

Decennial Liability in Construction: Law and practice in the United Arab Emirates

Professor Aymen Masadeh
The British University in Dubai
aymen.masadeh@buid.ac.ae

Abstract

Decennial liability arises in cases of traditional construction procurement where the engineer or architect prepares the design and oversees the construction works. FIDIC Red Book and other standard contracts provide for the limitation of contractor's liability. Apparently, this will have some impacts on the cost due to the contractor's risk calculation. However, this paper shows that the enforcement of such provisions in the United Arab Emirates UAE is not straightforward.

In Dubai, most employers tend to sell premises on map (off-plan sales) or shortly upon completion. The question becomes whether the subsequent owners can benefit from decennial liability. If not, how can the employer benefit from such a liability in cases where the defective premises had been already sold out? The privity principle strictly applies under the law of United Arab Emirates UAE. The paper argues that subsequent owners may have similar rights against the employers who can shift the liability to the contractor.

Keywords: Decennial Liability, Dubai Construction Law, Contractor's Liability, Privity Principle, Defect's Liability.

1. Introduction

The construction traditional procurement method (Design-Bid-Build) is widely used in the UAE and the Gulf region. Decennial liability arises under the traditional method where the project is designed and supervised by the same engineer/architect.¹ Here, both the engineer and the contractor will be jointly liable for any partial or total collapse or for any structural or safety defects for ten years from the time of delivery.

This paper argues a number of issues related to decennial liability under the UAE law. It discusses the possibility of contractually limiting or excluding such a liability and whether its period can be contractually changed. It also discusses the engineer's liability where the design is defect-free and the collapse or structural defect is purely related to defective workmanship.

The issue of scope of liability occupies a significant part of this paper. This is discussed in relation to the types of defect, the parties responsible and the scope of compensation. It is questionable whether the subcontractor can be held liable towards the main contractor under the provisions of decennial liability.

The issue of privity arises when discussing the liability of the contractor towards the end user. The paper argues that there seem to be a number of ways to circumvent the rigorous application of privity principle in this field.

2. Overview of civil liability

Civil liability can arise out of either a breach of contract or a breach of duty of care. The UAE Civil Transactions Law Code (CTC) provides for the contractual liability under its general rules of contract. Parties are required to honor their contractual promises in good faith.² Where a party is in breach of contract, the aggrieved party may claim specific performance. Specific performance is the primary remedy for breach of contract under the UAE law. Article 380(1) of the CTC states that "An obligor shall, after being given notice, be compelled to discharge his obligation by way of specific performance, if that is possible."

However, in certain cases, the court may allow damages instead of granting specific performance. Article 380(2) states that "provided that if specific performance would be oppressive for the obligor, the judge may, upon the application of the obligor, restrict the right of the obligee to a monetary substitute unless that would cause him serious loss." Article 338 of the CTC states that "a right must be satisfied when the legal conditions rendering it due for performance exist, and if an obligor fails to perform an obligation, he shall be compelled to do so either by way of specific performance or by way of compensation in accordance with the provisions of the law." Therefore, damages can be awarded for breach of contract

¹ The UAE law uses the term "engineer" to refer to the person who makes the design and/or supervises the work. For the sake of simplicity, the term engineer will be used throughout this paper to refer to both the engineer and the architect.

² Article 246(1) of the Civil Transactions Code states that "The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith."

where the obligation is oppressive or impossible to perform. This is evident in cases of late performance where damages can be the only available legal remedy. Where the obligation requires personal skills and the obligor rejects performance, the court will have no choice other than awarding damages. Furthermore, parties may agree in advance or after the occurrence of breach of contract on damages as the absolute legal remedy. As discussed below, most standard construction contracts include terms of liquidated damages.

Contractual duties can be of purpose or care. While the former requires the debtor to achieve a certain result, the latter can be satisfied by paying reasonable care. Duties of care are evident in the cases of medical contracts. The failure of the physician to cure does not raise legal liability unless the negligence is proved. In construction projects relations, duties are mostly of purpose. It is difficult to argue that the duty in construction contract is a one of care only. Article 878 of the CTC states 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.” Both contractors and consultants are required to provide a product in compliance with contract. Here, it may be sufficient enough to prove the defects and the resulting losses. As discussed below, in cases of agreed (liquidated) damages, the claimant may not even need to prove losses. The claim can be for the agreed amount due to the breach.

Tort liability is based on three elements: an unlawful act or omission, damage and causal link between the act or omission and the damage. The harmful act, as demonstrated by the official Explanatory Memorandum of the CTC, is “going beyond the limit at which a person should stop, or not reaching the limit which a person should reach, in an act or withholding from an act, which results in harm.”

Damages are the primary remedy in tort. Article 282 of the CTC states that “Any harm done to another shall render the actor, even though not a person of discretion, liable to make good the harm.” Apart from certain cases, the liability is generally strict. The aggrieved party needs to prove that the loss was caused by an illegitimate act. Losses resulting from legitimate acts cannot be compensated for. Article 104 of the CTC states that “the doing of what is permitted by law negates liability, and no person who lawfully exercises his rights shall be liable for any harm arising thereout.”

Where the act amounts to both a breach of contract and a violation of law, the aggrieved party may choose to sue in either contract or tort. The harmful act does not need to be a criminal or an administrative offence. Criminal and civil jurisdictions are entirely separate in UAE law. Not every wrongful act constitutes a crime under the criminal law in the UAE. Therefore, a person may be found liable in tort, without being convicted in the criminal courts. However, if a wrongful act committed by an individual constitutes a crime under the UAE Federal law No. 3 of 1987 (the Penal Code), the judgment delivered by a criminal court will be useful in a subsequent civil claim in tort. Article 297 of the CTC states that “Civil liability shall be without prejudice to criminal liability provided that the elements of criminal liability are present, and no criminal penalty shall limit the scope of the civil liability or the assessment of the compensation.”

3. Overview of decennial liability

Decennial liability is a term used to describe the joint liability of the contractor and engineer for defective “buildings or other fixed installations” where the engineer designs and supervises the work. The terms of “building or other fixed installations” are broad enough to include infrastructure civil works such as roads, bridges, water canals, sewage systems, etc.³ Article 880(1) of the CTC states that

“If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.

According to this article, decennial liability can only arise in the traditional procurement (Design-Bid-Build) of buildings construction or other fixed installations. Here, the employer enters in consultancy contract with the engineer to design and supervise the whole work. The FIDIC White Book “Client/Consultant Model Service Agreement” is commonly used for this purpose. The consultant helps in selecting the contractor, through a tendering process, with whom the employer ultimately signs a construction contract.

Having said that, the engineer who is not required to supervise the work will not be liable for defective workmanship where the design is free of defects. Article 881 of the CTC states that “If the work of the architect is restricted to making the plans to the exclusion of supervising the execution, he shall be liable only for defects in the plans.” However, if the engineer/architect is required to prepare the design and supervise the work, he will be jointly liable with the contractor for the defective work regardless of whether the design is defective or free of defects.

The employer can commence a legal action for any major defect affecting stability or safety of a structure, both against the engineer and the contractor without being obliged to decide whether the defect is of a designing or structural nature. The outcome of a legal action could be either that liability is apportioned between the architect and the contractor, or that only one of the two parties is liable.

The trigger events of decennial liability, i.e. partial or structural collapse and defects threatening the stability or safety of a structure, are not defined by the CTC. The judge or arbitrator may need an expert opinion to decide whether a certain defect falls within the scope of decennial liability.

Decennial liability can still arise even though the defect is due to soil defects. The duty of the contractor to make the proper soil investigation prior to commencement of work is presumed here. The consent of the employer cannot be used as a defense. Article 880(2) of the CTC states that “The said obligation to

³ Said Hanafi, “Contractors’ Liability under the Civil Codes of Algeria, Egypt, Qatar and the UAE”, (2008) *International Construction Law Review*, 221, 228.

make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations.”

Decennial liability is a contractual⁴ strict liability. Proof of negligence is not needed. When it is established that there is a structural or a safety defect, both the contractor and the engineer will be jointly liable even if they worked by the book. The contractor or the engineer may defend themselves by proving the external cause. In the UAE case of 125/Judicial Year 1, 2007, the Union Supreme Court held that “if the contractor is in breach of the performance of the works entrusted to him under the muqawala (construction) contract or if what he has performed is contrary to the conditions and specifications agreed with the employer, then he will be liable for any damage or loss arising out of his act, whether or not there was an infringement or a shortcoming. His liability will be negated only by proof of an extraneous cause.” Similarly, the same Court held, in the case of 336 and 407/Judicial Year 21, 20 March 2001, that “the obligation of the architect or the contractor is an obligation to achieve a result, namely to build a sound and sturdy building, for the period specified in the Civil Code, namely ten years from the date of handover, where it has not been previously determined.... Breach of such obligation is proved by simple proof of that result not having been achieved, without the requirement to prove any default.”

Still, can the subcontractor be held liable under the provisions of decennial liability? Under UAE law, the contractor may subcontract the work or part of it unless agreed otherwise. Subcontractors can be either domestic or nominated. While the former is selected by the contractor, the latter is selected by the employer. Contractors usually need to secure the employer’s or engineer’s approval for their domestic subcontractors. Two main questions may arise here: first, does decennial liability arise under subcontracts? Second, can the contractor be held liable for losses caused by the nominated subcontractor?

Although the subcontractor may have no role in selecting the nominated subcontractor, standard contracts’ terms usually provide him with the right to object. Of course, he will be required to provide reasonable justification for his objection. One of such justifications is the absence of an indemnity clause in the subcontract. FIDIC Red Book allows the contractor to reject the nominated subcontractor if the subcontract does not provide for the latter’s obligation to indemnify the contractor for his liability towards the employer that arises out of the defective subcontracted work.

Such an indemnity clause will help much in cases of the contractor’s decennial liability that arises out of the defective subcontracted work. The main contractor stays responsible for the proper performance of the sub-contracted work regardless of whether the subcontractor is domestic or nominated. Article 890 of the CTC states 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.”

⁴ The Union Supreme Court held, in the case of 336 and 407/Judicial Year 21, 20 March 2001, that “the liability of an engineer has its bases in the contract made between him and the employer, which results in his being liable for errors in planning or flaws in implementation, this being a contractual liability laid down by law in respect of every muqawala contract for building, whether or not specifically provided for in the contract.” See Said Hanafi, “Contractors’ Liability under the Civil Codes of Algeria, Egypt, Qatar and the UAE”, (2008) *International Construction Law Review*, 221, 227.

It should be noted here that the decennial liability provisions do not apply to the subcontract. The article speaks clearly about the relationship between the owner and contractor. Obviously, the owner is not a party to the subcontract. Therefore, it is significant for the contractor to protect himself against such a liability by an indemnity sub-contractual clause or a “back to back” term.

The decennial liability period is a warranty period for ten years from the date of delivery. As a mandatory rule, parties may not agree on a shorter period. Article 880(1) clearly states that “...they shall both be jointly liable for a period of ten years The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.” Therefore, the ten years period shall always apply unless the project is intended to last for lesser period.

Decennial liability period is different from the limitation period within which the claim must be filed. Although the general limitation period in UAE is 15 years, the limitation period for decennial liability claims is three years.⁵ Therefore, if defects appear at the end of the tenth year of handing the constructed work, the owner will still have a period of three years within which he may bring a civil action before the court.

Decennial liability, unlike limitation periods, cannot be affected by unforeseeable events and judicial claim or proceeding. Articles 481⁶ and 484⁷ of the CTC determine the cases where the limitation period is suspended or interrupted. They have no application to decennial liability period.

4. Scope of compensation and limitation clauses

Under UAE law, the scope of compensations is linked to the actual loss. Article 292 of the CTC states that “In all cases the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that that is a natural result of the harmful act.” In the case of 125/Judicial Year 1, 2007, the Union Supreme Court held that “articles 282, 291 and 293 provide that any harm done shall render the doer liable to make good the harm, and that the indemnity shall in all cases be commensurate with the harm suffered and loss of profit, provided that that is a result of the harmful act. Loss of opportunity suffered by the employer in a muqawala contract in the exploitation and enjoyment of his building by unjustified non-performance on the part of the contractor of his obligations under the muqawala contract, or defective execution of the work precluding enjoyment of the land, will be an element of damage in respect of which an indemnity will be payable to the employer, if such opportunity was probable, and he has in fact been deprived of it. The law does not preclude missed

⁵ Article 883 of the CTC states that “no claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect.”

⁶ Article 481 of the CTC states that “(1) The running of time for prescription shall be suspended if there is a lawful excuse whereby the claim for the right could not be made. (2) The period during which that excuse subsisted shall not be taken into account in the prescription period.”

⁷ Article 484 of the CTC states that “The prescription period shall be interrupted upon a judicial claim being made or by any judicial proceeding being taken by an obligee to enforce his right.”

earnings being taken into account provided that the aggrieved party had a hope of making such earnings, provided that such hope was based on reasonable causes.”⁸

Is it possible to limit the scope of compensation? Construction contracts may cap the contractor’s liability by a fixed percentage, typically 10% of the contract price. In principle, this is permitted expressly by the CTC. Article 390(1) of the CTC states that “the contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law.” In UAE, the Judge acquires the discretion to vary the agreed sum. Either the obligee or obligor can prove that the actual loss suffered is more or less than the agreed sum. The Judge has a wide discretionary power to adjust the agreed upon liability between the parties to match the loss occurred. Article 390(2) of the CTC states that “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.” Having said that, the UAE judges are often reluctant to vary an agreed limit of compensation. This is due to the fact that the UAE law recognizes the freedom of contract principle that should be respected by the court as long as it does not contradict with public policy. The main benefit of a limitation clause is the shifting of the burden of proof. In normal circumstances, the claimant has to prove the existence of the damage; the penalty clause, instead, is deemed as a presumptuous method of proof whereby the defendant can always rebut the claim.

In the case of decennial liability, any limitation or exclusion of liability clause will be held invalid. The contractor’s liability for major defects cannot be limited or excluded. Decennial liability is a matter of public policy. Article 882 of the CTC states that “any agreement the purpose of which is to exempt the contractor or architect from liability, or to limit such liability, shall be void”. Of course, this does not apply to settlement of decennial liability disputes. If decennial liability arises, parties may settle the dispute amicably.

It is worth mentioning that the calculation of damages is a matter of fact and within the sole discretion of the trial judge. The Union Supreme court held, in 36/Judicial Year 21 155, that “The assessment of damage and the consideration of the surrounding circumstances in assessing the compensation to make it good are matters of fact within the independent discretion of the trial court, provided that the judgment is based on sound grounds sufficient to support it.” Similarly, in 128/Judicial Year 25 144, the said court held that “It is settled law that the assessment of damage and the determination of the amount of compensation to make it good are matters of fact within the independent discretion of the trial court, provided that it states the element of damage and the extent of the entitlement of the aggrieved party to compensation for them.”

⁸ Similarly, in the Abu Dhabi Court of Cassation, in the case of 721/Judicial Year 3, held that “under the provisions of articles 282, 291 and 293 of the Civil Code, any harm done to a third party requires that the doer make good that harm. Harm is in all cases to be assessed in accordance with the damage sustained by the aggrieved party, together with loss of earnings, on condition that that is a result of the harmful act. Compensation may also be awarded for loss of opportunity of the building owner to exploit the land and have the benefit of it by reason of non-performance by the contractor, without justification, of his obligation arising out of the muqawala contract made between them, or by reason of his defective performance whereby it becomes impossible to make use of the building. This is one of the elements of damage for which compensation must be awarded in favour of the building owner.”

However, this approach does not apply to cases where the lower case awards or does not award for a specific kind of loss. Here, the Supreme/cassation court will have a jurisdiction and a duty of supervision.⁹ The Supreme Court will also have discretion to look into the reasoning of the lower courts. This includes the absence of reasoning for excluding evidence.¹⁰ In addition, the court must, on assessing the physical loss sustained by a party by way of actual loss or loss of profit, state the source from which it has derived those elements of compensation.¹¹

5. Decennial Liability Period & defects liability period

Standard contracts usually include a provision for a defects liability period (Notification Period). Usually, this period is one year from the time of delivery. The work is deemed delivered when the engineer issues the taking over certificate (TOC). Within the defects period, the contractor will be liable for all sorts of defects resulting from defective workmanship. Obviously, this period overlaps with the decennial liability period which lasts for ten years starting from the date of delivery. While the contractor's responsibility for minor defects usually ends when the engineer issues a completion statement by the end of the defects liability period, his joint liability with the engineer for structural and safety defects (decennial liability) continues to run for the rest of the ten years.

The starting date of the decennial liability may be disputable in multi-units projects. Here, the employer may argue that the period starts at the time of delivery of the whole project. In such cases, the judge or arbitrator needs to consider the date when the unit was actually used, could have been used, by the employer or beneficiary, such as a subsequent buyer. Obviously, decennial liability will start at that date regardless of whether the employer has actually used the unit or not. This issue becomes more persistent in multi-stages projects. In some projects, the employer may sign a separate contract for the underground work. When the underground work is finished, the question becomes whether the decennial liability period starts to run, for this particular work, from that moment or from the date when the whole project is

⁹ The Union Supreme court, in 303/Judicial Year 21, held that "In the present case, the appellant claimed loss of income on the grounds that he did not have the use of his car following the accident. This is a proper head of claim under articles 282 and 292 of the Civil Code. There was no justification for the finding of the lower court that the insurance company is not obliged to pay for the hire of an alternative car if the insured car is out of commission." Similarly, the Dubai Court of Cassation, in 51/2007, held that "Article 292 of the Civil Code provides that in all cases indemnity will be assessed according to the harm and loss of profit sustained by the aggrieved party. For that reason, the trial court is obliged to examine all of the elements going to make up the loss at law, and those that could come into the calculation of the compensation on the basis that the specification of those elements is a matter of law in which it is subject to the supervision of the court of cassation."

¹⁰ The Dubai Court of Cassation, in 251/2007, held that "although the assessment of compensation for material and moral damage due to the aggrieved is a matter within the discretion of the trial court, nevertheless if the applicant for compensation submits acceptable evidence of one of the elements of damage for which he applies for compensation and the court sees fit to exclude that evidence and to assess damage on a different basis, then it must give its reason for not adopting that evidence, failing which the judgment will be tainted by a defect in reasoning."

¹¹ This was stated by the Dubai Court of Cassation, in 28/2008, where the Court held that "although it is well settled that the trial court has jurisdiction in respect of the assessment of the value of compensation for all losses sustained by the aggrieved party, nevertheless the court must, on assessing the physical loss sustained by a party by way of actual loss or loss of profit, state the source from which it has derived those elements of compensation, and if the court awards an overall lump sum figure without stating the basis of such assessment, i.e. the evidence and documents placed before it in the case, in such a way as to demonstrate the facts of the loss and expenses and loss of profit sustained, then the judgment will be in error in the application of the law and tainted by a defect in reasoning."

delivered. The CTC does not provide a clear-cut answer to this question. However, one may argue that decennial liability provides a ten years warranty from the date when the premises become ready to use. Finishing the underground work is just a stage to be followed with other works.

After the credit crunch 2008, many projects were suspended in Dubai. As an expo 2020 host city, most Dubai projects are back to life now. New contractors are aboard with fresh construction contracts. If a safety or structural defects appear later, all sorts of issue will come up. The new contractor will argue that he is not responsible for the previous contractor's faults. The old contractor will argue that the ten years warranty (decennial liability period) started to run from the date of suspension. Therefore, new construction contracts, made for the purpose of completing existing works, should predict such issues and provide for precaution measures. Such contracts may provide for the duty of the new contractor to test the existing work and confirm its suitability & sustainability.

6. Privity of contract and decennial liability

Liability may be shifted down the chain to reach ultimately the contractor. "Back to Back" terms can be efficiently used here. Such terms are used to shift the liability from a party to another down the chain.¹² By this way, liability will ultimately reach the employer who can sue the contractor for defective workmanship or the consultant for defective drawings or both the contractor and the consultant under the decennial liability rule, as previously mentioned. In order to support this method, Article 26(1) of the Law No. (27) of 2007 Concerning Ownership of Jointly Owned Properties in the Emirate of Dubai states that

“(1) With respect to the construction contract provisions in the Civil Transaction Federal Law No. (5) of 1985, 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. (2) The Developer, in respect of a development or part of a development undertaken by him, remains liable for 1 year from the date of completion certificate of the building to repair or replace defective installations in the Jointly Owned Property which, for the purpose of this Article, include mechanical and electrical works, sanitary and plumbing installations and the like.”

On the face of it, this sounds a good choice to shift the liability to the person who was actually responsible for carrying out the construction properly; however, this choice may not be always available. For example, if one of the parties in the chain disappears or becomes insolvent, the chain will be broken

¹² Antonios Dimitracopoulos, "Can any owner of a building pursue the contractor under his 10 yearlong defects liability? CATCH ME IF YOU CAN" March 2004, Al-tamimi, available at <http://www.westlawgulf.com>, "one possible method would be through a chain of contractual clauses (commonly referred to as "back to back") linking the last owner to the contractor. These clauses would act effectively as a warranty of the stability and safety of the structure initially for ten years and then on a sliding scale as time passes and ownership changes. In that scenario, like a string of dominos, the consecutive warranties would be called upon until they reach the last claiming party who would be the employer and who, under the decennial liability provisions, does not actually have to also be the owner. This option can activate the contractor's liability as set out in Article 880 (of the UAE Civil Transactions Code) but does very much depend on the way this liability is conveyed from the employer to the next owner and onwards to any last owners.”

and, thus, liability cannot be shifted through the chain. This is why the last owner may need a direct action against the contractor for defective workmanship.¹³

Although it is obvious that there is no direct contractual relationship between the last owner and the contractor, one may envisage a number of situations where the former can bring an action in contract against the contractor under UAE law. The CTC provides for the so-called “contracts made in favour of third parties”. This type of contract grants the third party beneficiary an action against the undertaker for breach of contract.¹⁴ One may also rely on the CTC provisions to argue that contractual rights can move to last owners automatically upon the transfer of title.

6.1 Contracts Made in Favour of Third Parties

The “contracts made in favour of third parties” provide for the contractual benefits to be conferred *directly* on a third party.¹⁵ Seemingly, one may argue that this theory may apply in cases where it is obvious that the construction contract is made in favour of a third party. In certain projects, such as commercial buildings of residential compounds, it is obvious that developers (employers) invest in construction and gain their profit by selling the units. The contractor is aware that the premises will ultimately be utilized by a subsequent buyer. However, the contractual rights here are conferred on the developer first and there was no right conferred directly on the subsequent buyer.

For Article 254 to apply, the contractual right must be conferred *directly* on the third party by the undertaker. This was stated clearly by the UAE Union Supreme Court, in the case of 250/Judicial Year 20, where it held that “the effect of the provisions of article 254 of the Civil Code is that in a stipulation in favour of a third party, the stipulator contracts with the undertaker in his name for a personal benefit in the performance by the undertaker of the obligations contracted for towards the beneficiary, without the beneficiary becoming a party to the contract. The beneficiary derives his right directly from the contract itself as made between the stipulator and the undertaker, which stipulates obligations in his favour as beneficiary. He may be specified in person or by description as a future person, or he may be capable of being identified at the time that the contract takes effect.”¹⁶

¹³ The same argument may be raised in cases of designer’s liabilities towards the subsequent or last owner. See White N., Principles and Practices of Construction Law, Practice Hall, Ohio, 2002, p.333.

¹⁴ The UAE Union Supreme court, 791/Judicial Year 3 held that “This is in accordance with the rules of stipulation for a benefit in favour of a third party in articles 254 and 256 of the Civil Code. It is permissible for a person to contract in his own name with a third party for rights stipulated in favour of a third party, if he has a personal, material or moral interest in the enforcement of it. Such stipulation will result in the third party acquiring a direct right against the undertaker for the performance of the stipulation, and he may make a claim against that person for performance of it unless it has been agreed otherwise.”

¹⁵ Article 254 of the UAE Civil Transactions Code states that “(1) It shall be permissible for a person to contract in his own name imposing a condition that rights are to enure 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.”

¹⁶ Similarly, the Union Supreme Court, in the case of 264 and 346/Judicial Year 20, held that “Articles 1026(1) and 254(1) and (2) of the Civil Code show that in a stipulation of a benefit for a third party, the stipulator contracts with the undertaker for a personal

The source of such a right is the contract itself. Therefore, it is significant for the parties to make it clear at the time of making the contract that the benefit is to be conferred directly on a third party and the latter will have the right to enforce the contract. The Commentary on UAE Civil Code (Ministry of Justice) states that “the stipulation in favour of a third party involves a true departure from the rule that the benefits of contracts are restricted to the contracting parties to the exclusion of others. The undertaking party is under an obligation to the beneficiary in whose favour the stipulation is made, and that person thereby acquires a direct right, notwithstanding that he is not a party to the contract. In that way, it is the contract itself that is the source of that right.” Nevertheless, it is not necessary for the beneficiary to exist or be mentioned in name at the time of making the contract as long as he is identifiable at the time when the rights are due to be conferred on him.¹⁷ In order for the beneficiary to have such a direct right, he must accept such a right and notify the undertaker or the stipulator of his acknowledgement.¹⁸

Conferring the contractual rights directly to a third party is not the norm in construction contracts where the contractual rights are conferred first on the employer. The employer may choose to sell the units through off-plan sales. Here, the buyer cannot be a third party beneficiary under Article 254. Off plan sales are usually made after the construction contract is signed. In cases of off-plan sales, the property is still delivered to the developer first. Thereupon, the reliance on the theory of “contracts made in favour of third parties” to grant the last owner the right to sue the contractor for defective workmanship does not seem helpful.

To sum up, the theory of “third party beneficiary” will not provide a ground for the end user to sue the contractor for decennial liability for the following reasons. Firstly, parties to the construction contract must stipulate at the time of making the contract that a third party will acquire the benefit of the contract. Here, it is not enough that the benefit of the contract is conferred on a third party. Parties must agree at the time of making the contract that a third party will have the right to enforce the contract.¹⁹ Secondly,

benefit in the performance by the undertaker of the obligations contracted for towards the beneficiary, without the beneficiary becoming a party to the contract. The beneficiary will acquire a direct right out of the contract itself made between the stipulator and the undertaker, which stipulates certain obligations in his favour with him as the beneficiary...”. In view of the aforementioned judgments, it can be noted that although the third party beneficiary is not a party to the contract, he acquires a direct right against the undertaker. Having said that, it is necessary to note that the beneficiary is not a total stranger to the contract as he is the beneficiary to it and acquires direct rights against the undertaker. The Union Supreme Court made this point clear by stating that the third party beneficiary “...will not be a stranger to the contract but will be the beneficiary party to it.” The UAE Union Supreme court, 791/Judicial Year 3.

¹⁷ Article 256 of the CTC states that “in imposing a stipulation in favour of a third party it shall be permissible for the beneficiary to be a future person or future body, and the beneficiary may also be a person or body not specified at the time the contract is made if such beneficiary is ascertainable at the time the contract produces its effect in accordance with the condition.”

¹⁸ The Commentary on UAE Civil Code (Ministry of Justice) states that “if the beneficiary duly accepts the stipulation, he may notify the undertaking party or the stipulator of his acknowledgment. Such acknowledgment is a legal disposition made unilaterally. It does not have to satisfy any particular form, nor has the legislature specified any particular time in which it must be done. Notice may, however, be given to the beneficiary to declare within a reasonable time what his intention is, and the right of the beneficiary will become binding or incapable of annulment immediately upon his announcing his acknowledgment, and it will be a direct right the source of which is the contract. This will produce two results: The first is that it will be open to the beneficiary to claim performance of the stipulation in the absence of an agreement to the contrary. As the person imposing the stipulation has a personal interest in such performance he is different from a voluntary agent in that regard, and it is likewise open to him to make the demand himself, unless the contract provides otherwise. The second is that it is open to the undertaker to rely as against the beneficiary on any defences arising out of the contract.”

¹⁹ Andrew Van Niekerk, “Construction Law”, Al-Tamimi, October 2006, available on <http://www.westlawgulf.com> “Essentially, the difference between Article 254 of the UAE Civil Code and the United Kingdom Act is that under the latter it is not sufficient

the benefit must be conferred on the third party *directly*. As previously mentioned, this is not the usual case in construction contracts where the developer is the first owner who sells the project or its units to third parties.

6.2 Contractual Rights Transferred to Last owners by the rule of law

Article 251 of the CTC states that “If the contract gives rise to personal rights connected with a thing transferred thereafter to a special successor, such rights shall be transferred to such successor at the time at which the thing is transferred if it is one of the appurtenances thereof and the special successor was aware of those rights at the time of the transfer of the thing to him.”

The employer’s right for conforming performance of construction contract can be argued to be transferred automatically with the transfer of title. There is no clear-cut court decision to support this interpretation of the Article 251 in construction contract. Actually, this Article applies usually to maintenance contracts, power provision contracts, etc. that are needed to keep the plant functioning. There is nothing, however, preventing this Article to apply to cases of defective workmanship as the right to defects-free construction is one the employer’s rights under the construction contract.

Article 251 speaks about contractual rights transferable to a special successor. The special successor is the person who acquires a particular right over a particular thing from his predecessor. Under this meaning, one may strongly argue that the right for defects-free construction is a contractual right on a particular thing that is transferred to the last owner upon the passage of title.²⁰

In interpreting Article 251, the Union Supreme Court states that “the effect of the provisions of article 251 of the Civil Code is that if a contract creates personal obligations or rights connected with a thing that thereafter is transferred to a special successor, then those obligations and rights will also be transferred to that successor as from the time that the thing is transferred, if it is one of the appurtenances thereof, and if the special successor was aware of them at the time of the transfer of the thing to him. A finding of fact as to whether the special successor had knowledge of the prior disposition before transfer of the ownership of the thing to him, is a matter of fact within the independent discretion of the trial court, provided that its judgment in that regard is based on sound grounds sufficient to support the judgment.”²¹

for the obligation to amount to a benefit for a third party but it must further be apparent from the contract that the parties intended for the term to be enforceable by the third party. Whereas under Article 254, such right is created automatically where it is recorded as a condition of the contract that the right is to vest with a third party, unless there is a contrary agreement.”

²⁰ Commentary on Civil Code by the ministry of justice provides: “A special successor is a person who acquires from his predecessor a particular right over a particular thing, such as a purchaser or a donee or a usufructuary. If the predecessor makes a contract relating to such thing, all of the rights and obligations resulting from that contract pass to the special successor by three conditions: Firstly, that the date of the contract precedes the date of the acquisition by the successor of ownership of the thing; the contract must be of ascertained date. [JW: this is probably meant to mean ascertained latest date]. The second is that the rights and obligations arising out of the contract must be appurtenances of the thing; that will be the case if such rights are supplementary to it, such as contracts of insurance, or if the obligations limit the freedom of use of it, such as an obligation not to erect a building. Thirdly, the successor must have been aware of the rights and obligations passing to him.”

²¹ The UAE Union Supreme court, 434/Judicial Year 24. See also the decision of the Union Supreme Court, 351/Judicial Year 3 where it was held that “It is likewise settled law under articles 250, 251 and 252 of the Civil Code that the effect of a contract extends to the contracting parties and to a general successor, unless it appears from the contract or from the nature of the

7. Conclusions

Under the decennial liability provisions of UAE law, both the contractor and engineer are jointly liable for any partial or total collapse or for structural and safety defects. Such a joint liability requires the engineer/architect to design and oversee the work. Decennial liability is part of public policy and, thus, it cannot be excluded or limited. However, parties may extend the period for more than ten years. The period can be shorter only in cases where the building or establishment is intended to last for less than ten years.

The period of decennial liability starts from the date of delivery. This is usually the date of issuing the taking over certificate (TOC). Obviously, this period overlaps with the defects liability period that can be found in most standard contracts in UAE. The defects liability period is usually one year, from the date of the TOC, within which the contractor will be liable for all sorts of construction defects.

The ten years period is a guarantee period. Thus, it does not fall under the rules of suspension and interruption of limitation period. The law also provides for the limitation period of claims based on decennial liability provisions. Such claims must be filed within three years from the date when the partial or total collapse occurs or when the structural or safety defects appear.

In cases where the contractor subcontracts the work, he stays liable towards the employer for any defective performance of the subcontracted work. Even in cases of nominated subcontractors, the contractor will not be released from liability towards the employer for the defective subcontracted works unless agreed otherwise. The employer may also require the subcontractor to issue a warranty in his favour and/or in the favour of end user in order to have a direct action against him. The contractor may choose to use the “back to back” terms under which he can shift the decennial liability to the subcontractor. The contractor may require a sub-contractual indemnity clause that covers his decennial liability with regards to the subcontracted works. If such a liability arises, the subcontractor will have to indemnify the contractor.

The employer may sell the building or its units to subsequent buyers. This can be upon completion or by the so-called off-plan sales. Under Dubai law, the developer becomes liable towards the buyer for structural defects up to ten years from the date of delivery. Liability for defective construction may be shifted down the chain till it reaches the contractor. In some cases, such a chain becomes broken due to the disappearance of one of the parties or due to the limitation period. If this becomes the case, the ultimate buyer will need a direct action against the contractor. This paper argues that decennial liability may move with the premises under Article 251 of the CTC. Furthermore, if the construction contract was initially made in his favour, he will have a direct action against the contractor. This requires both parties

transaction or from a provision in the law that such effect will not extend to a general successor. If a contract establishes personal rights connected with a thing that is thereafter transferred to a special successor, such rights will be transferred to the successor at the same time as the thing passes, if it is one of the appurtenances thereof, and if the special successor knows of them at the time of the transfer of the thing to him. So far as concerns obligations created by the contract, they will not pass to a special successor unless they are part of the appurtenances of the thing passing to such successor, and are specified in his favour [translator's note: but phrase obscure] as imposing restrictions or narrowing his scope.”

to the construction contract to agree that the benefit of the contract will be directly conferred on a third party. A statutory protection for consumers is always recommended. Indeed, it is submitted that the last owner should be given a statutory right to sue the contractor for defective construction.