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Consortia from a legal and business perspective – the Polish approach

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Presentation plan

1. What is a consortium under Polish law?
2. Can a consortium cause competition problems?
3. Who gains experience (know-how) in a consortium?
4. To be or not to be a consortium member or a subcontractor?
5. Is it possible to change a consortium member?
6. Consortium in a court dispute or arbitration – general rules



The legal nature of the consortium

The legal nature of the consortium (1)

CONSORTIUM = CONTRACT

A consortium is a contractual, bilateral or multilateral legal relationship aimed at synergies for the realization of a particular business venture on the basis of mutual benefit and shared risk.

The essence of the consortium agreement is reduced to the commitment of its participants (members of the consortium) to achieve a common economic goal by taking the contracted activity.

No specific legal framework regarding the consortia (with minor exceptions).

E.g. art. 73 of Banking law:

1. Banks may enter into an agreement on the establishment of a bank consortium in order to grant credit jointly.
3. The banks referred to in par. 1 will bear the risk related to the joint grant of credit in proportion to the amount of funds contributed to that credit.

A consortium agreement is often neglected by the parties!

The legal nature of the consortium (2)

- consortium agreement and civil partnership agreement

"The consortium agreement is a sub-contract of a civil law partnership" (e.g. the judgment of the Court of Appeal in Warsaw dated 13.05.2014).



- independent nature of the consortium agreement
 - ❖ temporary nature of cooperation
 - ❖ no extended organizational bond
 - ❖ lack of common property (co-ownership is not presumed, in the case of a civil law company, article 863 of the Civil Code)
 - ❖ different character of the representation (usually by the leader, not by all members)
 - ❖ joint and several liability for the obligations of the consortium must result from the contract (in the case of a civil partnership it arises from article 864 of the Civil Code)



Creating a consortium
in the light of
competition law

Creating a consortium in the light of competition law

- *Judgement of the Court of Appeal, ref. VI ACa 651/15*
- forming a consortium by two competitors who are able to separately participate in the tender might be considered as a violation of the competition and in the consequence – be penalized by the Polish Office of Competition and Consumer Protection
- consortium agreement can be considered as an agreement that restricts the competition, i.e. can be regarded as anti-competitive!
- S8 express road Warszawa Konotopa-Powązkowska 10,5 km – PLN 2.7 billion
2007 winning bid by Budimex Dromex, Strabag, Mostostal Warszawa, Warbud



Consortium members do not always gain experience for the entire project

Consortium member does not gain experience for the entire project

- *Judgement of the Court of Justice of the European Union on the Esaprojekt, ref. C-387/14*
- being just a member of the consortium does not always mean gaining experience (know-how) for the entire project, one must carefully look at the exact scope of works executed by the particular consortium members
- The rule of thumb: *you are what you eat* [= you get experience for works actually executed within the consortium]



Crucial decision –
to be a consortium
member or a
subcontractor?

Crucial decision – to be a consortium member or a subcontractor?

- *Civil law perspective – liability issue*

- *Subcontractors are well protected!*

The **investor is jointly and severally liable with a contractor (general contractor) for the payment of remuneration due to subcontractor** for the construction works performed by the latter, that have been previously notified to the investor (article 647¹ of Civil Code).

Both the contractor and the subcontractor may ask for a payment guarantee.

- *Consortium members often end up in a dispute....*

Parties of the consortium agreement **may generally determine the legal relation at their own discretion**, provided that its content or purpose do not prejudice the nature of the relation, a statute or the principles of community coexistence.

Crucial decision – to be a consortium member or a subcontractor?

- *Public procurement law requirements*
- *The investor is obliged to make direct payments to the subcontractor – subcontractors are even better protected under public procurement law*

The contracting entity **makes a direct payment of the remuneration** due to a subcontractor or subsequent subcontractor who entered into a subcontract for works approved by the contracting entity or who entered into a subcontract for supplies or services a copy of which was delivered to the contracting entity, if the economic operator, subcontractor or subsequent subcontractor of a contract for works, respectively, avoids the obligation to pay the remuneration. (article 143c Public procurement law)

- *But sometimes being a consortium member is a must....*
The contracting entity may require the economic operator to perform on his own:
 - 1) the key part of a contract for works or services;
 - 2) works associated with arrangement and installation associated with a supply contract.(article 36a Public procurement law)

Crucial decision – to be a consortium member or a subcontractor?

- *Public procurement law requirements*
- *Each consortium member is fully responsible to the investor but gains experience....*

Economic operators jointly apply for a contract **are jointly and severally liable for the performance of a contract and payment of a performance bond.** (article 141 Public procurement law).
- *If the consortium fails to perform the project, it may hit all the consortium members by:*
 - 1) obligation to pay contractual penalties and other damages to the contracting authority;
 - 2) potential claims from subcontractors?
 - 3) the risk of being excluded from future public procurement procedures...



Is it possible to change the composition of a consortium during the project?

Is it possible to change the members of a consortium?

- *Before July 2016 – no change was possible (big problem in PPP projects)*
- *After July 2016 – possible to certain extent - art. 144 of the Public Procurement Law*

„a new economic operator is to replace the one to which the contracting authority has awarded the contract:

a) **pursuant to the contractual provisions** if modifications have been provided for in the contract notice or in the terms of reference in the form of unequivocal contractual provisions, stating the scope, in particular the possibility of modifying the amount of remuneration of the economic operator, the nature, and the conditions of introducing such modifications,

b) **as a result of a merger, de-merger, transformation, bankruptcy, restructuring or acquisition of the economic operator or its enterprise**, provided that the new economic operator fulfils the conditions of participation in the procedure, no grounds for exclusion provided that this does not entail other substantial modifications to the contract,

c) in the event that **the contracting authority itself assumes the economic operator's obligations towards its subcontractors**”



Consortium in a court
dispute or arbitration
– general rules

Consortium in a court dispute or arbitration – general rules

I. Material joint participation in the defendant's case

- In the case of joint and several liability there is no necessary participation

II. Material joint participation in the plaintiff's case

Thesis no. 1: material joint participation of all consortium members is necessary!

- independent action of a member of the consortium is impossible (the court will dismiss the suit)
- such a status may prejudice not only the total active legitimacy of the consortium in the case against the ordering party for the refund of the secured bond (...), but also about their legitimacy in respect of remuneration in connection with the performance of construction works by one consortium
- the divisive character of the claimed benefit is irrelevant

Consortium in a dispute or arbitration – general rules

- **Thesis no. 2: material joint participation of all consortium members is unnecessary!**
- the existence of a consortium agreement does not have to result in the necessary participation on the part of the plaintiff
- the only significant thing is essence of the legal relationship or the provision of the law, resulting in the creation of necessary co-operation, is always the substantive law (e. g. agreement)
- in principle, the consortium does not act in the form of a civil partnership, unless it prefers the parties to be constructive in such a way that the design requirements of the legal relationship are met, i.e. common property, organizational and financial ties of partners = in principle, there is no material joint participation
- each member of the consortium can represent his own interests individually

Consortium in a dispute or arbitration – general rules

- How to avoid material joint participation?
 - ❖ demonstrating that the consortium's intention was not to establish a company (no VAT registration for the company, no common property, etc.)
 - ❖ clear division of work done between the consortium members
 - ❖ explanation who paid the subcontractors for their work
 - ❖ as a last resort - division of remuneration into equal parts
 - ❖ assignment of claims to the consortium leader?

Take-home message

1. Consortium is usually just a contract (no separate legal entity), unless the consortium agreement provides otherwise
2. Be aware of the competition law when creating a consortium, in particular with the direct competitors
3. Being just a member of the consortium does not always mean gaining experience (know-how) for the entire project (*you are what you eat*)
4. Pros and cons of being a consortium member/ subcontractor in the light of the public procurement law and civil law – assessment required!
5. In public contracts executed after 2016 it is possible to change the composition of a consortium (under certain conditions)
6. Try to avoid material joint participation of all consortium members in a dispute (unless you really want it)!

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