

FRENCH LAW ON SUBCONTRACTING

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A distinctive feature of French construction law is that subcontracting is regulated by a special legislative enactment: Law No. 75-1334 of 31 December 1975, as amended (the "Law"). The main purpose of the Law was to ensure subcontractors would be paid notwithstanding the bankruptcy or insolvency of the main contractor. The Law has sought to accomplish this purpose through the establishment, in the case of public works contracts, of the right for subcontractors to be paid directly by the employer and, in the case of private sector contracts, for subcontractors to have a right of direct action against the employer. This article will (1) briefly summarise the main features of the Law (section I below), the complete text of which is annexed hereto in English translation, (2) comment briefly on its application in an international context (section II), and (3) conclude with some remarks about its effectiveness (section III).

I THE LAW

The Law contains 16 articles divided into four sections:

- (1) Provisions of general application (articles 1 to 3),
- (2) Provisions establishing that, in the case of public works contracts, the subcontractor has a right to be paid directly by the employer (articles 4 to 10),
- (3) Provisions establishing that, in the case of other (private sector) construction contracts, the subcontractor has a right of direct action against the employer (articles 11 to 14), and
- (4) Miscellaneous provisions (articles 15 and 16).

(1) Provisions of general application

The Law begins, in article 1, with a definition of subcontracting. Subcontracting is defined as (translation):

"the activity by which a contractor entrusts by a subcontract, and under his responsibility, to another person called a subcontractor, all or part of the performance of a construction

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contract (*contrat d'entreprise*) or public works contract (*contrat du marché public*) entered into with an employer."¹

As can be seen, subcontracting is defined to include the subcontracting of "all or part" of a public or private works contract. However, in the case of public works, by virtue of the Public Works Code (*Code de Marchés Publics*), the main contractor may only subcontract part of the works.² Thus, the subcontracting of all of the works may only be possible in the case of private works contracts.

Before a subcontractor may exercise a right to direct payment from, or direct action against, an employer (public or private), as provided for in the Law, it is necessary for the employer first to have been informed of the price and conditions of payment that were agreed to between the main contractor and the subcontractor. Accordingly, article 3 of the Law provides that (translation):

"The contractor who intends to perform a (construction) contract or public works contract by resorting to one or several subcontractors shall, at the time he enters into, and during the entire duration of such contract or public works contract, cause each subcontractor to be accepted and the conditions of payment of each subcontractor to be approved, by the employer; the main contractor is required to communicate the subcontract or subcontracts to the employer when the latter requests them."

According to the Law's legislative history, it had been proposed to require that the subcontract be itself ratified by the employer. This proposal was rejected³ and, instead, the Law provides that the contractor has a duty to cause each subcontractor to be accepted and the conditions for paying him to be approved by the employer. However, the employer is entitled to obtain a copy of the subcontract if he wishes to see it.⁴

Where, in the case of a public or private works contract, the contractor has not caused the subcontractor to be accepted or the conditions for paying him to be approved, the Law provides, by way of sanction, that the contractor is nevertheless bound to the subcontractor but, on the other hand, the contractor may not invoke the subcontract against the subcontractor. Thus, for example, the contractor will be bound to pay the subcontractor for his work on the basis of the subcontract but may not claim against him for defects, if any, on the basis thereof. However, the contractor may still have a claim for defects in tort (*quasi-delict*) if he can establish fault on the part of the subcontractor.

Article 2 of the Law provides that (translation): "The subcontractor is considered as being a main contractor as regards its own subcontractors."

¹ Article 1. This is the first definition of subcontracting given by the French legislature.

² Article 2, *Code des Marchés Publics* (Public Works Code) and Circular of 7 October, 1976 relating to the reform of subcontracting in public works contracts. If a main contractor were permitted to subcontract a public works contract in its entirety, his position would be similar, it has been suggested, to that of an (illegal) commission agent.

³ Flecheux, *La loi no. 75-1334 de 31 décembre 1975 relative à la sous-traitance*, JCP 76 I 2791, para. 10.

⁴ Article 3.

The effect of this provision is that if a subcontractor elects itself to subcontract it must obtain acceptance of the second-tier subcontractor as well as approval of the conditions for paying him from the employer.

(2) The right to direct payment

In the case of any public works contract with the state, a regional organisation (*collectivité locale*), or a public establishment or enterprise, a contractor must, at the time of tender, inform the employer of the nature and amount of all services which it intends to subcontract.⁵ This requirement is independent of the requirement in article 3 (quoted above) to cause each subcontractor to be accepted by the employer.

In the case of any such public works contract, the Law provides that the subcontractor who has been accepted and whose conditions of payment have been approved by the employer has the right to be paid directly by it for the part of the contract of the execution of which such subcontractor is responsible.⁶ The payment procedure is as follows:

- (1) the documents intended to support a direct payment by the employer are to be delivered to the contractor (presumably, in the usual case, by the subcontractor) who then has 15 days from receipt either to note on them his acceptance, or to give notice to the subcontractor of his refusal, giving reasons; and
- (2) after this period, the contractor is deemed to have accepted those documents or parts of them which he has not expressly accepted or refused, enabling direct payment to be made by the employer.⁷

The right to direct payment is limited to subcontractors of the contractor having a contract with the State or other public body.⁸ Second-tier subcontractors employed on public works projects are limited to a right of direct action (see below) against the main contractor.⁹ The Law expressly provides that any waiver of the right of direct payment is void and that such right subsists even though the contractor is in bankruptcy or reorganisation.¹⁰

To limit the risk that the subcontractor's right to direct payment is prejudiced by claims, if any, of the contractor's creditors, the Law provides

⁵ Article 5.

⁶ Article 6.

⁷ Article 8. The Law does not itself specify what happens in the case of a refusal by the contractor, in whole or in part.

⁸ Circular of 7 October 1976 relating to the reform of subcontracting in public works contracts.

⁹ *Idem*. But this interpretation of the Law is disputed. Compare Laubadère, Moderne and Delvolvé, *Traité des Contrats Administratifs* (1984), Vol. 2, 297-298 with Y Dousset, *Le Droit Français de la Sous-Traitance*, 32, a paper delivered at the Paris Subcontracting Conference, see note 21 *infra*.

¹⁰ Article 7. To the extent that any co-called "pay when paid" (or "payment on payment" or "if and when") clause in a subcontract purports to make payment by the employer to the main contractor a condition precedent to any payment of the sub-contractor or otherwise purports to limit or restrict the sub-contractor's right of direct payment (public works) or direct action (private contracts) it would appear to be void as incompatible with the Law (articles 7 and 12). See M Klein, *L'Assurance-Crédit et Les Autres Garanties des Risques dans le Commerce International* (Thesis, Doctorat d'Etat, Paris 1983) 414-415.

that the contractor is only entitled to pledge (*nantir*) that part of a public works contract (for which it is responsible) which it performs personally.¹¹

While only mandatory in a public works contract (which equals or exceeds FF4000 in amount), parties are at liberty to provide for a procedure for direct payment in a private contract.¹²

(3) The right of direct action

In the case of subcontracts to which the right to direct payment does not apply (private sector subcontracts), the Law provides that the subcontractor (who has been accepted and whose conditions of payment have been approved by the employer pursuant to article 3) has the right of direct action against the employer if the contractor does not pay sums due under such a subcontract within one month after having received a formal notice (*mise en demeure*) to pay from the subcontractor. A copy of such notice is required to be sent at the same time to the employer.¹³

Every subcontractor, regardless of its tier (who has been accepted and whose conditions of payment have been approved by the employer), enjoys such a right of direct action against the original employer. In this respect, the right of direct action differs from the right to direct payment, the benefit of which is restricted to first-tier subcontractors (see above).

The Law expressly provides that any waiver of the right of direct action is void and that such right subsists even though the contractor is in bankruptcy or reorganisation.¹⁴

If the right of direct action is exercised, then the Law provides that the obligations of the employer are limited to those which he still owed to the contractor on the date of his receipt of a copy of the formal notice to pay, sent to the contractor, mentioned above.¹⁵

As in the case of the right to direct payment, to limit the risk that the subcontractor's right could be prejudiced by the claims, if any, of the contractor's creditors, the Law provides that the contractor may not transfer or pledge amounts receivable under its contract with the employer except to the extent of sums which are due to it for work which it does personally.¹⁶

As the employer will be a private entity (e.g., a corporation) which may go bankrupt, direct action against it will not afford subcontractors the same protection as direct rights against the state or another public body. To compensate for the reduced protection afforded on private works projects,

¹¹ Article 9.

¹² Internationally, for example, a direct payment procedure is provided for in certain circumstances in sub-clause 59.5 of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (fourth edition, 1987) in the case of a "nominated subcontractor".

¹³ Article 12.

¹⁴ Article 12. With respect to the potential incompatibility of the Law with a "pay when paid" clause in a subcontract, see note 10 *supra*.

¹⁵ Article 13.

¹⁶ Article 13-1.

the Law provides that, under pain of nullity of the relevant subcontract, all payments to the subcontractor must be secured either by:

- (1) A joint and several (*solidaire*) guarantee obtained by the contractor from an approved establishment (usually a bank), pursuant to conditions fixed by decree, or
- (2) A delegation by the contractor to the employer of the performance of the contractor's payment obligation to the subcontractor pursuant to article 1275 of the Civil Code up to the amount of the value of the services to be rendered by the subcontractor.¹⁷

From the subcontractor's perspective, a guarantee is preferable as it will protect the subcontractor against the bankruptcy or insolvency of both the employer and the contractor. However, guarantees are more costly and hence, in practice, contractors are disinclined to procure them. Since the Law's adoption in 1975, contractors have reportedly often failed to take the steps necessary under article 3 to enable subcontractors to enjoy the right of direct action or to provide them with the forms of security referred to above.

In an attempt to remedy this situation, the Law was amended in 1986 to add a new article 14-1 which requires the employer to police the situation. According to article 14-1:

- (a) If the employer learns of the presence on the site of a subcontractor who has not been the subject of the obligations under article 3, it must give notice to the contractor to fulfil such obligations; and
- (b) If a subcontractor who has been accepted and whose conditions of payment have been approved does not benefit from the delegation of the performance of the contractor's payment obligation, the employer must require the contractor to establish that it has provided the necessary guarantee.¹⁸

However, at least in the case of private works contracts, the difficulty appears not to have been fully resolved, as discussed below (see section III).

(4) Miscellaneous provisions

The Law expressly provides that any contractual provision or arrangement the effect of which is to frustrate the provisions of the Law is null and void.¹⁹

II APPLICATION OF THE LAW INTERNATIONALLY

In an international context, the application of the Law may give rise to interesting and difficult conflicts of law questions. Under what circumstances

¹⁷ Article 14. Article 1275 of the Civil Code provides for the delegation of the performance of obligations with or without recourse.

¹⁸ Article 14-1.

¹⁹ Article 15.

will the provisions of the Law apply in such a context? For example, will the right to direct payment apply, subject to compliance with article 3, when the main construction contract is with the French State or a French public body, or when the main construction contract is governed by French law or when the subcontract is governed by French law, or only in some combination of the foregoing circumstances? Will the right of direct action apply when the main contract is governed by French law or when the subcontract is governed by French law or must both be governed by such law?

According to a leading French conflicts of law scholar (Paul Lagarde):

- (1) The contractor will only be obliged to cause the employer to accept the subcontractor and approve its conditions of payment, as provided in article 3 of the Law, if the construction contract is governed by French law (or a foreign law which imposes a similar obligation). Consequently, if the construction contract is governed by French law article 3 will apply.
- (2) The sanction in the Law (article 3) for failure by the contractor to cause the employer to accept the subcontractor and approve its conditions of payment (namely, that the contractor may not invoke the subcontract against the subcontractor) will also be governed by the law which governs the main construction contract.
- (3) The right to direct payment is equally subject to the law governing the main construction contract, but by providing for direct payment only in the case of public works contracts the French legislature intended to make only the French State and French public entities bound by this obligation. Thus, the right to direct payment will only apply, according to this author, if both the main construction contract is governed by French law and the employer is the French State or a French public entity.
- (4) The admissibility of the right of direct action is governed by the law that governs the subcontractor's claim (*créance*), that is, the law governing the subcontract. But the exercise (*mise en oeuvre*) of this right, to the extent such exercise affects the interests of the employer, is subject to the law governing the main construction contract. Thus, according to this author, the laws governing each contract, if different, will need to be considered.²⁰

III CONCLUSION

The Law is now 15 years old. To what extent has it been effective in achieving its main objective, namely, to protect subcontractors against the bankruptcy or insolvency of main contractors?

²⁰ P Lagarde, "La Sous-traitance en Droit Internationale Privé" in C H Gavalda, *La Sous-traitance de Marchés de Travaux et de Services*, Econima 1978.

There appears to be a general consensus that the Law has been successful in the area of public works contracts. The direct payment procedure has been widely accepted and applied.²¹ However, the Law is not regarded as having been a success in relation to private works contracts. Despite amendments in 1986 designed to remedy the situation, concealed or disguised subcontracting (that is, non-compliance with article 3) is reportedly still wide-spread.²² Hence, in the case of such contracts, subcontractors continue often to be denied both the right of direct action and the security provided for by the Law (a guarantee of the contractor's payment obligation or a delegation to the employer of such obligation) as mentioned above. The sanction imposed for failure to cause a subcontractor to be accepted and his conditions of payment approved by the employer, namely, that the main contractor cannot invoke the subcontract against the subcontractor, has proved ineffective (partly because the courts have held, as mentioned above, that the contractor may still have a claim for defects in tort if he can establish fault on the part of the subcontractor).

Commentators have urged that the contractor's obligations under article 3 should be enforced by penal sanctions or, alternatively, that the direct payment procedure, which has worked satisfactorily, be extended to apply to private employers.²³ However, while change of the Law is currently under study by the government, to date no bill to amend the Law has been introduced.

ANNEX

LAW NO 75-1334 OF 31 DECEMBER 1975 RELATING TO SUBCONTRACTING, AS AMENDED [translation]

Title I

General Provisions

Article 1—For the purpose of this Law, subcontracting is the activity by which a contractor entrusts by a subcontract, and under his responsibility, to another person called a subcontractor, all or part of the performance of a construction contract (*contrat d'entreprise*) or public works contract (*marché public*) entered into with a employer.

Article 2—The subcontractor is considered as being a main contractor as regards its own subcontractors.

²¹ Remarks of Mr. Bernard Gosselin, *Secrétaire Général, Commission Centrale des Marchés*, French Ministry of Finance, at a conference in Paris on 6 and 7 March 1990 concerning "*La Sous-traitance comme Relation Internationale Triangulaire*" organised by Office de Formation et de Documentation Internationales (herein called "Paris Subcontracting Conference"); and the article entitled "Sous-traitance: de la Théorie à la Pratique" in *Moniteur T P*, 17 April, 1987.

²² *Réponse Ministerielle* No. 6775: J. O. deb. Ass. nat. 16 Oct 1989 p. 4588 cited in *Jurisqueur, Construction, Sous-traitance*, fascicule 206, para. 23 to 27; and article entitled "Sous-traitance de la Théorie à la Pratique" in *Moniteur T P*, 17 April 1987.

²³ *Réponse Ministerielle* No. 6775 (*op. cit.* note 22); and Y Dousset, *Le Droit Française de la Sous-traitance*, a paper delivered at the Paris Subcontracting Conference.

Article 3—The contractor who intends to perform a (construction) contract or public works contract by resorting to one or several subcontractors shall, at the time he enters into, and during the entire duration of, such contract or public works contract, cause each subcontractor to be accepted, and the conditions of payment of each subcontract to be approved, by the employer; the main contractor is required to communicate the subcontract or subcontracts to the employer when the latter requests them.

When neither the subcontractor has been accepted nor the conditions of payment have been approved by the employer pursuant to the conditions provided for in the preceding paragraph, the main contractor shall nevertheless be bound towards the subcontractor but may not invoke the subcontract against the subcontractor.

Title II

Concerning Direct Payment

Article 4—This title applies to public works contracts entered into by the State, regional organisations (*les collectivités locales*), and public establishments and enterprises.

Article 5—Without prejudice to the acceptance provided for in Article 3, a main contractor must, at the time of tender, inform the employer of the nature and amount of each of the services which he intends to subcontract.

Article 6—The subcontractor who has been accepted and whose conditions of payment have been approved by the employer shall be paid directly by the latter for that part of the public works contract for the execution of which he is responsible.

However, the provisions of the preceding paragraph do not apply when the amount of the subcontract is less than a threshold which, for all contracts provided for in this title, is fixed at FF4000; this threshold may be increased by a decree of the Council of State (*Conseil d'État*) as a function of variations in economic circumstances. Above this threshold, the provisions of Title III of this Law are applicable.

With respect to industrial contracts entered into by the Ministry of Defence, a different threshold may be fixed by a decree of the Council of State.

Such payment is mandatory, even if the main contractor is in bankruptcy (*liquidation des biens*), reorganisation (*règlement judiciaire*) or subject to the temporary suspension of legal proceedings (*suspension provisoire des poursuites*).

Article 7—Any waiver of the right of direct payment is void.

Article 8—The main contractor shall have a period of 15 days from receipt of the relevant documents on which direct payment is based, to note on them his acceptance or to give notice to the subcontractor of his refusal, with reasons, of acceptance.

After such time period, the main contractor shall be deemed to have accepted those of the relevant documents or those parts of the relevant documents which he has not expressly accepted or refused.

The notices provided for in the first paragraph shall be sent by registered letter return receipt requested.

Article 9—The part of the contract which may be pledged (*nantie*) by the main contractor is limited to that part which he performs personally.

When the contractor proposes to subcontract a part of the contract which has previously been pledged, acceptance of the subcontractors provided for in Article 3 of this Law shall be subordinated to a reduction of the pledge up to the part that the contractor proposes to subcontract.

Article 10—This Title applies:

To contracts subject to adjudication (*marchés sur adjudication*) or invitations to tender (*appel*

d'offres) notices or invitations for which will be given more than three months after the publication of this Law;

To privately negotiated contracts notice for the signature of which will be given more than six months after such publication.

Title III

Concerning Direct Action

Article 11—This Title applies to all subcontracts to which Title II does not apply.

Article 12—The subcontractor has the right of direct action against the employer if the main contractor does not pay, one month after having been given formal notice (*mise en demeure*) of payment, the sums due by virtue of the subcontract; a copy of such notice shall be addressed to the employer.

Any waiver of the right of direct action is void.

Such right of direct action will subsist even though the main contractor is in bankruptcy, reorganisation or subject to the temporary suspension of legal proceedings.

Article 13—The right of direct action may only be used to obtain a payment corresponding to the services provided for by the subcontract and of which the employer is effectively the beneficiary.

The obligations of the employer are limited to those which he still owes to the main contractor on the date of receipt of a copy of the formal notice provided for in the preceding article.

Article 13-1—The main contractor may not transfer or pledge receivables from the public works contract or the contract with the employer except to the extent of sums which are due to him for work which he performs personally.

He may, however, transfer or pledge all of these receivables if he first obtains the written personal, joint and several guarantee (*cautionnement personnel et solidaire*) mentioned in Article 14 of this Law *vis-à-vis* subcontractors.

Article 14—Subject to nullity of the subcontract, payments of all sums owed by the contractor to the subcontractor, pursuant to such subcontract, shall be guaranteed by a personal and joint and several guarantee obtained by the contractor from a qualified establishment, approved pursuant to conditions fixed by decree. However, the guarantee need not be furnished if the contractor delegates to the employer its obligations to the subcontractor pursuant to Article 1275 of the Civil Code, up to the amount of the services rendered by the subcontractor.

As a transitional measure, the guarantee may be obtained from an establishment appearing on the list established by the decree promulgated pursuant to Law No. 71-584 of 16 July 1971 regarding retention monies (*retenues de garantie*).

Article 14-1—With respect to building and public works contracts:

- the employer must, if he knows of the presence on the site of a subcontractor not having been the subject of the obligations defined in Article 3, give formal notice to the main contractor to fulfil such obligations;
- if the accepted subcontractor, the conditions of payment of whom have been approved by the employer pursuant to conditions defined by decree of the Council of State, does not benefit from the delegation of payment, the employer must require the main contractor to establish that he has supplied the guarantee.

The above-mentioned provisions concerning the employer do not apply to an individual building a lodging to occupy himself or to be occupied by his spouse, ascendants, descendants or those of his spouse.

Title IV

Miscellaneous Provisions

Article 15—Clauses, stipulations and arrangements, whatever their form, the effect of which would be to frustrate the provisions of this Law, are null and void.

Article 16—Decrees of the Council of State will specify the conditions under which this Law shall be applied.