

Guarantee of payment for performance of construction works – Act Amending the Polish Civil Code

On 2 February the Polish Senate approved the bill of 8 January 2010 on amendment of the Polish Civil Code through the introduction into the Polish Civil Code of provisions to regulate the issuance of guarantees of payment for performance of building works under construction works contracts. The act was adopted on 1 March 2010 by the President and will come into force 30 days as of it being made public (hereinafter referred to as the “Act”).

To date, the regulations relating to such payment guarantees were not uniform – the issue of construction works contracts is regulated by the Polish Civil Code while the issue of payment guarantees was regulated by the applicable to-date Act on Guarantee of Payment for Construction Works of 9 July 2003. The regulatory rationale for the adoption of the above Act on Guarantee of Payment for Construction Works was to secure claims for damages on part of contractors and subcontractors of construction works against investors, for payment of remuneration of performed works. In line with the grounds to the the Act on Guarantee of Payment for Construction Works, its provisions were to counteract fraudulent practices on part of investors who delayed in payment for performed works. Yet, as soon as it was passed, the statute was a source of many concerns. A year after its passing into law, the Civic Rights Ombudsman submitted a petition to the Constitutional Tribunal, in which he charged that the statute contained glaringly imprecise provisions which are detrimental to security of trade, contradict the principle of the freedom of contract, and confer privilege on only one enterprise group. As a consequence, in its decision of 27 November 2006 (File No. K 47/04), the Constitutional Tribunal determined that the provisions of Art. 4.4 and Art. 5.1 2 of the Act on Guarantee of Payment for Construction Works of 9 July 2003 were in breach of the provisions of Art. 2 of the Polish Constitution. Furthermore, the Tribunal determined that as a consequence of its decision the legislator should again analyse the entire institution of the guarantee of timely payment for construction works and comprehensively align the terminology with

the one adopted in the Polish Civil Code, and apply the appropriate form for terminating a contractual relationship. Thus the Act constitutes the enforcement of the abovementioned decision of the Constitutional Tribunal.

The Act implements new regulations about guarantee of payment in Title XVI of Book Three of the Polish Civil Code (Art. 649¹-649⁵ of the Polish Civil Code). In line with the assumptions and the opinion expressed by the Constitutional Tribunal, the amendment should go a long way towards greater coherence of regulations pertaining to construction works contracts.

In light of the Act (Art. 649¹ of the Polish Civil Code), participants of the construction process (including also subcontractors – as under the new Art. 649⁵ provisions of Art. 649¹ - 649⁴ are applicable to contracts executed between a contractor and further contractors and subcontractors) have the right to request (at every phase of the construction process, and not only at the signing of the contract) to be issued a guarantee of timely payment of agreed-upon remuneration for performed construction works. Such accounts receivable can be guarantees by to-date applied securities, i.e.: bank guarantee, insurance guarantee, banker's letter of credit. All documented costs of establishing a guarantee for repayment of accounts receivable shall be incurred equally by both parties, in line with the decision of the Constitutional Tribunal.

A request made by a contractor (or subcontractor) to obtain the abovementioned guarantee can be voiced at any time up to the value of the possible claim for remuneration under the contract and additional or necessary works performed to execute the agreement, accepted in writing by the investor.

The issue of acceptance of works by the investor may prove problematic in practice. To note, the Act on Guarantee of Payment for Construction Works had provided for reimbursement of costs of issued guarantees in the commonly accepted amount of not more than 2% of guaranteed amount. The Constitutional Tribunal determined this provision unconstitutional.

Investors have expressed their dissatisfaction as under the Act every investor must provide a guarantee of payment regardless of the fact whether it is a private person or the State Treasury. It is said that public persons, and in particular the State Treasury, should be released of the obligation as the risk of non-payment for the works is very low.

The non-issuance of a guarantee despite a request being made for its issuance represents a barrier to the performance of construction works, arising because of the investor. In such a case, pursuant to Art. 649^{4.3} of the Act, the investor cannot refuse to pay remuneration despite the non-performance of construction works, if the contractor was ready to perform the work but encountered a barrier which arose because of the investor. Yet, then the investor can deduct the savings realized by the construction because of the non-performance of construction works.

It is also important that in accordance with the Act, it is not possible to exclude or limit through legal actions the right of the contractor (or subcontractor of the contractor for whom the works are being done) to request that the investor issue a guarantee of payment. In turn, the investor's decision to withdraw from the agreement because of the contractor making the above request will not have legal force.

Art. 649⁴ of the Act provides for the withdrawal from the contract because of fault on part of investor effective on the day of withdrawal if a guarantee is not issued within a defined period, of not less than 45 days.

The proposed solution, pursuant to Art. 2 of the Act, will apply to construction works contracts concluded as of the date of it coming into force.

A question has been raised on whether the legislator consciously excluded the possibility of a request being made for the issuance of a guarantee of payment by other business entities (suppliers of building materials or services, those leasing plant and equipment necessary to perform the works, cartographers) participating in the broader construction process. Reference here is being made to entities providing services for contractors (subcontractors) under other contracts

than construction works contracts, such as hire purchase agreements, executed to effect a different performance than construction works. In light of the regulations, such entities do not qualify to be categorized as entities entitled to request a guarantee of payment. Thus, a request to be issued a guarantee of payment cannot be made by, among

others, architects, engineers, cartographers, entrepreneurs leasing scaffolding, plant and equipment, construction machinery, transport companies, material producers and suppliers). This is why the bill has been criticized by entrepreneurs.

With the coming into force of the Act, the to-date Act on Guarantee of Payment for

Construction Works of 9 July 2003 will lose legal force.

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