



**Legal Nature of the Investor's Consent to  
the Conclusion of the Agreement with  
Sub-contractor**

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**Abstract:** Author of present article presents and comments on the divergent views of doctrine and judicature concerning the legal nature of the investor's consent to the conclusion of the agreement for subcontracting, arose from the introduction of the provisions of Article 647<sup>1</sup> § 2 and 3 to the Polish Civil Code with Act dated 14 February 2003 amending the Act – the Civil Code and other acts. Author refers also to the joint responsibility of the investor and the contractor towards further subcontractor and to the formal requirements of giving the investor's consent to the conclusion of the agreement between the contractor and the subcontractor. The institution of joint and several liability for the payment of salaries investor subcontractors, is in the Polish private law remedy important because it protects the interests of subcontractors by the insolvency of construction contractors. Thus, the test makers institution may use other countries to protect the interests of subcontractors against the insolvency of contractors through the introduction of these regulations into their legal systems

**Keywords:** subcontracting; construction works contracts; specific legal structure

**1. The Personal Nature of the Obligations Performance Result from the Agreements for Construction Works Execution**

Until the introduction of the provision of Article 647<sup>1</sup> to the Polish Civil Code (hereinafter referred to as the Civil Code), the contractor was free to enter into agreements for subcontracting, unless the construction works agreement excluded such possibility. This position was justified by the doctrine that, since statutory definition of agreement construction works emphasizes on handing over of the facility, not its execution – this means, that it is immaterial whether the contractor shall execute the construction works by himself or by third parties (subcontractors) (Okolski, 1976, p. 100; Zielinska, 2009, p. 180).

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By contrast on 24 April 2003, the Article 647<sup>1</sup> of the Civil Code has entered into force, which constitutes that, in the construction works agreement concluded between the investor and the contractor, the parties agree on the scope of works, which the contractor shall execute personally, and which will be executed by subcontractors.

The purpose of this regulation was needed to prevent negative phenomena in economy, in particular, failure to pay when due by the construction works contractors for works executed by subcontractors – of small and medium enterprises<sup>1</sup>. Since the introduction of aforementioned regulation, the possibility to enter into agreement for subcontracting is subject to whether the parties determine the scope of works in the construction works agreement, the execution of which the contractor will be able to entrust to subcontractor. At the same time it was assumed that, the conclusion of the agreement for subcontracting is additionally subject to the investor's consent (Article 647<sup>1</sup> § 2 of the Civil Code) and consent of the investor and the contractor – in case of the conclusion of the agreement by subcontractor with further subcontractor ( Article 647<sup>1</sup> § 3 of the Civil Code).

Thus arose the doctrine and judicature doubts as to the legal nature of the investor's consent (the investor and the contractor) to the conclusion of the agreement with the subcontractors. Namely, whether this consent has nature of consent stipulated in Article 63 of the Civil Code or not, and only on its giving the joint responsibility of the investor (the investor and the contractor) for the payment of remuneration to the subcontractor is dependent. (Zielinska, 2009, p. 185)

## **2. The Investor's Consent (the Contractor) for the Conclusion of the Agreement for Subcontracting as Consent of the Third Party**

Provision of Article 647<sup>1</sup> § 2 and 3 of the Civil Code makes conditional the conclusion of the agreement for subcontracting on the investor's consent or investor and contractor (in case of entering into agreements with further subcontractors). Additionally, Article 647<sup>1</sup> § 5 of the Civil Code defines joint liability of investor and the investor and the contractor for the payment of remuneration for subcontractors construction works.

Doctrine and judicature positions regarding legal nature of the investor's consent to

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<sup>1</sup> *Justification governmental draft act amending the Act - Civil Code*. Parliamentary print no 888 Parliament IV Tenure. Accessible on: [www.sejm.gov.pl](http://www.sejm.gov.pl).

the conclusion of the agreement with subcontractor are divergent. In the legal writing was expressed the predominant view, that consent has nature of the third party consent (Article 63 of the Civil Code) (Drapala, 2003, s. 12; Strzepka & Zielinska, 2003, p. 975; Zielinska, 2009, p. 185 and next). The argument in favor of adoption of such a position is maintenance of the Civil Code consistency – since Article 63 § 1 of the Civil Code governs the effects of the third party consent to perform act in law, then this regulation shall be applied to the investor’s consent to the conclusion of the agreement for subcontracting. Adoption of such position means that, the agreement effectiveness for subcontracting is dependent on the investor’s consent (the investor and the contractor consent). This applies to the form in which the investor’s consent is given to the conclusion of the agreement for subcontracting. Pursuant to Article 63 § 2 in connection with Article 647<sup>1</sup> § 4 of the Civil Code, this consent shall be made in writing (Zielinska, 2009, p. 186) or else shall be null and void (as a condition of validity – “*ad solemnitatem*”).

Therefore, the concern raised by the doctrine (Zielinska, 2009, p. 180 and next) regarding introduced provision 647<sup>1</sup> § 2 of the Civil Code instead of protecting subcontractors weakens their positions and is contradictory with theory of rational legislator.

### **3.The Investor’s Consent (the Contractor) to the Conclusion of the Agreement for Subcontracting as “Lex Specialis” in Relation to the Provision of Article 63 of the Civil Code**

Therefore assumed that, the investor’s consent (the contractor) to the conclusion of the agreement for subcontracting has “*lex specialis nature*” in the relation to the provision of Article 63 of the Civil Code (Kostecki, 2004, p. 20; Kozminska & Jerzykowski, 2005, p. 58; Gutowski, 2008, p. 77).

The investor’s consent (the contractor) constitutes only premise to the joint responsibility of the investor and the contractor for the payment of remuneration to subcontractor<sup>1</sup>.

The Supreme Court fully justified this position in the resolution dated 29 April

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<sup>1</sup> Look at judgment SN z 30.5.2006, IV CSK 61/06, OSNC No 3/2007, position 44; resolution SN z 28.6.2006 r., III CZP 36/06, OSNC Nr 4/2007, position. 52; wyrok SN z 15.11.2006 r., V CSK 221/06, OSNC No A/2008, position. 8; judgment SN z 20.6.2007 r., II CSK 108/07, Biul. SN No 11/2007; judgment SN z 9.3.2007 r., V CSK 457/2006, Legalis.

2008<sup>1</sup>. The Court stated that, making conditional the agreement effectiveness entered into between the contractor and the subcontractor and further subcontractor on the investor's consent (and in the case of another subcontractor – also on the contractor's consent) infringes the principle of economic freedom (Article 20 and 22 of the Polish Constitution). That economic freedom might be limited by law, but only because of the important public interest (Article 20 in the last part (“in fine”) of the Polish Constitution). However, in this case it is difficult to discern existence of public interest, which would be in favor of making conditional the agreements effectiveness for subcontracting on the investor's consent.

The practical arguments raised in the legal writing (Zielinska, 2009, p. 180), pointing out the possibility of a delay in the investment processes in respect of the uncertainty as to the validity of agreements with subcontractors, remain not without meaning. Finally, this shall not be omitted either, that making conditional the agreement effectiveness for subcontracting on the investor's consent (or the contractor) would lead to weakening the position of subcontractors, who despite signing of an agreement with contractor (subcontractor) – they would remain uncertain as to the validity of agreement being a source of obligation performed by them, and they were afraid of this, that such a state of affairs will conclusively cause the refusal of remuneration payment for construction works not only by the investor, but also by the second party of agreement- in reference to the invalidity of agreement.

Another argument against assigning to the investor's consent to the conclusion of the agreement for subcontracting the nature of consent as defined in Article 63 of the Civil Code is fact that, the provision of Article 647<sup>1</sup> § 5 of the Civil Code defines effects of consent given by the investor, consisting in bearing of the joint responsibility by the investor (and the contractor – if the consent concerns the agreement concluded by further subcontractor) for the remuneration payment for construction works executed by subcontractor. By contrast (‘a contrario’) lack of consent shall not result in the agreement invalidity with subcontractor, but shall exclude only joint responsibility stipulated in Article 647<sup>1</sup> § 5 of the Civil Code. In addition, making conditional the agreement effectiveness for subcontracting on the investor's consent would cause, that this consent would have to be made properly to Article 63 § 2 of the Civil Code in writing or else shall be null and void (reserved in 647<sup>1</sup> § 4 of the Civil Code). Interpretation of passive investor behavior

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<sup>1</sup> Resolution SN (7) z 29.4.2008 r., III CZP 6/08, OSNC No 11/2008, position 121.

as a form of his consent given to the conclusion of the agreement by contractor with subcontractor contained in Article 647<sup>1</sup> § 2 of the second sentence of the Civil Code opposes to the adoption of such position. In this way, the legislator contested the stipulated in Article 63 § 2 of the Civil Code requirement of respect identical form for making declarations of intent on consent given to perform act in law, which requires such a consent.

This constitutes another strong argument for this that, the investor's consent to the conclusion of the agreement with subcontractor is a specific legal structure built for the purposes of the construction works agreement. Therefore, it shall not constitute the consent of a third party indicated by Article 63 of the Civil Code. This consent is therefore regulated by provision of Article 647<sup>1</sup> of the Civil Code, which in § 2 and 3 specifies a manner in which the consent shall be granted, in particular in § 5 – there are effects of its granting, and in § 6 gives the nature of compelling norms 'ius cogen's to provisions in question.

In this respect, the above provisions constitute the special regulation in relation to the provision of Article 63 of the Civil Code. Therefore an objection raised by the investor (if necessary by the investor or contractor – when it comes to agreement to be concluded with further subcontractor) against such an agreement, shall not cause invalidity of such an agreement, but only shall avoid the investor's responsibility (the contractor) for a debt due to the subcontractor remuneration.

The position indicated in the aforementioned resolution of the Supreme Court<sup>1</sup> is also approved by the doctrine (Zielinska, 2009, p. 180). Namely, the adoption of the functional interpretation of the provision of Article 647<sup>1</sup> of the Civil Code is more reasonable from the point of view of the subcontractor interests' protection, than the conclusions resulting from the systemic interpretation. The situation of subcontractor is certainly more favorable, because in spite of lack of the investor's consent (the contractor) or its refusal, the agreement with subcontractor remains effective.

The adoption of such position may, however, lead to the fact that, neither the contractor nor the subcontractor shall have any interest in obtaining the investor's consent (the contractor) to the conclusion of the agreement with subcontractor, since parties of the construction works agreement establish the scope of works, which shall be executed by subcontractors. As a result of no consent shall be an exclusion of the investor (the contractor) from the joint responsibility for the

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<sup>1</sup> Resolution SN (7) z 29.4.2008 r.

payment of the subcontractor remuneration (Zielinska, 2009, pp. 187-188). Hence, the further continuation of the provision of Article 647<sup>1</sup> § 5 of the Civil Code is unjustified (Szostak, 2008, p. 12; Szostak, 2007, p. 72).

#### **4. The Joint Responsibility for the Payment of the Subcontractor Remuneration and Form of the Investor's Consent to the Conclusion of the Agreement between Contractor and Subcontractor**

In the light of Article 647<sup>1</sup> § 3 and 5 of the Civil Code the following question arose: whether the joint responsibility of the investor and the contractor to further subcontractor arises only when, both parties (the investor and the contractor) shall accept this agreement, or whether the consent of one of them is a sufficient premise to the joint responsibility for the payment of the subcontractor remuneration.

Use of the conjunction „and” in Article 647<sup>1</sup> § 3 of the Civil Code when determining the subjective scope of required consent (“consent of the investor and the contractor”) would indicate the need for common consent. However, the protective purpose, which is aimed at the provision in question, in comparison with the independence of the debtors joint responsibility, resulting from Article 366 § 1, Article 368 and Article 371 of the Civil Code entitles to assume that, the joint responsibility for the payment of the subcontractor remuneration shall be bear by this entity (the investor and the contractor), who has agreed to enter into agreement with subcontractor<sup>1</sup>.

The passive nature of consent specified in Article 647<sup>1</sup> § 2, the second sentence of the Civil Code requires proper explanation. This provision states that „If the investor within 14 days following the receipt from the contractor of the agreement with subcontractor or its draft, along with part of documentation concerning the works execution specified in the agreement or its draft, does not make any written objection or comments, it is deemed that the investor has agreed to enter into the agreement”. This regulation has special nature and requires a strict interpretation. In order to present this interpretation, I will refer to the judgment of the Supreme Court dated 9 April 2008<sup>2</sup>. Therefore, in order to make possible the assignment to the investor of tacit consent to the conclusion of the agreement for subcontracting, the fulfillment of all premises of the provision in question is hereby required, that is receipt by the investor of an agreement (draft) along with a proper part of

<sup>1</sup> Look at judgment SA w Poznaniu z 8.2.2007 r., I ACa 940/06, unpublished.

<sup>2</sup> Judgment SN z 9.4.2008 r., V CSK 492/07, unpublished.

documentation concerning the subject of the agreement from the contractor. The aforementioned documents shall be presented, when the investor (the contractor) expressed his consent to the participation of subcontractor in the investment process<sup>1</sup>. However, in case that, the tacit consent shall refer to the agreement entered into between subcontractor and further subcontractor, the obligation to present the aforementioned documents to the investor lies with the subcontractor.

Issue regarding the form in which the agreement for subcontracting shall be concluded, requires an explanation. Pursuant to Article 647<sup>1</sup> § 4 of the Civil Code, the agreements for subcontracting shall be made in writing or else shall be null and void. With reference to the above, in doctrine and judicature arose doubt as to the form required for giving consent to the conclusion of the agreement for subcontracting. However, this problem has settled the above quoted judgment of the Supreme Court<sup>2</sup>.

The Supreme Court assumed<sup>3</sup> that, since the investor's consent to the conclusion of the agreement between contractor and subcontractor does not fall under Article 63 § 2 of the Civil Code, it may be expressed in a free manner to be sufficiently disclosed (Kozminska & Jerzykowski, 2005, p. 62). Thus, if the general principles of interpretation of declarations of intents lead to the conclusion that, the investor (the contractor) has agreed to a specific agreement (its draft) from which results his scope of joint responsibility, then that circumstance shall be sufficient to deem effectiveness of the consent.

Summing up the considerations of the Supreme Court, the Court stated that, the consent indicated in Article 647<sup>1</sup> § 2 and 3 of the Civil Code does not have the nature of consent as defined in Article 63 of the Civil Code. Lack of consent or its refusal, determines only lack of joint responsibility of the investor (the contractor) for the remuneration payment. While the validity of agreement for subcontracting is dependent on this, if parties of the construction works agreement specify the scope of works in the agreement, which can be entrusted to subcontractors. This consent may be expressed in a free manner (Article 60 of the Civil Code), and the provisions of Article 647<sup>1</sup> of the Civil Code shall apply to the construction works agreements, concluded by subcontractors with contractor after 23 April 2003<sup>4</sup>.

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<sup>1</sup> *Ibidem.*

<sup>2</sup> *Ibidem.*

<sup>3</sup> *Ibidem.*

<sup>4</sup> Judgment SN z 30.5.2006 r., IV CSK 61/06, OSNC No 3/2007, position. 44.

## 5. Conclusions

I think that, the position adopted by doctrine and judicature is properly justified and deserves approval. However, adoption of such a position infringes the constitutional principle of the citizen legal certainty as well as the consistency of the legal system, in which the same terms shall be treated equally. Therefore, if in the provisions of the First Book of the Civil Code, the consent to perform act in law is understood as premise to the validity of act in law (Article 63 of the Civil Code), thus it is logical that, the investor's consent (the contractor) stipulated in Article 647<sup>1</sup> § 2 and 3 of the Civil Code shall be interpreted in the same manner. Therefore, the law as it stands ('de lege lata') shall be adopted in accordance with the position of the Supreme Court expressed in the judgment dated 2 December 2005<sup>1</sup>, that the investor's consent (the contractor) constitutes a premise to the agreement effectiveness concluded between the contractor and the subcontractor. The provisions of Article 63 of the Civil Code shall be applied to the agreement.

Due to the provision faultiness of Article 647<sup>1</sup> of the Civil Code noticed by the Supreme Court<sup>2</sup>, the law is to come into force ('de lege ferenda') proposes to repeal not only the provision of Article 647<sup>1</sup> § 5, but also the provisions that govern issue of the investor's consent (the investor and the contractor) to the conclusion of the agreement with subcontractor and to govern this issue in the following manner (Szostak, 2008, p. 12; Szostak, 2007, p. 72). If parties of the construction works agreement specify in this agreement the scope of works, which the contractor (the subcontractor – in case of the conclusion of the agreement with further subcontractor) will be able to entrust to subcontractor, then this kind of reservation shall be equal with expressing of the investor's consent (the investor and the contractor – in case of the conclusion of the agreement with further subcontractor) to the conclusion of the agreement for subcontracting in the future. This kind of reservation performed in the construction works agreement by parties of the investment process, will constitute the reason to arise the joint responsibility of the investor or the contractor for the remuneration payment for construction works in accordance with directive indicated at present in the valid provision of Article 647<sup>1</sup> § 5 of the Civil Code.

Another less rigorous solution, not demanding the normative changes, might be an introduction of the contractor main system, applied to the German construction

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<sup>1</sup> Judgment SN, V CSK 46/2005, unpublished.

<sup>2</sup> Judgment SN (7) z 29.4.2008 r.



practice. Under this contracting system for construction works, the investor shall conclude the agreement with the contractor, who agrees to execute within the scope of his company the most of works necessary to achieve the construction aim. At the same time, the investor shall conclude direct agreement with the partial contractors, called in the German legal writing the “marginal contractors” (Nebenunternehmer) Ingenstau & Korbion, 2001, s. 2272, rdn 160; Strzepka, 2006, p. 1314).

The specificity of this system consists in this that, the main contractor committed himself to the investor not only to execute the construction works within the scope of his company, but also to coordinate the partial contractors. The implementation of the construction project in such an arrangement of relations, allows the investor from the one hand to avoid the joint responsibility (‘in solidum’) for payment of the subcontractor remuneration as defined in Article 647<sup>1</sup> § 5 of the Civil Code, and on the other hand allows to entrust the coordination of partial contractors works to the main contractor (Strzepka, 2006, p. 1314).

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\*\*\* Judgment SN on 30.5.2006, IV CSK 61/06, OSNC No 3/2007, position 44 resolution SN on 28.6.2006., III CZP 36/06, OSNC No 4/2007, position 52.

\*\*\* Judgment SN on 15.11.2006, V CSK 221/06, OSNC No A/2008, position 8.

\*\*\* Judgment SN on 20.6.2007, II CSK 108/07, Biul. SN No 11/2007.

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\*\*\* Resolution SN(7) on 29.4.2008, III CZP 6/08, OSNC No 11/2008, position 121.

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