GARRIGUES
Newsletter

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REAL ESTATE

Liability for the defects under FIDIC standard agreements

The interests of contractors and investors are often set on a conflicting course in the investment process. As the Polish real estate market have been growing steadily since the wake of its transformation two decades ago, it is not unusual that construction or development projects are executed by foreign investors and/or contractors having different understanding of the basic notions of the investment process. Therefore, in order to provide contractual balance and uniformity in the construction market, its participants are often resorting to the FIDIC standard agreements. Since FIDIC standards are meant as a bridge between different legal systems, the application of its clauses under the Polish law can raise some issues.

One of the most blatant examples of such discrepancies is the liability for the defects left in the erected building. Under the Polish law, the general contractor bears the liability for such defects during the warranty period of three years since the building has been handed over to the investor. Therefore, for the warranty period to start, it is decisive how the parties to the investment process agreed in terms of handing over of the building. Slightly different approach is implemented in the FIDIC standards which provides for two types of acceptance procedures, each one entailing different consequences. At first, the investor (or the contract's engineer) has to issue the take-over certificate once the works has been *essentially* completed. Issuing such certificate signals the beginning of the defects notification period which serves to allow the contractor to complete the due works and rectify all defects indicated by the investor. The fulfillment of the contractor's obligations can be confirmed only by the investor issuing the performance certificate within 28 days after the defects notification period has ended. Therefore, since FIDIC standards provides for two separate hand-over procedures, it has raised many doubts as to the exact beginning of the warranty period under its stipulations. It can be argued that according to FIDIC standards, the defect notification period should be applied instead of the warranty period as understood under the Polish law or as its contractual modification. In such case, issuing the take-over protocol (as indicated in the FIDIC regulations) would trigger the beginning of the warranty period. This corresponds to the regulations of the Polish Civil Code which assumes that the warranty period starts with physical hand-over of the finished building. On the other hand, under the Polish law, handing over of the building means not only the beginning of the warranty period but also confirms the performance of the construction agreement. Under the FIDIC standards, however, the fulfillment of the contractual obligations is identified with the moment of issuing the performance certificate. It thus can be argued that calculating the warranty period should start only after the investor has issued such certificate. Deciding which certificate triggers the beginning of the warranty period makes a significant difference as the gap between the take-over certificate and the performance certificate can last even a couple of years. Since the opinions and views on this matter are often contradictory, it cannot be certainly stated which solution should be followed. Though the rulings of the National Appeals Chamber are not binding towards parties not involved in the given case and can be overruled by the common courts, some guidelines in this respect have been provided in its recent rulings. For instance, ruling of the National Appeals Chamber of August 6, 2012[1] clarified that the commencement of the warranty period should depend on issuing the take-over certificate.

[1] KIO 1570/12

LITIGATION LAW

Limitation period for claims secured by enforcement titles in the form of notarial deeds

One of the commonly used contract performance security forms is the declaration of a business partner on the voluntary submission to enforcement, e.g. as regards an obligation of payment, executed in the form of a notarial deed pursuant to the article 777 § 1 point 5 of the Code of Civil Procedure.

Such kind of notarial deed allows the creditor to enforce its claims from a debtor relatively easier. The creditor files a motion for granting an enforcement clause to the notarial deed and once is granted it may initiate the enforcement proceedings against the debtor. The court recognizing the motion for granting the enforcement clause is not entering into the material basis of the claim and is duly verifying the fulfillment of the formal requirements of the motion and the declaration on voluntary submission to enforcement only. The effectiveness of this security form depends obviously on the legal correctness of the wording of the notarial deed.

Consequently, one of the most important questions related to the declaration executed in accordance with the article 777 § point 5 of the Code of Civil Procedure, is the indication of the time limit during which it will be possible to file a motion for granting an enforcement clause to the notarial deed. The parties negotiating the wording of the declaration on the voluntary submission to enforcement, particularly in the case when such declaration is securing an agreement on periodic services (e.g. a delivery contract, a lease agreement), are indicating usually distant time limits enabling the creditor to file a motion for granting the enforcement clause to the notarial deed. Although there are no obstacles to indicate the mentioned time limit in this manner, the creditor should be aware that claims secured by such declaration are subject to the limitation periods determined by the regulations of the Civil Law, the Banking Law, etc., irrespective of the time limit for granting an enforcement clause stipulated in the aforesaid notarial deed. As for example, in case of claims for remuneration from contracts of mandate concluded within the business activity the limitation period will be 2 years and in case of claims for payment of rent for a lease it will be 3 years.

Due to the above, if the creditor wishes to exercise its rights and files a motion for granting the enforcement clause to the notarial deed after the lapse of the limitation period stipulated for a given type of claim secured by such notarial deed, the debtor will be able to prevent the effective enforcement of the notarial deed raising a charge of statute of limitations, e.g. in the court proceedings initiated by the debtor against enforcement proceedings. The entrepreneurs who are choosing this form of security of their rights should therefore consider whether it protects sufficiently their interests or whether they should look for another legal solutions in this scope.

TAX LAW

Electronic tax returns

On November 10, 2014, the President signed an amendment to the tax law imposing on Personal Income Tax (PIT) remitters and Corporate Income Tax (CIT) payers an obligation to submit certain tax returns electronically.

Amendments to the law on PIT and other acts introduce the principle that tax returns and annual tax calculations must be transmitted to the tax authorities by electronic means.

From January 1, 2015, every PIT remitter with the obligation to prepare information or annual tax calculations for more than five taxpayers (individuals) will be required to send certain tax returns to the tax office via the internet only. In order to facilitate the transmission of tax returns by electronic means, a new intuitive channel used to send e-statements called Universal Documents Gateway (*Uniwersalna Bramka Dokumentów*) will be launched. The main advantage of this is the ability to make one data transfer of up to 20,000 documents and to download one Official Confirmation Receipt (*Urzędowe Poświadczenie Odbioru*) for the entire transmission.

The new rules will apply to income (or losses) generated on or after January 1, 2014. They will concern among others: the annual return of tax withholdings collected (PIT-4R) and the flat-rate tax return (PIT-8AR), information on revenues from other sources (PIT-8C), on income tax withholdings collected (PIT-11) and the annual tax calculation for taxable persons (PIT-40). In the case of CIT taxpayers, the new regulations will apply to, among others: statements of income (loss), i.e. CIT-8, CIT-8A, CIT-8B and IFT-2.

Conceptually, the proposed Act seeks to facilitate the preparation of tax returns, to reduce common errors in the accounts, and to reduce the number of paper documents submitted to the tax authorities. It should also be underlined that tax remitters will be able to send the tax authorities cumulative information on the incomes of many taxpayers, signed with one electronic signature. Additionally, tax remitters who do not have access to the Internet will be allowed to send tax forms online at the tax office.

PUBLIC PROCUREMENT

Amendment to Public Procurement Law

On October 19, 2014 the amendment of the act on Public Procurement Law dated January 29, 2004 (the "**PPL**") entered into force. The amendment introduces a number of changes concerning, among others, **the possibility of the contractor to provide references of third parties, the rules of exclusion of untrustworthy contractors, the requirements allowing to retain the deposit or the possibility of concealing of the bid.**

Below we would like to present the most significant changes.

Referring to the third party's skills and competences

The Article 26.2b of the PPL has been amended based on which the contractor may rely on a third party in order to prove the fulfillment of the requirements of the terms of the contract. According to the new version of Article 26.2b of the PPL, the contractor shall be obliged to prove that it will actually have at its disposal during the performance of the contract the resources necessary to performing the contract. Additionally, the legislator has introduced a joint and several liability between the contractor and the third party for damages incurred by the ordering party as a result of withholding of these resources by the third party, unless the third party is not responsible for the withholding.

New basis for exclusion of unreliable contractors

The provisions specifying the conditions for mandatory exclusion of contractors (i.e. Article 24.1.1 and 24.1.1a of the PPL) have been repealed. The repeal of these provisions has been required for a long time. Article 24.1.1a of the PPL has been recognized by the Court of Justice of European Union to be inconsistent with EU law. The main objection concerned the lack of obligation to prove culpability of a contractor with whom the ordering party terminated the contract.

Instead, a new article has been introduced. Article 24.2a of the PPL requires the ordering party to exclude from a proceeding the contractor that during the three years prior to the initiation of the proceedings, culpably violated its professional obligations, in particular, when the contractor, as a result of a deliberate action or gross negligence, failed to perform or improperly executed the agreement, which the ordering party is able to prove by any means of evidence.

However, this obligation exists only if the ordering party foresaw such a possibility in the contract notice, in the terms of the contract or in the invitation to negotiate. In addition, it is also clearly indicated that the ordering party cannot exclude a contractor who proves that he has taken the measures to prevent wrongful and serious violations of its professional duties in the future and repaired the damage caused by a breach of professional duties or undertaken to remedy them.

Limitation of the possibility to retain a deposit

According to the amended Article 46.4a of the PPL, the ordering party may retain the deposit only if the lack of remedies or reply of the deficiencies in the offer results in the inability to choose the offer submitted by the contractor as the most favorable.

Rules of concealing of the offers

Contractor participating in the public procurement proceedings may require the ordering party not to disclosure the information such contractor regards as a business secret. In order to prevent the ordering party from revealing such information, the contractor should (i) expressly reserve that the information in question has to remain secret and (ii) demonstrate that such information can be regarded as a business secret under the act on fair trading. However, the contractor should make the above reservation before the deadline for submitting an offer or an application to be allowed to participate in the proceedings passes.

As mentioned, we have briefly commented on the most significant aspects of the amendments to the PPL. Other changes have been introduced to, among others, the obligation to provide indexation clauses in long term contracts or the limitation of the possibility to use the criteria of price as the sole criteria for the evaluation of offers.

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