

The act on payment terms in commercial transactions. Critical comments.

Kochański Brudkowski i Wspólnicy sp.j.
SPÓŁKA ADWOKATÓW I RADCÓW PRAWNYCH



The act on payment terms in commercial transactions of 12 June 2003 came into force on 1 January 2004. The act implemented new rules on payment terms either when a contract has or has not set a payment term. The act applies to commercial transactions between entrepreneurs and regarding delivery of goods or performing of services.

If parties to a contract (i. e. a sale contract) agree to payment term exceeding 30 days, then a creditor (i. e. a seller) may demand statutory interest (i. e. 12.25% per year) as of the 31st day to until the date that payment occurs, but not longer than the date (payment date) when the debtor's payment becomes due, that is can sue for payment. Subsequently, if the debtor fails to make payment by the agreed payment date (more than 30 days), the creditor may, without issuing a separate payment demand, charge and demand interest for tax delays (i. e. 13.5% per year).

The parties cannot set payment terms in different way than indicated above. Any contractual clause, excluding or limiting creditor's right to the interest or debtor's obligation to pay interest is null and void.

The act is strongly criticized since its implementation. The act raises doubts about its compatibility with the Constitution and existing law. Many Polish businessmen and lawyers believe that the act provides:

1. A limitation to the principle of contractual freedom.

It is impossible to introduce clauses limiting creditor's rights to demand statutory interest for payment made after 30 days from the date of delivery of services or goods. Such clauses are invalid. The consequences of this are vast and changed business practices.

2. A limitation of the creditor's rights to dispose of his property.

The act violates a fundamental principle of civil law that anyone entitled to any property or right may, by a legal act, dispose it (i. e. renounce or suspend its implementation). Renouncement by a creditor of rights to charge and demand interest, and also suspension of the implementation of that right for a certain period is impossible and void.

3. A limitation to constitutional economic freedom.

The contractual freedom violation also violates a constitutional principle of economic freedom. The Constitution guarantees economic freedom. The law may restrict it, but only if it is necessary for an important public policy only and if these limitations do not interfere with the nature of this freedom. The act, clearly and for „the sake” of particular group of entrepreneurs (small businesses), breaks with economic freedom.

4. An abolition of installment sale contracts.

As in current situation the purchaser has to pay interests after lapse of 30 days payment period, the installment sale contracts, i. e. ownership transfer against the price payable in specified installments, have no longer economic sense.

5. Disproportion between the intended aim of the act and its potential results.

The act gives opposite results to its aim, which was the protection of creditors from delays in payment. Stronger parties use complicated and sophisticated legal mechanisms to force their weaker contractors to avoid the law. This surely increased the dependence between weaker creditors (i. e. suppliers) and stronger debtors (i. e. recipients).

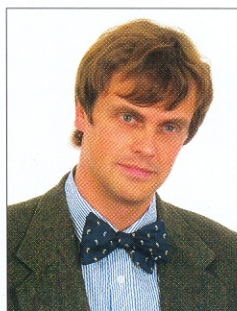
6. Corporate controversies resulting from the Act.

The act which gave the creditor the right to charge and demand statutory interest, in a situation when the creditor's mana-

ger for commercial reasons do not demand interest, create doubts of a corporate nature. A creditor's manager may risk civil and corporate liability for acts detrimental to the company.

7. Conflicts with the European law.

The act is based on European directive. Under the directive if a payment period is not contractually fixed, then payment should take place within 30 days of receipt of goods or services. Otherwise the creditor may demand interest from the debtor. The directive provides also for so called a minimal harmonization, which means that the EU Member States may maintain or bring into force provisions that are more favorable to the creditor. Considering the constitutional, legal and practical objections that act raises, the need to implement the directive cannot be invoked as a possible justification to its provisions, particularly because the directive, unlike the act, respects the principles of freedom in the conduct of business and contractual freedom between entrepreneurs. For these reasons most of Polish entrepreneurs demand amendment of this law. The Polish Private Employers Chamber with our law firm involved prepared Constitutional Court petition in order for the Court to declare the act's inconsistency with Polish legal system. It was widely discussed at the press conference at the end of April 2004. Immediately after this Polish Economic Minister declared that under influence of the entrepreneurs argumentation the law will be changed. Our law firm prepared draft of appropriate amendment to this law.



Piotr Kochański, adwokat i partner zarządzający oraz Rafał Rapala, radca prawny i partner w kancelarii prawnej Kochański Brudkowski i Wspólnicy sp. j. w Warszawie

Piotr Kochański, advocate, managing partner and Rafał Rapala, legal counsel, partner of Kochański Brudkowski & Partners in Warsaw

Kontakt
p.kochanski@kochanskioffices.com.pl
r.rapala@kochanskioffices.com.pl
Kochański Brudkowski i Wspólnicy sp. j.
www.kochanskioffices.com.pl
tel.: + 48 22 616 37 61
ul. Czeska 22A
03-902 Warszawa