

Investor's joint and several liability – regulations revised

The concept of the investor and general contractor's joint and several liability to subcontractors performing construction work raises numerous concerns among participants of investment processes.

Previously, grounds for joint and several liability included the investor's "consent" to hire a subcontractor to perform construction work. The notion "consent" was put in inverted commas intentionally as there are many views on what nature of consent is required and how the consent should be expressed in practice of law application and jurisprudence, as I already referred to in *PMR Construction Insight: Poland* in 2016.

The Polish legislator decided to modify the regulations by adopting on 7 April 2017 the Act on Amendment of Certain Acts with a view to facilitating recovery of claims ("Amendment"). The Amendment, which came into force on 1 June 2017, introduced a new wording of Art. 647¹ of the Civil Code which stipulates the rules for the investors and general contractor's joint liability for fees payable to subcontractors performing construction work.

Pursuant to the amended Art. 647¹ of the Civil Code, the Investor shall be jointly and severally liable with the contractor (general contractor) for payment of the fees due to the subcontractor in respect of construction work performed by the subcontractor, the detailed scope of which the contractor or general contractor has notified to the investor prior to commencing the work, unless the investor filed with the subcontractor and the contractor an opposition against the subcontractor performing the work within thirty days of the date when the investor was

served the notification, with a proviso that the notification shall not be required if the investor and the contractor defined a detailed scope of construction work to be performed by a specified subcontractor in the agreement which must be made in writing otherwise being null and void. Leaving aside the latter case, joint and several liability on the part of the investor will arise subject to the investor receiving from the contractor or subcontractor a written notification containing the detailed scope of construction work to be performed by the subcontractor and the investor not filing a written opposition to the notification within 30 days of receiving the opposition. I emphasise that for the Investor's opposition to be effective, it must be filed with both the contractor and the subcontractor in writing.

Pursuant to Art. 647^{1.3} of the Civil Code, the Investor shall be liable for payment of the subcontractor's fees in the amount specified in the agreement between the subcontractor and the contractor unless the amount exceeds the amount of fees payable to the contractor in respect of the construction work, the detailed list of which is specified in the notification or the agreement. If this is the case, the investor's liability regarding the payment of the fees will be limited to the amount of fees payable to the contractor in respect of construction works as per the notification or the agreement. Accordingly, the amendment introduc-

es a cap on the investor's liability in respect of the payment of the subcontractor's fees, defining it as the amount of the contractor's fees for the given part of work. Therefore, it is advisable that the subcontractor's fees be divided into many smaller portions when signing contractors with general contractors.

The amended Art. 647^{1.5} of the Civil Code stipulates that the mechanism will apply accordingly to the joint and several liability of the investor, the contractor and the subcontractor which concluded the agreement with a further subcontractor in respect of the further subcontractor's fees. As a result, the amended regulations will also apply to further subcontractors. The literal wording of the regulation indicates that the investor's liability is limited to two strata: the subcontractor's fees and fees of the subcontractor's subcontractor. It may be the case that the rule will be extended to apply to the entire subcontracting chain in judicial decisions.

The change to Art. 647¹ of the Civil Code introduced pursuant to the Amendment makes the conditions for arising the investor's liability for the subcontractor's fees more comprehensible. On the other hand, the law does not require investors to review agreements between contractors and subcontractors as it bases the investor's joint and several liability on information extracted only from the notification, which, in principle, will contain less details of the relationship linking the contractor and the subcontractor than even, say, a draft of the agreement between these two parties.

Marcin Żak

Kancelaria Adwokatów i Radców Prawnych Miller, Canfield, W. Babicki, A. Chelchowski i Wspólnicy