding payment has been pre-notified under the HGCR<sup>502</sup> and as in *Reinwood*.<sup>503</sup>

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<sup>498</sup> *ibid* Page 187.

<sup>499</sup> UAE CTC article 885.

<sup>500</sup> *Sumpter v Hedges* [1898] 1 QB 673.

<sup>501</sup> FIDIC RB 99 Sub-Clause 5.4 Evidence of Payments , FIDIC RB 87 Sub-Clause 59.5 Certification of Payments to Nominated Subcontractors . ICE 7<sup>th</sup> edn Sub-Clause 59 (7) Payment to nominated subcontractors.

<sup>502</sup> *Furst, Ramsey, Williamson, Uff* (n 16) Paragraph 20-273

<sup>503</sup> *Reinwood v Brown* [2008] UKHL 12.



#### **4.15.2 Employer's Liability for Paying Nominated Subcontractor Directly**

Does the employer's direct discretionary contractual payment to nominated subcontractors create any binding obligation upon the employer?

According to Lin<sup>504</sup>, who refers to the common law ruling in *Shanghai Tongji*<sup>505</sup>, no contract is implied from the employer exercising its right to make direct payments to the nominated subcontractor because the conduct is complying with an existing contractual obligation. If however direct payments are made without a direct payment provision, regular payments may create a contract.

In contrast, the employer's verbal promise to make direct future payment to the nominated subcontractor in *Actionstrength*<sup>506</sup> was not binding; however a direct "enforceable right" for the employer to pay directly was created in *Golden Sand*.<sup>507</sup>

According to McInnis<sup>508</sup>, an employer may instruct and deal exclusively with a nominated subcontractor which may create a direct or collateral contract. Generally a separate tripartite agreement is required between employer, contractor and nominated subcontractor to allow direct payment, however unless stated otherwise, the employer's right to pay directly is strictly at the employer's discretion under most standard forms of contract containing nomination provisions.

This concurs with UAE law where the subcontractor has no right to direct payment from the employer unless expressly agreed otherwise or rights are assigned to the benefit of the subcontractor.<sup>509</sup>

#### **4.15.3 Employer's Remedies - Withholding Payment**

The CA should not withhold a payment certificate, unless proof of payment to nominated subcontractors has not been provided<sup>510</sup> or certain works fail to conform with the contract.

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<sup>504</sup> Linn, 'A Leapfrog Attempted' (n 3) Page 17.

<sup>505</sup> *Shanghai Tongji Science & Technology Industrial Co. Ltd v Casil Clearing Ltd* [2004] 7 HKCFAR 79.

<sup>506</sup> *Actionstrength Limited v International Glass Engineering IN.GL.EN Spa and Others* [2003] UKHL 17.

<sup>507</sup> *Golden Sand Marble Factory Ltd v Easy Success Enterprises Ltd* [1999] 2 HKC 356.

<sup>508</sup> Linn, 'A Leapfrog Attempted' (n 3) Page 18.

<sup>509</sup> UAE CTC Article 891.

<sup>510</sup> See Chapter 4.15.1.

The employer may withhold performance of payment under UAE law<sup>511</sup> where works fail to conform with contract obligations. Under English law a mandatory notice must be issued where payment is to be withheld.<sup>512</sup>

#### 4.15.4 Back to Back Payment Provisions

Generally nominated subcontractors are paid once the contractor receives payment from the employer under back to back<sup>513</sup> payment provisions.

Dubai Court of Cassation<sup>514</sup> held that back to back payment is conditional upon the occurrence of a future event<sup>515</sup> and is therefore acceptable. English law<sup>516</sup> forbids such clauses which are considered unreasonable<sup>517</sup>, although the decision in *Durabella*<sup>518</sup> opposed this.

In respect of nominated subcontractors, back to back payment may create ambiguity in its meaning. In one respect, once payment has been received by the contractor from the employer, back to back means that payment should then be made to the nominated subcontractor. Does this also mean that the amount certified under the main contract should be paid to the nominated subcontractor? In *Scobie*<sup>519</sup>, the contractor was ruled to be at liberty to pay the nominated subcontractor for actual work executed, which differed from that certified by the CA under the main contract. There is no definition contained within standard forms of contract regarding back to back, however FIDIC<sup>520</sup> prescribes that the nominated subcontractor should receive all amounts certified under previous payment certificates issued under the main contract.

*Keating*<sup>521</sup> suggests the CA should set off amounts for a nominated subcontractor's breach before certifying payment. The contractor may also have justifiable rights to set off against a nominated subcontractor's payment for works undertaken under this and perhaps another

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<sup>511</sup> Article 267 CTC and Article 414 CTC.

<sup>512</sup> Housing Grants, Construction and Regeneration Act 1996 (HGCRA)

<sup>513</sup> Refer to Chapter 4.20.

<sup>514</sup> Dubai Court of Cassation 240/2006.

<sup>515</sup> UAE CTC Article 243.

<sup>516</sup> HGCRA - Chapter 113 (1) Back to back payment is not allowed except where the employer becomes insolvent.

<sup>517</sup> Unfair Contract Terms Act 1977.

<sup>518</sup> *Durabella Ltd v J. Jarvis & Sons Ltd* [2001] 83 Con LR 145.

<sup>519</sup> *Scobie & McIntosh Ltd v Clayton Bowmore Ltd* [1990] 49 BLR 119.

<sup>520</sup> FIDIC RB 99 Sub-Clause 5.4 and FIDIC RB 87 Sub-Clause 59.5.

<sup>521</sup> *Furst, Ramsey, Williamson, Uff* (n 16) Section 20-273.

contract outside the jurisdiction of the CA.<sup>522</sup> Difficulties may arise, in the Author's experience, where the contractor is paid and the subcontractor's payment is withheld in whole or part for contractual reasons outside the parties' contract. Unless a contractual provision restricts the contractor from exercising external rights which impact upon the subject main contract, then this creates a contractual dilemma which should be resolved between the parties.

According to Ibrahim<sup>523</sup>, under UAE law a nominated subcontractor's claim for payment before the contractor has received payment is generally dismissed. Nonetheless, the author has experience of a case in the UAE, where a Court Expert demanded proof that the contractor was taking positive action to recover outstanding payment from the employer, failing which the contractor was compelled to pay the nominated subcontractor prior to receiving payment from the employer.

Direct payment of nominated subcontractors is included in standard forms of contract to provide security of payment to the employer's selected subcontractors in the event of default by the contractor. However if the employer intervenes by paying the nominated subcontractor directly, it is argued that this removes a fundamental contractual instrument for effective administration of the nominated subcontract. Thereafter the nominated subcontractor may also insist that the employer continues to pay the nominated subcontractor directly.

Both UAE and common law permit the employer to make direct payment when the contractor defaults in paying the nominated subcontractor, providing that a prior withholding notification is issued under English common law. UAE law prevents the nominated subcontractor seeking direct payment from the employer. The employer's action of direct payment implies no contract under both laws, providing such express provisions exist under the contract.

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<sup>522</sup> The author has encountered such a situation which has resulted in the employer paying the nominated subcontractor directly.

<sup>523</sup> Ahmed Ibrahim, *Subcontracting Under UAE Law*, 7<sup>th</sup> August 2015. <http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/subcontracting-under-uae-law> Accessed 2.10.2016.

## **4.16 Insolvency of Contractor – Effect on Employer’s Rights**

Contractually, an employer may terminate the contract immediately following a contractor’s insolvency, bankruptcy or liquidation<sup>524</sup> including removal of the contractor from site, completing the balance of works using other entities and ceasing any further payment until final costs are determined.<sup>525</sup> Subcontractors may also be assigned to the employer.<sup>526</sup>

Privity of contract generally preserves the contractual chain of liability according to McInnis<sup>527</sup>, however how are the employer’s rights affected if this contractual chain is broken by the contractor’s insolvency, particularly in relation to continuing to pay for the works directly to nominated subcontractors? Furthermore, can the nominated subcontractor seek direct rights of payment against the employer in these circumstances?

### **4.16.1 Employer’s Rights or Obligations to Pay Nominated Subcontractor Directly after Contractor’s Insolvency**

Under UAE Law<sup>528</sup>, a subcontractor cannot seek payment directly from the employer unless assignment has been concluded<sup>529</sup> according to the UAE Supreme Court.<sup>530</sup> Assignment of such rights provides one of the most reliable methods for subcontractors to secure payment from the employer according to Professor Masadeh, although Teo maintains it is rare for employers to consent to this<sup>531</sup> because of the direct rights provided to the subcontractor.

The civil law jurisdiction of Belgium similarly prevents such action however Dutch law does permit direct recourse to the employer for payment.<sup>532</sup>

In comparison with domestic subcontractors, nominated subcontractors acquire greater security of payment due to the discretionary right of the employer to make direct payment, however, as discussed below, this security is not always certain after the contractor’s insolvency.

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<sup>524</sup> FIDIC RB 99 Sub-Clause 15.2 (e), FIDIC 1987 4<sup>th</sup> edn Sub-Clause 63.1 and ICE 7<sup>th</sup> edn Clause 64.

<sup>525</sup> FIDIC RB 99 Sub-Clause 15.4.

<sup>526</sup> Refer to Chapter 5.2.

<sup>527</sup> Linn, ‘A Leapfrog Attempted’ (n 3) Page 3 and 4.

<sup>528</sup> UAE CTC Article 891.

<sup>529</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) Page 9 to 11.

<sup>530</sup> UAE Supreme Court Case 108/Judicial Year 22, 2002.

<sup>531</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115).

<sup>532</sup> Chao-Duivis, *Subcontracting in Europe* (n 44) Page 6 and 10.

The nominated subcontractor in *Yew Sang Hong*<sup>533</sup> failed in its action to claim unjust enrichment, an implied contract or Quistclose trust<sup>534</sup> following the contractor's bankruptcy because the contract expressly stated there was no obligation for the employer to pay nominated subcontractors directly.<sup>535</sup>

Lin<sup>536</sup> refers to the common law case of *Glow*<sup>537</sup> where a subcontractor claimed directly against the employer for payment following the contractor's insolvency. A mandatory direct payment clause existed under the main contract for the employer to pay the subcontractor in the event of the contractor's failure to do so. It was held that the payment clause permitted payment, although this contravened the principle of *pari passu*<sup>538</sup> which relates to the dispersal of the contractor's assets following insolvency; *pari passu* is discussed in Chapter 4.16.1.1.

The contractor went into liquidation in *Dawber Williams*<sup>539</sup> after receiving payment from the employer and prior to paying the subcontractor for delivered materials. The subcontractor successfully claimed against the employer in conversion<sup>540</sup> because the main contract terms were unincorporated into the subcontract. This contradicts with *Uff*, where works and materials become attached to the land and pass to the employer upon a contractor's insolvency or repudiation.<sup>541</sup> Murdoch maintains that retention titles represent a large risk to the employer, particularly as these clauses are excluded from some standard forms of contract.<sup>542</sup>

Alternatively, if the employer attempts to pay the nominated subcontractor directly this may bear the following consequences.

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<sup>533</sup> *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] HKCA 109; 3 HKLRD 307.

<sup>534</sup> Please refer to Chapter 4.16.1.2.

<sup>535</sup> GCC Clause 69(3) (d) excludes employer's obligation to pay the nominated subcontractor directly.

<sup>536</sup> Linn, 'A Leapfrog Attempted' (n 3) Page 2 and 3.

<sup>537</sup> *Glow Heating Ltd v Eastern Health Board* [1988] IR 110.

<sup>538</sup> Refer to Chapter 4.16.1.1. *pari passu* means on an equal footing.

<sup>539</sup> *Dawber Williams v Humberside CC* [1979] 14 BLR 70.

<sup>540</sup> Conversion is tort.

<sup>541</sup> *Uff* (n 12) on page 333 states that repudiation can be accepted by the plaintiff or continue to accept the contract. Repudiation is a serious breach of a fundamental term of the contract perhaps where refusal to rectify defective works or critical delay occurs such as in *Charles Rickards v Oppenheim* [1950] 1 KB 616. Page 210.

<sup>542</sup> Murdoch and Hughes (n 8) Page 281 JCT SB Sub-Contract 05.

Such action was held unlawful in *Plaza West*<sup>543</sup> and in *Hobbs*<sup>544</sup> and *Milestone*<sup>545</sup> however the employer's promise to pay subcontractors directly after the contractor's insolvency was not binding in *Victorian Railway*.<sup>546</sup>

The scope of this dissertation does not extend to examining and discussing in detail the insolvency laws of common law and UAE legal jurisdictions and how these treat direct payment by the employer to the nominated subcontractor or vice-versa. However common law jurisdictions such as England, Hong Kong and Singapore contain insolvency laws which generally dictate that such direct payments cannot be made when other creditors of an insolvent contractor have to wait for insolvency proceedings to take place.<sup>547</sup>

Despite recent announcements by UAE Federal Government regarding the proposed introduction of new bankruptcy laws<sup>548</sup>, current insolvency laws in the UAE<sup>549</sup> are described by Watts<sup>550</sup> as "ineffective" and infrequently used. This creates an element of uncertainty regarding the rights of nominated subcontractors and employers in the event of the contractor's insolvency.

Surprisingly, contracts such as FIDIC are silent regarding direct payment following insolvency, except for the provision allowing the employer to assign subcontracts from the contractor and to comply with the governing laws of the legal jurisdiction.<sup>551</sup> In contrast, the Singapore SIA<sup>552</sup> expressly prohibits employers paying nominated subcontractors directly because it would contravene insolvency laws which ensure equal treatment of unsecured creditors.

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<sup>543</sup> *Plaza West Pty Ltd v Simons Earthworks (NSW) Pty Ltd* [2008] NSWCA 279.

<sup>544</sup> *Hobbs v Turner* (1902) 18 TLR 235 CA.

<sup>545</sup> *Milestone v Yates* [1938] 2 All ER 439.

<sup>546</sup> *Victorian Railway Commissioners v James L Williams Pty Ltd* [1969] 44 ALJR 32.

<sup>547</sup> Linn, 'A Leapfrog Attempted' (n 3).

<sup>548</sup> Out-Law.com, *UAE Bankruptcy Law to Come Into Effect in Early 2017*, <http://www.out-law.com/en/articles/2016/september/uae-bankruptcy-law-to-come-into-effect-in-early-2017/> Accessed 9<sup>th</sup> September 2016.

<sup>549</sup> Latham & Wakins, *Restructuring and Insolvency in the United Arab Emirates*, March 2011. [https://www.lw.com/upload/pubContent/\\_pdf/pub2881\\_1.pdf](https://www.lw.com/upload/pubContent/_pdf/pub2881_1.pdf) Accessed 9<sup>th</sup> September 2016 refers to the UAE bankruptcy provisions under the Commercial Transactions Law (Federal Law No. 18 of 1993) applicable to traders and others such as professionals.

<sup>550</sup> Gary Watts, *Insolvency in the UAE – Business Failure Without Bankruptcy Rules*, October 2014, <http://www.tamimi.com/en/magazine/law-update/section-8/october-4/insolvency-in-the-uae-business-failure-without-bankruptcy-rules.html> Accessed 17<sup>th</sup> September 2016.

<sup>551</sup> FIDIC 99 RB Sub-Clause 1.13.

<sup>552</sup> Wai Fan Wong and Charles Y.J. Cheah, *Issues of Contractual Chain and Sub-Contracting in the Construction Industry* (20<sup>th</sup> Annual ARCOM Conference, 2004) SIA is the Singapore Institute of Architects. The 6<sup>th</sup> edn of SIA Building Contract removes direct payment right.

Notwithstanding the fact that nominated subcontractors may have discharged their obligations under the nominated subcontract, the employer may nonetheless, decide to withhold payment for works certified and included within an insolvent contractor's payment.<sup>553</sup> In such circumstances, if the employer pays the nominated subcontractor directly, the employer may still remain liable for payment to the contractor or its administrators<sup>554</sup> for breaching the main contract.<sup>555</sup>

The contractor's insolvency therefore prohibits direct payment according to Uff<sup>556</sup> and Keating<sup>557</sup> who highlight the employer's risk of double payment if direct payment is made. However in *Re Tout*<sup>558</sup> direct payment to continue performance was acceptable despite the contractor's insolvency.

The legal position appears to be uncertain and to depend upon the insolvency laws under the relevant legal jurisdictions. Whilst insolvency law is outside the scope of this dissertation, Linn suggests that specific legislation is required to address these circumstances.<sup>559</sup> An unambiguous payment clause is required clearly defining the parties' rights upon a contractor's insolvency. In addition, the right to assign nominated subcontracts to the employer should mitigate the adverse effects of the contractor's insolvency by improving the chances of nominated subcontract works continuing and securing future payment to the nominated subcontractor. This does not however address any outstanding payments which may be due to the nominated subcontractor and already paid by the employer to the contractor prior to its insolvency. The *pari passu* principle discussed in Chapter 4.16.1.1 considers whether the subcontractor retains rights to leapfrog other debtors to receive payment directly from the employer.

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<sup>553</sup> Linn, 'A Leapfrog Attempted' (n 3).

<sup>554</sup> Administrators in this respect means any organisation responsible for winding up the affairs of the insolvent contractor.

<sup>555</sup> Archer & Marks, *Subcontracting in United Arab Emirates*, [www.archermarks.com](http://www.archermarks.com) Accessed 14<sup>th</sup> January 2016.

<sup>556</sup> Uff (n 12) Page 336.

<sup>557</sup> Furst, Ramsey, Williamson, Uff (n 16) Paragraph 20-273.

<sup>558</sup> *Re Tout v Finch* [1954] 1 WLR 178.

<sup>559</sup> Linn, 'A Leapfrog Attempted' (n 3).

Collateral warranties<sup>560</sup> may also provide the employer with direct contractual remedy against subcontractors, which, according to Ramus<sup>561</sup>, would encourage the subcontractor to complete of the project after the contractor's insolvency.

#### **4.16.1.1 The Principle of *pari passu***

Under the common law *pari passu* principle, the court decides whether a nominated subcontractor can leapfrog other unsecured creditors for payment from the employer, from any remaining amounts after debts owed by an insolvent contractor have been set-off.<sup>562</sup>

In *Yew Sang Hong*<sup>563</sup> and *Joo Yee Construction*<sup>564</sup> insolvency laws prevented such action because the subcontractor had accepted the contractual risk of queuing for payment with other creditors. In *Golden Sand Marble*<sup>565</sup> payment was ruled to belong to the contractor until insolvency proceedings had been completed, however in *Eagle*<sup>566</sup> direct payment clauses contravened the *pari passu* principle.

The *pari passu* principle is recognised under UAE law which effectively places all creditors on an equal footing when distributing an insolvent company's assets. The law does allow payment to certain preferred creditors such as unpaid taxes to the Government however, according to Latham and Watkins<sup>567</sup>, it is not clear whether payment to secured creditors would always be ranked higher in priority to that of all unsecured creditors.

This creates uncertainty whether a nominated subcontractor could leapfrog the queue of other debtors in the event of the contractor's insolvency under UAE law. Nonetheless this creates an interesting area for further research, and whether the imminent introduction of new UAE bankruptcy laws will address this area, given the significant usage of nomination in the UAE.

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<sup>560</sup> See Section 5.1.

<sup>561</sup> Ramus, Birchall, Griffiths (n 29) Page 320.

<sup>562</sup> Murdoch and Hughes (n 8) Page 302.

<sup>563</sup> *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] HKCA 109; 3 HKLRD 307.

<sup>564</sup> *Joo Yee Construction Pte Ltd (in liquidation) v Diethelm Industries Pte Ltd and others* [1990] 2 MLJ 66; (1991) 7 Const LJ 53.

<sup>565</sup> *Golden Sand Marble Factory Ltd v Easy Success Enterprises Ltd* [1999] 2 HKC 356.

<sup>566</sup> *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758.

<sup>567</sup> Latham & Watkins, *Restructuring and Insolvency in the United Arab Emirates*, March 2011.

[https://www.lw.com/upload/pubContent/\\_pdf/pub2881\\_1.pdf](https://www.lw.com/upload/pubContent/_pdf/pub2881_1.pdf) Accessed 9<sup>th</sup> September 2016



The application of this principle appears to align with the UAE law, preventing direct subcontractor claims against the employer, unless benefits are assigned in favour of the subcontractor.<sup>568</sup>

#### **4.16.1.2 Quistclose Trust – Funds held in trust**

A Quistclose Trust<sup>569</sup> contains funds loaned for a specific project which are returned to the lender in the event of a borrower's insolvency as in the case of Quistclose Investments.<sup>570</sup> This is based upon the reasoning that, once the borrower becomes insolvent, the loaned purpose thereafter becomes impossible.

Despite this, the court would not allow a subcontractor's payment to be made from the trust in *Yew Sang Hong*<sup>571</sup> because the debt relationship existed between the employer and lending institution and did not include the subcontractor. No payment was permitted to the subcontractor in *Twinsectra*<sup>572</sup> either.

Entitlement of the nominated subcontractor to payment from a Quistclose Trust could therefore depend upon the contractual terms contained within the trust. Otherwise the trust remains an agreement between the lending institution and employer, although one could argue that the nominated subcontractor has completed works for which the funds have been loaned, just as the contractor completed works prior to its insolvency. Privity of contract did not prevent such payments being made to the contractor, so one might question why it should prevent payments to the nominated subcontractor?

The use of such trusts on building projects in the UAE is unclear, however lending institutions commonly ensure sufficient security is obtained from borrowers, against business or personal assets.

#### **4.16.2 Effect of Insolvency of Contractor or Nominated Subcontractor on Employer Under UAE Decennial Liability**

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<sup>568</sup> UAE CTC Article 891.

<sup>569</sup> Linn, 'A Leapfrog Attempted' (n 3).

<sup>570</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] UK HL 4, [1970] AC 567.

<sup>571</sup> *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] HKCA 109; 3 HKLRD 307.

<sup>572</sup> *Twinsectra Ltd v Yardley* [2002] UKHL 12.

As discussed in Chapter 4.14.4, strict liability exists under UAE decennial liability, however there is no specific provision stating what recourse exists for the employer in the event of insolvency of the contractor, designer<sup>573</sup> or nominated subcontractor.

There is no direct right of action for the employer against the nominated subcontractor under decennial liability unless rights are assigned, a collateral warranty is arranged between subcontractor and employer or action is brought in tort by the employer.<sup>574</sup>

Action for defective construction may therefore be limited if the contractor or nominated subcontractor have become insolvent and may have to be sought against one or more of the surviving entities such as a supervising CA.

In the event of defective design which causes total or partial collapse, the employer again could pursue surviving entities such as the designer. The effect of the nominated subcontractor's insolvency on decennial liability would appear to make no difference to the contractor's continuing liability for performance of its subcontractors.

Professional indemnity insurance could also provide the employer direct remedy against defective structural works by a nominated subcontractor with a design obligation.

#### **4.16.2.1 Project Accounts**

According to Tamimi, project accounts allow employers to make direct payments to subcontractors in the event of the contractor's insolvency.<sup>575</sup>

In the UK, project bank accounts hold payments in trust for the contractor and the supply chain, allowing payment of subcontractors following a contractor's insolvency.<sup>576</sup>

In Dubai, RERA<sup>577</sup> regulates project accounts which hold payments from investors and make payments to contractors. It is unclear whether a nominated subcontractor could be paid from the account if the contractor became insolvent.

### **4.17 Delay or Repudiation by a Nominated Subcontractor**

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<sup>573</sup> Law Teacher, *Construction Law in UAE distinct body* [www.lawteacher.net](http://www.lawteacher.net) Accessed 14<sup>th</sup> January 2016. Page 3.

<sup>574</sup> Refer to Chapter 5.

<sup>575</sup> Sadoon, Teo, Anani, *Surviving the slowdown – a current analysis of the UAE Construction Industry* (n 213).

<sup>576</sup> Linn, 'A Leapfrog Attempted' (n 3).

<sup>577</sup> RERA is the Real Estate Regulatory Authority in Dubai, UAE.

Delay or repudiation by a nominated subcontractor could cause the contractor to delay completion of the project and expose the contractor to payment of delay damages under the main contract. In these circumstances would the contractor be excused from liability due to delays caused by the employer's selected subcontractor? This is discussed below.

Any delay from the CA or employer to instruct expenditure of a provisional sum may entitle the contractor to an extension of time<sup>578</sup>, depending upon the date stipulated within the contract programme and whether the delay in nomination has a critical impact of extending the time for completion.<sup>579</sup>

Nominated subcontract conditions generally indemnify the contractor against the default of the nominated subcontractor which would cause the contractor to breach the terms of the main contract, otherwise this may be a ground under which the contractor may reasonably object to the nomination.<sup>580</sup>

Contracts such as FIDIC<sup>581</sup> and ICE differ significantly in their treatment of delay or repudiation. Delays or repudiation by a nominated subcontractor are the contractor's responsibility under FIDIC, whilst under ICE, time for completion and costs may be determined for the consequences of the nominated subcontractor's delays.<sup>582</sup> Under both contracts, extension of time may be awarded if an excusable event delays the nominated subcontractor under the main contract.

The effects of such delays and repudiation by the nominated subcontractor under UAE and common law are discussed below.

#### **4.17.1 Nominated Subcontractor Delays**

Under the common law case of *Fairweather*<sup>583</sup>, the contractor was held liable for the nominated subcontractor's delays however in *Fairclough*<sup>584</sup> the contractor was entitled to an extension of time.<sup>585</sup>

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<sup>578</sup> FIDIC RB 99 Sub-Clause 8.4 (a) to (e).

<sup>579</sup> Totterdill, (n 14) Page 176-177.

<sup>580</sup> See Chapter 4.6.

<sup>581</sup> FIDIC RB 99 and FIDIC RB 87.

<sup>582</sup> ICE 7<sup>th</sup> edn 59 (4) (f).

<sup>583</sup> *H. Fairweather v London Borough of Wandsworth* [1987] 39 BLR 106.

<sup>584</sup> *Fairclough v Rhuddlan District Council* [1985] 30 BLR 26. Under JCT 1963.

<sup>585</sup> Uff (n 12) Page 322.

Under UAE law, the Dubai Court of Cassation<sup>586</sup> held the employer liable for delays caused by a subcontractor selected by an employer or CA. This decision is however criticised by Professor Masadeh for contradicting with UAE law<sup>587</sup> under which the contractor is liable for the performance of any subcontractor.<sup>588</sup>

Based upon the above, the law under both jurisdictions appears to be unclear regarding the employer's liability for a nominated subcontractor's delays.

#### **4.17.2 Nominated Subcontractor's Repudiation**

In the absence of clear contractual provisions, a nominated subcontractor which repudiates the nominated subcontract raises a number of issues. These include which party completes the remaining works or is responsible for re-nomination, who pays any increased costs for a replacement subcontractor, who makes good defective works or pays for delay and disruption to the contractor's works?

In *Bickerton*<sup>589</sup>, based upon the premise that it is the employer's discretionary right to instruct expenditure and nominate the subcontractor, the contractor was held to have no right or obligation to execute these works. Therefore the employer was made to pay any additional costs for completing works caused by repudiation of the nominated subcontractor.<sup>590</sup> This gives the contractor little incentive to rescue a repudiating nominated subcontractor, according to Wallace<sup>591</sup>, although this contradicts the otherwise robust UAE law under which the contractor is responsible for subcontractor's performance.<sup>592</sup>

Following the nominated subcontractor's repudiation in *Percy Bilton*<sup>593</sup>, the employer was held responsible for delays and costs arising from re-nomination, however not for the nominated subcontractor's un-excusable delays prior to repudiation.<sup>594</sup>

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<sup>586</sup> Dubai Court of Cassation Case 266/2008.

<sup>587</sup> UAE CTC Article 890 (2).

<sup>588</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) Page 2.

<sup>589</sup> *North West Metropolitan Regional North West Metropolitan Regional Hospital Board v T.A. Bickerton & Sons* [1970] 1 All Er 1039. The nominated subcontractor repudiated the subcontract due to escalation in materials.

<sup>590</sup> JCT 63 wording in *Bickerton* resulted in the employer being responsible for re-nomination.

<sup>591</sup> Murdoch and Hughes (n 8) Page 296

<sup>592</sup> UAE CTC Article 890 (2).

<sup>593</sup> *Percy Bilton Ltd v GLC* [1982] 20 BLR 1.

<sup>594</sup> Murdoch and Hughes (n 8) Page 203 and 204.

The contractor could also object to a re-nomination if the main contract time for completion is insufficient to incorporate the new nominated subcontractor's time for completion. This insufficiency of time may cause the works to be impossible to complete within the remaining time, unless an extension of time is awarded as held in *Trollope & Colls*.<sup>595</sup> In this case the employer was allowed to imply a term to extend the project completion.<sup>596</sup>

Murdoch<sup>597</sup> suggests that the employer may omit the works when an in-excusable delay exists at the time a nominated subcontractor repudiates the subcontract. This would effectively preserve the right to liquidated damages, although the contractor could, as a result of this action, raise a claim for loss, expense and loss of profit for works being removed from its scope of works and being executed by others.

In *John Jarvis*<sup>598</sup>, the main contractor validly terminated the contract after the nominated subcontractor delayed its progress of works, executed defective works and subsequently abandoned works and the architect suspended the works whilst finding a replacement subcontractor. It was held that the contractor could terminate the contract, irrespective of lack of specific reference or provision for a nominated subcontractor's breach. In contrast, the contractor was held liable in *Westminster*<sup>599</sup> for the nominated subcontractor's defectively constructed works.

The employer's liability generally stems from the express provisions in the respective contract. In pre JCT 2005<sup>600</sup> contracts, the employer was generally liable for delays caused by re-nomination and repudiation by the nominated subcontractor. JCT contracts now omit these provisions altogether, favouring named subcontracting<sup>601</sup> where the contractor is liable for all delays and repudiation of the named subcontractor, similar to that found in FIDIC.<sup>602</sup>

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<sup>595</sup> *Trollope & Colls v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601.

<sup>596</sup> Eggleston (n 237). Page 327.

<sup>597</sup> Murdoch and Hughes (n 8) Page 296.

<sup>598</sup> *John Jarvis v Rochdale Housing Association* [1986] 36 BLR 48, CA. The Architect was entitled to suspend works for one month under JCT 80 unless delay caused by the contractor's default or negligence. This case also assisted towards the demise of nominated subcontracting under English law according to Adriaanse, (n 19), Page 249-250.

<sup>599</sup> *Westminster City Council v Jarvis & Sons Ltd* [1970] 1 All ER 942 under a JCT 63 form of contract.

<sup>600</sup> Uff (n 12) Page 391 which clarifies that pre JCT 2005 includes JCT 63 and JCT 98.

<sup>601</sup> Murdoch and Hughes (n 8) Page 299. Named subcontracting is provided under JCT05 also discussed under Chapter 3.2..

<sup>602</sup> FIDIC refers specifically to FIDIC RB 99 and FIDIC RB 87.

By contrast, ICE provides for the contractor's payment of "unrecovered expenses"<sup>603</sup> and extension of the time arising from the nominated subcontractor's delays or default<sup>604</sup> or completion of the works by the contractor.

Importantly, the legal outcome in the case of Percy Bilton<sup>605</sup> placed stringent liability on the employer for its selected subcontractor which has contributed to the omission from standard forms of contract and accelerated the demise of provisional sums and nomination under English common law.

By contrast under UAE law, the express liability of the contractor for its subcontractors transfers the risk to the contractor which suggests why the employer chooses its subcontractor, passing the burden of performance to the contractor.

### 4.17.3 Delay Damages

The parties are free to agree delay damages in the event of the contractor's inexcusable delay to the time for completion.

Under English law, delay damages require no proof of loss but cannot be punitive according to Uff.<sup>606</sup> These damages would be subject to the test stated in the case of Dunlop.<sup>607</sup> In contrast, UAE law<sup>608</sup> does not differentiate between a penalty or LADs<sup>609</sup>, however the parties' agreement<sup>610</sup> may be amended<sup>611</sup> by the court.<sup>612</sup> This may adjusted to reflect a penalty equal to the harm caused by the breach of this primary obligation, providing the tripartite test is satisfied which links the breach, actual damage and causation.

According to Mastrandrea<sup>613</sup>, the test for damages is that they would not have occurred "but-for" the defendant's wrongful act or omission.

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<sup>603</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (4) (e).

<sup>604</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (4) (f).

<sup>605</sup> *Percy Bilton Ltd v GLC* [1982] 20 BLR 1.

<sup>606</sup> Uff (n 12) page 311 *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] EWHC 281 (TCC).

<sup>607</sup> *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd* [1915] AC 79 as stated on page 309 and 310 of Murdoch and Hughes (n 8).

<sup>608</sup> UAE CTC Article 390 (1) and (2).

<sup>609</sup> LADs are Liquidated and Ascertained Damages.

<sup>610</sup> Dubai Court of Cassation Case 138/94.

<sup>611</sup> UAE CTC Article 390 (2) the Judge may vary a pre-agreed contractual condition relating to penalty.

<sup>612</sup> Hok, Fahey, *Observations on the FIDIC Subcontract 2011* (n 34).

<sup>613</sup> Franco Mastrandrea, *Concurrent Delay in Construction – Principles and Challenges*, [2014] I.C.L.R. 083 International Construction Law Review. Page 4.

Under UAE law, a party may withhold performance in the event of the other party's default in performance of an obligation.<sup>614</sup> It is however argued that the employer may decide to withhold payment because of delays it considers are caused by the contractor and in response, the contractor could contractually suspend or slow the rate of the works due to non-payment on the basis that delays have extended the time for completion for which an extension of time and costs entitlement exists and have not been determined.

According to O'Leary<sup>615</sup>, these actions by both parties may be conceived as contrary to good faith<sup>616</sup> and result in unlawful exercise a right by both parties.<sup>617</sup> The employer's above action, in the event of a nominated subcontractor's delay, would contravene the decision of the Dubai Court of Cassation 266/2008<sup>618</sup> where the employer was held liable for delays caused by its chosen subcontractor.

Any defective work remedied within the time for completion could result in no default arising under the principle of temporary disconformity as held in *Hosier*.<sup>619</sup> Under common law, anticipatory breach could lead to termination where evidence suggests the nominated subcontractor will not complete on time.<sup>620</sup> The same principle was held by the Dubai Court of Cassation in Case 200/2013.<sup>621</sup>

The provisions of the relevant contract will determine whether the contractor is liable for the nominated subcontractor's default under common law, however UAE law generally maintains the contractor's liability for its nominated subcontractors with the exception of one particular court decision. Providing damages are not punitive, the amount agreed between the parties will generally apply under common law, however under UAE law the court has discretionary powers to review the parties agreement. This leaves a degree of uncertainty for UAE contracting parties, particularly where pre-agreed damages may be increased or decreased.

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<sup>614</sup> UAE CTC Article 267 and 414.

<sup>615</sup> Dean O'Leary, *Dealing with Concurrency in Construction Delay Claims*, April 2014, <http://www.tamimi.com/en/magazine/law-update/section-8/april-7/dealing-with-concurrency-in-construction-delay-claims.html> Accessed 24<sup>th</sup> October 2016.

<sup>616</sup> UAE CTC Article 246 (1)

<sup>617</sup> UAE CTC Article 106.

<sup>618</sup> Refer to Chapter 4.17.1.

<sup>619</sup> *P and M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 WLR 146.

<sup>620</sup> Peel, (n 121) on page 843 refers to the case of *Hochster v De la Tour* (1853) 2 E. & B. 678 in which the claimant was able to claim damages before the time for performance expired.

<sup>621</sup> Dubai Court of Cassation Case 200/2013.

#### 4.18 Unjust enrichment

Under UAE and common law, a claimant is prevented from unjustly profiting from damages.

Unjust enrichment may arise when using provisional sums and nomination. For example if a nominated subcontractor has compensated the employer for defective performance through a collateral warranty<sup>622</sup>, the contractor cannot claim the same on behalf of the employer, otherwise unjust enrichment would arise.

The employer may engage a specialist's design services prior to and on the assumption of being nominated. If this does not occur or the contractor raises reasonable objection, English law recognises that the employer may have become unjustly enriched, even though no contract exists.<sup>623</sup>

The nominated subcontractor may be compensated *in quantum meruit* as in *Landesbank Girozentrale*.<sup>624</sup> However *PJ Ribeiro*<sup>625</sup> considers the occurrence of unjust enrichment as "highly debatable" where benefit is conferred by a third party who is not party to a contract, which is also supported by *Costello*.<sup>626</sup>

The UAE Union Supreme Court<sup>627</sup> held that an enriched party<sup>628</sup> shall reimburse any accrued benefit with interest<sup>629 630</sup> and the contract can be made void.

However *Linn*<sup>631</sup> maintains the employer's unjust enrichment from a nominated subcontractor's works is not about enrichment or being unjust, but whether the parties' legal and contractual right to freely contract undermines that contract. When risk has been contractually distributed, the law of restitution should not intervene as in the case of *Yew Sang Hong*.<sup>632</sup> The employer was a "remote enricher" and privity of contract prevented such

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<sup>622</sup> See Chapter 5.1.

<sup>623</sup> *Uff* (n 12). Page 163 refers to the common law of restitution.

<sup>624</sup> *Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

<sup>625</sup> Judge in *Shanghai Tongji Science & Technology Industrial Co. Ltd v Casil Clearing Ltd* [2004] 7 HKCFAR 79.

<sup>626</sup> *Linn*, 'A Leapfrog Attempted' (n 3) refers to *Castello and another v MacDonald and others (CA)* [2011] EWCA Civ 930 in which remoteness caused the claim to fail.

<sup>627</sup> UAE Union Supreme Court 560/Judicial Year 20

<sup>628</sup> UAE CTC Article 318.

<sup>629</sup> UAE CTC Article 324.

<sup>630</sup> Dubai Court of Casation 643/2003.

<sup>631</sup> *Linn*, 'A Leapfrog Attempted' (n 3).

<sup>632</sup> *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] HKCA 109; 3 HKLRD 307.



a claim, however this would succeed if the claimant is an “immediate enricher” as in *Shanghai Tongji*.<sup>633</sup>

Damages should in any case reflect the loss suffered arising out of the breach otherwise unjust enrichment may arise as in *Wraight*.<sup>634</sup>

The employer should be wary of engaging a prospective nominated subcontractor and then fail to reimburse for services rendered or have any cause for the contractor to object to the nomination. Otherwise the employer may face a claim of unjust enrichment.

#### **4.19 The effect of Termination on Nominated Subcontracts**

A contractor’s termination is effected in accordance with the employer’s rights and obligations under the contract, however termination of a nominated subcontractor may also fall under the employer’s rights to approve.

A potential situation arises where a nominated subcontractor defaults under its subcontract and the contractor cannot remove said subcontractor, causing the contractor to further delay or default in performance under the main contract. This and other issues are discussed below.

##### **4.19.1 Employer’s Termination of the Contractor’s Employment**

Commonly back to back subcontract provisions automatically terminate the subcontractor’s employment in the event of a contractor’s termination unless subcontracts are assigned to the employer.<sup>635</sup> It is important that subcontracts contain these termination provisions otherwise the employer may claim against the contractor for breach of the main contract.<sup>636</sup> Under UAE law, termination may be by mutual consent, completion of the works or by court order.<sup>637</sup>

Under FIDIC RB 99, the employer may terminate the contractor’s employment for repudiation, failure to proceed with the works or to comply with a notice to correct, insolvency<sup>638</sup>, subcontracting all of the works, bribery<sup>639</sup> or for his convenience.<sup>640</sup>

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<sup>633</sup> *Shanghai Tongji Science & Technology Industrial Co. Ltd v Casil Clearing Ltd* [2004] 7 HKCFAR 79.

<sup>634</sup> *Wraight Ltd v PH & T (Holdings) Ltd* [1968] 13 BLR 26. The contractor terminated the contract for the employer’s default.

<sup>635</sup> Refer to Chapter 5.2.

<sup>636</sup> Murdoch and Hughes (n 8) Page 343 refers to the termination clause under JCT SBCSub 05 which automatically terminates the subcontract if the contractor’s employment is terminated.

<sup>637</sup> Article 892 of CTC

<sup>638</sup> For the purposes of brevity, this includes bankruptcy, liquidation, administration, etc.

UAE law prevents unilateral termination of the contract, particularly for the employer's convenience and employment of another contractor as this would contravene good faith,<sup>641</sup> resulting in a potential claim for unjust enrichment. However, following defective performance, reasonable time must be allowed for remedying the default, before an application can be made to the court to cancel the contract or employ others at the contractor's cost<sup>642</sup>, although the decision of the court may not always be required.<sup>643</sup>

Under common law a contract may be terminated if there is a material or significant breach, which depends upon the individual characteristics associated with each case. This includes the nature, consequences, significance, remaining time under the contract and the consequences if no term exists for termination as in *Cross Town Music Co.*<sup>644</sup>

According to Murdoch<sup>645</sup>, common law implies that a subcontractor should not be denied opportunity to execute work and earn money. In *Dyer*<sup>646</sup>, the nominated subcontractor's termination caused by the contractor's termination denied the nominated subcontractor this opportunity, allowing recovery of damages and loss of profit. However Mastrandrea<sup>647</sup> highlights that FIDIC RB 99<sup>648</sup> permits the employer to terminate for his convenience and pay no consequential losses or lost profit.

Dr Malas<sup>649</sup> states that non-instructed provisional sums are not payable at termination. This aligns with the employer's discretionary right to expend these sums, however where expenditure is clearly essential for the works, the contractor's denied profit is surprisingly not considered in post termination payments.

#### **4.19.2 Contractor's Right to Terminate a Nominated Subcontractor**

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<sup>639</sup> FIDIC RB 99 Sub-Clause 15.2.

<sup>640</sup> FIDIC RB 99 Sub-Clause 15.5.

<sup>641</sup> Franco Mastrandrea, *Termination for convenience: recovering the expectancy* [2015] I.C.L.R. 286 International Construction Law Review and UAE CTC Article 246.

<sup>642</sup> UAE CTC Article 877.

<sup>643</sup> Dubai Court of Cassation 353/1999.

<sup>644</sup> *Cross Town Music Co. LLC v Rive Droite Music Ltd and Ors* [2009] All ER (D) 269.

<sup>645</sup> Murdoch and Hughes (n 8).

<sup>646</sup> *ER Dyer Ltd v Simon Build/Peter Lind Partnership* [1982] 23 BLR 23.

<sup>647</sup> Franco Mastrandrea, *Termination for convenience: recovering the expectancy* [2015] I.C.L.R. 286 International Construction Law Review. Page 18.

<sup>648</sup> FIDIC RB 99 Sub-Clause 17.6.

<sup>649</sup> Dr Kamal Adnan Malas, *Provisional Sums in FIDIC Red Book 1999* [2011] accessed 13<sup>th</sup> January 2016.

As mentioned above, certain contracts require the contractor to obtain the express approval of the employer or CA prior to terminating the employment of a nominated subcontractor.

ICE compels the contractor to notify the engineer regarding a nominated subcontractor's default and obtain its consent prior to termination.<sup>650</sup> Keating highlights that consent may be withheld, but the engineer should "facilitate continued performance and completion" by giving instruction for the contractor to complete the works directly or by using another subcontractor.

If the employer does not agree with the termination and the contractor nonetheless proceeds with terminating the nominated subcontractor, this could lead to denial of any additional time or additional cost by the contractor from the employer under ICE.<sup>651</sup> Totterdill highlights that under FIDIC 1999 RB<sup>652</sup>, default by a subcontractor "without knowledge or consent of the Contractor" could lead to termination of the main contract rather than termination of the subcontract. This action appears to be extreme given that the contractor may be innocently unaware of and oppose the subcontractor's actions.

Where consent is given to terminate, the contractor should recover direct losses and employer's losses, however if this "proves impossible"<sup>653</sup>, the employer should compensate the contractor<sup>654</sup> although no timescale or method is stated for recovery of such losses.

The consequences of a nominated subcontractor's termination depend upon the parties' agreement. Under FIDIC<sup>655</sup>, the contractor is deemed to be liable for the time and cost of completing the works, whereas under ICE, the employer bears the consequences of increased time and cost.<sup>656</sup> This is significant, given the impact of *Bickerton*<sup>657</sup> where the contractor had no right or obligation to execute nominated works or to re-nominate. UAE law follows the position taken by FIDIC, holding the contractor liable for the subcontractor's acts or omissions.<sup>658</sup>

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<sup>650</sup> ICE 7<sup>th</sup> edn Sub-Clause 59 (4) (b).

<sup>651</sup> Abrahamson, (n 18) Page 248.

<sup>652</sup> Totterdill, (n 14) Page 258.

<sup>653</sup> ICE Sub-Clause 59 (4) (d).

<sup>654</sup> Murdoch and Hughes (n 8) Page 298.

<sup>655</sup> FIDIC refers specifically to FIDIC RB 99 and FIDIC RB 87.

<sup>656</sup> Uff (n 12) Page 346

<sup>657</sup> *North West Metropolitan Regional Board v TA Bickerton & Son Ltd* [1970] 1 All ER 1039.

<sup>658</sup> UAE CTC Article 890 (2).

## 4.20 Back to Back and Nominated Subcontract Provisions

Privity of contract generally requires the employer to invoke rights against the contractor for a defaulting nominated subcontractor and prevents direct action.<sup>659</sup>

To establish rights of recourse for the employer through the contractual chain, Chao-Duivis asserts that all nominated subcontract terms must comply with main contract obligations, otherwise the contractor's employment may be terminated.<sup>660</sup> The CA may also be empowered to obtain proof from the contractor that the nominated subcontract complies with the main contract.<sup>661</sup>

According to Hok<sup>662</sup>, a subcontractor's primary obligation is to discharge its obligations to prevent the contractor from paying damages to the employer as stated in *Barclays Bank*.<sup>663</sup>

Although the subcontract should not conflict with the main contract<sup>664</sup>, incorporation of main contract terms into the subcontract in *Gilbert-Ash*<sup>665</sup> was used to overcome subcontract ambiguities only. Main contract terms may be incorporated in contracts under UAE law.<sup>666</sup>

Murdoch states that the chain liability "is only as strong as its weakest link"<sup>667</sup> particularly where no back to back sub-contract exists as in *Smith*.<sup>668</sup>

It is important that main contract terms are clearly incorporated within the nominated subcontract, where applicable, otherwise the nominated subcontractor may be free from contractual liability for defective performance in the contractual chain liability through the contractor.

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<sup>659</sup> See Chapter 4.2.

<sup>660</sup> Chao-Duivis, *Subcontracting in Europe* (n 44) Page 4.

<sup>661</sup> Abrahamson, (n 18) Page 237.

<sup>662</sup> Hok, Fahey, *Observations on the FIDIC Subcontract 2011* (n 34).Page 9.

<sup>663</sup> *Barclays Bank Plc v Fairclough Building Ltd* (1995) 76 BLR 1.

<sup>664</sup> *Brightside Kilpatrick Engineering Services v Mitchell Construction* (1973) Limited [1975] 1 BLR 62.

<sup>665</sup> *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195.

<sup>666</sup> See Chapter 4.3 and UAE CTC Article 243.

<sup>667</sup> Murdoch and Hughes (n 8). Page 270.

<sup>668</sup> *Smith v Johnson Bros* [1954] 1 DLR 392. In this Canadian case. losses on a back to back subcontract could be recovered from the contractor and not from the employer directly.

## 5. EMPLOYER'S REMEDIES AND RISK MITIGATION FOR PROVISIONAL SUMS AND NOMINATED SUBCONTRACTS

The legal and contractual consequences discussed in Chapter 4 may lead the employer to consider alternative methods to mitigate risk or provide direct remedy against default of its chosen nominated subcontractor as discussed below.

### 5.1 Warranties

According to Uff<sup>669</sup>, warranties create a direct enforceable contract between the employer or third party<sup>670</sup> and nominated subcontractor, providing the employer's direct recourse for the latter's defective performance as in *Shanklin Pier*.<sup>671</sup>

Under UAE law<sup>672</sup>, Professor Masadeh distinguishes that a warranty may be enforced as a unilateral act<sup>673</sup> but no collateral contract is created between employer or end user and the subcontractor.

The subcontractor has no respective remedy against the employer<sup>674</sup> and the contractor remains liable for the nominated subcontractor's performance<sup>675</sup> as in *Rotegear*.<sup>676</sup> Despite these options of recourse, the employer cannot be compensated twice, otherwise unjust enrichment would result.<sup>677</sup>

Uff recommends execution of a collateral warranty prior to the subcontract "otherwise there is no consideration and the warranty may be unenforceable", although the main contract commonly contains this obligation.<sup>678</sup>

Warranties may also be obtained from the employer's professional team, in certain cases increasing the duty of care to one of purpose.<sup>679</sup> The parties should be clearly identified so

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<sup>669</sup> Uff (n 12) Page 199 maintains that the statutory right of the CROTPA 1999 is commonly deleted in contracts and collateral warranties used instead.

<sup>670</sup> The third party may be a subsequent owner.

<sup>671</sup> *Shanklin Pier Ltd v Detel Products* [1951] 2 KB 854.

<sup>672</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89) Page 11.

<sup>673</sup> A unilateral act is one of the sources of obligations under UAE law. This requires the unilateral intention of a person making a promise to be legally bound by the promise.

<sup>674</sup> Al Tamimi, *Highlights of the laws of the United Arab Emirates* (n 301). Page 5.

<sup>675</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115).

<sup>676</sup> *Hong Kong Housing Authority v Rotegear Corporation Ltd* [2009] HKCFI 625.

<sup>677</sup> Refer to Chapter 4.18.

<sup>678</sup> Uff (n 12) Page 295.

<sup>679</sup> *ibid* Page 296.

that the contribution of any loss may be shared. Professional indemnity insurance is generally provided by designers, however the claims made<sup>680</sup> provision and level of duty of care<sup>681</sup> should be stated.<sup>682</sup>

A warranty may also allow “step-in” rights for a beneficiary such as a lending institution to complete the project in the event of a contractor’s insolvency.<sup>683</sup>

## 5.2 Assignment and Novation

Contracts commonly allow assignment of the benefit of the nominated subcontract to the employer or another party.<sup>684</sup> UAE law prevents direct recourse by a subcontractor to the employer unless the contractor has assigned such rights<sup>685</sup>, however English law allows a third party to enforce a right<sup>686</sup> providing the contract expressly confers the benefit upon that party.<sup>687</sup>

Obligations cannot be assigned under common law but may be novated<sup>688</sup>, however obligations may be assigned under UAE law which, according to Professor Aymen<sup>689</sup>, provides the employer with direct contractual recourse against the subcontractor. The employer, contractor and subcontractor<sup>690</sup> must consent to assignment as held by the UAE Supreme Court<sup>691</sup> in which the assignment effectively substituted the contractor with the subcontractor.

The contractor cannot assign any part or the whole contract under FIDIC<sup>692</sup> unless the employer agrees. According to Teo<sup>693</sup> this is rarely allowed by the employer because the

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<sup>680</sup> Claims made refers to an insurance policy which covers a claim event irrespective of when the claim occurred.

<sup>681</sup> In some cases the duty of reasonable care may be raised to one of purpose.

<sup>682</sup> *Greater Nottingham Cooperative Society v Cementation Piling & Foundations Ltd* [1989] QB 71.A collateral warranty between the nominated subcontract and employer covered design only but not workmanship.

<sup>683</sup> Practical Law, *Step In Rights*, <http://uk.practicallaw.com/8-107-7320?service=finance> Accessed 26<sup>th</sup> October 2016.

<sup>684</sup> FIDIC RB 99 Sub-Clause 4.4 (d).

<sup>685</sup> UAE CTC Article 891.

<sup>686</sup> Contracts (Rights of Third Parties) Act 1999 (CRoTPA 1999).

<sup>687</sup> Chao-Duivis, *Subcontracting in Europe* (n 44) Page 8.

<sup>688</sup> Peel, (n 121).Page 712, Paragraph 15-001.

<sup>689</sup> Masadeh, *Vicarious performance and privity in construction contracts* (n 89).

<sup>690</sup> UAE CTC Article 1109.

<sup>691</sup> UAE Supreme Court Case 108/Judicial Year 22, 2002 The three parties, contractor, nominated subcontractor and employer/third party must give consent.

<sup>692</sup> FIDIC RB 87 Sub-Clause 3.1 and FIDIC 1999 RB Sub-Clause 1.7

<sup>693</sup> Teo, *UAE: Bridging the contractual gap between an employer and a subcontractor* (n 115). Refer to Chapter 4.16.1.

subcontractor would then possess direct rights against the employer. JCT05 and ICE<sup>694</sup> prevent any assignment by a party unless the other party agrees in writing. Under FIDIC, subcontracts may be assigned to the employer in the event of contractor's termination or employer's request.<sup>695</sup>

Uff<sup>696</sup> stresses the importance of obtaining tripartite consent otherwise assignment may be ineffective, as in *Linden Gardens*.<sup>697</sup> Although the original employer, who suffered no loss, could not enforce the contract, the employer could enforce its rights against the contractor to avoid the loss vanishing into a black hole.

Providing the three parties<sup>698</sup> agree, novation transfers the rights and obligations to a third party under UAE and common law.<sup>699</sup> Adriaanse<sup>700</sup> advises that specialists engaged by employers are increasingly novated to the contractor, particularly in post JCT 2005 contracts which excludes nomination provisions.

### 5.3 Employer's Direct Action in Tort

The employer may alternatively bring an action in tort against a defaulting nominated subcontractor.<sup>701</sup>

However when a contract exists, it is uncertain whether an action may also be brought in tort under UAE law. The Dubai Court of Cassation<sup>702</sup> allowed such action whilst the Union Supreme Court<sup>703</sup> did not. English law permits claims in both contract and tort as established in *Esso*.<sup>704</sup>

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<sup>694</sup> Murdoch and Hughes (n 8) Page 269.

<sup>695</sup> FIDIC RB 99 Sub-Clause 4.4 (d).

<sup>696</sup> Uff (n 12) Page 162

<sup>697</sup> *Linden Gardens Trust Ltd v Lanesta Sludge Disposals Ltd* (1993) 63 BLR 1. The contractor's consent for assignment was not received making the assignment ineffective.

<sup>698</sup> The three parties are the employer, contractor and nominated subcontractor which by novation substitutes the contractor with the subcontractor.

<sup>699</sup> Ahmed Ibrahim, *Subcontracting Under UAE Law* (n 523). Refers to Article 252 of CTC under which a contract may not impose an obligation upon a third party but it may vest a right in the third party.

<sup>700</sup> Adriaanse, (n 19).Page 255.

<sup>701</sup> Chao-Duivis, *Subcontracting in Europe* (n 44) Page 10.

<sup>702</sup> Dubai Court of Cassation Case No. 311/2009.

<sup>703</sup> Union Supreme Court 232/Judicial Year 21.

<sup>704</sup> *Esso Petroleum Co. v Mardon* [1976] 2 WLR 583.

Notwithstanding the general stringency of privity of contract, it is suggested that, if circumstances<sup>705</sup> such as pre-nomination discussions give rise to a binding contract, a UAE court could, based upon the aforementioned Union Supreme Court decision, disallow a claim in tort.

In the UAE, an action may be brought in tort for an unlawful and harmful act<sup>706</sup> or omission which causes damage or injury<sup>707</sup>, providing a causal link exists between the damage or injury and the cause.<sup>708</sup> Both direct harm and consequential harm should be made good<sup>709</sup>, and no limitation or exemption from liability is permitted.<sup>710</sup> No negligence needs to be proved where a duty of purpose exists, however negligence must be proved where a duty of care exists.

Providing all claims are brought within three years of becoming aware of the act or omission, subject to a 15 years long-stop period<sup>711</sup>, the plaintiff may recover economic loss, loss of opportunity and benefit due to damage<sup>712</sup>, moral<sup>713</sup>, reputational or financial status<sup>714</sup> due to harm caused by others as “a natural result of the harmful act”<sup>715</sup> based on the causation principle under the “but for” test.<sup>716</sup>

Under English law<sup>717</sup> claims must be made within six years from the date the cause of action commenced or three years from the date of discovery, subject to a longstop of fifteen years.

Providing there is foreseeability of harm, proximity and causation resulting in injury or damage, under *Donoghue v Stevenson*<sup>718</sup>, a duty of care exists if a breach would result in losses. Causation is based upon the “but for” test under *Barnett*.<sup>719</sup>

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<sup>705</sup> See Chapter 4.3 regarding pre-nomination discussions and negotiations.

<sup>706</sup> Professor Aymen Masadeh., *UAE Tort Law*, Lecture Notes, The British University in Dubai, 2<sup>nd</sup> November 2014 states on page 13 that the harmful act may be personal injury, death, property damage, extortion or trespass.

<sup>707</sup> Dubai Court of Cassation case 226/2007.

<sup>708</sup> UAE CTC Article 283 and 284.

<sup>709</sup> UAE CTC Article 282.

<sup>710</sup> UAE CTC Article 296.

<sup>711</sup> UAE CTC Article 298.

<sup>712</sup> Abu Dhabi Court of Cassation 721/Judicial Year 3 under Article 282, 291 and 293 of CTC.

<sup>713</sup> UAE CTC Article 293.

<sup>714</sup> Dubai Court of Cassation 93/2009.

<sup>715</sup> UAE CTC Article 292.

<sup>716</sup> UAE Union Supreme Court 110/Judicial year 21 – The “but for” test established that the loss would not have occurred but for the result of the harmful act.

<sup>717</sup> Latent Damages Act 1986

<sup>718</sup> *Donoghue v Stevenson* [1932] AC 562.



In *Veitchi*<sup>720</sup> a nominated sub-contractor was tortiously liable for the employer's losses and physical damage due to sufficient proximity and a duty of care existing not to cause economic loss resulting from the employer's reliance.<sup>721</sup> In *Murphy*<sup>722</sup>, physical injury to persons or property was allowed but not for defects in the property itself.

Whilst common law permits tortious action, under UAE law this remedy is uncertain when a contract exists, however the employer may alternatively have recourse under the mandatory law of decennial liability<sup>723</sup> for structural defects affecting safety or collapse.

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<sup>719</sup> *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428.

<sup>720</sup> *Junior Books v Veitchi* [1983] AC 520. (Scottish case).

<sup>721</sup> *Murdoch and Hughes* (n 8) Page 290.

<sup>722</sup> *Murphy v Brentwood DC* [1991] 1 AC 398.

<sup>723</sup> Refer to Chapter 4.14.4. The employer's recourse would be directly to either the designer or contractor or both.

## 6. FINDINGS

The comparative analysis of the rights and obligations of the employer when using provisional sums and nomination under UAE and common law has found many issues which vary in treatment under the relevant governing law or in certain cases the legal position remains unclear.

No specific or dedicated statutory law exists to govern provisional sums and nominated subcontractors in common law or UAE law, however each law includes general provisions for subcontracting. UAE civil law provisions are brief and generally rely upon other provisions within the civil code, whilst common law is generally derived from case law and contained within statutory provisions such as the English HGCRA.

From the literature and legal references examined as part of this comparative analysis, considerable material was found regarding provisional sums and particularly nomination under English common law whereas, in contrast, that related to UAE law contained limited material.

The extensive availability of material under common law appears to derive from prolific former application of the method by employers for engaging nominated subcontractors. However evidence from significant case law demonstrates that decisions against the employer has caused considerable demise in use, to the extent that JCT contracts have dropped all contractual provisions in favour of alternatives such as named subcontracting.

The move towards named subcontracting under English law, under which the contractor remains fully responsible for the subcontractor, reflects a position regarding liability similar to that for all subcontractors under UAE law.

These court decisions caused the employer to bear full responsibility for re-nomination following the nominated subcontractor's repudiation and preclusion of the contractor for any responsibility or liability for the time or cost of reselection.<sup>724</sup> It appears that the employer sought to obtain benefit from the method such as choice of subcontractor, price and quality whilst at the same time, sought to retain recourse against a defaulting nominated subcontractor, although adverse legal decisions made this unfeasible.

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<sup>724</sup> Refer to the cases of Bickerton and Percy Bilton in Chapter 4.17.2.

In stark contrast, provisional sums and nomination under the UAE legal jurisdiction continues to be extensively employed on both private and public contracts. From the analysis, the employer appears to derive contractual and legal certainty and release from liability from widely used contracts such as FIDIC, which apportions the contractor with full liability for nominated subcontractors aligning with equivalent provisions within UAE law. Notwithstanding this, a UAE case has raised doubt over this robust stance towards the contractor's liability, in which the employer was held liability for delays caused by its selected subcontractor.

The choice of contract profoundly influences the treatment under the applicable governing law. Furthermore, it has been found that an unambiguous and comprehensive definition of the employer's rights and obligations and provisions for administering this method is of fundamental importance to prevent a different interpretation being applied by a court or arbitrator to that intended by the parties.

The process prior to nomination has been found to contain a number of contractual and legal issues. For instance the validity of the prospective subcontractor's offer is questionable because the offer is made to the employer and not to the contractor. Even though a contract may be held to exist due to customary practice, if a contract is subsequently found to be invalid, the prospective nominated contractor could seek recourse against the employer for damages and unjust enrichment for works or designs executed.

Privity of contract is maintained under both UAE and common law, which generally prevents the employer from taking direct action against a defaulting nominated subcontractor or for the nominated subcontractor bringing an action against the employer. The employer may obtain direct recourse by collateral warranty or by assigning or novating the rights of the subcontract from the contractor. Otherwise the employer is restricted to an action in tort.

Pre-nomination discussions between the employer, CA and nominated subcontractor may lead to binding obligations for the employer, particularly if the contractor is not party to these deliberations. UAE law may, in certain circumstances rebalance a contract of adhesion whilst common law remains mixed on altering an unreasonable contract.

The contractor may raise reasonable objection to a nomination, however surprisingly, following objection by the contractor, FIDIC does not contain any contractual mechanism

compared to the extensive provisions contained under ICE. Furthermore, time for objection is not stated or which party is responsible for re-nomination or the time and costs of any delay.

Objection may leave the employer no option but to employ a contractor directly, which cannot be novated to the contractor. This could result in a contractor's claim for loss of profit or disruption caused by a direct works contractor. Alternatively the employer may face a claim for unjust enrichment where the employer terminates the prospective nominated subcontractor's engagement from which the employer has derived benefit.

Whether information provided under a provisional sum is sufficient to define the scope of works thereunder or the employer may nominate a sum which is significantly higher than the provisional sum is unclear under both laws but may rely upon customary practice.

Uncertainty exists whether provisional sums should include sums which are essential for the works and not just based upon the employer's discretionary expenditure. This is relevant when works are delayed by the employer's failure to nominate or whether loss of profit should be paid upon such uninstructed sums in the event of termination.

A lack of information was found in literature and case law regarding whether an obligation or duty is owed by the CA, employer or nominated subcontractor for information provided and representations made within the nomination or during the contractor's period of due diligence prior to acceptance or objection to the nomination. It appears that the onus rests with contractor for verifying that nomination information is correct, prior to entering into subcontract. However legal provisions for fraudulent misrepresentation exist under both laws and for innocent or negligent misrepresentation under English law, which could provide the contractor with subsequent recourse for misrepresented information.

A provisional sum must expressly state any design obligations, particularly under English law where such an obligation cannot be implied, otherwise the contractor may object to the nomination. Decennial liability under UAE law is silent regarding a subcontractor's liability and therefore, unless stated otherwise, the employer's recourse would be via the contractor, employer's designer or supervising CA in the event of a partial or full structural collapse. The employer may obtain direct remedy by collateral warranty, assignment or an action in tort against the nominated subcontractor. The nominated subcontractor owes a duty of care from the reliance placed by the employer upon its design.

The employer may pay nominated subcontractors at its discretion if the contractor defaults in payment, however this does not create a binding obligation to pay. UAE law prevents a subcontractor seeking direct payment from an employer unless rights to do so are expressly assigned. The employer may withhold payment, however under English law it is a mandatory requirement to issue a notice prior to withholding payment.

Back to back payment clauses are permitted under UAE however English law prohibits such clauses. Nonetheless the UAE courts may insist payment is made to a nominated subcontractor in certain cases, even if payment has not been received by a contractor.

Following a contractor's insolvency, the employer may decide to pay the nominated subcontractor to continue the works. This action contravenes the insolvency laws under common law. The UAE recognises this principle also, however much uncertainty surrounds the employer's rights. New bankruptcy laws are currently being drafted by the Federal Government which may provide further clarity on this matter. The nominated subcontractor is generally prevented from leapfrogging other creditors to secure payment, unless a project account or trust expressly allows for such payment.

Termination of a contractor commonly results in automatic termination of the nominated subcontractor, unless the benefit of the subcontract is assigned to the employer. Certain contracts contain mandatory provisions requiring approval of the employer or CA prior to termination of a nominated subcontractor. This raises a number of issues which remain unclear, including if such approval is not provided and the legal consequences of the contractor's subsequent liability towards the employer in such circumstances.

The CA owes a duty of care to the employer who could claim in negligence for under-estimating provisional sums or agreeing terms which bind the employer.

The comparative analysis has sought to answer the issues raised in Chapter 1.2 and 1.5. However ambiguities or silence found under the existing UAE and common laws in response to these issues, warrants the introduction of definitive and separate law to cover provisional sums and nomination.

## 7. CONCLUSION

Many contractual and legal issues are raised by using provisional sums and nomination which affect the employer's rights and obligations under UAE law and common law.

UAE law and the commonly used FIDIC standard forms of contract in the UAE, tend to allocate full liability for performance of the nominated subcontractor to the contractor, once nomination has taken place, with the exception of one ruling which ruled against the employer for a nominated subcontractor's delays.

By contrast, common law jurisdictions such as England have moved away from this method in favour of alternative methods including named subcontracting, which allocates liability to the contractor for its subcontractors. This follows repeated cases which exposed the employer to liability or failure to obtain direct recourse against a defaulting nominated subcontractor.

Despite the use of collateral warranties, assignment and novation in both legal jurisdictions, which provide the employer with direct contractual redress, the employer's rights and obligations under the law in both jurisdictions remain silent or ambiguous on a number of issues highlighted throughout the dissertation.

These deficiencies highlight the requirement for a law to govern the procedures and remedies and clear contractual conditions to administrator provisional sums and nomination and to address the issues highlighted in this dissertation.

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