Liabilities of Primary Employer and Subcontractors in case of a Collusive Contract

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Growing economy and competitive environment in Turkey has been leading companies to seek more profitable ways to conduct their business. Therefore companies have chosen to engage in subcontracts for the purpose of reducing their costs. Yet, to serve such purpose, at some point companies have started utilizing subcontracts to limit employees' entitlements through collusive contracts. Labor Law numbered 4857 (the "**Labor Law**") and Bylaw on Subcontractor dated September 27, 2008 (the "**Bylaw**") regulate which services or works may be subcontracted and strictly prohibit collusive contracts. According to Article 2/7 of the Labor Law, a collusive subcontract is considered null and void. Such nullity of subcontract automatically results in primary employers being redefined as main and sole employers of employees assigned to subcontracted work. Consequently, primary employers are solely responsible for employees' rights arising from subcontracted works and technically, primary employers would not have the option to recourse to subcontractors in order to claim any compensation due to their sole responsibility.

This article discusses the recent decisions of High Court of Appeals stating that subcontractors cannot evade liabilities against employees assigned to subcontracted works despite the regulation under Article 2/7 of the Labor Law.

Permitted Subcontracted Works

Per Article 2 of the Labor Law and Article 4 of the Bylaw, either (i) auxiliary works for production of goods and services (e.g. security work, transportation, cleaning facilities etc.[1]) or (ii) dividable parts of main works that require expertise due to technological reasons or features of workplace and business (e.g. maintenance of technical equipment) may be assigned to subcontractors.

As neither the Labor Law nor the Bylaw defines what would qualify as auxiliary work, there are differences of opinion in the doctrine. According to one opinion which is often called "*Indirect Participation to Production"*, works that are, not directly but indirectly related to main work and would exist as long as main work continues, would qualify as auxiliary works[2]. Per one other opinion which is often named as "*External Work",* any work that serves to technical purposes of workplaces would qualify as main work and any other work that does not fall under the scope of main works is called auxiliary work[3].

[1] Please see: The decision of 9th Civil Chamber of High Court of Appeals dated June 1st, 2005, numbered 12985 E.-20130 K.; The decision of 9th of High Court of Appeals dated July 1st, 2004, numbered 4320 E.-16307 K.; The decision of 9th of High Court of Appeals dated March 1st, 2007, numbered 2007/11602 E.-11500 K.

[2] ÖZDEMİR, Kemal N; "İş Denetiminde İş Sağlığı ve Güvenliği Yönüyle Alt İşveren Uygulama Sorunları ve Çözümler", İş Hukukunda Asıl İşveren Alt İşveren İlişkisi Uygulama Sorunları ve Çözüm Önerileri, İş Müfettişleri Derneği, Panel Notları, Istanbul, 2006, p. 65.

[3] MOLLAMAHMUTOĞLU, Hamdi/ASTARLI, Muhittin; İş Hukuku (Genel Kavramlar-Bireysel İş Hukuku), 4th Edition, Ankara, 2011, p. 185.

On the other hand, the Labor Law and the Bylaw regulates the conditions to meet in order to partially assign main works to subcontractors. Accordingly, dividable parts of main works which require expertise due to technological reasons or features of workplace and business may be subcontracted. The dominant element in this regulation is the term "w*orks require expertise due to technological reasons*". Meaning that, main works cannot be subcontracted unless there are technological reasons that do not fall under primary employer's expertise. Thus, without complying with those conditions, dividing main work and assigning a part of it to a subcontractor is not permissible[4].

In light of the foregoing, in case of a valid subcontractor relation, primary employers and subcontractors are jointly responsible for entitlements of employees assigned to subcontracted works pursuant to Article 2/6 of the Labor Law.

Definition of Collusion

Collusion is regulated under Turkish Code of Obligations numbered 6098 and defined as an agreement made for the purpose deceiving third parties which does not reflect its parties' genuine will. Collusion requires the intention to deceive third parties and conceals the real purpose behind making such agreement[5].

As collusive transactions are wrongful acts, third parties suffering from collusion are entitled to request for compensation of their damages[6].

Article 2 of the Labor Law and Article 3/g of the Bylaw re-defines collusion in terms of employment relations and regulates that:

(i) Assignment of a part of main work which does not require expertise to subcontractor,

(ii) Establishment of a subcontractor relationship with a former employee,

(iii) Subcontractor employing primary employer's employees by restricting entitlements of employees in question,

(iv) Agreements containing transactions concealing genuine intention of parties and having the purpose of circumventing public liabilities or restricting employees' entitlements borne from employment agreement, collective labor agreement or labor legislation

would mean and constitute "collusion".

[4] Please see: The decision of 9th Civil Chamber of High Court of Appeals dated October 13th, 2008, numbered 32916 E.-26551 K.
[5] Please see: The decision of 22nd Civil Chamber of High Court of Appeals dated January 16th, 2014, numbered 2013/37248 E.-2014/247 K.
[6] Please see: The decision of 9th Civil Chamber of High Court of Appeals dated February 10th, 2014, numbered 2011/54312 E.-2014/3884 K.

Consequences of Collusive Subcontracts

According to the general provisions under Turkish Code of Obligations numbered 6098, collusive transactions are deemed invalid and do not inure effect, in other words they are null and void[7]. As the collusion regulated under the Labor Law is a reflection of the one set forth under the general provisions, collusive subcontracts would be treated as if they never existed.

In this context, most remarkable legal consequences of collusion in the aspect of subcontractor relationship are explained below.

Article 2/7 of the Labor Law outlines the consequences of collusive subcontracts and regulates that employees subject to a collusive subcontract shall be deemed as if they were employed by primary employer from the beginning of subcontractor relation[8].

Meaning that primary employer will be solely and retrospectively responsible for employees' unpaid salaries, bonuses, social security premiums, unused annual paid leave etc. and/or any difference between remuneration paid by subcontractor and remuneration that primary employer should have paid if they were its employees[9] since a collusive subcontract would be null and void. In brief, subcontractor will be out of the picture and employees' claims will be addressed to primary employers by the competent court. These claims are often subject to Article 5 of the Labor Law which regulates "equal treatment principle"[10] and related to all kinds of remuneration, social security and tax liabilities of employers along with reemployment.

Yet the fact that primary employers are deemed solely liable retrospectively against employees[11] and subcontractors are free from any liability, if not technically but in practice, is a way out for subcontractors. Given that the main purpose of the Labor Law is to protect employees against powerful employers, primary employers aiming to reduce their costs by limiting employees' rights even though they do not intend to and subcontractors being free from any liability eventually leave employees unprotected.

The recent decisions of High Court of Appeals[12] point out that even though collusive subcontracts are deemed null, primary employers and subcontractors shall be still held jointly

[7] AYDINLI, İbrahim; Türk İş Hukukunda Alt İşveren (Taşeron) İlişkisi ve Muvazaa Sorunu, 3rd Edition, Ankara, 2013, p.328.
[8] ÇELİK, Nuri, İş Hukuku Dersleri, 24th Edition, İstanbul, 2011, p.56.
[9] EYRENCİ, Öner/TAŞKENT, Savaş/ULUCAN, Devrim; Bireysel İş Hukuku, 2nd Edition, Istanbul, 2005, p. 39.
[10] Please see: The decision of 22nd Civil Chamber of High Court of Appeals dated June 29th, 2012, numbered 2012/134 E.-2012/15016 K.
[11] AYDINLI, İbrahim; Alt İşveren İlişkisi, p. 329.
[12] Please see: The Decision of 9th Civil Chamber of High Court of Appeals dated March 3rd, 2014, numbered 2012/1266 E. 2014/6470 K.; The Decision of 22nd Civil Chamber of High Court of Appeals dated January 16th, 2014, numbered 2013/37248 E. 2014/247 K.

liable against employees' rights arising from collusion in accordance with the general provisions of Turkish Code of Obligations numbered 6098.

Conclusion

Per Article 2/7 of the Labor Law and the previous decisions of High Court of Appeals, as explained above, primary employers would solely responsible for employees' claims arising from employment agreements, the Labor Law and other relevant regulation in case of collusive subcontracts.

That being said, with the recent decisions of High Court of Appeals, this approach of primary employers being solely responsible, which keeps subcontractors exempt from liability towards employees, has shifted.

The current approach of the High Court of Appeals, with which we also concur, is that "***no one can benefit from his/her own collusion***[13]" even if it is a collusive subcontract relationship. By virtue of these recent decisions, **subcontractors shall still be deemed jointly responsible for employees' rights with primary employers.**

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[13] Please see: The Decision of 6th Civil Chamber of High Court of Appeals dated June 9th, 2003, numbered 2003/4177 E. 2003/4306 K.