

Blind bet

It sometimes happens that parties to a given contract anticipate the need to transfer the rights and obligations arising from such contract to another entity in the future. Such situations can be a source of significant emotion during negotiations, so we have decided to look at this issue little closer. It is a fairly universal problem that can apply to contracts of all kinds, both within the real estate sector (e.g., preliminary sales agreements, development agreements, or lease agreements) and beyond.

Let us recall – in the case of bilateral contracts, both parties have rights and obligations towards each other. Thus, they are both creditors and debtors at the same time.

Assignment, or the transfer of rights and obligations from the contract to a third party, can be done through a simultaneous transfer of claims (under Article 509 of the Civil Code) and assumption of debt (under Article 519 of the Civil Code). Unless particular provisions of a contract, or specific laws, or the nature of the obligation limit such possibility, the transfer of claims can occur without the debtor's consent. However, debt assumption can take place either based on an agreement between the creditor and a third party with the debtor's consent or based on an agreement between the debtor and a third party with the creditor's consent. This means that changing the debtor always requires the creditor's consent. This has a clear justification, not least from the perspective of the creditor's need to assess the general credibility of such a new debtor. This regulation serves a protective function, fully expressing the rule that the creditor's consent to the debt assumption by a third party is ineffective if the creditor was unaware of the new debtor's insolvency.

In practice, the need for contract assignment often arises with respect to lease agreements signed for purposes of renewable energy projects (REPs). Such projects are often designed for future sale. In property lease agreements, usually made with individuals (predominantly landowners), elaborate "change of control" clauses have not been established. For more organized investors planning to sell shares in a special-purpose vehicle developing a particular project, such omissions are not a hindrance – as such transaction does not lead to a change in the lessee.

However, to reduce costs and limit organizational activities, investors often choose not to establish special-purpose vehicles for developing projects, planning their further sale as a "project sale". Such an agreement, in practice, involves transferring all rights and obligations constituting the project, including administrative decisions and agreements. And this is where certain complications can arise.

In such cases, investors strive to introduce clauses in their lease agreements allowing for an unilateral transfer of rights and obligations from the agreement to a third party. It has become common practice to grant so-called blank consents, as the entity that would take over the rights and obligations from a given agreement is often unknown at the time of its signing. Therefore, clauses with general consent for assignment are meant to allow the current lessee to "transfer the agreement" to any other entity without the involvement of the lessor.

Does a blank consent for assignment not contradict the general provisions of the Civil Code discussed above? This issue has become so significant that a legal question regarding the effectiveness of such general consent (based on a preliminary real estate sale agreement) was submitted for resolution by the Supreme Court. The Supreme Court has not yet issued a ruling on this matter. Meanwhile, the prevailing opinion in doctrine and jurisprudence is that blank consents are ineffective, and the prior consent of the creditor for

the debt assumption should refer to a designated entity and a specified claim.

However, such general clauses are commonly observed in practice, especially in the aforementioned lease agreements. Recognizing them as ineffective could have serious consequences for the effectiveness of transfers of other "project components" that are rooted in land ownership, such as building permits or agreements with operators. If the Supreme Court were to share the existing doubts about the effectiveness of blank consent, it could affect the content of future contracts. Still court verdicts are one thing while practice follows well-established industry patterns...

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