

Investor's joint and several liability to the subcontractor – latest judicial decisions

Art. 6471 of the Civil Code was introduced so as to prevent the objectionable practice of contractors not paying for services provided by subcontractors. The objective behind adding the provision is fulfilled by the institution of joint and several liability borne by the investor and the contractor (and a subcontractor entering into a contract with another subcontractor) with respect to the payment to the subcontractor for construction work services rendered. In the light of practical experience, it turns out that the application of this seemingly simple regulation encounters many obstacles.

Art. 647¹ of the Civil Code stipulates that the investor's is required for the contractor to enter into a construction work contract with a subcontractor. If, within 14 days from having been presented by the contractor with the contract with the subcontractor, or its draft, along with a part of documentation concerning the performance of work defined in the contract or its draft, the investor does not raise any objection or reservation in writing, it will be understood that the investor has given their consent to the conclusion of the contract. In its resolution of 29 April 2008 (III CZP 6/08), the Supreme Court stated that the investor's consent conditions the existence of the investor's joint and several liability with the contractor with respect to the payment of remuneration payable to the subcontractor, while it does not affect the validity of the contract with the subcontractor.

Therefore, the investor's consent, or lack thereof, to conclude the contract with a subcontractor is a factor conditioning the existence of the investor's joint and several liability.

If the investor has been notified of the contractor's intention to enter into contract with a subcontractors and does not consent to the contract, the investor's joint and several liability will not apply. If the investor actively gives consent, for example by making a representation, that they accept the conclusion of the contract with the subcontractors, joint and several liability will apply. However, there are controversies surrounding the notion of the investor's "implied consent", i.e. the investor's action involving toleration of the subcontractor's participation in a given construction process.

The theoretical notion referred to above prompted the Regional Court to ask the Supreme Court for opinion on the following legal issue: "Is it required – in the event of the investor's active implied consent to the contractor for entering into the contract with the subcontractor – for the investor's joint and several liability with the contractor to the subcontractor to apply pursuant to Art. 647¹ §5 of the Civil Code that the investor is aware of the provisions concerning the subcontractor's remuneration or the manner for determining the remuneration, or, as the case may be, the rules or basis for the contractor's liability for payment of the subcontractor's remuneration?"

In Resolution of 17 February 2016 in the case court docket III CZP 108/15, the Supreme Court concluded that:

"The effectiveness of the investor's implied consent (Art. 60 of the Civil Code) to the contractor to conclude the construction work contract with the subcontractor is conditional on whether the investor has been given an opportunity to read the terms and conditions of the contract which define the the scope of the investor's liability provided for in Art. 647¹§ 5 of the Civil Code."

As a result, the subcontractor enforcing their claims from the investor in the capacity of a joint and several debtor with the contractor will be required to prove that the investor was given an opportunity to freely read the contract between the subcontractor and the contractor. Therefore, it appears that the opinion according to which investor's consent to presence of subcontractor's workers on the construction site or tolerating subcontractor's entries in the construction log

book is sufficient for creation of joint and several liability of the investor and the contractor with respect to the payment of the subcontractor's remuneration could apply cannot be regarded as appropriate.

Difficult, though not rare, cases of financial difficulties experienced by general contractors, which can often result in subcontractors not receiving their remuneration, are a potent argument to conclude that the issue of the investor's joint and several liability with respect to the payment of remuneration should be determined clearly and unambiguously. The new resolution contains numerous guidelines, which can be highly helpful in this regard.

*Marcin Żak
Kancelaria Adwokatów i Radców Prawnych
Miller, Canfield, W.Babicki, A.Chełchowski
i Wspólnicy sp. k.*