

# Selected aspects of the investor's liability to the subcontractor in connection with payment of fees for construction work in view of court decisions

A rule of the Polish civil law applied to construction works consists in that the investor and the general contractor, or partial contractors, bear joint and several liability in regard to agreements with subcontractors and subsequent subcontractors (Art. 647<sup>1</sup>.5 of the Civil Code). Therefore, subcontractors are entitled to enforce a direct claim against the investor, the partial contractor as well as the general contractor.

This instrument protects subcontractors' interests in the event of financial non-reliability of the contractor as the entity with whom the agreement to perform part of the work was directly signed as the investor is required to carefully select contractors and control how the contractors meet their financial obligations to the subcontractors.

However, it turns out that when it comes to filing a claim for payment of fees for construction work, subcontractors often fail to receive from the investor the full amount that the contractor directly commissioning the work would otherwise be required to pay. Claims concerning statutory interest on late payments are among the most-often questioned ones, and so are the claims that relate to amounts subtracted by the contractor in respect of deposits or performance bonds. Refusals to pay the said amounts are not always justified.

The provisions of Art. 647<sup>1</sup>.5 of the Civil Code stipulate that the investor's liability is limited to the "fees for construction works performed by the subcontractor". The issue how the phrase should be understood and which amounts should be considered as the fees in question has been raised in the decisions of the Supreme Court, and of other courts, on many occasions.

The following conclusions can be derived from the decisions of the Supreme Court and of other courts.

The material scope of the investor's liability is limited to the fees due to the subcontractor from the contractor, which is understood as the principal amount. The investor is not liable for any of the payment of interest on late payment caused by the contractor, the contractor's wilful action (neglect) resulting in damage or for expenses related to the enforcement of the claim directly against the contractor.<sup>[i]</sup> However, the investor is liable for delayed payment on their part, on the terms defined in Art. 455 of the Civil Code, which stipulates that if the time for making the performance is not specified, the performance should be delivered immediately upon the debtor being requested to make the performance.<sup>[ii]</sup> It follows from the foregoing that the investor may refuse to pay statutory interest on late payment that the contractor is required to pay; however, the investor has no legal basis to contest the claim for payment of interest in connection with their own delay in payment, in the event they have not provided the payment which is their responsibility in full, immediately upon the subcontractor's submission of the claim.

It is an accepted position in the courts' judicial decisions that the investor and the general contractor bear joint and several liability in respect of the payment to the subcontractor of the part of the fees retained as "deposit" or "performance bond" as the retained amounts meet the criteria of the fees defined in Art. 647<sup>1</sup>.5 of the Civil Code<sup>[iii]</sup>. In order to substantiate the foregoing viewpoint, it is held that retaining part of the fees payable to the subcontractor is only a measure resembling the guarantee deposit, while not being a deposit guarantee. On the contrary, the retained amount remains a part of the fees for construction work performed. As the Supreme Court stated in the grounds of the decision of 19 January 2011<sup>[iv]</sup>, "the deposit contract (...) is a causal contract (securing the claim is the legal cause of the gain) that has the properties of an irregular deposit and is also a real contract where the deposit giver transfers a specified amount of money while the deposit taker can use the money and agrees to return it. Accordingly, the ownership of the deposit is transferred, which involves the holding of the deposit, i.e. there is a transfer of possession of the thing involved. Furthermore, deposit has an ancillary nature as it is closely related to the legal relationship which it secures. Therefore, it may not be concluded that securing the proper performance of construction work by keeping the fees meets the requirements of the deposit contract as the contractor does not transfer the ownership of the money to the investor." Accordingly, it should be assumed that the investor has no legal basis for refusing the payment of amounts retained by the contractor as deposit or guarantee if the timeframe for returning the deposit or guarantee to the subcontractor has already passed as the said amounts represent "part of the fees for construction work performed by the subcontractor" within the meaning of Art. 647<sup>1</sup>.5 of the Civil Code.

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<sup>[i]</sup> E.g. the Supreme Court's decision of 5 September 2012, IV CSK 91/12, LEX No. 1275009

<sup>[ii]</sup> Cf. decisions of the appellate courts: the Gdansk Appellate Court's decision of 14 October 2014, court docket I ACa 140/14, LEX No. 1554627; the Katowice Appellate Court's decision of 27 February 2014, court docket V ACa 746/13, LEX No. 1448538; the Warsaw Appellate Court's decision of 16 January 2014, court docket VI ACa 846/13., LEX No. 1438335

<sup>[iii]</sup> Cf. the Supreme Court's decision of 19 January 2011, court docket V CSK 204/10, Legalis No. 417551, the Katowice Appellate Court's decision of 17 December 2013, court docket V ACa 766/13

<sup>[iv]</sup> The Supreme Court's decision of 19 January 2011, court docket V CSK 204/10, Legalis No. 417551