

# Differences in payment provisions & practices between civil and common law

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18 June 2020



# What is a “Pay-When-Paid” Clause?

Common forms of ‘pay-when-paid’ clauses:

1. The main contractor is to progress the payment to the subcontractor within certain time, usually 7 or 14 days, from the receipt of payment from the employer.
2. Receipt of payment by the main contractor from the employer for the subcontract work is a condition precedent to payment by the contractor to the subcontractor.

# Prohibition under English Law

*“A provision making payment under a construction contract conditional on the payer receiving payment from a third person is ineffective, unless that third person ... is insolvent.”*

**Section 113 of the Housing Grants, Construction and  
Regeneration Act 1996**

# Position in Civil Law Countries

The UAE Civil Code permits the parties to agree a ‘conditional’ obligation:

Article 420:

*“A Condition is a future matter upon the existence or absence of which the full effectiveness (of a disposition) depends.”*

Article 429:

*“It shall be permissible to defer a disposition to a future time, upon the coming of which the provisions (of the disposition) shall become effective or be extinguished.”*

# Position in Civil Law Countries

- No exception to payment obligations or construction contracts
- Local courts generally uphold 'back-to-back' payment provisions on the ground that the claim is 'premature'
- The subcontractor can only claim proportional payment from what received from the employer

# Remedies for Non-Payment

## English Law

- Adjudication
- Suspension

## Civil Law Jurisdiction

- Suspension of works; (contractual suspension vs suspension under Article 247 of the Civil Code)
- Termination and seeking payment of work already done: if the performance of the contract has become impossible – Article 272 of the Civil Code)
- Interim measure – attachment order over the main contractor's dues with the employer
- *Action paulienne* – challenge an unfair deal between the main contractor and the employer.

## Tips for Drafting

- Co-ordination between contracts
- Draft detailed payment provisions to cover what the parties ought to do in case of the employer's failure to pay.

## Avoiding Payment Dispute

- Take measures in a timely manner
- Main contractors should co-ordinate with subcontractors in seeking payment from the employer for the work already done
- Compliance with good faith duty

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Questions?

