



BACK-TO-BACK CLAUSES IN SUBCONTRACTING CONTRACTS

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ABSTRACT

Back-to-back contracts represent a strategic mechanism in the construction industry, designed to effectively manage and allocate risks between main contractors and subcontractors. This approach is instrumental in ensuring that the terms and conditions of the subcontract reflect those of the main contract, thereby aligning obligations and liabilities and transferring risks appropriately. However, the application and implications of back-to-back arrangements can vary significantly across different legal systems, adding layers of complexity to their enforcement and interpretation.

The concept of back-to-back contracts involves mirroring the terms in the subcontract in the main contract to ensure that the main contractor's liabilities and risks are passed down the contractual chain. This practice aims to limit the contractor's exposure by ensuring that subcontractors assume risks and responsibilities aligned with the main contract. Such arrangements typically address key aspects of construction projects, including payment terms, work acceptance, scope of works, claims procedures, limitations of liabilities and dispute resolution mechanisms.

This article delves into the intricate role of back-to-back contracts in managing risk allocation within construction projects and their implementation. The discussion extends to a detailed analysis of back-to-back provisions under FIDIC, which are pivotal in providing a structured framework for ensuring that subcontractor agreements are consistent with the main contract's terms.

The article further explores how back-to-back provisions are treated under different legal frameworks, including Turkish law, civil law regimes, common law, and Middle Eastern jurisdictions. This comparative analysis reveals the varied approaches to enforcing these clauses and their impact on risk management.

Overall, this comprehensive analysis of back-to-back contracts and risk allocation practices serves to enhance the understanding of how different legal and contractual frameworks address the complexities of risk management in construction projects. It emphasizes the need for careful consideration of both legal and contractual factors to ensure successful project outcomes and mitigate potential risks.

Keywords: Back-to-back contracts, risk allocation, subcontract, FIDIC, Turkish Law

1. INTRODUCTION

In the construction industry, projects almost always include subcontractors. Utilizing subcontractors is common, as they often specialize in specific areas, such as electromechanical or communication tasks. Additionally, subcontractors may be chosen for their competitive pricing in certain project components. Ultimately, subcontracting benefits both the employer and the main contractor. However, it's crucial to remember that despite handling specific work, subcontractors remain independent contractors.

Back-to-back contracts play a significant role, particularly within the context of the construction industry, in defining the relationships and responsibilities between the main contractor, subcontractors, and the employer. These types of contracts create a chain of responsibility that aligns the interests and duties of all parties by ensuring the transfer of obligations specified in the main contract to the subcontractors. By this way, the subcontract effectively mirrors the main contract so that the subcontractor fulfils the main contractor's principal obligations towards the employer.¹

Back-to-back contracts are particularly prevalent in large-scale construction projects where various tasks, requiring different expertise and resources, are undertaken by numerous subcontractors. However, the employer usually enters into an agreement with a single main contractor who is responsible for the delivery of the entire project.² From the employer's perspective, the main contractor protects the employer's interests by being solely accountable for the whole project. This means that, in the event of a dispute, the employer only needs to seek redress from the main contractor.

Nevertheless, it is a common practice for the main contractor to engage several subcontractors for the specific aspects of the work. When the main contractor, who undertakes the task of completing and delivering a specific work for the employer, transfers all or part of this task to other contractors, subcontracting relationship is established. The subcontracting agreements between the main contractor and the subcontractors are completely independent from the main contract. In subcontracting agreements, the main contractor acts as the contractor for the employer, they take on the role of the employer in relation to the subcontractors.

¹ TUTKUN, İnşaat Hukukunda Alt Yüklenicilik Sözleşmeleri, 2019, p. 77.

² NIELSEN, AKANMU, ANUMBA, Comparative Analysis of Back-To-Back Subcontracts in The Construction and Telecommunications Industries, 2014, p. 449.

While these two contracts, the main contract and the subcontract, are legally independent, they become practically interrelated due to the unavoidable consequence that the condition or outcome of one contract to impact the other, as they are executed for the same construction project.

The principle that a subcontract is independent in terms of substance and content from the main contract imposes the risk on the main contractor of being negatively affected by the lack of coordination between the two contracts. Therefore, the parties involved may mutually consent to formally link these two contracts by incorporating specific provisions into both or by drafting supplementary agreements.³ In such cases, the main contractor often includes back-to-back provisions in their contracts with the subcontractors to avoid being directly liable to the employer for the work performed by the subcontractor. This ensures that subcontracts align with the main contract, allowing the main contractor to pass down risks to the subcontractor through the contractual chain.⁴

This implies that the main contractor could potentially face minimal risk exposure. While there are advantages to such an arrangement for contractors, in practice, fully "back-to-back" applications are rarely accepted by subcontractors. In practice, this typically leads to a mixed sharing of risks between the main contractor and the subcontractors.⁵

Back-to-back subcontracts can generally be structured in three main ways. The first approach involves incorporating all the terms of the main contract into the subcontract, with exceptions for specific clauses that are either excluded or varied, often those that are obviously irrelevant to the subcontract.⁶ This is also referred to as the "mirror back-to-back contract". The purpose of this approach is to hold the subcontractor to the same level of responsibility as the main contractor, while also ensuring consistency between the contracts and minimizing gaps or conflicts.

The second approach is to draft a unique set of terms and conditions tailored specifically for the subcontract, independent of the main contract.⁷ The aim this approach is to bind the subcontractor with specific obligations that are suitable for the requirements of the subcontracted

³ AKINCI, Milletlerarası İnşaat Sözleşmeleri, 2023, p. 202.

⁴ HÖK, The FIDIC Subcontract for Works and Design & Build Subcontract, 2014, ¶ 3,
Available at: <https://www.dr-hoek.com/legal-information/commercial-law/the-fidic-subcontract-for-works>

⁵ MURRAY-SMITH, RICH, Back-To-Back Contracting Sounds Simple, But Is It Really, 2024.

⁶ SEÇER, Arsa Payı Karşılığı İnşaat Sözleşmesi, 2023, p. 243.

⁷ SEÇER, Arsa Payı Karşılığı İnşaat Sözleşmesi, 2023, p. 243.

work. However, the disadvantage of this approach is that it can lead to potential gaps.

The third approach, which is the most common approach in larger international construction projects, is to use standard form contracts, such as FIDIC or NEC, that already include back-to-back provisions for both main contract and subcontracts.⁸ Each method offers a different way to align the subcontract with the main contract while managing associated risks and responsibilities.

In this context, back-to-back contracts align the otherwise independent agreements by transferring the risks borne by the main contractor within the chain of responsibility to the subcontractor, thereby establishing a standard of accountability between the parties.

2. RISK ALLOCATION IN BACK-TO-BACK CONTRACTS

A. Payment

Most subcontracts contain a clause related to payment which only entitles the subcontractor for a payment when the contractor has actually received payment. Examples of such clauses include; *"The contractor's payments to the sub-contractor shall occur within seven days after the client has made payments"* or *"Any delay in payment by the client will also affect the subcontractor"*.

The specifically agreed payment clause can either state that the payment due by the contractor is contingent on the actual payment by the employer to the contractor, known as a "pay-when-paid clause," or it can make the sub-contractor's right to demand payment contingent not on timing but on the occurrence of payment from the client to the contractor, which is referred to as a "pay-if-paid clause."¹¹ Alternatively, a "pay-when-certified clause" requires that the subcontractor will only receive payment after submitting a certified payment application or invoice that has been reviewed and approved as correct and in accordance with the terms of the main contract.

⁸ Royal Institution of Chartered Surveyors (RICS), *Subcontracting*, 2021, p.15.

¹¹ AKINCI, *Milletlerarası İnşaat Sözleşmeleri*, 2023, p. 203.

In relation to the legal nature of the payment clauses under Turkish law, Prof. Dr. Halil Akkanat states that:

*“The accrual of the payment concerning remuneration can be assessed as either a "condition" (under TBK Article 170) or a "term" (accrual time), depending on its content, and this distinction is subject to interpretation. When the payment of the subcontractor's fee is conditional, the subcontractor's claim does not arise until the contractor's own fee claim is paid by the employer, and the subcontractor bears the risks associated with the employer's payment difficulties, bankruptcy, etc. Conversely, if the payment is agreed upon as a term, the accrual of the subcontractor's fee is dependent on the employer's payment. Thus, the risk arising from the employer's failure to pay due to the contractor's non-compliance with their obligations is not deemed acceptable for the subcontractor.”*¹²

‘Pay-if-paid’, ‘pay-when-paid’ and ‘pay when certified’ clauses have become standard terms in subcontractor agreements for international construction projects. Subcontractors accept these clauses as part of the contracts to be included in large projects.¹³

I. Pay-If-Paid

The provisions related to payment may include a clause such as *"Payment will be made to the subcontractor as long as the employer makes payments to the main contractor"* or *"The main contractor is not obligated to make payment to the subcontractor until the employer has made payment to the main contractor."*¹⁴

In such a case, the main contractor adds a clause stating that it will not be liable if the employer fails to pay. This way, the main contractor enters into a non-liability agreement with the subcontractor for the event of non-payment by the client. Therefore, with a pay-if-paid clause, the risk of non-payment is transferred from the contractor to the subcontractor.

¹² AKKANAT, Taşeronluk (Alt Müteahhitlik) Sözleşmesi, p. 89-90.

¹³ KERMAN, Contrat de Sous-Traitance du Point de Vue du Droit Turc et Suisse, p. 161.

¹⁴ KERMAN, Contrat de Sous-Traitance du Point de Vue du Droit Turc et Suisse, p. 159-162.

II. Pay-When-Paid

It is also possible to establish a connection with the main contract regarding the timing of payments. The provisions related to this type of payment may include a clause such as *"The payment timing applied by the employer to the main contractor will also apply to the subcontractor"* or *"The final payment to the subcontractor will be made upon the employer's final acceptance of the work and the payment to the main contractor."*¹⁵

In this case, it would be sufficient to include a provision stating that payment to the subcontractor will be made after the employer has paid the contractor. Such a provision would be legally regarded as a payment due date clause. The pay-when-paid clause offers the contractor flexibility in terms of when they must fulfil their payment obligation. This way, the contractor transfers the cash flow issue to the subcontractor. However, this clause does not grant the contractor the right to delay the due date through arbitrary actions.

III. Pay-When-Certified

The pay-when-certified clause stipulates that the subcontractor will receive payment only after they submit a certified payment application or invoice, which has been reviewed and certified as accurate and in line with the main contract terms.¹⁶ The main contractor's obligation to pay the subcontractor is triggered once this certified documentation is received, ensuring that the payment process aligns with the verification of completed work.¹⁷

B. Acceptance of Work

The main contractor may require that the subcontractor's work be carried out in accordance with the specifications outlined in the main contract as a condition for acceptance. Furthermore, the main contractor may link the acceptance of the work to the employer's approval of the completed work.¹⁸ In this scenario, the subcontractor's work will only be accepted if it meets all the requirements of the main contract, and the client approves it. Thus, through back-to-back

¹⁵ KERMAN, *Contrat de Sous-Traitance du Point de Vue du Droit Turc et Suisse*, p. 159-162.

¹⁶ CUNNINGHAM, *The Construction Contracts Act 2013 – An Overview*, 2017, p. 10-11.

¹⁷ NDEKUGRI, RYCROFT, *The JCT 05 Standard Building Contract Law and Administration*, 2009, p. 47.

¹⁸ AKINCI, *Milletlerarası İnşaat Sözleşmeleri*, 2023, p. 203.

subcontracting, the main contractor shares the risks associated with acceptance of the work with the subcontractor.

Additionally, agreements may be made stipulating that the subcontractor's work will be considered not delivered until it is handed over to the client by the contractor. Such provisions extend the period during which the subcontractor must bear the risk until the expiry of the agreed timeframe. Furthermore, these agreements protect the contractor's right to claim against the subcontractor in the event of a defective subcontracting performance. It may also be agreed that the subcontractor's liability will not expire until the contractor's liability expires, ensuring that the right of recourse is preserved.

C. Claims: Notification and Compensation

As it can be seen from the types of back-to-back arrangements all types carry risks for the subcontractor. It is therefore essential that the deadlines in subcontracts align with those in the main contract. This alignment should cover not only document approvals but also delivery, completion dates, and claim notification periods.

Gaps between the claim procedures in the main contract and subcontract also pose risks for main contractors. In many contracts, the main contractor's right to make a full claim against the employer depends on complying with the main contract's notification requirements.¹⁹ Therefore, these notification requirements should be adequately reflected in the subcontract. It is particularly important to ensure that the main contractor is not prevented from making a full claim against the employer due to not receiving the necessary claim details from the subcontractor in time. In this context, it is crucial for the main contractor to have sufficient time to pass on the subcontractor's claim notifications to the employer. As such, the subcontract should include shorter notification periods than those specified in the main contract.²⁰

D. Dispute Resolution

In a back-to-back arrangement, it should be recognized that a dispute between the main contractor and the employer under the main contract will most likely lead to a corresponding dispute between the main contractor and the subcontractor under the subcontract, and vice versa.

¹⁹ HERBER SMITH, Asia Construction Newsletter, Back-to-Back Contracts, 2011.

²⁰ HERBER SMITH, Asia Construction Newsletter, Back-to-Back Contracts, 2011.

Depending on the nature of the subcontract, frequently passed down the chain are claims related to defects, performance errors, and delays, as well as changes in scope and valuation.²¹ In every case, the main contractor will seek to avoid being burdened with responsibilities that are beyond their control and cannot be transferred to the relevant parties.

The primary concern for the main contractor with having different dispute resolution clauses in the main contract and subcontract is facing conflicting decisions from different courts or arbitral tribunals under separate contracts involving various parties at different levels in a project. To avoid complex situations, it would be crucial for both the main contract and subcontract to include provisions requiring the parties to agree to collaborate and assist each other in resolving disputes under the main contract as a first resort. Another key provision to include in the subcontract to minimize the main contractor's risk would be the subcontractor agreeing to suspend any disputes with the main contractor under the subcontract until the dispute between the employer and the contractor under main contract is resolved. Such provisions could help in achieving more effective resolution of disputes.

3. FIDIC (SAMPLE BACK-TO-BACK PROVISIONS)

The International Federation of Consulting Engineers (FIDIC) publishes a suite of standard contracts widely used in the construction and engineering sectors globally. These contracts are particularly valued for their balanced allocation of risks and clear delineation of responsibilities among the parties involved. The FIDIC Conditions of Subcontract for Construction, often used in conjunction with the main FIDIC contracts, are designed to ensure that the rights and obligations of the contractor and subcontractor are aligned with those under the main contract. This is critical in back-to-back contractual arrangements, where the contractor's responsibilities towards the employer are mirrored by the subcontractor's duties towards the contractor.

There are currently three FIDIC-published Conditions of Subcontract: the *Conditions of Subcontract for Works of Civil Engineering Construction (1994)*, the *Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer (2011)*, which is used in conjunction with the 1999 and 2017 editions of the Red Book ("**Red Book Conditions of Subcontract**"), and the most recently published *Conditions of Subcontract for Plant and Design-Build*, used in conjunction with the Yellow Book. For the purposes of this article, provisions within the Red Book Conditions of Subcontract will be evaluated, as it is the most

²¹ JENKINS, STEBBINGS, *International Construction Arbitration Law*, 2006, p. 45-46.

commonly used agreement by parties.

One of the key provisions in the Red Book Conditions of Subcontract is Sub-Clause 1.8, which stipulates that both the subcontract and the main contract will be governed by the same laws and language.²²

This ensures legal and linguistic consistency, helping to avoid discrepancies that might arise from applying different jurisdictions or languages. Sub-Clause 1.10 clarifies that there is no direct contractual relationship, i.e. privity, between the employer and the subcontractor.²³ This reinforces the principle that the subcontractor's rights and liabilities exist solely in relation to the contractor, shielding the employer from any direct claims by the subcontractor.

A critical clause for ensuring alignment of obligations is Sub-Clause 2.2, which requires the subcontractor to assume and perform the contractor's obligations under the main contract, unless the subcontract states otherwise.²⁴ It further requires the subcontractor to carry out the works and rectify any defects in such a way that the contractor's compliance with the main contract is not compromised. This provision is fundamental to the contractor's risk management, as it ensures that subcontractors do not expose the contractor to additional risks or liabilities.

In terms of communication, Sub-Clause 2.3 specifies that any instructions or determinations issued by the engineer under the main contract must be relayed to the subcontractor as instructions from the contractor.²⁵ This establishes a clear channel of communication and ensures that the subcontractor's actions are aligned with the contractor's obligations under the main contract.

Moreover, Sub-Clause 2.4 grants the subcontractor the same rights and remedies against the contractor as the contractor has against the employer under the main contract.²⁶ This alignment of rights ensures fairness and allows the subcontractor to benefit from similar protections and

²² FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 1.8.

²³ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 1.10.

²⁴ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 2.2.

²⁵ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 2.3.

²⁶ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 2.4.

remedies as those available to the contractor.

The coordination of the works is addressed in Sub-Clause 3.5, which makes the contractor responsible for coordinating the main works with the subcontract works and any other subcontracts.²⁷ Effective coordination is essential in construction projects to prevent delays, overlaps, or conflicts between different subcontractors and the main contractor.

Clause 8 further synchronizes the progress of the subcontract with that of the main contract. Sub-Clause 8.1 requires the contractor to provide the subcontractor with at least 14 days' notice before the subcontract commencement date, ensuring sufficient preparation time for the subcontractor to mobilize resources and begin work on schedule.²⁸ Sub-Clause 8.3 obliges the subcontractor to submit a detailed schedule for the subcontract works that fully complies with the main contract's programming and reporting requirements.²⁹ This ensures that both contracts progress in tandem. Sub-Clause 8.4 entitles the subcontractor to an extension of time for delays attributable to any of the causes listed in the main contract, while Sub-Clause 8.6 and Sub-Clause 8.7 deal with the suspension of work and the consequences of delays, ensuring consistency between the main and subcontract in managing such events.³⁰

Financial risk allocation is dealt with in Clause 14, which introduces the "pay when paid" mechanism. As explained above in Section 2 (A) (II), this shifts the risk of delayed payments by the employer onto the subcontractor.³¹ Sub-Clause 14.6 allows the contractor to withhold or defer payment to the subcontractor if certain conditions are met, such as non-certification of works by the engineer or non-payment by the employer. However, the clause also ensures that any sums withheld must eventually be paid, either within seven days of the contractor receiving payment from the employer or within 56 days after the defects notification period, regardless of whether the employer has made the payment.³²

²⁷ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 3.5.

²⁸ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 8.1.

²⁹ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 8.3.

³⁰ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clauses 8.4, 8.6, 8.7.

³¹ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 14.

³² FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the

In situations involving termination, Sub-Clause 15.3 is particularly relevant as it grants the subcontractor the right to recover loss of profit if the contractor is entitled to such recovery under the Red Book termination provisions.³³ This provides a measure of financial protection for the subcontractor in the event of termination. Sub-Clause 16 is another significant provision, allowing the subcontractor to suspend performance and ultimately terminate the subcontract in the event of persistent non-payment by the contractor.³⁴ This clause adds an additional layer of protection for subcontractors, ensuring that they have recourse if payments are delayed or withheld.

Under the Red Book Conditions of Subcontract, FIDIC has given considerable attention to the dispute resolution provisions of the subcontract. The subcontract contains its own dispute resolution procedures, with shorter time limits for notifying and dealing with claims than those in the main contract. This approach is likely intended to ensure that subcontractor claims can be passed up the contractual chain in a timely manner. Importantly, the subcontractor is only entitled to extra time or costs if it complies with the main contract's notice requirements. Additionally, the subcontract introduces a suspension period that requires parties to defer any Dispute Adjudication Board (DAB) proceedings for 112 days once a claim is notified. This period is intended to give the contractor time to resolve the dispute under the main contract before resorting to subcontract-level dispute resolution.

Finally, Sub-Clause 17.1 extends the subcontractor's responsibility for any damage to the subcontract works until the employer takes over the works under the main contract.³⁵ This ensures that the subcontractor remains liable for the condition of the works until the employer formally assumes responsibility.

The 2017 edition of the Red Book also includes relevant provisions concerning subcontracts, notably Sub-Clause 5.2.4, which allows the engineer to demand proof that the contractor has paid any sums due to the nominated subcontractor.³⁶ If the contractor fails to provide such proof, the employer has the right to make direct payments to the nominated subcontractor and seek

Employer, Sub-Clause 14.6.

³³ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 15.3.

³⁴ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 16.

³⁵ FIDIC 2011, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, Sub-Clause 17.1.

³⁶ FIDIC 2017, Red Book Construction Contract 2nd ed., Sub-Clause 5.2.4.

reimbursement from the contractor. This provision is crucial in safeguarding the subcontractor's payment rights and avoiding disputes over unpaid sums.

In conclusion, the FIDIC Conditions of Subcontract for Construction provide a robust framework for aligning the rights, obligations, and risk allocation between the main contract and the subcontract, thereby supporting the effective management of back-to-back contracts in the construction industry. By establishing clear terms for coordination, payment, and performance, these provisions enable the smooth execution of complex projects involving multiple contracting parties.

4. BACK-TO-BACK PROVISIONS UNDER DIFFERENT JURISDICTIONS

The validity of back-to-back provisions included in a subcontract is contingent upon the law governing the contract.³⁷ This means that in order to assess whether such provisions are enforceable, it is essential to consider the applicable legal framework that governs the subcontract. Different jurisdictions may have varying rules regarding the enforceability of these provisions, and the specific legal principles and precedents established in the relevant legal system will influence their validity.

This article will examine the treatment of back-to-back provisions under Turkish law, civil law and common law.

A. Turkish Law

The Turkish legal system upholds the principle of freedom in private law, allowing parties significant autonomy to determine their rights and obligations. This principle, manifests in the private law sphere as the principle of freedom of contract. The provision on freedom of contract is regulated under Article 26 of the Turkish Code of Obligations (“TCO”):

“ARTICLE 26- The parties may freely determine the content of a contract within the limits prescribed by law.”³⁸

While Turkish law does not provide a specific regulation governing the definition, legal nature, or characteristics of subcontractor agreements, Article 471/3 of the Turkish Code of Obligations, which relates to contracts of work, includes a provision pertinent to subcontractor agreements:

³⁷ AKINCI, *Milletlerarası İnşaat Sözleşmeleri*, 2023, p. 204.

³⁸ Law No. 6098 “*Turkish Code of Obligations*”, 2011, Article 26.

“ARTICLE 471- (3) The contractor may directly make the work to be produced by himself or by his own under the management of the contractor. However, in the realisation of the work, the contractor if his/her personal qualities are not important, he/she may also outsource the work to someone else.”³⁹

According to Article 471 (3), subcontracting of the whole or part of the work is not permitted under Turkish law as a general rule. However, an exception is made when the personal attributes of the main contractor are not critical to the completion of the work. Importantly, Article 471/3 is not a mandatory provision but rather a supplementary legal rule. The manner in which the work is performed, and the use of subcontractors depend on the mutual agreement between the employer and the main contractor. Consequently, parties may agree on contrary terms in their contract, allowing subcontracting even in situations where the contractor’s personal qualities are significant.

Additionally, within the framework of a subcontracting agreements where the contractor assigns all or part of the work to the subcontractor, the principle of relativity of contracts applies.⁴⁰ This principle prevents subcontractors from making direct claims against the employer and vice versa. As illustrated by the decisions of the Court of Cassation explained below, subcontractors can only claim their entitlements arising from their work from the main contractor, who direct counterpart to the subcontract, rather than against the employer. This principle supports the main contractor's ability to transfer responsibilities and risks to the subcontractor, while ensuring that subcontractors can only assert their rights against the main contractor.

For instance, in its decision dated 1 January 2023, the 6th Civil Chamber of the Court of Cassation stated:

“According to the principle of relativity of contracts, a contract, as a rule, binds only the parties to that contract. In disputes arising from the contract, the parties to the case are also the parties to the contract. [...] In light of these explanations, with respect to the specific case: The subcontracting agreement [...] is legally classified as a works contract. It is understood that the other defendant, the employer (...), is not a party to this contract and there is no claim or evidence within the file suggesting that they have assumed any responsibility towards the claimant arising from the contract. Furthermore,

³⁹ Law No. 6098 “*Turkish Code of Obligations*”, 2011, Article 471-(3).

⁴⁰ EREN, Borçlar Hukuku Genel Hükümler, Yetkin Yayıncılık, 2021, p. 18.

while the claimant's contractual counterpart is the defendant contractor company, the defendant contractor company's counterpart in relation to the works contract is the other defendant (...). It is evident that there is no claim or evidence in the file necessitating the claimant subcontractor to make a claim against the defendant principal employer (...) on grounds outside the contract. Therefore, the regional court's decision to reject the case due to lack of standing against (...) and to reject the claimant's appeal on its merits is found to be accurate."⁴¹ (Emphasis added)

Since the main contractor agreement and the subcontracting agreement are two separate and independent contracts, the parties have the freedom to determine the content of each agreement as they see fit. However, if this freedom is exercised in such a way that the contents of the two agreements are not aligned, it may create significant risks, particularly for the main contractor, who is bound by both agreements. To mitigate these risks, Turkish law permits the inclusion of back-to-back provisions in subcontracting agreements, which align the subcontract with the main contractor agreement and transfer some of the associated risks to the subcontractor.⁴²

In the Turkish construction industry, subcontracting agreements that are back-to-back with the main contractor agreement are frequently encountered. Among the most frequently encountered back-to-back clauses are those related to payment. Indeed, the Court of Cassation upheld the validity and enforceability of such clauses, including "pay when paid" provisions:

*"The contract [...], is, in its legal nature and as defined in Article 355 of the Turkish Code of Obligations, a "work" contract. The defendant company is the contractor (employer), and the plaintiff company has signed the contract as the subcontractor (subcontractor). According to Article 3 of the contract, the cost of the "waterproofing" work, which is to be performed by the subcontractor with materials, has been agreed at (6.50 USD/m² plus VAT). The method and manner of payment for the work to the plaintiff are also regulated in Articles 4 and 6 of the contract. According to Article 4 of the contract, the subcontractor's payment will be made seven days after the employer (defendant) receives its payment, in parallel with the employer's payment."*⁴³

In conclusion, while Turkish law allows considerable freedom in drafting subcontracting agreements, the principle of relativity of contracts and the supplementary nature of Article 471/3

⁴¹ Court of Cassation, 6th Civil Chamber, M.N. 2022/1058, D.T. 2023/811 K, D. 01.03.2023.

⁴² AKINCI, Milletlerarası İnşaat Sözleşmeleri, 2023, p. 204.

⁴³ Court of Cassation, 15th Civil Chamber, M.N. 2005/6895, D.T. 2006/72, D. 18.01.2006.

necessitate careful consideration when structuring these agreements. The use of back-to-back provisions is a common and effective method for aligning subcontracting agreements with main contractor agreements, thus mitigating risks for the main contractor. However, it is essential for parties to these agreements to clearly define their terms and ensure consistency between the two contracts to avoid potential disputes and ensure a smooth execution of the project.

B. Civil Law

In civil law systems, particularly in the continental European legal system, the principle of freedom of contract is also fundamental. Parties can determine the terms of their contracts based on their mutual agreements. The reflection of the terms of the main contract in the subcontracts is typically assessed within the framework of contract freedom. In this context, the validity of back-to-back contracts is generally accepted. However, since local laws and regulations can affect the validity of back-to-back contracts, the validity of these contracts will vary according to each country's specific legal regulations.

For example, in the French legal system, subcontracting is governed by Law No 75-1334 “*On Subcontracting*” which provides strict regulations to protect sub-contractors, particularly against the risks of non-payment by the main contractor.⁴⁴ Pursuant to Article 6 (1) of the Law No 75-1334, “*Subcontractors who have been accepted and whose conditions of payment have been approved by the client shall be paid directly by the latter for the part of the contract executed by the former*”.⁴⁵ This provision only applies to private subcontracts where the employer explicitly approves the subcontractor and conditions of payment, and where the value of the subcontract exceeds a threshold of EUR 600.⁴⁶

This means that in the context of private subcontracts, if the main contractor fails to pay a subcontractor accepted by the employer, the subcontractor has the right to claim payment directly from the employer, provided the employer has not already paid the corresponding amount to the main contractor. This principle, known as “direct action,” is a mandatory rule

under French law, meaning that any clause that attempts to deprive the subcontractor of this right would be deemed null and void.⁴⁷

⁴⁴ HÖK, The FIDIC Subcontract for Works and Design & Build Subcontract, 2014, Available at: <https://www.dr-hoek.com/legal-information/commercial-law/the-fidic-subcontract-for-works>

⁴⁵ Law No 75-1334 “*On Subcontracting*”, Article 6 (1).

⁴⁶ Law No 75-1334 “*On Subcontracting*”, Article 6 (2).

⁴⁷ HÖK, The FIDIC Subcontract for Works and Design & Build Subcontract, 2014, Available at: <https://www.dr-hoek.com/legal-information/commercial-law/the-fidic-subcontract-for-works>

C. Common Law

Under English law, the general rule is that parties are free to agree on the terms of their contracts, allowing them to structure payment obligations as they see fit. This principle of freedom of contract gives contracting parties significant autonomy, including the use of "pay-when-paid" or "pay-if-paid" clauses, which tie payment obligations to the receipt of payment from a higher-tier party.

However, in the construction industry, the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") introduces an important exception to this rule. The Act prohibits the enforcement of such conditional payment clauses, reflecting a legislative intervention aimed at protecting subcontractors from the financial risks of non-payment or delays by parties higher up the chain, particularly in back-to-back contractual arrangements.

The HGCRA explicitly addresses these clauses in Section 113, prohibiting their enforcement.⁴⁸ This prohibition means that, provided the construction contract falls within the scope of the HGCRA, a contractor cannot make payment to a subcontractor contingent upon receiving payment from the employer.

The scope of the HGCRA applies to "construction contracts" as defined under Section 104 and "construction operations" under Section 105(1), which includes various construction-related activities.⁴⁹ However, Section 105(2) excludes certain operations, such as oil and gas extraction, mineral tunnelling, and the assembly of machinery in industries like power generation.⁵⁰ These exclusions have been criticized for being arbitrary, as they create a distinction between industries that fall under the HGCRA and those that do not.⁵¹

Additional exclusions from the definition of "construction operations" have been established through secondary legislation under the Act.⁵² These include agreements for highway works, planning agreements, externally financed development agreements, top-tier private finance initiative contracts, certain finance agreements, and development agreements related to the sale or lease of land upon completion of site works.

[hoek.com/legal-information/commercial-law/the-fidic-subcontract-for-works](https://www.hoek.com/legal-information/commercial-law/the-fidic-subcontract-for-works)

⁴⁸ Housing Grants, Construction and Regeneration Act, 1996, Section 113.

⁴⁹ Housing Grants, Construction and Regeneration Act, 1996, Sections 104 and 105(1).

⁵⁰ SCRIVEN, PRITCHARD, DELMON, A Contractual Guide to Major Construction Projects, 1999, p. 219.

⁵¹ Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 1626 (TCC) paragraph 75.

⁵² Construction Contracts (England) Exclusion Order 1998 (SI 1998/648).

D. The United States of America

In the United States of America, the enforceability of risk allocation clauses in back-to-back contracts, particularly pay-if-paid and pay-when-paid clauses, varies significantly across jurisdictions. Some states have enacted laws that make these provisions unenforceable altogether, while others limit their enforceability, particularly concerning mechanics' lien and payment bond rights.

In states like Maryland and the District of Columbia, although pay-if-paid clauses are generally enforceable, they cannot override a subcontractor's rights under mechanic's lien laws or payment bonds.⁵³ For example, Maryland law ensures that any contractual provision attempting to nullify a subcontractor's lien or bond rights is void, even if the contract is governed by another state's law.⁵⁴

Virginia's approach further restricts the enforceability of such clauses. In 2022, Virginia enacted a statute prohibiting pay-if-paid clauses in private construction contracts, though exceptions exist in cases of contractor insolvency or bankruptcy.⁵⁵ Similarly, Delaware law invalidates pay-if-paid clauses in private construction contracts, although such provisions remain enforceable in public works contracts.⁵⁶

Across these states, courts generally view higher-tier contractors as better positioned to bear the risk of nonpayment, offering economic protection to subcontractors, particularly where lien or bond rights are at stake. A comprehensive analysis of these clauses' enforceability across the Mid-Atlantic region, including Maryland, Virginia, the District of Columbia, and Delaware, reveals a nuanced legal landscape that contractors must navigate carefully when drafting conditional payment provisions.

⁵³ Code of the District of Columbia § 27A-104.

⁵⁴ Maryland Code, Real Property, § 9-113(b); Maryland Code, State Fin. and Proc. Art., § 17-108(d)(2).

⁵⁵ Code of Virginia Ann. § 2.2-4337.

⁵⁶ Delaware Code Ann. tit. 6, § 3507(e).

E. Middle East

The applicable law of certain jurisdictions in the middle east allows subcontractors to make claims directly to the employer. These include Qatar, Iraq, Egypt, Libya and Lebanon. Jurisdictions such as Jordan, Oman and UAE do not allow direct claims by subcontractors to employers unless the main contractor assigns that right to the subcontractor.

In the United Arab Emirates (UAE), the use of "back-to-back" (conditional) payment provisions in construction contracts is a significant topic concerning payment arrangements between contractors and subcontractors.⁵⁷ These provisions are primarily developed to ensure that a main contractor is not obliged to pay the subcontractor unless the employer has made payment. Designed to protect cash flow for main contractors and prevent financial strain between the two parties in cases where the employer fails to make payments, these provisions are commonly applied in the UAE. They remain valid and are generally accepted by UAE courts.

Some provisions in the UAE Civil Code (Federal Law No. 5/1985) include rules on conditional contracts. For example, Articles 420, 422, 425, and 427 of the Civil Code state that if an obligation is conditional, it is suspended until the relevant condition is fulfilled.⁵⁸ In this context, the obligation of a main contractor to pay the subcontractor is considered suspended until payment is received from the employer.

UAE law does not make a legal distinction between different types of conditional payment clauses, such as "Pay When Paid" and "Pay If Paid". Therefore, such clauses are treated as a single type of conditional payment provision in UAE courts, and the subcontractor's right to demand payment does not arise unless the condition is met. However, the wording of the clause and the stance of the relevant court or tribunal may influence whether the court or tribunal determines that the clause has lapsed due to the passage of time or completion of works.

5. CONCLUSION

The analysis back-to-back contracts reveals their fundamental role in managing risk allocation within construction projects by aligning the responsibilities and obligations of main contractors and subcontractors. By ensuring that subcontractor agreements reflect the terms of the main contract, back-to-back arrangements help maintain consistency and coherence across the contractual chain. FIDIC's back-to-back provisions exemplify a structured approach to

⁵⁷ Silva, *Unfair Payment Practices in the UAE (Back to Back Payments)*, 2014.

⁵⁸ Federal Law No. 5/1985, "Civil Transactions Law of the United Arab Emirates State", 1985.

integrating subcontractor agreements with main contracts, offering a valuable tool for mitigating risk and enhancing communication between parties. These provisions are instrumental in ensuring that risks are effectively managed and that all parties are aware of their respective responsibilities.

The comparative review of legal frameworks across Türkiye, civil law systems, common law jurisdictions, and the Middle East jurisdictions highlights the diverse approaches to the regulation and enforcement of back-to-back provisions. In Türkiye, the flexibility afforded by the principle of freedom of contract allows for the effective use of back-to-back clauses, enabling tailored risk management strategies. Conversely, common law jurisdictions such as England impose statutory limitations on certain conditional payment clauses, which can affect the enforceability of back-to-back arrangements. Some civil law systems and Middle Eastern legal frameworks present distinct considerations regarding subcontractor rights and obligations, influencing the application and effectiveness of back-to-back provisions.

In addition to back-to-back contracts, the article addresses alternative methods of risk allocation, including exceptions to the principle of privity and mechanisms for direct claims between parties. These methods offer additional strategies for managing risks that arise during construction projects, highlighting the importance of a comprehensive approach to risk management. Effective risk allocation requires a nuanced understanding of both contractual and legal frameworks, as well as precise contract drafting to ensure alignment and mitigate potential conflicts.

Ultimately, the article highlights the critical importance of carefully considering the legal and contractual dimensions of risk allocation in construction projects. By leveraging back-to-back contracts and alternative risk management methods, parties can achieve more equitable risk distribution and enhance the likelihood of successful project outcomes. The insights provided in this article aim to contribute to a more informed and strategic approach to managing risks in the construction industry.

REFERENCES

- AKINCI Ziya, Milletlerarası İnşaat Sözleşmeleri, Onikilevha Yayıncılık. 2023.
- AKKANAT Halil, *Taşeronluk (Alt Müteahhitlik) Sözleşmesi*, İstanbul: Filiz Kitabevi, 2000.
- Civil Transactions Law of The United Arab Emirates States, Federal Law No. 5/1985.
- Code of the District of Columbia, § 27A.
- Code of Virginia, § 2.2, 1950.
- Construction Contracts (England) Exclusion Order, 1998, (SI 1998/648).
- Court of Cassation, 6th Civil Chamber, M.N. 2022/1058, D.T. 2023/811 K, D. 01.03.2023.
- Court of Cassation, 15th Civil Chamber, M.N. 2005/6895, D.T. 2006/72, D. 18.01.2006.
- CUNNINGHAM Tony, The Construction Contracts Act 2013 –An Overview, Dublin Institute of Technology, 2017.
- Delaware Code, tit. 6 § 3507, 1984.
- Engie Fabricom (UK) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 1626 (TCC).
- EREN Fikret, Borçlar Hukuku Genel Hükümler, Ankara: Yetkin Yayıncılık. 2022.
- Federal Law No. 5/1985, “Civil Transactions Law of the United Arab Emirates State”, 1985.
- FIDIC, Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer, 2011.
- FIDIC, Red Book Construction Contract 2nd ed., 2017.
- HERBER SMITH, Back-to-Back Contracts, Asia Construction Newsletter, 2011.
- Housing Grants, Construction and Regeneration Act, United Kingdom, 1996.
- HÖK, Götz-Sebastian, The FIDIC Subcontract for Works and Design & Build Subcontract, 2014.
- JENKINS Jane, STEBBINGS Simon, International Construction Arbitration Law, The Netherlands, Kluwer Law International, 2006.

KERMAN Evrim, *Contrat de Sous-Traitance du Point de Vue du Droit Turc et Suisse*, Istanbul: On İki Levha Yayıncılık, 2018.

Law No. 6098 “Turkish Code of Obligations”, 2011.

Law No. 75-1334 “Law On Subcontracting”.

Maryland Code, Real Property, § 9-113, 2023.

Maryland Code, State Finance and Procurement, § 17-108, 2005.

MURRAY-SMITH Rachel, RICH Sydney, *Back-To-Back Contracting Sounds Simple, But Is It Really?*, 2024.

NDEKUGRI Issaka, RYCROFT Michael, *The JCT 05 Standard Building Contract Law and Administration*, 2009.

NIELSEN Lars-Henrik Kvist, AKANMU Abiola, ANUMBA Chimay J., *Comparative Analysis Ofback-To-Back Subcontracts in The Construction and Telecommunications Industries*, 2014.

PEPPER Troutman, *NY Appellate Court Enforces Pay-If-Paid Provision Against Party With No Lien Rights*, 2023.

Royal Institution of Chartered Surveyors (RICS), *Subcontracting*, London, 2021.

SEÇER Öz, *Arsa Payı Karşılığı İnşaat Sözleşmesi*, Ankara: Yetkin Yayınları, 2023.

SCRIVEN John, PRITCHARD Nigel, DELMON Jeff, *A Contractural Guide to Major Construction Projects*, London: Sweet & Maxwell, 1999.

Silva, *Unfair Payment Practices in the UAE (Back to Back Payments)*, 2014.

TUTKUN Ceyda, *İnşaat Hukukunda Alt Yüklenicilik Sözleşmeleri*, Seçkin Yayıncılık, 2019.