

transactions act 'unconstitutional'

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The Act on payment terms in commercial transactions of 12 June 2003 came into force on 1 January 2004. The new rules on payment terms, regardless of whether a contract has or doesn't have its own payment terms, applies to all commercial transactions between businesses regarding delivery of goods or performance of services. Piotr Kocharński, advocate, managing partner and Rafal Rapala, legal counsel, partner of Kocharński Brudkowski Olechowski & Partners in Warsaw¹ review the major changes in the law.

If parties to a contract agree a payment term exceeding 30 days, then the creditor may demand statutory interest (i.e. 12.25% per year) for the period between the 31st day and the date that payment occurs, but not longer than the date when the debtor's payment becomes contractually due (the date the creditor can sue for payment). Should the debtor fail to pay by the agreed date (more than 30 days), the creditor may, without issuing a separate payment demand, charge and demand interest applicable for tax delays (i.e. 13.5% per year).

Parties cannot in fact set payment terms other than those indicated above. Any contractual clause, excluding or limiting creditor's right to the interest or debtor's obligation to pay interest, is void.

■ The Act has been strongly criticised since its implementation because it raises doubts about its compatibility with the Constitution and existing law. Many Polish businessmen and lawyers believe that the Act:

■ limits contractual freedom:

Clauses limiting creditor's rights to demand statutory interest for payment made after 30 days from the date of delivery of services or goods are void under the Act. This is a major disruption of business practices.

■ limits the creditor's right to dispose of his property:

The Act violates a fundamental principle of civil law that anyone entitled to any property or right may, dispose it as he sees fit (this includes renouncing or suspending it). 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 void.

■ limits constitutional guaranteed economic freedom:

Violation of contractual freedom is also a violation of the constitutional principle of economic freedom. The Constitution guarantees economic freedom and other law may restrict it, but only if it is necessary for an important public policy and if these limitations do not interfere with the nature of this freedom. This Act breaks with economic freedom.

■ abolishes sales in instalments:

Under the new Act, a purchaser has to pay interest after the lapse of 30 days after receiving the goods – even in the case of sales in instalments. Purchasing an item in instalments is therefore senseless.

■ is disproportionate between the intended aim of the act and its potential results:

The Act gives rise to opposite results to those intended – the protection of creditors from delays in payment. Stronger parties will use complicated and sophisticated legal mechanisms to force their weaker contractors to avoid the law. This will increase the dependence between weaker creditors (suppliers) and stronger debtors (purchasers).

■ will create problems in corporate activities:

The Act gives the creditor the right to charge and demand statutory interest. There may be situations when the creditor's executives do not want to demand interest;

they may then risk civil action for acts detrimental to the creditor.

■ conflicts with EU law:

The Act is allegedly based on the Directive. Under the Directive, the period is not contractual. Payment should take place on receipt of goods or services. The creditor may demand interest from the debtor. The directive provides for 'harmonisation', which means that States may maintain or introduce provisions more favourable to consumers. Considering the constitutional and practical objections that may arise, it is not clear how the Directive can be invoked as a possible basis for its provisions, particularly in light of the Directive, unlike the principles of freedom of contract, business and contractual autonomy of entrepreneurs.

For these reasons many entrepreneurs have been demanding the Act be amended. The Polish Confederation of Employers (PKPP) and the Polish Chamber of Commerce and Industry prepared a petition to the Constitutional Court in order to challenge the inconsistency with Polish law. The petition was announced at a press conference on 21 March 2004. After this the Minister of Justice declared that, taking into account the objections, the law will be amended.

¹ The subject was covered in depth during the seminar on 24 March in association with Kocharński Brudkowski Olechowski & Partners in Warsaw