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**“Nominated Subcontractors and the Principle of Privity under the UAE and English Laws”.**

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## Table of Contents

<b>I.</b>	<b>Introduction</b>	<b>....3</b>
<b>II.</b>	<b>Principle of Privity and Subcontracting</b>	<b>....4</b>
<b>III.</b>	<b>Liability of the Subcontractor to the Employer</b>	<b>....5</b>
<b>III. (A)</b>	<b>Assignment of the Main-Contractor’s Obligations to the Sub-Contractor</b>	<b>....6</b>
<b>III. (B)</b>	<b>Collateral Warranties</b>	<b>....7</b>
<b>III. (C)</b>	<b>Liability on Subcontractor by Law to the Employer</b>	<b>....9</b>
<b>III. (D)</b>	<b>Subcontractor’s Tortious Liability to the Employer</b>	<b>...11</b>
<b>IV.</b>	<b>Liability of Subcontractor to Subsequent Owner</b>	<b>...14</b>
<b>IV. (A)</b>	<b>Contractual Liability of Subcontractor to Subsequent Owner</b>	<b>...15</b>
<b>IV. (B)</b>	<b>Lawful Liability of Subcontractor to Subsequent Owner</b>	<b>...17</b>
<b>V.</b>	<b>Employer’s Liability to the Subcontractor</b>	<b>...23</b>
<b>V. (A)</b>	<b>Employer’s Direct Payment to the Subcontractor</b>	<b>...24</b>
<b>V. (B)</b>	<b>Employer’s Direct Instructions to Subcontractors</b>	<b>...25</b>
<b>V. (C)</b>	<b>Employer’s Liability under the Principle of Unjust Enrichment</b>	<b>...26</b>
<b>V. (D)</b>	<b>Assignments of Rights and Payment Guarantees to Subcontractor</b>	<b>...29</b>
<b>VI.</b>	<b>Employer’s Liability to Head Contractor under the Nomination</b>	<b>...31</b>
<b>VI. (A)</b>	<b>Default of Nominated Subcontractor and the Employer’s Liability</b>	<b>...31</b>
<b>VI. (B)</b>	<b>Allocation of Risk and Effect of Limitation of liability Clauses</b>	<b>...34</b>
<b>VII.</b>	<b>Effect of Consolidation in Arbitration on the Privity Principle</b>	<b>...37</b>
<b>VIII.</b>	<b>Conclusion</b>	<b>...40</b>
<b>IX.</b>	<b>References</b>	<b>...43</b>
<b>X.</b>	<b>Words Count</b>	<b>...47</b>

## **I. Introduction**

This paper will discuss the interaction of the subcontracting in the principle of privity of contracts focusing on the effect of subcontractor's nomination by the employer. Thus, the main purpose of this paper is to address the issue whether the nominated subcontractor or the employer are somehow can be liable to each other and whether such nomination can limit the head contractor liability in this respect.

At the beginning, this paper will highlight on the general principle of privity and relevance of it to subcontracting aspect in the contraction contract. Thereafter, this paper will demonstrate several ways by which the nominated subcontractor "NS hereinafter" will be liable to the employer. Those ways could be thru contractual devices like assignments and collateral warranties, or non contractual, as such, the lawful and tortious liabilities. Then, this paper will through light on the matter whether the NS owes any kind of liability to the subsequent owner.

Furthermore on the other side, this paper will discuss whether the employer can be somehow held liable to the NS thru a contractual or non contractual way. After that, this paper will point to the position of head contractor's "HC hereinafter" liability to the employer in respect of the NS's works that it will explain whether the nomination can limit the HC liability. Finally, this paper will illustrate how far the NS and employer can be liable to each other before the arbitration by any of the arbitral consolidation tools.

In order to convey the concepts of this project more clearly, this paper will use a comparative technique by explaining the positions of the UAE civil and English common laws respect of all said points. Thus, references will be made to the interpretations of the courts and commentators wherever the context so requires. In addition, this paper will reveal how in practice the standard contracts like the FIDIC and JCT and the institutional arbitration rules in the UAE and UK are dealing with the privity principle.

## II. Principle of Privity and Subcontracting

The principle of privity is a long established rule under the common and civil laws jurisdictions that the contract confers rights and obligations to only its connected parties. This chapter will introduce the privity principle under the UAE and English laws and will brief how such principle applies on the parties who are connected indirectly thru a contractual chain like the employer and subcontractor.

In construction contracts, the subcontracting is inevitable, that the HCs are always used to have subcontracts of workmanship, supply of materials and labours and providing of design or specialists services on doing the project. Despite that such subcontracts confer a benefit to the employers; this does not make them a party thereof. Thus, the latter and the subcontractors cannot be liable to each other by the virtue of privity.

In principle, the UAE law via article 890 of the CTC recognizes subcontracting part of or all the works by the HC unless performance of the contract is of personal nature or there is a condition to the contrary, with emphasizing that the liability of the HC to the employer is intact.<sup>1</sup> Further, the UAE law maintains the privity principle in article 891 of the CTC which provides in this respect that the subcontractor cannot resort of an action with its dues from the HC against the employer.<sup>2</sup>

The case will be more complicated when the employer selects the subcontractors and impose them on the HC. Under the UAE law, there are no provisions covering this subject specifically. The courts however are used to interpret this point in ambit of the privity principle and provide in general that the main contractor's liability will not be relieved to

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<sup>1</sup> Article 890 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "(1) A contractor may entrust the performance of the whole or part of the work to another contractor unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he do it in person. (2) The first contractor shall remain liable as towards the employer."

<sup>2</sup> Article 891 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "the second contractor may not make any claim against the employer for anything due to him from the first contractor unless he has made an assignment of it to him as against the employer."

the employer against the default of the subcontractor.<sup>3</sup> More detailed discussion about the effect of nomination in this respect will be done further in chapter VI.

Under the English law, the rule of privity is a primary aspect of the law of contract that it was long established “only a party to a contract can sue on it.”<sup>4</sup> Thus, when this principle applies in the construction contracts; neither the employer nor the subcontractor can sue each other as they do not have a direct contractual nexus.

The mere nomination of subcontractors by the employer does not change the position of the English law in respect of the privity principle,<sup>5</sup> unless there is a contract vested in such nomination. As such, if it contains a promise or warranty from either of these parties which amount to establish a binding relationship toward each other. This point will be also discussed further in details via below chapters III & V.

This paper focuses on the effect of subcontractors’ nomination on the privity principle. Thus, distinguishing between the domestic subcontractors “who are selected by the HC” and the employers’ selected subcontractors “NSs” is apart from the scope of this paper. Despite of that, there are ordinary rules of law are applied on both, those areas of law pertaining the tort and unjust enrichment, what will be discussed further via the subsequent chapters.

### **III. Liability of the Subcontractor to the Employer**

This chapter will through light on the circumstances under which the NS may become directly liable to the employer “face to face”. Thus, this chapter will examine this aspect under the following four areas of the English and UAE laws. Firstly; will the employer is able to sue the NS under the law of tort? Secondly and thirdly; how do the assignments and

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<sup>3</sup> Union Supreme Court 457/Judicial Year 24, 2005, it held that “the effect of articles 891 and 892 of the Civil Code is that the liability of the first contractor remains in place as against the employer, and there is no direct contractual relationship between the employer and the second contractor, such as exists between the employer and the first contractor. Thus, the contract between the first contractor and the second contractor defines the rights and obligations of each of them towards the other, and the employer may not rely on it unless the original contract provides to the contrary.”

<sup>4</sup> *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd* [1915] UKHL 1

<sup>5</sup> *Young & Marten Ltd v. McManus Childs Ltd* [1969] 1 AC 454

collateral warranties are helpful to the employer in this respect? Fourthly; despite of the contractual chain; will the NS is obliged by lawful provisions to the employer on doing his duties under the subcontract?

### **III. (A) Assignment of the Main-Contractor's Obligations to the Sub-Contractor**

The principle of assignment in a contract is divided into two parts: firstly, the assignment of rights, which will be discussed further in section V. (D), secondly; the assignment of obligations. This section will discuss up to what extent the latter form of assignment can bring the NS liable to the employer under UAE law and then under the English common law.

Pursuant to article 891 of the CTC; the employer and the subcontractor cannot have a direct contractual relationship unless there is an assignment through the main contractor.<sup>6</sup> In this regard; the UAE law considers the assignment is the parties' choice to get the employer and the NS directly liable to each other, such arrangement falls within the parties' autonomy in the contract.

It can be understood therefore that; in the presence of all parties acceptance;<sup>7</sup> then the valid assignment of the HC's rights and obligations to the NS amounts to create a secondary binding contract between the employer and the NS under the UAE law.<sup>8</sup> For example; in this respect; sub-clause 4.5 of the FIDIC Red Book 1999 applies the concept of assignment, by which as soon as it becomes in act; the NS becomes directly liable to the

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<sup>6</sup> Articles 891 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "the second contractor may not make any claim against the employer for anything due to him from the first contractor unless he has made an assignment of it to him as against the employer."

<sup>7</sup> Articles 1109 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "In order for an assignment to be valid, there must be the consent of the assignor, the assignee and the creditor."

<sup>8</sup> Union Supreme Court, 108/Judicial Year 22: "In accordance with general rules of contractual liability the liability of the contractor arising out of the muqawala contract is a contractual liability and therefore it is permissible to agree to vary the provisions of liability or to agree something to the contrary, it is thus permissible for the head contractor to make a stipulation that the sub-contractor will be exclusively liable to the employer, and it is also permissible, after the sub-contract has been concluded, for the employer to agree that the sub-contractor shall take the place of the principal contractor in the performance of the contract works, and consequently with regard to all of the rights and obligations arising out of that contract, in which case the sub-contract will be converted into an assignment of the head contract, and that assignment will be governed by the agreement between the parties, namely the employer and the sub-contractor, as from the date of the agreement, and the period prior thereto will continue to be governed by the sub-contract and the general rules of muqawala contracting."

employer.<sup>9</sup>

On dealing with this matter under the English law; the assignment of an obligation will not be valid if the assigner is required to perform a contract himself or his personal character is an integral part of such contract.<sup>10</sup> Thus; in this context; the HC must get the consent of the employer to assign any of his obligations to the NS. However, it is an arguable point whether the HC's character is an integral part of the construction contract or not and therefore this may prevent the assignment. Hence, it is advisable to have no assignment clause or to agree the assignable duties in the contract to avoid the ambiguity in this respect.<sup>11</sup>

Moreover; rather to the position of UAE law; the valid assignment here does not establish a direct contractual relationship between the principal (employer) and the assignee (NS) under the English law. Rather for this case; the legal relationship between the employer and the NS is governed by the Contracts (Rights of Third Parties) Act 1999<sup>12</sup>, which shall be discussed further in section III. (C).

### **III. (B) Collateral Warranties**

The business need behind the collateral warranties is that when the employer requires to have a direct control on the works which are to be performed by a NS with whom the former has no direct contractual relationship. For example, the collateral warranties are common in the PPP projects; for which the employers/financers are used to save a clause of step-in rights in every subcontract of the project. This provides more security to these

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<sup>9</sup> Sub-clause 4.5 "Assignment of Benefit of Subcontract" of the FIDIC red book 1999 provides that "If a Subcontractor's obligations extend beyond the expiry date of the relevant Defects Notification Period and the Engineer, prior to this date, instructs the Contractor to assign the benefits of such obligation to the Employer, then the Contractor shall do so. Unless otherwise stated in the assignment, the Contractor shall have no liability to the Employer for the work carried out by the Subcontractor after the assignment takes effect."

<sup>10</sup> *Nokes v. Doncaster Amalgamated Collieries Limited* [1940] AC 1014 HL

<sup>11</sup> For Example; clause 19.1 of the JCT Contract 1998 provides that "neither party is allowed to assign the contract without the written consent of the other party."

<sup>12</sup> M, Bridge, 'Unassignable Rights' [www.lse.ac.uk/](http://www.lse.ac.uk/) accessed 28/9/2015

financers in a construction project against the parties delivering it without having direct contracts with them.<sup>13</sup>

A collateral warranty establishes an additional contract between, commonly among, a contractor, NS (warrantor) and an employer (third party beneficiary), which gives the right to the employer, to sue the warrantor(s). Such warranty creates a direct contractual link between the employer and the NS, which otherwise may not exist. This section will discuss the validity and enforcement of such collateral warranties under the English and then the UAE laws.

In order to have a valid collateral warranty under the English law; the requirements of a legal contract must be fulfilled between the NS and the employer. For this contract; the mutual consideration is that the employer can avail the benefit of suing directly the NS in case of being in default, whilst on the other side; the NS is deemed have given such warranty perhaps against the benefit of being nominated by the employer to take part in performance certain project(s).<sup>14</sup>

On the other side; pursuant to articles 124, 276, 277 and 278 under UAE CTC law; the valid collateral warranty does not need to satisfy the requirements of contract, rather it can be enforced as a unilateral act, which is one the sources of obligations under UAE law.<sup>15</sup> For example; it is a common practice in the UAE that the public services employers are being asking the contractors as well the subcontractors to issue an undertaking letters in favour of securing the assets of those employers, which they can use shall any of their services are damaged or interrupted by the undertaker.

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<sup>13</sup> <http://www.out-law.com/topics/projects--construction/construction-contracts/why-are-collateral-warranties-necessary/> accessed 30/9/2015

<sup>14</sup> N. Gould, 'Subcontracts' <http://www.fenwickelliott.com/subcontracts> accessed 27/9/2015: "For example; in the case *Shanklin Pier Limited v. Detel Products Ltd.* [1951] 2 KB 854; Detel Products warranted to Shanklin Pier that their paint would provide an impervious layer giving rust protection for some 7 to 10 years. The claimant relied upon this warranty, and then when engaging the contractor, instructed the contractor to place an order for this paint, rather than be the bituminous paint that was originally specified. The paint was a total failure and the claimants sought to recover damages direct from the defendant. This is despite the fact that the contract for the sale of the paint was in fact between the main contractor and the defendant. While the warranty given in Detel Products was in respect of its quality or fitness for purpose, warranties may also be given with regards to the time for performance, design or indeed any other matter."

<sup>15</sup> Articles 124, 276, 277 and 278 of UAE Civil Transactions Law (Fed. Law 5 of 1985)



In principle; under UAE law; the collateral warranty does not limit of liability of the HC under the main contract toward the employer against the NS's works. However, if this not the case and the HC is not liable to the employer in this respect; then having such warranty will be more significant, otherwise the employer will be left with no remedy under the contract.<sup>16</sup> In this regard, the FIDIC suit applies the concept of collateral warranty via sub-clause 2.2 of the FIDIC Subcontracts Red Book 2011, which provides that by having such collateral warranty; the sub-clause 1.10 "No Privity of Contract with Employer"; will not apply to the scope of subcontractor's works under this warranty.<sup>17</sup>

It is worthy note that the collateral warranty does not release the HC from its liability in case of NS's default. Rather, its purpose to get the employer with the choices either to sue the NS under the breach of warranty or the HC under breach of contract. This however is not a tool that puts the employer in over compensated position. Thus, if the employer is adequately compensated under either of these two devices, then further damages shall not be awarded from the other party; otherwise the former will be liable under the principle of unfair enrichment.<sup>18</sup>

### **III. (C) Liability on Subcontractor by Law to the Employer**

This section will discuss whether the privity principle can be broken by a provision of law under certain circumstances. As such in the case if the NS will be liable to the employer by law considering the employer as a third party beneficiary from the subcontract. Thus, firstly, this section will explain the employer position in this respect under the English Contracts (Rights of Third Parties) Act 1999. Thereafter, secondly the same argument is addressed under article 254 of the UAE CTC.<sup>19</sup>

Under English law; pursuant to the Contracts (Rights of Third Parties) Act 1999; a third party became entitled to enforce a contract term under specific conditions; mainly these if

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<sup>16</sup>A, Masadeh, 'Vicarious Performance and Privity in Construction Contracts' (2014) International Construction Law Review

<sup>17</sup> Sub-Clause 1.10 and Sub-Clause 2.2 of the FIDIC Subcontract Red Book 2011 "Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, 1<sup>st</sup> edition 2011"

<sup>18</sup> See section V.(C) for more details about the principle of unjust enrichment

<sup>19</sup> Perhaps the subcontractor will be liable under other areas of both English and UAE laws to the employer as well as to the subsequent owner, this matter will be discussed in section IV. (B)

the contract provides that such third party can do so or if the contract “purports to confer a benefit” for him/her.<sup>20</sup> On dealing with this Act in the subcontracting; a construction professional understands that the employer is the beneficiary stakeholder in the normal construction subcontracts. Hence, merely by this Act; it could be argued that the latter can enforce a term in the subcontract and therefore the liability of the subcontractor is exposed to the employer. This makes the privity of contract principle questionable to the extent that some commentators construed that it is eroded by the Act.<sup>21</sup>

The criticisms on the said Act focused on the expression: “purports to confer a benefit”, this phrase may open the door for subjective interpretation of this part by the contracting parties and perhaps by the courts. In this respect, the Irish Law Reform Commission with thanks have analysed the Act in depth and stated on this point that: by this Act; unless otherwise expressly agreed; the presence of contractual chain shall prevent making the subcontractor directly liable to the employer as a beneficiary in the subcontract.<sup>22</sup> Nonetheless, to avoid any possible ambiguity in this subject; it is recommended to use limitation of liability clauses excluding the effect this Act if the parties wish so, at least until the interpretation of it becomes more clearer by the courts.

Alike to the principle of third party’s right under English law; pursuant to article 254 of the UAE CTC; the third party can demand the performance of a condition in a contract if it was agreed in such contract that condition confers a benefit for this third party unless agreed otherwise.<sup>23</sup> Apparently as commented by Andrew Niekerk; unless the parties agreed to the contrary; this right is automatically created and it does not require the

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<sup>20</sup> The Contracts (Rights of Third Parties) Act 1999 provides that “(1) Subject to the provisions of the Act, a person who is not a party to a contract (a ‘third party’) may in his own right enforce a term of the contract if (a) the contract expressly provides that he may, or (b) subject to subsection (2), the term purports to confer a benefit on him. (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party. (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.”

<sup>21</sup> M, Charman, *Contract Law* (4<sup>th</sup> edn Willan Publishing, Devon UK 2007) 160-163

<sup>22</sup> Law Reform Commission, ‘Privity of Contract and Third Party Rights’ Dublin, (2008) <http://www.lawreform.ie/fileupload/Reports/Report%20Privity.pdf> accessed 6/10/2015 Page:53-67

<sup>23</sup> Article 254 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “(1)It shall be permissible for a person to contract in his own name imposing a condition that rights are to inure to the benefit of a third party if he has a personal interest, whether material or moral, in the performance thereof. (2) Such a condition shall confer upon the third party a direct right against the undertaker for the performance of that condition in the contract enabling him to demand the performance thereof unless there is a contrary agreement, and such undertaker may rely as against the beneficiary on any defences arising out of the contract.(3)The person making the condition may also demand the performance of the condition in favour of the beneficiary, unless it appears from the contract that the beneficiary alone has such a right.”

presence of the parties' intentions to confer this right to the third party as in the case of English Act.<sup>24</sup> However, I disagree with this opinion, because it contradicts with the ordinary rules of UAE law as stated via articles 258 and 265 in the CTC,<sup>25</sup> which provide that the understanding of the parties' intentions while setting up the contract is essential in order to interpret any relevant contractual clause.<sup>26</sup>

Based on the above paragraph; the subcontractor will not be straight forward liable to the employer under the effect of article 254 of the UAE CTC if the subcontract was silent at this point. In other words, such silence cannot be filled by this area law "article 254". Rather, the interpretation of this is that the parties' had had no intentions to enable the employer as a beneficiary to enforce a term in the subcontract; this is of course unless expressly agreed otherwise.

Practically speaking; as per the custom in the UAE construction industry; the employers are not used to rely on the subcontracts for which they have no part to protect their rights where they have supposed to do so in the main contracts. On the other side; article 874 of the UAE CTC provides that "the manner and description for performance the contract shall be specified"<sup>27</sup> and pursuant to article 877 "the contract shall be executed in the manner specified"<sup>28</sup>. Hence, a subcontractor is not expected to fulfil employer's requirements in matter of time to complete, scope nor quality of works which were not agreed in the subcontract with their main contractor.

### **III. (D) Subcontractor's Tortious Liability to the Employer**

Beside the above illustrated contractual and lawful liability of the NS to the employer; this section will draw attention whether the former can be upheld liable under both the English and UAE tort laws to the employer.

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<sup>24</sup> A, Niekerk, 'Construction Law - The Statutory Creation of Third Party Rights under UAE Law' (2006) Law Update

<sup>25</sup> Articles 258 and 265 of the UAE Civil Transactions Law (Fed. Law 5 of 1985)

<sup>26</sup> Dubai Court of Cassation, 294/2008 rules in this case that "Under articles 258 and 265 of the Civil Code, the criterion in contracts is the intentions and meanings, and not the words and the form."

<sup>27</sup> Article 874 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "In a muqawala contract, there must be a description of the subject matter of the contract, and particulars must be given of the type and amount thereof, the manner of performance, and the period over which it is to be performed, and the consideration must be specified."

<sup>28</sup> Article 877 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "The contractor must complete the work in accordance with the conditions of the contract."

The liability under tort is a long established principle under the English common law targeted to protect the civil rights of entities' against personal injuries and properties' damage.<sup>29</sup> In presence of a contractual relationship between two parties having case under tort; despite of that the scope of tortious liability is arguable.

In principle, nothing prevents the employer from suing under contract or tort under the common law;<sup>30</sup> even it is quite difficult to establish a tortious liability on the subcontractor to the employer while there is contractual link between them and the main contractor. A number of courts went in this way adopting the approach that, at first, the subcontractor should not owe duty of care to the employer in the presence of the aforesaid contractual chain,<sup>31</sup> where employer is supposed to have the chance by contract to protect its position. Secondly, the pure economic losses are irrecoverable under the case tort law.<sup>32</sup> This is preventing the employer from seeking damages from the subcontractor for the defective and delayed works under tort.<sup>33</sup>

However, there are exceptional circumstances under which the NS can be held liable by tort to the employer even for pure economic losses; those were discussed in depth by Nicholas Gould.<sup>34</sup> As such, in the case of specialist subcontractor, the court considers that there will be a link of special reliance between the employer and the NS, by which the NS owes duty of care for not causing defects to the building owner "employer".<sup>35</sup> As well, the NS might be found liable if he produces faulty statements knowing that the employer will rely upon them, which might take the form of drawings or any other documents.<sup>36</sup>

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<sup>29</sup> <https://en.wikipedia.org/wiki/Tort> accessed 19/10/2015 : "A tort, in common law jurisdictions, is a civil wrong<sup>[1]</sup> that unfairly causes someone else to suffer loss or harm resulting in legal liability for the person who commits the tortious act, called a tortfeasor. Although crimes may be torts, the cause of legal action is not necessarily a crime, as the harm may be due to negligence which does not amount to criminal negligence. The victim of the harm can recover their loss as damages in a lawsuit. In order to prevail, the plaintiff in the lawsuit must show that the actions or lack of action was the legally recognizable cause of the harm."

<sup>30</sup> *Henderson v. Merrett* [1995] 2 AC 145

<sup>31</sup> *Riyad Bank v. Ahli United* [2006] 2 Lloyd's Rep 292, *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758

<sup>32</sup> *Murphy v. Brentwood* [1991] 1 A.C. 398, *Department of Environment v. Thomas Bates* [1991] 1 A.C. 499

<sup>33</sup> F, O'Farrell, 'Professional Negligence in the Construction Field' <http://www.keatingchambers.co.uk/> accessed 27/9/2015

<sup>34</sup> N, Gould, 'Subcontracts' <http://www.fenwickelliott.com/subcontracts> accessed 27/9/2015

<sup>35</sup> *Junior Books Ltd v. The Veitchi Company Ltd* [1983] 1 AC 520

<sup>36</sup> *Hedley Byrne & Co Ltd v. Heller & Partners Ltd.* [1964] AC 465

Under the UAE law; the liability for the acts causing harm “torts” is one of the sources of obligations.<sup>37</sup> Further, The UAE ordinary rules provide that the tortious liability is strict “no fault” liability: it is sufficient to prove there is a harmful act which leads to damage or injury and causation link between them”.<sup>38</sup>

In respect of subcontracting firm; the employer might choose to sue the NS under the tort rather than suing the HC under breach of contract because the former provides a longer limitation period always. However, the way to do so is not straightforward, because perhaps the presence of contractual chain breaks the tortious chain of causation if the NS proves that in the defence that he used to fulfil its obligations under the subcontract.

Well, does the tortious liability extend the contractual liability under the UAE Law? On dealing with this point in some cases, the UAE courts did not recognize the concurrent contract and tort liability in case the tortfeasor has a contractual link with the other party. On the other hand, other UAE courts adopted contrary approach on dealing with such cases.<sup>39</sup> Hence, it can be understood from those contrary approaches that establishing a liability under tort on the subcontractor to the employer is a matter of fact depends on the circumstances of the case.

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<sup>37</sup> Article 124 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “Personal obligations or rights shall arise out of dispositions, legal events and the law, and the sources of obligations shall be as follows: (1) contracts; (2) unilateral acts; (3) acts causing harm (**torts**); (4) acts conferring a benefit; and (5) the law.”

<sup>38</sup> Pursuant to articles 282, 283, 284 & 292 of the UAE Civil Transactions Law (Fed. Law 5 of 1985); the default rule of tortious liability under UAE law is strict, and it is based on three elements: wrongful act which via causation link a produces damage or harm, for which the aggrieved party is not needed to prove negligence nor intention on the wrongdoer. Moreover, The Dubai Court of Cassation, 226/2007, stated that “The effect of articles 282, 283 and 284 of the Civil Code is that any act resulting in harm to a third party, whether directly or by way of indirect causation, will oblige the doer thereof to make indemnity for the harm.”

<sup>39</sup> Al Tamimi & Company, ‘*Law of Tort in the UAE*’ <http://docslide.us/documents/law-of-tort-tamimi-article.html> accessed 27/9/2015

#### IV. Liability of Subcontractor to Subsequent Owner

In connection with the preceding chapter; but instead of the employer; this chapter will talk about issue of liability of the NS to the subsequent owner. This subject is important to enlighten the end users and consumers of the construction projects whether they have a right to recourse of an action against a NS shall they encounter any latent defects in their properties after the works had been completed and perhaps the warranty period elapsed. In this respect, it is assumed that the contractual chain from the subsequent owner to the subcontractor “NS” is tailored in the way as shown in figure no.1. Having guided by the previous chapter; this chapter in the flowing sections IV. (A to C) will discuss the possible inroads of getting the NS liable to the subsequent owner whether thru tort, law, contract or any

alliance of these.

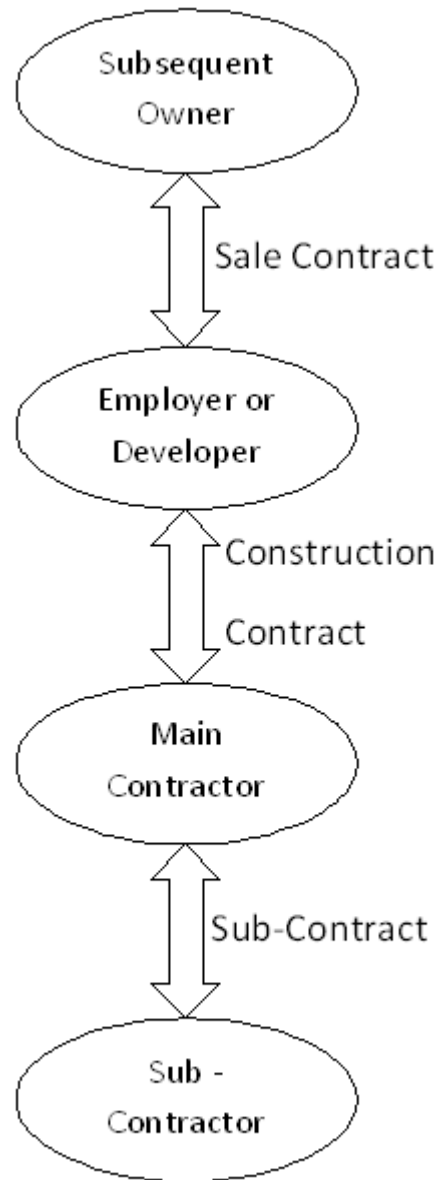


Figure No. 1

**IV. (A) Contractual Liability of Subcontractor to Subsequent Owner**

This section deals with the case on how to get the NS liable to the subsequent owner using the contracts, for which it is required to have a mechanism passing the liability through the contractual chain from the subsequent to the NS. Such mechanism is illustrated in

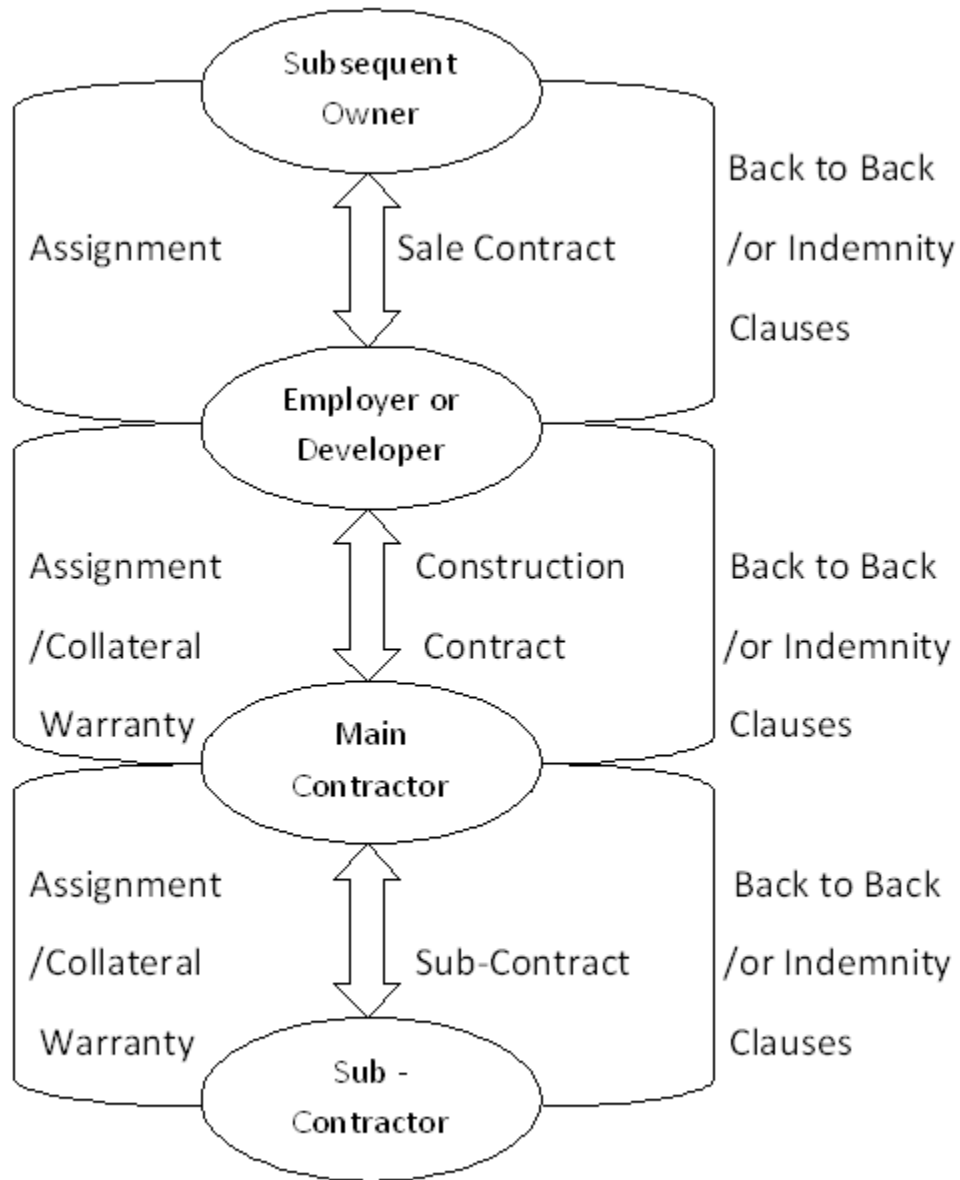


Figure No. 2

figure no.2.

Perhaps the assignment of certain employer’s rights to the subsequent owner is the most common way to confer the right to sue the contractors or subcontractors. For example,

most commonly the scope of such assignment can be tailored to cover the latent defects in the property for the benefit of the purchaser or subsequent owner shall such defects are encountered.

On dealing with this matter under the English law,<sup>40</sup> the assignment will not be valid if it is prohibited somewhere in the contractual chain, or if it was done without the principal consent.<sup>41</sup> Moreover, the extent of damages to which the assignee “who is supposedly the purchaser or subsequent owner in this case” can claim is restricted to the amount agreed; if any; in the contractual chain.<sup>42</sup>

The UAE law agrees with English law that consent of all parties is required for a valid assignment. Whilst in respect of the damages; unlike English Law; specific performance is the primary remedy under UAE Law against breach of contract.<sup>43</sup> Nonetheless; shall the court found that a party “like the subsequent owner in this case” will be entitled for a damages; the ordinary rules of UAE law allocate to the judge more flexibility to move around the contract in respect of quantifying the damages “where the justice so requires” pursuant to article 390 of the UAE CTC rather than the case of English law.<sup>44</sup> Such rules are applied to the case of subsequent owner rights against the NS thru the contractual chain.

Generally speaking, the employer has no contractual link with the NS in the normal case. Hence, in order to utilize this assignment against a NS by the subsequent owner; the employer is required to secure his right which he intended to confer to the purchaser either

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<sup>40</sup> For more details on this point, reference can be made to sub-title 22.3.2 “Assignment of rights to the subsequent owner” in the book: J, Murdoch & W, Hughes, *Construction Contracts Law & Management* (4<sup>th</sup> edn Tyler & Francis, London 2008) 326-328

<sup>41</sup> For example, Clause 19.1 of the JCT Standard Form of Building Contract 1998 states that neither the employer nor the contractor shall without the written consent of the other to assign the contract.

<sup>42</sup> *Dawson v. Great Northern & City Railway Co.* [1905] 1 KB 260: the court upheld that the “an assignee cannot enforce any claims ... which would not have been available to his assigner.”

<sup>43</sup> Article 386 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides for this point that: “If it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation.”

<sup>44</sup> Article 390 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that: “(1) The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law. (2) The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.”



thru another assignment or collateral warranty against the subsequent as discussed in Sections III. (A & B).

Rather, to avoid struggling in a contractual chain among many parties and to set aside the legal obstructions if any, the subsequent owner can obtain a collateral warranty directly from a subcontractor. This arrangement is more considerable in case the subcontract is of a critical nature for the subsequent owner. For example, the subsequent owner may wish to have a collateral warranty on professional services like design works, or on critical safety works like the electrical, fire fighting and gas piping works in the property, as well as he might do so for a special decoration works.

Further, it is a worthy note in this respect that the employer and HC can use other contractual devices to shift the risk of the liability associated with the default of NS to subsequent owner, like using of the back to back and indemnity clauses. However, such clauses will not transfer liability to a subcontractor as in the case of assignments and collateral warranties. Rather, these clauses help the HC or employer to recover their losses from the NS shall they become in default due to the NS's breach.

#### **IV. (B) Lawful Liability of Subcontractor to Subsequent Owner**

In brief, this section will answer the question: does the subsequent owner have a right by law to bring an action against a subcontractor as shown in the below figure no.3? On doing this, it is required to through lights on the relevant English and UAE areas of law and explaining how far such provisions are applied in this case.

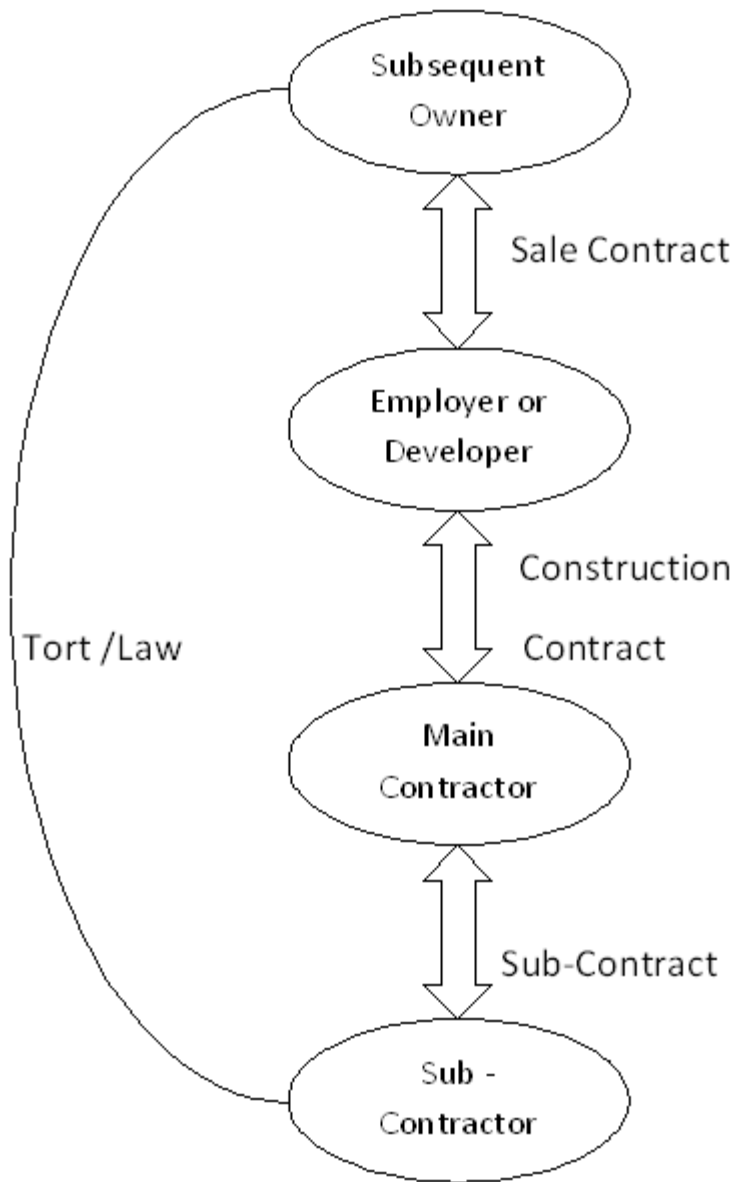


Figure No.3

Under English law; perhaps under the following Acts the subsequent owner can resort of a case to the court directly against a subcontractor: Firstly, the Defective Premises Act 1972 is applicable to every party who contributes in the design or construction of

“dwelling”<sup>45</sup> what applies on the subcontractors.<sup>46</sup> This Act sets up a minimum level of obligation on the contractors and subcontractors in the course of housing building works so that such works shall be delivered in a “workmanlike manner” targeting to provide protection to the individual subsequent owner to receive the dwelling in a “fit for habitation” conditions.<sup>47</sup> However, this Act is not applicable for commercial buildings as in the case of ordinary construction contract what it is in favour of NSs.

Secondly, the Consumer Protection Act 1987 “in respect of defective products that cause injury or damage” applies on the NSs since they supply materials in the course of construction works then at the end for use of consumers. However, the scope of this Act does not cover the defects in workmanship.<sup>48</sup> Thirdly, up to some extent, the Civil Liability Contribution Act 1978 may also put some liability on the NS as a party who take part causes damage to the subsequent owner. The effect of this Act will be more considerable against the NSs as long as they share a substantial role in the design or construction works, which therefore may increase the chance of getting him/her involved in the said damage, or vice versa in favour of the NSs in the other side if they share minor part in that damage.<sup>49</sup>

Fourthly, the Sales of Goods Act 1979, Supply of Goods and Services Act 1982<sup>50</sup>, the Building Act 1984, the Housing Grants, Construction and Regeneration Act 1996 and the Housing Act 2004 along with the Construction (design and Management) Regulations 2007 imply a level of liability into the relevant contracts that in this sequence requires a material, workmanship or design to be delivered at satisfactory level of skill and care and reasonably fit for purpose. Despite of these provisions; the subsequent owner cannot use any of them to bring an action against the NS unless there is an assignment or collateral warranty. Rather, the subsequent owner can under these provisions sue the employer who

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<sup>45</sup> <https://en.wikipedia.org/wiki/Dwelling> accessed 20/10/2015: “Under English law a dwelling is defined as a self-contained 'substantial' unit of accommodation, such as a building, part of a building, caravan, houseboat or other mobile home. A tent is not normally considered to be substantial.”

<sup>46</sup> The Defective Premises Act 1972 provides that “ the dwelling works must be delivered to the customer in a workmanlike manner, using proper materials, which shall be fitness for habitation, such dwelling is not meant for commercial buildings”

<sup>47</sup> S, Lupton, ‘Design Liability’ <http://www.buid.ac.ae/> at 6/2/2014

<sup>48</sup> J, Murdoch, & W, Hughes, *Construction Contracts Law & Management* (4<sup>th</sup> edn Tyler & Francis, London 2008) 323 - 324

<sup>49</sup> N, Gould, ‘Subcontracts’ <http://www.fenwickelliott.com/subcontracts> accessed 27/9/2015

<sup>50</sup> E, Macintyre, *Business Law* (6<sup>th</sup> edn Pearson, England 2012) 285: see figure 10.1 which explains thru a road map the way to establish liability under the Sales of Goods Act 1979, Supply of Goods and Services Act 1982.

can shift the liability to the HC and further to the NS using the passing down liability clauses “back to back or indemnity clauses” as shown in the below figure no.4.

Fifthly, often there is a right to sue the subcontractor directly under tort, for which the liability will be established only if the ordinary conditions of tortious act are met: “duty of care, breach of it and property damage or personal injury.”<sup>51</sup> Well, the question here: does the liability under tort can be restricted thru the contractual chain? For this point, it was ruled by the court that such said restrictions on the assignment in a contract will not prevent assigning a right in tort but this is under specific conditions.<sup>52</sup> Whilst, such conditions will not be required for the subsequent owner in case there are no restrictions on the assignment in the contract in order to use it to sue the contractor or subcontractor under tort on behalf of the employer.<sup>53</sup>

Sixthly and finally, perhaps under the Contracts (Rights of Third Parties) Act 1999; the subsequent owner as beneficiary party of the construction contract can sue the head contractor directly who would pass down the liability to the subcontractor in such a way as mentioned in the previous paragraph. Or in other way around under this Act, the former might be able to sue the subcontractor as beneficiary in the subcontract on behalf of the employer given that there is a valid assignment or collateral warranty in the subcontract in favour of the employer.<sup>54</sup>

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<sup>51</sup> See Section III. (D) for more details about the tortious liability

<sup>52</sup> *Linden Gardens v. Lenesta Sludge Disposals* [1994] 1 AC 85 HL: The House of Lords held for this case that “despite that the contract prohibits the assignment without consent; the subsequent owner could sue to recover its own loss provided that : (1)The loss was foreseeable, and that the Contractor’s original breach would cause loss to later owners. (2) The contract must prevent an assignment. (3) A third party must have no other cause of action (for example, a collateral warranty) and; (4) Substantial damages had been incurred by and will be for the benefit of the third party subsequent owner.”

<sup>53</sup> *Darlington Borough Council v. Wiltshier Northern Ltd.* [1994] 69 BLR 1 CA

<sup>54</sup> See Section III. (C) for more details about the Contracts (Rights of Third Parties) Act 1999

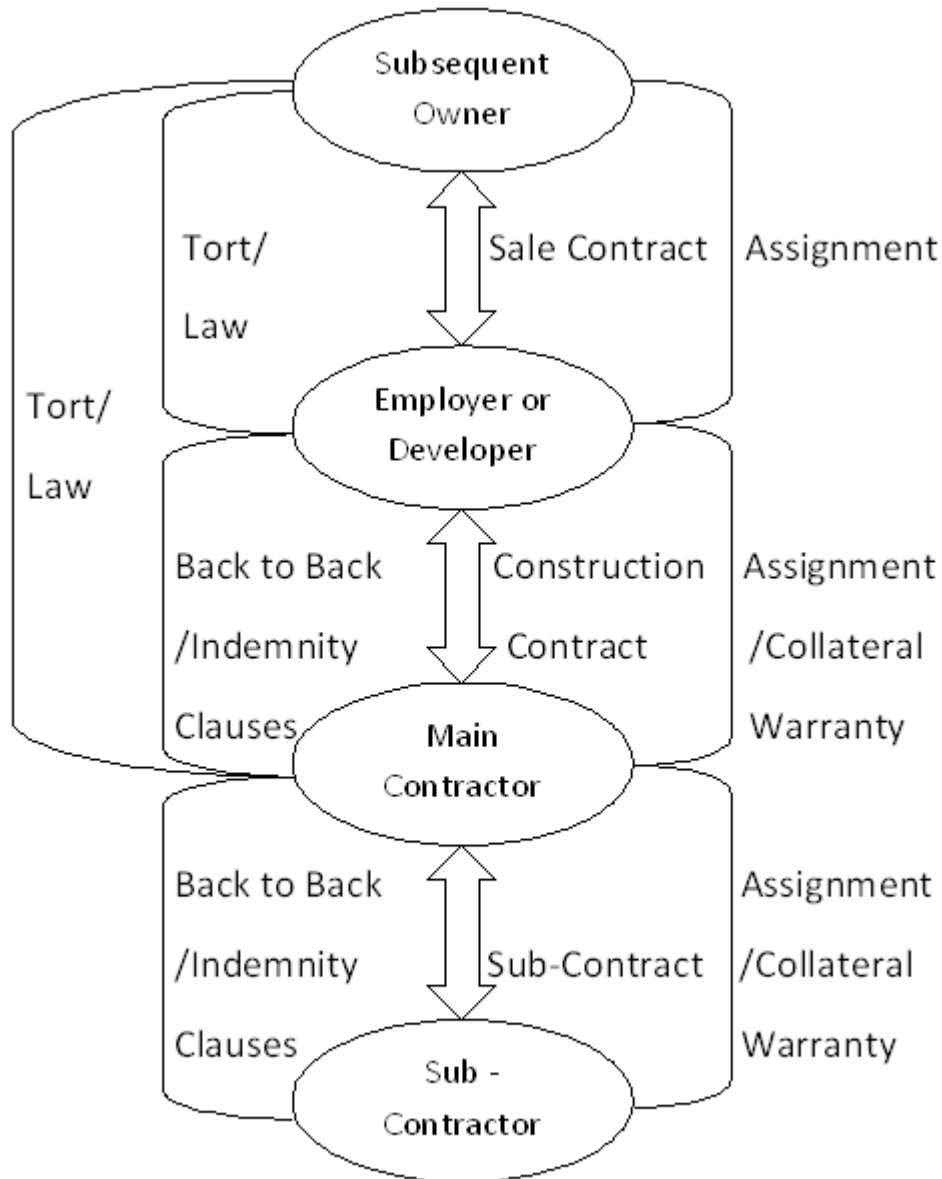


Figure No. 4

Under UAE law, firstly, pursuant to article 254 of the CTC; the subsequent owner as a third party beneficiary in the construction contract has a right to bring an action against the head contractor unless agreed otherwise. Whilst, to do this against a subcontractor; there must be an assignment or collateral warranty in favour of the employer in the contractual chain as mentioned in the previous paragraph.<sup>55</sup> Secondly, in principle, the right to sue the subcontractor under tort is always exist to the subsequent owner, but in practice, since, the

<sup>55</sup> See Section III. (C) for more details about the third party's right under article 254 of the CTC

subsequent owner has such right against the employer as well; it sounds well and perhaps more fruitful to resort of an action against the latter. Moreover, the presence of contractual chain provides strong defence to the subcontractor.<sup>56</sup>

Thirdly, if the main purpose of the subcontract was to supply materials; then pursuant to article 544; perhaps the subcontractor as a seller will be liable to the head contractor purchaser shall any latent defects are discovered within those materials; provided that the requirements of said article are attended.<sup>57</sup> Will this applies to the employer or subsequent owner against the subcontractor? The answer is yes, but only thru the main contractor. This is taken from article 542; by which it is ruled that a main contractor “as purchaser” is entitled to recourse against a subcontractor “as a seller” for anything he has paid to an employer “as a third party claimant”.<sup>58</sup> Hence, without having an assignment or collateral warranty; the employer cannot rely on article 544 only to recourse of an action directly against the subcontractor.

Fourthly, pursuant to article 880 of the UAE CTC; “the decennial liability article”; the head contractor is strictly liable to the employer for a period of ten years if the latter encounters any partial, complete collapses or structural defects in the works. The scope of this liability does not cover the latent defects which do not affect the safety or structure stability of the building. Further; the stipulated wordings in this article do not include the subcontractors.<sup>59</sup> Therefore, they will not be liable by which to the employers nor subsequent owners. Thus, in order to pass this liability to the subcontractor; it is required to have an assignment and collateral warranty thru the contractual chain or using of the indemnity or back to back clauses.<sup>60</sup>

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<sup>56</sup> See Section III. (D) for more details about the tortious liability under UAE law

<sup>57</sup> Article 544 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides via section (4) that “for a defect to be regarded as old it must have been latent, and a latent defect is one which cannot be observed by an external inspection of the goods, or which would not be apparent to the ordinary man, or which could not be discovered by any person other than an expert or which would only be apparent upon testing.”

<sup>58</sup> Article 542 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “the third party claimant may claim against the purchaser for any yield deriving from the goods sold or exploitation made thereof after deducting any expenses necessary to produce such a profit, and the purchaser shall have a right of recourse against the seller for anything he has paid to the third party claimant.”

<sup>59</sup> Article 880 of UAE Civil Transactions Law (Fed. Law 5 of 1985)

<sup>60</sup> A, Masadeh, ‘Decennial Liability in Construction: Law and practice in the United Arab Emirates’ <http://www.buid.ac.ae/> accessed 8/10/2015

Well, if there is a second subsequent owner who is to further buy the property from the first subsequent owner who bought it from the employer or developer; does the decennial liability article applies in favour of the second owner even there is no privity between the latter and the developer? The decennial liability article does not cover this point. Hence, it is assumed that no protection to the second owner against the developer at this situation unless agreed otherwise. Whilst if it is agreed that the second owner is a beneficiary in the first sale contract; then pursuant to article 254 of the UAE CTC; the second owner can retain the effect of decennial liability against the developer.

In order to overcome the said obstacle of “no privity”; Dubai's Strata Law “Law No. 27 of 2007” via article 26 went for further step than the UAE federal law in extending the developer liability to the subsequent owner of the property.<sup>61</sup> Thus, the decennial liability article automatically applies in favor of the second owner as well as the subsequent owners for a period of 10 years starting from the date of building's handing over in the premises covered under this law “Dubai Emirate”.<sup>62</sup>

## **V. Employer's Liability to the Subcontractor**

First of all, in respect of NSs, it is worthy to note that the nomination is not a binding agreement unless it contains mutual promises between an employer and subcontractor. Thus, the latter in principle cannot rely on the mere nomination to establish liability against the employer. However, up to some extent in practice, this matter is bothering the head contractors in their endeavours of limiting their liability against the NSs' works; this will be discussed in the next chapter.

Nevertheless, whether the employer owes any kind of liability to the NS even of “no privity” between them? This chapter will discuss this point under these scenarios: in case of having direct payment provisions to the NS, interpretation of the direct instructions,

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<sup>61</sup> Article 26 of Dubai's Strata Law (Law No. 27 of 2007) provides that: “The Developer remains liable for 10 years from the date of completion certificate of the building to repair and cure any defects in the structural elements of the Jointly Owned Property notified to him by the Owners' Association or a Unit Owner.”

<sup>62</sup> L, Dale & S, Hunt ‘Decennial Liability and Latent Defects - Contractors' and Developers' Liability in Dubai’ (2009) 222 Law Update 20

conditions of NS's entitlement to payment under unfair enrichment and assignment of HC's rights to the subcontractor.

#### **V. (A) Employer's Direct Payment to the Subcontractor**

The UAE CTC law via article 891 provides that the subcontractor has no right of payment against the employer even in case of the HC's default.<sup>63</sup> This approach is in line with privity principle, which aims to protect the employers from such claims under NSs for which they have no part. However, at the same time, this in practice may sometimes cause detriment to the employer that if the NS does not receive a payment due from the HC; then under the primary rules of UAE law; the NS will therefore have the right to suspend the works.<sup>64</sup>

Thus, in order to fortify the employer from the said detriment; sub-clause 5.4 of the FIDIC Red Book 1999 empowers the employer to make a direct payment to the NS under specific conditions.<sup>65</sup> Further, perhaps this sub-clause will be useful to the employer if he has an interest to keep the NS working for the project in case of the HC's insolvency. Nonetheless, at any case, the right of such payment under this sub-clause is designed to take place at only the sole discretion of the employer without having an obligation on his part. Therefore, the NS will have no right to sue the employer pursuant to the said sub-clause.

In line with UAE law; the English law maintains the principle of privity at this point, for which, it stipulates that the employer has no obligation of direct payment to neither domestic or NSs. Nonetheless, some of the standard contracts in the UK like: "clause 35.13

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<sup>63</sup> Article 891 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "A sub-contractor shall have no claim against the employer for anything due to him from the first contractor unless he has made an assignment to him against the employer."

<sup>64</sup> Article 247 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "in contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do."

<sup>65</sup> Sub-clause 5.4 of the FIDIC Red Book 1999 provides that "the employer may at his sole discretion pay to the nominated subcontractor part or all of such an amount...for which the contractor has failed...to provide an evidence to the engineer that this payment is done to the nominated subcontractor...or to satisfy the engineer...that the contractor is reasonably entitled to withhold...such amount...and to provide a reasonable evidence that the nominated subcontractor has been notified of the contractor's entitlement (to hold the payment)."



of the JCT 98 and clause 59 of the ICE 7”<sup>66</sup> adopt similar approach as in the FIDIC in containing provisions of direct payment to NSs under certain conditions. Whilst; in case of HC’s insolvency; in order to avoid having the employer liable to make double payment to the liquidator against the NS’s works as well as to the NS; clause 35.13 of the JCT 98 has a significant addition to the other contracts, which provides that “the direct payment provisions shall cease as soon as the HC is subject to liquidation proceeding.”<sup>67</sup>

In France, the law “No. 75-1334 of 1975” went further step in favour of the subcontractors’ position than the UAE and English laws.<sup>68</sup> “This law provides that main contractors are obliged to issue bank guarantees in favour of their subcontractors, guaranteeing payment for executing the subcontract works. Equally, employers are under obligation to ensure that their main contractors comply with this requirement, and failure by the employer to ensure these requirements would give the subcontractor the right to make a direct claim to both the employer and the main contractor jointly.”<sup>69</sup>

For instance, perhaps having a right of direct payment provisions to the subcontractors helps the employers in some circumstances. But what about in case the subcontractor sues for damages against the delayed payment? Or, in practice, sometimes the prices of special works in subcontracts are higher than in main contracts, then for this case, how much the employer shall pay to the subcontractor? I don’t think there are short cut answers. Hence, the employers are advised to be aware of all the subcontractors’ prices and claims if any, before using the direct payment provisions in order to secure their positions.

## **V. (B) Employer’s Direct Instructions to Subcontractors**

How far the employer’s direct instructions to a NS making him liable? Well, this depends on the context and contents of these instructions themselves. In other words, this

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<sup>66</sup> For more details; see Clause 35.13 of the JCT 98 and Clause 59 of the ICE 7

<sup>67</sup> J, Murdoch, & W, Hughes, *Construction Contracts Law & Management* (4<sup>th</sup> edn Tyler & Francis, London 2008) 301 - 303

<sup>68</sup> French Law No. 75-1334 issued on 31 December 1975

<sup>69</sup> E, Bannaga, ‘Understanding the Mutual Influence of Contract and Subcontract Terms on Construction Relationships’ <http://www.buid.ac.ae/> accessed 14/9/2015

section will test whether such instructions amount to break the contractual chain and produce a new relationship between the employer and NS or not.

In the UAE, the general approach of the courts is that the HC remains liable on all the NS works including the employer's instructions to NS.<sup>70</sup> However, will such instructions amount to make independent contract between the employer and NS? Yes if the elements of a valid contract are fulfilled including the intentions of the parties what need to be expressly found in the course of these instructions. Indeed, unless agreed otherwise, the intention to have a binding contract with a NS thru the employer's direct instructions is in contrary to the custom of construction works in UAE. This perhaps clarifies the dealings of the courts in this respect.

Under English law; perhaps the employer's direct instructions to a NS circumvent the principle of privity. Thus; unlike the case of UAE law; the performance of works by the latter pursuant to these instructions may exempt the HC's liability shall there are defects encountered pertaining such works under specific conditions.<sup>71</sup> Nonetheless, the mere employer's direct instructions to a NS do not establish liability for payment unless they contain at least a "promise to pay".<sup>72</sup> This is because having the parties' agreed on the consideration is an integral part of a valid binding contract under English law.

#### **V. (C) Employer's Liability under the Principle of Unjust Enrichment**

Having said that the NS is not entitled for payment for works done pursuant to employer's direct instructions is not the end. Still, the NS can resort to the principle of

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<sup>70</sup> A, Ibrahim, 'Subcontracting under UAE Law' <http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/subcontracting-under-uae-law> accessed 14/10/2015: "In many cases, the UAE courts emphasized that the main contractor remains contractually liable for the acts or defaults of the subcontractor even if the subcontractor in reality performed the employer's instructions during the course of the project... See for example the High Federal Court decision in Petition No. 307 of 11 where the court held that the subcontractor's performance of the employer's instructions does not qualify to create a contractual relationship between the employer and the subcontractor. As such, the main contractor's liability remains in place."

<sup>71</sup> *Gloucestershire County Council v. Richardson* [1969] AC 480: "in this case it was held that by Lord Wilberforce: if the employer and sub-supplier fix the design, materials, specification, quality and price of materials without any reference to the contractor ... then this situation will give an implied exemption to the head contractor from in respect of latent defects in these materials".

<sup>72</sup> D, Atkinson, 'Collateral Warranty' <http://www.atkinson-law.com/library/article.php?id=128> accessed 2/11/2015

“Unjust Enrichment”<sup>73</sup> as a defence to leapfrog from the contractual chain in course of restitution its rights. This is might be useful as well in case(s) of the HC’s insolvency or termination.

Under article 124 of the UAE CTC law, the liability of unfair enrichment is recognized as one of the sources of obligations named by the “act conferring a benefit.”<sup>74</sup> In addition, articles 318 and 319 stipulates in the same context.<sup>75</sup> How far this applies to the subcontractors’ claims against employers? The Dubai Court of Cassation in interpretation of article 318 states that the principle of unfair enrichment does not apply if there is a contractual relationship between the parties, in addition, the aggrieved party has the burden to prove that there was a benefit conferred to the other party thru a transaction without a lawful cause.<sup>76</sup>

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<sup>73</sup> <http://legal-dictionary.thefreedictionary.com> accessed 3/11/2015; the “Unjust Enrichment” expression is defined as “a general equitable principle that no person should be allowed to profit at another’s expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained. Although the unjust enrichment doctrine is sometimes referred to as a quasi-contractual remedy, unjust enrichment is not based on an express contract. Instead, litigants normally resort to the remedy of unjust enrichment when they have no written or verbal contract to support their claim for litigants ask a court to find a contractual relationship that is implied in law, a fictitious relationship created by courts to do justice in a particular case.”

In other jurisdictions they use the expression of “quantum meruit” for this purpose where it states in this context that “By allowing the recovery of the value of labor and materials, quantum meruit prevents the unjust enrichment of the other party. A person would be unjustly enriched if she received a benefit and didnot pay for it when fairness required that payment be made. Quantum meruit can be used to address situations where no contract exists or where a contract exists but for some reason isunenforceable. In such cases courts imply a contract to avoid an unjust result. Such contracts are called quasi contracts. Quantum meruit also describes a method used to determine the exact amount owed to a person. A court may measure this amount either by determining how much the defendant has benefited fromthe transaction or by determining how much the plaintiff has expended in materials and services.”

<sup>74</sup> Article 124 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “Personal obligations or rights shall arise out of dispositions, legal events and the law, and the sources of obligations shall be as follows: (1) contracts; (2) unilateral acts; (3) acts causing harm (**torts**); (4) acts conferring a benefit; and (5) the law.”

<sup>75</sup> Article 318 of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “No person may take the property of another without lawful cause, and if he takes it he must return it.” Article 319 (1) of the UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “Any person who acquires the property of another person without any disposition entitling him so to do must return it if that property still exists, or similar property or the value thereof if it no longer exists, unless the law otherwise provides.”

<sup>76</sup> The Dubai Court of Cassation, 216/2009 states in this case that “The effect of article 318 of the Civil Code, as clarified by the Commentary, is that the basic presumption is that a property of a person may not be transferred to another save in one of two cases. They are the agreement of those two persons to such transfer, or if the law dictates that such transfer take place. If there is a transfer of property in either of those two cases, it must be returned to its owner. That is the rule of unjust enrichment. The owner of property who alleges that it has been transferred to another person otherwise than in the two circumstances aforesaid has the burden of proving his allegation in that he has to adduce evidence firstly that his property was transferred to another, and secondly that the transfer of the property to that person took place without lawful cause. Whether that has happened is a matter of fact for the trial court. There is no scope for the application of the principle of unjust enrichment in a case where there is a contract governing the relationship between the two parties. In a case where there is no contract, the action is brought on the basis of unjust enrichment if the conditions therefore are made out.”

Based on the above, as long as there is a valid contractual link; the NS may not be able to establish liability against the employer under the unfair enrichment principle. Further, the NS is required to prove that there was no lawful cause governed the works done or materials delivered to the employer. Thus, these conditions weaken the position of the subcontractor's claim under the principle of unfair enrichment. Nonetheless, in case of successful claim; the amount of compensation under this principle will not be as per agreed in a contract. Rather, it will be either equal to the loss suffered or benefit gained whichever is less, due to that transaction.<sup>77</sup>

Under the English law, when resorting with a case to the unjust enrichment principle; the claimant must provide evidence that the defendant received benefit at the expense of the former thru unjust transaction. The English law agrees with UAE law on the rule that the principle of unjust enrichment is not applied if there is a valid contractual nexus across the parties of the transaction. However, rather to the UAE law, the quantum of restitution under English law is based on the benefit(s) received disregard of the losses incurred.<sup>78</sup>

In respect of the NS's claim under this principle; Dr. Lin in analyzing a relevant case<sup>79</sup> in Hong Kong addresses two concerns; up to what extent such claim interacts the contract and law.<sup>80</sup> Firstly: the courts are not used to rule in contrary to the parties' agreed terms in the contract. For example, if the NS agreed to accept the risk of no payment at a certain circumstances in the subcontract with the HC, then the court is not expected to shift this risk to the employer. Secondly: in case of the HC's insolvency, the process of liquidation will follow the relevant provisions in law, which will not give an advantage of payment to the deprived NS and leave the other creditors of the HC unsecured.

Based on the above, under the common law, the chance of subcontractor's successful claim of payment under the principle of unjust enrichment depends on the ability to

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<sup>77</sup> The Dubai Court of Cassation, 234/2009 states in this case that "The intention of the rule relating to unjust enrichment is that the obligor has an obligation to make compensation to the obligee in respect of the loss he has suffered to the extent of which the other has become enriched."

<sup>78</sup> J, Adriaanse, *Construction Contract Law* (3rd edn Palgrave Macmillan, England 2010) 22-25

<sup>79</sup> *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] 3 HKC 290

<sup>80</sup> D, Lin, 'A Leapfrog Attempted: Unjust Enrichment, Implied Contract and Quistclose Trust- Recent Development on Direct Payment Claims by Nominated Subcontractors' (2014) *International Construction Law Review*

leapfrog from the hurdles in the contractual chain and law, which is, indeed, very limited, even if the employer wills to pay, unless otherwise agreed.

#### **V. (D) Assignments of Rights and Payment Guarantees to Subcontractor**

This section will throw light on contractual devices, which if they are in effect, they may break the “no privity” principle across the employer and NS. The purpose of these devices is to secure the rights of NSs against the employers in case of HCs’ default. Such devices, anyway, from the employers’ perspective, might be helpful to invoke wanted subcontractors to participate in the project, for example; thru using an assignments or payment guarantees,<sup>81</sup> what will be discussed via this section.

In this respect, pursuant to article 891 of the UAE CTC law; the HC is in principle can assign its right of payment from an employer to the NS.<sup>82</sup> Thus; unless there is a condition in the contract to the contrary;<sup>83</sup> such assignment empowers the NS to sue an employer directly against its failure to pay to the HC. However, the case will be still debatable before the court if the latter is in default that could entitle the employer to retain the payment to the HC.

Whilst in order to set the “no privity” hurdle aside and secure the right of NS beyond such said debate; the employer may issue a direct payment guarantee in favor of the former against the HC’s default. Such guarantee is enforceable as a unilateral promise under the UAE law as discussed in section III. (B), which could be conditional or unconditional. Having used to issue such payment guarantee; the employer is advised to fortify its position from making double payment toward the HC by having an indemnity or reservation of right clause(s).<sup>84</sup>

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<sup>81</sup> E. Teo, ‘Bridging the Contractual Gap between an Employer and a Subcontractor’ (2010) 230 Law Update 38

<sup>82</sup> Articles 891 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “the second contractor may not make any claim against the employer for anything due to him from the first contractor unless he has made an assignment of it to him as against the employer.”

<sup>83</sup> For example, sub-clause 1.7 of the FIDIC Red Book 1999 “prohibits the assignment of any benefits or interests under the contract unless such assignment is agreed by both parties, whilst it is only allowed to assign the rights of money due to a bank or a financial entity.”

<sup>84</sup> For example, sub-clause 5.4 of the FIDIC Red Book 1999 provides that “...the contractor shall then repay to the employer the amount which the nominated subcontractor was directly paid by the employer.”

Under English law, unless prohibited by the contract; the HC is allowed in principle to assign its rights to a NS. Therefore, there is a significance of having “no assignment clause without mutual consent”<sup>85</sup> in order to limit the employer liability of payment to NS under such assignment.<sup>86</sup> Nonetheless, the default rules provide that “under a valid assignment, the assignee is entitled to be placed in the same position of the assigner.”<sup>87</sup> Well, in case of the employer default, can the NS sue for payment on behalf of the HC? This will depend whether the employer conveys a promise for such payment in the assignment, otherwise, unlike in case of UAE law; since no consideration across the parties; no such right is vested thru a mere assignment.

Beyond the assignments, the employer however will be face to face obliged toward the NS if they have entered into a collateral agreement or under a payment guarantee.<sup>88</sup> Thereby, the right of direct payment to NS is enforceable given that the elements of a valid contract are satisfied in such collateral arrangement, these mainly the presence of the parties’ intentions to create binding relationship and the consideration. Perhaps the consideration in this case is a NSs warranty to fulfil certain requirements for the employer against its right of direct payment.

It is worthy note that the absence of a contractual link with a NS provides protection to the employers up to some extent, but this could not be in their favor in some cases. That, the risk of no payment to NSs would make them hesitated to quote for the project, or if so, they may put contingency reserves against the risk of no or delayed payment. At the end, the employers will be used therefore to pay for such risk for which they have no part or

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<sup>85</sup> For Example; clause 19.1 of the JCT Contract 1998 provides that “neither party is allowed to assign the contract without the written consent of the other party.”

<sup>86</sup> M, Bridge, ‘Unassignable Rights’ [www.lse.ac.uk/](http://www.lse.ac.uk/) accessed 28/9/2015: “The issue of no-assignment clauses came to the fore in *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, QBD, where a construction contract provided that the contractor was not to “assign the contract or any part thereof or any benefit or interest therein or there under” without the written consent of the council employer. The contractor, nevertheless, assigned the amount due from the council to the plaintiff, which brought an action to recover the amount due. The clause was held to be effective to prevent the assignment. It was not unjust for assignees to have to make inquiries about no-assignment provisions before accepting an assignment; inquiries were needed anyway to see if the debtor had the means to pay or had a set-off defence to payment. The no-assignment clause, therefore, was not applied just as a matter of contract between obligor and assignor so as to make the latter’s assignment a breach of contract, yet an effective proprietary transfer.”

<sup>87</sup> J, Adriaanse, *Construction Contract Law* (3rd edn Palgrave Macmillan, England 2010) 329

<sup>88</sup> For example, see the NSC/W JCT 1998 forms of collateral agreement.

they may lose the chance of having sufficient competent NSs quoting for the project. Perhaps, this disadvantage lies behind the rational of having those contractual devices to break the “no privity” despite using of them, indeed, is still rare.

## **VI. Employer’s Liability to Head Contractor under the Nomination**

The principle of privity stipulates that the employer who is not a party in a subcontract shall not be held liable to any party thereof. The previous chapter discussed this statement in ambit of the employer’s liability to NS. This chapter on the other hand will explain how far the consequences of subcontractor’s nomination will affect the liability of the employer to the HC.

The nomination, in brief, is a process or direct selection of subcontractor(s) by the employer without having them in a face to face contractual nexus. The HC is then required to sublet certain part of the works to such “nominated” subcontractor(s). The HC often has no part in this nomination. Thus, at first, this chapter will discuss the effect of nomination and default of NS on the employer’s liability to the HC. Secondly, it will draw an attention on the risk allocation of the NS’s default between the employer and HC thru the use of limitation of liability clauses under the JCT and FIDIC standard forms.

### **VI. (A) Default of Nominated Subcontractor and the Employer’s Liability**

This section will explain how the nomination and further the default of NSs interact with the liability of the employer toward the HC. More specifically, this matter will be discussed in the ambit of these points: the delay in nomination by the employer, the impact of the delays, defective design and works of the NS, and further the circumstances of repudiation the works by the NS.

Under English law, having the right of subcontractors’ nomination for the employer in a contract is not merely interpreted anyhow to limit the HC’s liability. However, shall the employers decide to avail from this right; then they are obliged to do it at the correct time,



which is, indeed, shall be consistent with the agreed program of works, otherwise delay on this, may upheld the employer liable to the HC.<sup>89</sup>

Further, if the employer warrants the quality of specific materials supplied by the NS and there is “no right to object” clause in the contract; this may absolve the HC from the liability connected with such materials.<sup>90</sup> On the other hand, “it is very unlikely that the HC will be held liable for errors on design made by the NS.”<sup>91</sup> However, unless it is connected with such defects, the liability of the HC on the NS’s workmanship shall remain in place giving that there is a “right to object” clause. Whilst, in respect of the NS’s delayed works; unless agreed otherwise; the courts often maintain the privity principle, and thus tend to uphold the HC liable to the employer.<sup>92</sup>

The case will be more controversial if the NS repudiates the works, becomes insolvent or encounters force majeure.<sup>93</sup> Probably; unless agreed otherwise; the courts will have no choice but to apply the ordinary rules and thus abide with privity principle.<sup>94</sup> However, in respect of the repudiated works; the employer will then have a duty to re nominate another subcontractor within a reasonable time, or to instruct the HC to do those works by itself or thru a domestic subcontractor, rather the former can cease such works. Nonetheless, the HC is required to make sure that the new nominee can meet the project time frame, if not; uses its right to object if it is there, to clear its position toward the employer.<sup>95</sup>

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<sup>89</sup> H. Freehills, ‘Nominated subcontractors’ <http://www.lexology.com/library/> accessed 10/11/2015

<sup>90</sup> *Gloucestershire County Council v. Richardson* [1969] 1 AC 480, “the court in this case held that the head contractor shall not be liable for the defects found in materials (precast columns) which were supplied by the employer’s nominated supplier, for which the contract does not provide the head contractor with the right to object.”

<sup>91</sup> J. Murdoch & W. Hughes, *Construction Contracts Law & Management* (4<sup>th</sup> edn Tyler & Francis, London 2008) 291

<sup>92</sup> *Westminster City Council v. Jarvis & Sons Ltd* [1970] 1 All ER 942: in this case the house of lords held that the HC is entitled for EOT against the NS’s delay of works caused by in the course of remedying defects in the latter’s part, which led to delay the entire project.”

<sup>93</sup> This is meant for the event of force majeure which applies only to the nominated subcontractor which does not cover the employer. For example, this in case the subcontract requires sales of materials from overseas state where such an event of force majeure arises.

<sup>94</sup> *Percy Bilton Ltd v. Greater London Council* [1982] 2 All ER 623, in this case the nominated subcontractor encountered insolvency for which the House of Lord held that the head contractor is entitled for EOT considering that the delay which is inevitable occurred due to such case is the head contractor’s risk.

<sup>95</sup> *Fairclough Building Ltd v. Rhuddlan DC* [1985] 30 BLR 26, in this case, the first nominated subcontractor repudiated the works. The court held that the head contractor is entitled to reject the second nominated subcontractor if the latter cannot meet deadline set up in the head contract, and thus, the head contract is entitled for EOT until the second nominated subcontractor can complete the repudiated works.



Under the UAE Law, article 890 provides that; in case of subletting part of the works to a subcontractor; the liability of the HC shall, in principle, remain in place toward the employer.<sup>96</sup> The wording of this article however does not distinguish between nominated and domestic subcontractors; it is interpreted anyhow by the UAE courts as a strict liability against the HC and thus it applies for both in principle. Despite of that; there was an exception made by the Dubai Court of Cassation for similar case, for which the court ruled that the HC shall not be liable against the NS's default under certain conditions.<sup>97</sup>

Having said that the privity principle is intact; it does not prevent the HC to seek redress from the employer in respect of the NS's default under other areas of the UAE law. As such: at first, the delay in nomination the NS by the employer may entitle the HC for extension of time pursuant to article 247 of the UAE CTC law giving that this delay precludes the HC to fulfil its obligation in the agreed due time.<sup>98</sup>

Secondly, in case of repudiation the works from the NS side due to insolvency, hardship or force majeure in its part; perhaps the HC can resort to article 249 "Hardship Theory" which applies to public, exceptional and unforeseeable event that renders the performance of the contract oppressive,<sup>99</sup> or article 273(2) "Force Majeure" which applies on the case of impossibility to perform part of the contract.<sup>100</sup> Since these articles are primary rules of

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<sup>96</sup> Articles 890(2) of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "(1) A contractor may entrust the performance of the whole or part of the work to another contractor unless he is prevented from so doing by a condition of the contract, or unless the nature of the work requires that he do it in person. (2) The first contractor shall remain liable as towards the employer."

<sup>97</sup> The Dubai Cassation Court in the case of 266/2008 stated that; "The criterion for the liability of the original contractor for a delay made by a sub-contractor is that the head contractor must be the person who appointed or chose the sub-contractor. If the subcontractor was chosen by the employer (the building owner) or the latter's consultant, then any delay in performance on the part of the sub-contractor is the liability of the employer and not of the head contractor, who will not be liable for any penalty for delay if it is demonstrated that his failure to hand over the building on the date specified in the contract was attributable to causes in which he played no part."

<sup>98</sup> Article 247 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "in contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do."

<sup>99</sup> Article 249 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void."

<sup>100</sup> Article 273 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that "(1) In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease and the contract shall be automatically cancelled. (2) In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing

UAE law; it cannot be limited or agreed otherwise. In other words, unlike the said case in English law; regardless how the risk is allocated in the contract, the judge in UAE pursuant to those articles can reduce or modify the performance of any part of the contract as the justice so requires. Nonetheless, the HC has the burden to prove that the default of the NS meet the requirements of such articles “hardship theory or partial force majeure”.

Thirdly, in case of defective or delayed works caused by the NS’s, for which the HC played no part; perhaps articles 287<sup>101</sup> and 878<sup>102</sup> of the CTC are relevant somehow to this case. However, I would say that it is difficult to relieve the HC from the liability to the employer in this respect, because, unless agreed otherwise, the HCs as per the custom in the UAE are used to accept the burden of monitoring the performance of the NSs against an additional margin paid for the HCs by the employers above the price of the NSs’ works. In other words, if the HC agreed, and paid by the employer for the risk of delayed and defective performance of the NS; then the HC shall be liable to the employer to mitigate the consequences of this risk once it arises.

## **VI. (B) Allocation of Risk and Effect of Limitation of liability Clauses**

Despite the privity principle states that the employer shall not be liable against the NS’s default to the HC; there is no short cut answer where the risk of NS’s default lies between of them neither under the English nor UAE laws. In this respect the parties however can have contractual devices in order to crucially allocate this risk between them, as such, thru the use of limitation of liability, indemnity and back to back clauses.

The limitation of liability clauses can be used anyhow by the employer either to retain the risk of NS’s default in its part or to exclude such risk and allocate it to the HC. The JCT forms in the UK are good examples in application the former case. Whilst in the UAE, the latter case is applicable to the FIDIC 1999 suite.

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contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.”

<sup>101</sup> Article 287 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.”

<sup>102</sup> Article 878 of UAE Civil Transactions Law (Fed. Law 5 of 1985) provides that “The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented.”

The JCT contracts provide that the risk of delayed works by the NS lies in the employer part.<sup>103</sup> In addition, they provide that the HC under no responsibility to the employer for any design work carried out by the NS.<sup>104</sup> These provisions are however criticized by the commentators that they leave the HC with no incentives in following up the NS's works; this situation therefore may encourage irresponsibility on the NS part due to the absence of liability to both the HC and employer. In line with this point of view; Murdoch and Hughes state for such case that; unless there is a collateral warranty; the employer will be deprived from availing its right to claim the liquidated damages against both sub and head contractors.<sup>105</sup>

Furthermore, the employer; by having the risk of NS's default in its part; will need to keep an eye on the dealings between its nominated sub and head contractors in order to preserve its rights, for which, there is a considerable cost. In addition, the employer will be used to incur the cost of collateral warranties; otherwise the former will be left with no compensation shall the NS is in default. Thus, because of the unpleasant consequences of the nomination; the new forms of the standard contracts in UK tend to omit the nomination or set up alternative contractual mechanism.<sup>106</sup>

The FIDIC Red book 1999 allocates the risk of NS's default to the HC, in this respect; sub-clause 4.4 stipulates that the HC shall be liable to the employer for the defaults of any subcontractor including the NS, as if they are the defaults of the HC.<sup>107</sup> Despite there are gaps that, sub-clauses 5.1 to 5.4 set up the process of subcontractors' nomination. Thereby, these provisions mainly deal with matters of "objection to nomination" and "payment to subcontractor". However, they neither cover the consequences of termination the NS nor

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<sup>103</sup> Earlier forms, until 1980, of the JCT contracts entitle the head contractor for EOT & prolongation cost against the delay of nominated subcontractor. The JCT 1998 form provides the head contractor is entitled to EOT only for such case.

<sup>104</sup> For example, Clause 35.21 of the JCT 98 states in the same context.

<sup>105</sup> J, Murdoch & W, Hughes, *Construction Contracts Law & Management* (4<sup>th</sup> edn Tyler & Francis, London 2008) 292: the employer cannot use the LD clause against the head contractor because the latter is entitled to EOT due to the nominated subcontractor default, as well the former cannot use it against the subcontractor because of the "no privity", unless there is a collateral warranty set up in this respect between them.

<sup>106</sup> S, Skaik & A, Al-Hajj 'Improving the Practice of Subcontract nomination in the UAE Construction Industry' <https://www.academia.edu/7038228/> accessed 11/11/2015, the researchers via this paper state that: "NEC3 contracts which replaced ICE forms in 2009 have omitted the nomination clause in all its forms to achieve the collaborative and integrated working approach. Moreover, JCT 2005 which is widely used in the UK has also omitted the nomination clause and replaced nominated subcontractors with a specified list of subcontractors in the contract."

<sup>107</sup> Sub-clause 4.4 of the FIDIC Red Book 1999 states that "The Contractor shall be responsible for the acts or defaults of any Subcontractor...as if they were the acts or defaults of the Contractor."

dealt with process thereafter.<sup>108</sup> Such circumstances if they arise will get the employer loop in the circle of re nomination process.

Nevertheless, perhaps giving the right to object the nomination to the HC via sub-clause 5.2 empowers the employer position in respect of the HC's liability in case of the NS's default.<sup>109</sup> However, in practice, I would say that having such right in the contract in the absence of a time frame, may liquidate the obligations of the HC, that nothing can prevent the HC from abusing this right against the employer to cover its delays in other areas of the project.

Further, perhaps the HC, by having the risk of NS's default in its part, will seek to pass down the liability to the NS thru the use of liquidated damages, performance bonds, indemnity or back to back clauses. These clauses however do not break the privity principle; rather they help the HC to reduce the risk of NS's default. Further, the HC has the option to shift this risk to third party "insurance" or at least put contingency reserves against it. Such cost anyhow will be paid by the employer ultimately.

In the UAE, some governmental infrastructure employers put a list of their nominated subcontractors within the documents of invitation to tender. The HC therefore would have the chance to get offers and feedback from those subcontractors and considers them in his offer, in other words, considers this risk. Thus, in this case, unless otherwise agreed, this way, beyond any doubt, does not let the HC to leapfrog from the liability toward the employer in respect of the NSs' works. In addition, pooling the list of NSs before the HC on doing the tendering, will increase the competence among them, perhaps this helps to reduce the cost of contingency measures against the NS's default.

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<sup>108</sup> S, Skaik & A, Al-Hajj 'Improving the Practice of Subcontract nomination in the UAE Construction Industry' <https://www.academia.edu/7038228/> accessed 11/11/2015, the researchers via this paper state that: "FIDIC forms of main contract such as FIDIC 1999 don't cover liabilities, termination and re-nomination issues but clause 18 of FIDIC subcontract 1994 allows the main contractor to terminate the subcontract in case of default. However, the termination of nominated subcontractors by the main contractor under FIDIC suites of contract is never easy. The Employer is responsible to make nomination and has inherent benefits of going with a specific subcontractor. Hence, he is deemed to be involved in the any decision for termination that is sought by the main contractor....Due to the absence of clear provisions in the main contract addressing these issues, many questions are left without answers. Is the Employer's consent required before termination? Who will be liable for damages resulting from termination? Is the Employer obliged to re-nominate and who will be liable for damages resulting from re-nomination process?"

<sup>109</sup> Sub-clause 5.2 of the FIDIC Red Book 1999 entitles the head contractor to reject the nominated subcontractor under specific conditions...i.e. in case the subcontractor fails to identify the head contractor against his liability to the employer in respect of the subcontract works.

## VII. Effect of Consolidation in Arbitration on the Privity Principle

There are several ways thru which the employer and NS can be connected by an arbitration regime, as such, the arbitration consolidation agreements,<sup>110</sup> the referencing<sup>111</sup> or assignments.<sup>112</sup> This chapter will discuss how such a regime among the employer, HC and NS can break the privity principle. In other words, it raises the question; how far this regime enables the employer or NS to recourse with their disputes to the arbitration, and thereupon, will they will be liable to each other?

The UAE law is silent in respect of the arbitration consolidation agreements so far. However, in a relevant case in this context however the Dubai Court of Cassation, 167/2002 held that “the arbitration clause may apply to third parties in some instances; inter alia, the case of assignment of the original agreement containing such a clause or referring thereto, as the arbitration clause shall move with the original agreement to the assignee.”<sup>113</sup> Thus, the right to resort to the arbitration is assignable. Whilst, in another case, the court ruled that the referencing to an arbitration clause in another contract is enforceable under specific conditions.<sup>114</sup>

Hence, based on the above-mentioned conditions; nothing prevents the employer neither the NS to resort with their disputes to the arbitration under the UAE law. Despite of that, can the arbitral tribunal render a decision disregarding the privity principle? The court

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<sup>110</sup> The consolidation in arbitration can take place either thru an agreement among more than two parties to resort their disputes before one arbitral tribunal or thru an agreement to consolidate two arbitral proceedings in one, like having the employer to HC case and HC to NS case before one arbitral tribunal, which renders one award enforceable on all.

<sup>111</sup> This takes place in case the HC refers to the arbitration clause in its main contract with the employer that the same is to be enforceable on the NS in the subcontract. For example, sub-clause 19.2 of the FIDIC Conditions of Subcontract 1994 provides that the arbitration sub-clause 20.6 under the main contract is applied to the disputes which are somehow connected with the subcontractor. Another example, see also sections (14) & (15) in sub-clause 20.8 of the FIDIC 2011 Conditions of Subcontract. However, enforceability of this is subject to the institutional rules and applicable arbitration law. The UAE courts are used to recognize the referencing to arbitration clause in the FIDIC suit of contracts giving that the parties sign at this page of the principal contract where the referencing clause is placed.

<sup>112</sup> For example, if the HC any of its rights or obligations to the employer or NS, more details were discussed in sections III. (A) and V. (D).

<sup>113</sup> The Dubai Court of Cassation, 167/2002

<sup>114</sup> The Dubai Cassation 174/2005 stated in this respect that “Any referral mentioned in the original contract to the document which contains the arbitration clause shall be deemed an agreement on arbitration if such referral is express and explicit to adopt this arbitration clause. Referral shall not be valid unless it includes a specification of the arbitration clause set out in the referred document. If such referral to the said document is merely general without any specification to the said arbitration clause in a manner that confirms that the two parties have knowledge of the arbitration clause in the referred to document, then, the referral shall not extend to arbitration and thus the parties had made no arbitration agreement in the contract.”

in the aforesaid former case did not leapfrog from the wording of article 891 in asserting that such claims are not recognizable unless there is an assignment. Further, the court left the matter of verifying the maturity of the assignment of the arbitration clause to the discretion of the trial judge as a matter of fact.<sup>115</sup>

Under the English law; pursuant to the Arbitration Act 1996; the consolidation is recognizable subject to the consent of all the parties.<sup>116</sup> Thus, unless the parties confer such power to the arbitral tribunal; it does not have jurisdiction to allow third party joinder to the case.<sup>117</sup> Further, due to the consensual nature of arbitration; the mere assignment of arbitration clause is not enforceable. However, if the entire contract is assignable; this applies on the arbitration clause, as well as any part of the contract.<sup>118</sup>

The referencing to arbitration clause in another contract as well is enforceable “if the reference is such as to make that clause part of the agreement.”<sup>119</sup> In ambit of referencing to a main-contract’s arbitration clause in the subcontract agreement; such referencing is valid under the English Arbitration Act as long as it is understood by the judge that the referencing clause in the subcontract is somehow worded so that the sub and head contractors are bound by the arbitration clause in the main contract.<sup>120</sup>

It is a worthy note that perhaps the institutional rules or procedural law do not empower the arbitral tribunal with the jurisdiction to adjudicate on such a case where multi parties are involved. Under this situation, the employer and NS may not therefore have the right to resort with their disputes to the arbitration without the HC, even if the formers have a direct contractual nexus by the virtue of collateral warranties or assignments.

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<sup>115</sup> The Dubai Court of Cassation, 167/2002 stated in this respect that “it is also established, pursuant to Article 891 of the Civil Procedure Law, that the subcontractor may not claim from the employer anything that is entitled to the principal contractor, unless the latter assigns the same upon the employer. It is established in law that inferring the parties to the arbitration clause and assignment of the original agreement containing the arbitration clause to a third party fall within the facts of the action over which the trial court has the exclusive jurisdiction without review, so long as its adjudication in respect of the same is legally valid and based upon the facts established in the action papers.”

<sup>116</sup> Section 35 of the Arbitration Act 1996 (UK) provides that: “(1) The parties are free to agree - (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms as may be agreed.(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings.”

<sup>117</sup> *Bay Hotel and Resort Limited v. Cavalier Construction Co. Ltd.* [2001] UKPC 34

<sup>118</sup> *Shayler v Woolf* [1946] Ch 320, more details for this point are available at: H, Seriki, ‘Assignment of Arbitration Clauses under English Law’ [https://files.dlapiper.com/files/upload/Intl\\_Arb\\_UK\\_0607.htm#1](https://files.dlapiper.com/files/upload/Intl_Arb_UK_0607.htm#1) accessed 26/11/2015

<sup>119</sup> Section 6(2) of the Arbitration Act 1996(UK) provides that: “The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.”

<sup>120</sup> *John Martin Hoyes Directional Drilling Ltd v. R. E. Docwra Ltd* [2000] 1999-TCC-117

Most of the local arbitral institutions in the UAE are silent in respect of the tribunal's jurisdiction in the matter of privity pertaining the cases involving multi parties, though, for which, some of them set up rules in ambit of nomination the arbitrator(s),<sup>121</sup> without giving guidelines that tailor the scope of the arbitral tribunal on dealing with the issue of privity.

The DIFC-LCIA and LCIA rules however went for further step in this respect that empower the arbitral tribunal upon the consent of either party to allow a third party to be joinder in such case, thereafter the tribunal may render an award applies on all.<sup>122</sup> Thus, pursuant to these rules, the employer and NS may find themselves in face to face before the arbitral tribunal and then perhaps they are bound to comply with the award, which could be thereafter enforced by the court, even there is no privity between them. This approach is criticized on the ground that it abolishes the principle of parties' autonomy in the arbitration agreement. As such, "this can often come as a surprise to the non-consenting party, who may object to the inclusion of the third party for legitimate reasons such as a desire to keep confidential information from the third party."<sup>123</sup>

In this regard, the ICC rules recognize the principle of consolidation of multi parties' arbitral proceedings in different contracts if all of them provide that the ICC rules are to be applied and consent of the parties is given as well.<sup>124</sup> Hence, "the mere existence of compatible arbitration clauses in two separate agreements between non-identical parties, such as the main contract and the subcontract, will not be sufficient as per the ICC court to

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<sup>121</sup> For example, Article 11 of the DIAC Rules provides that "(11.1) Where there are multiple parties, whether as Claimant or Respondent, and where the dispute is to be referred to a three arbitrator Tribunal, the multiple Claimants, jointly, and the multiple Respondents, jointly, shall nominate an arbitrator for appointment by the Centre pursuant to Article 9.(11.2) In the absence of such a joint nomination and where all the parties are unable to agree to a method for the constitution of the Tribunal, the Centre may appoint the Tribunal and shall designate one of them to act as Chairman. In such case the Centre shall give due consideration to any provisions of the Arbitration Agreement concerning the number of arbitrators to be appointed." See also in the same context; Article 17(3) (c) of the DIFC Arbitration Law

<sup>122</sup> Article 22.1 (H) of the DIFC-LCIA Rules provides that " Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration." As well, Article 22(1) of the LCIA Rules states in the same context.

<sup>123</sup> R, Karrar-Lewsley 'Three's a Crowd - Third Party Intervention and the Consolidation of Arbitral Proceedings' (2011) 238 Law Update 15

<sup>124</sup> Article 9 of the ICC Rules provides that "Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules."



decide in favor of the joint review of the disputes.”<sup>125</sup> Further, the ICC rules via article 10 set up procedure for consolidation of arbitrations.<sup>126</sup> Nonetheless, it does not deal with the matter if the parties are connected thru a contractual chain as such the employer to head to subcontractors. This gap allots an area for either the contract substantive or seat laws to intervene while enforcement of the award. Thus, in other words, the consolidation of arbitrations under the ICC rules does not provide leapfrog from the privity principle.

### VIII. Conclusion

The privity principle is one of the primary rules of contract under the UAE and English laws. In construction contracts, the UAE law recognizes the aspect of subcontracting with emphasizing that the privity is intact, it does not however cover the point of nomination. Thus, for me, the decision which was rendered by the Dubai Court of Cassation 266/2008 which absolved the HC’s liability against the NS’s default is not surprising, despite it was an exceptional. The mere nomination of subcontractors by the employer does not change the position of the English law in respect of the privity principle, unless there is a promise or warranty vested in that nomination, which amounts to establish a binding relationship between them.

The assignments and collateral warranties are the most common contractual devices which can break the privity principle. Thus, under a valid assignment; which requires consent of all the parties; the employer and NS can have a direct contractual relationship as it would be between the employer and HC pursuant to the UAE law. Such assignment is enforceable under the English law unless performance of the contract requires the HC in person. Further, the collateral warranty given by the NS to the employer is enforceable as

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<sup>125</sup> D, H, Kondev ‘Do Recent Overhauls of Arbitration Rules Respond to the Need for Multi-Party Arbitration in the Construction Industry?’ (2015) International Construction Law Review

<sup>126</sup> Article 10 of the ICC Rules provides that “The court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: a) the parties have agreed to consolidation; or b) all of the claims in the arbitrations are made under the same arbitration agreement; or c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible. In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.



unilateral promise, which is one of the sources of obligations under the UAE law. The same is recognizable as a binding document under the English law as long as it saves the requirements of a valid contract.

It is arguable whether the employer can be considered a beneficiary under the English Contracts Third Party Act 1999, if so; this abolishes the privity principle in the construction contracts. Thus, it is more likely this act is not applied on the parties who are connected in a contractual chain. Despite, it is recommended by the legal professionals to use limitation clauses against the act until the courts come up with clear interpretation. The same debate is arisen for article 254 of the UAE CTC law that it creates automatic right for the employer in the subcontract wherever the subcontract is silent in this respect. I disagree with this finding based on the fact that the validity of such rights under the UAE law requires presence of the parties' intentions in the subcontract, which is in contrary with custom in UAE.

Despite the English law recognizes the concurrent duty under law and contract; it is not visible to establish liability under tort on the NS by the employer under the English law, because having the contractual chain absolves the NS from the duty of care to the employer. Further, the pure economic losses are not recoverable under the ordinary rules of common tort law. However the specialist NS is treated as an exception to this rule if there is special reliance by the employer on the former. The said point of concurrent duty is not clear under the UAE law that in some cases the courts rejected the claims under tort if the tortfeasor has a contractual link with the other party, whilst they recognized such claims on other cases. Thus, dealing with such cases was done as a matter of fact in the UAE so far.

There are two main inroads, thru which the NS owes liability to the subsequent owner, these are; firstly, if they are connected by a contractual device thru the contractual chain like the assignments or collateral warranties. Secondly, by law, in this respect; there statues were set up by the English legislators to provide protection to the subsequent owner like the Defective Premises Act 1972...and the Housing Act 2004, which imply a level of liability to all contributors in the building contract, as such, the NS. However, the scope of those Acts is either not applied on the construction contracts or limited on the directly

connected parties. Thus, in practice, the employer and HC are required to assign its lawful right under such Acts to the subsequent owner in order to avail them against the NS. In the UAE, since the decennial liability is not applied on the NS, the said contractual devices are required to pass down the liability to the NS against the subsequent owner. Dubai's Strata Law overcomes this obstacle that it extends the decennial liability to the subsequent owner.

The employer has no duty of direct payment to NS under both the English and UAE laws even if the HC in default. Some of the standard contracts secure this as a right to the employer. However, the latter shall draw line between this right and its liability the HC to avoid claims of double payments. Further, the employer's direct instructions to the NS do automatically create an obligation of payment under both English and UAE law, unless they contain a promise to pay. Such instructions may limit the HC liability against the NS's works under the English law; this is however not recognized under the UAE law. On the other hand, the NS cannot establish liability of payment under the principle of unjust enrichment under both the UAE and English laws as long as they are connected thru a valid contractual chain. Thus, in order to secure the NS rights beyond such legal hurdles associated with the no privity; the employer may issue a payment guarantee in favour of the NS. This is helpful to invoke wanted NSs to quote for the project; in addition it can save the price of the contingency reserves against the risk of no payment.

It is arguable under English law how far the nomination can limit the HC liability to the employer in respect of the NS's works. Therefore, having the "right to object" clause can support the employer's position up to some extent. Nonetheless, the employer at least is obliged to do the nomination at the correct time to exempt its liability to the HC. The UAE law does not deal with the matter of nomination. Thus, the ordinary rules of privity provide that the nomination cannot limit the HC's liability. However, in case of delay in the employer part in this respect; the HC can resort to the primary rules to get redress like articles 247 and 249. Such debates behind the criticisms that the nomination is burdensome the employers, this construe the tendency to waive it in the standard contracts in the UK recently. In the UAE, some government employers provide the list of selected subcontractors in the tender documents. This is alternative efficient approach to the nomination that it does not let the HC from using it to circumvent around the privity

principle and abuse its “right to object”.

Despite that the consolidation and joinder in arbitration is recognizable; the privity principle remains a crucial jurisdictional challenge to the arbitral tribunal. In this respect, some arbitral institutional rules are silent like DIAC or they recognize the consolidation like the ICC rules but silent against the matter of privity if the parties connected via contractual chain. Whilst, it appears that the DIFC-LCIA and LCIA rules are the most attractive leapfrog from the privity principle, that they empower the tribunal upon the request of one party to accept joinder like the NS to the arbitration proceedings and thereafter the tribunal can render an award applied on all parties.

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