

**SECOND SUPPLEMENT TO THE GIBRALTAR
GAZETTE
No. 3988 of 15 March, 2013**

LEGAL NOTICE NO. 50 OF 2013.

INTERPRETATION AND GENERAL CLAUSES ACT

**LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT
2003 (AMENDMENT) REGULATIONS 2013**

In exercise of the powers conferred upon it by section 23(g) of the Interpretation and General Clauses Act, and for the purpose of transposing into the law of Gibraltar Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payments in commercial transactions, the Government has made the following Regulations—

Title and commencement.

1. These Regulations may be cited as the Late Payment of Commercial Debts (Interest) Act 2003 (Amendment) Regulations 2013 and come into operation on 16 March 2013.

Amendment of Act.

2. The Late Payment of Commercial Debts (Interest) Act 2003 (the “principal Act”) is amended in accordance with these Regulations.

Amendment to Long Title.

3. In the Long Title to the principal Act after the words “COMMERCIAL TRANSACTIONS” insert the following words “AS RECAST BY DIRECTIVE 2011/7/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COMBATING LATE PAYMENT IN COMMERCIAL TRANSACTIONS”.

Part heading.

4. The heading “PART I” is deleted.

Amendments to section 1.

5.(1) In section 1(3) of the principal Act—

- (a) for the definitions “contract for the supply of goods and services or services alone” and “contract price” substitute the following definitions–

“amount due” means the principal sum which should have been paid within the contractual or statutory period of payment, including the applicable taxes, duties, levies, or charges specified in the invoice or the equivalent request for payment;

“applicable interest rate” means for the first 6 months of any year the statutory interest prevailing on 1 January of that year and for the second 6 months of any year the statutory interest prevailing on 1 July of that year;

“commercial transactions” means transactions between undertakings or between undertakings and public authorities which lead to the supply of goods or the provision of services for remuneration;

“debt” means any amount due from time to time under a relevant contract;

“Directive” means Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions, as the same may be amended from time to time;

“grossly unfair term” means any contractual term or practice–

- (a) that is determined by the Supreme Court of Gibraltar to be grossly unfair taking into account all the circumstances of any case, including–
- (i) any gross deviation from good commercial practice, contrary to good faith and fair dealing,
 - (ii) the nature of the product or the service, and
 - (iii) whether the debtor has any objective reason to deviate from the statutory interest, from the payment period as provided for in sections 4(2), 6, 7 and 8 or from the fixed compensation as provide for in section 11;

- (b) that excludes interest for late payment;
- (c) that excludes compensation for recovery of costs as provided for in section 11,

and an agreement shall be deemed to be “grossly unfair” where it includes such a term or practice;

“interest for late payment” means statutory interest or, subject to sections 13 and 14, interest at a rate agreed upon between undertakings;

“interest payment date” means, subject to the provisions of section 11, which provisions shall apply in the circumstances defined in that section, the date calculated in accordance with the provisions of section 4 in the case of a relevant contract as between undertakings and as determined in accordance with section 5 in the case of a commercial transaction in which the debtor is a public authority;

“late payment” means payments that are not made within the contractual or statutory period of payment under a relevant contract and where the conditions laid down in section 3 are satisfied;”;

- (b) in the definition “Minister”, for the words “trade and industry” substitute the words “Commercial Affairs”;
- (c) for the definitions “purchaser” and “qualifying debt” substitute the following definitions—

“public authority” means any contracting authority as specified in regulation 3 of the Procurement (Public Contracts) Regulations 2012, regardless of the subject or value of the contract;

“relevant contract” means any contract to which this Act applies;

“representative body” means an organisation falling within section 14(a) or (b);

“retention of title” means the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full;”;

(d) in the definition “statutory interest” for the words “means interest carried by virtue of the term implied by section 2(1); and” substitute the words “means simple interest for late payment at the rate of 8% above the base rate set by the Gibraltar Savings Bank for savings on the day the debt became due; if the base rate changes thereafter, the Reference Rate shall also change to remain 8% above the base rate;”;

(e) for the definition “supplier” substitute the following definition—

““undertaking” means any organisation, other than a public authority, acting in the course of its independent economic or professional activity and includes where the activity is carried out by a single person.”;

(2) After section 1(3) of the principal Act insert the following subsection—

“(4) Any term used but not defined shall have the meaning given to it in the Directive.”.

Sections 2 to 15.

6. For sections 2 to 15 of the principal Act substitute the following sections—

“Scope.

2. This Act does not apply to debts that are subject to insolvency proceedings instituted against the debtor, including proceedings aimed at debt restructuring.

Obligation to pay interest.

3. It shall be an implied term of any contract governing any commercial transaction that the creditor shall be paid interest for late payment at the applicable interest rate as from the interest payment date on any debt if such contract is—

- (a) between undertakings; or
- (b) subject to sections 5, 6, 7 and 8, a commercial transaction in which the debtor is a public authority;

subject to the creditor having fulfilled its contractual and legal obligations under the relevant contract and not having received the debt on time, in the latter case, subject to the delay not due being due to the debtor.

- (2) Time shall be of the essence for the purposes of the implied term set out in subsection (1).

Period for which interest for late payment runs.

4.(1) Interest for late payment shall be due and payable to the creditor on the debt if the relevant contract is between undertakings—

- (a) subject to subsection (2), in the event that the date of payment of the sum due is fixed in the relevant contract, on the day next immediately following that date; or
- (b) in the event that the date of payment of the sum due is not fixed in the relevant contract, on the expiry of any of the following time limits—
 - (i) 30 calendar days immediately following the date of receipt by the debtor of the invoice or an equivalent request for payment;
 - (ii) in the event that the date of receipt of the invoice or an equivalent request for payment is uncertain, 30 calendar days immediately following the date of receipt of the goods or services supplied by the creditor to the debtor;
 - (iii) in the event that the debtor receives the invoice or an equivalent request for payment earlier than the goods or the services supplied by the creditor to the debtor, 30 calendar days immediately

following the date of receipt of the goods or services supplied by the creditor to the debtor;

- (iv) subject to section 9, in the event that the relevant contract or an applicable law provides a procedure of acceptance or verification, by which conformity of the goods or services with the relevant contract is to be ascertained and if the debtor receives the invoice or an equivalent request for payment earlier or on the date on which such acceptance or verification takes place, 30 calendar days immediately following that date;

- (2) The period for payment fixed in any relevant contract shall not exceed 60 calendar days, unless otherwise expressly agreed in the relevant contract and provided that such agreement is not grossly unfair to the creditor.

Public Authority: period for which interest runs.

- 5. In a relevant contract in which the debtor is a public authority—
 - (a) the date of receipt of the invoice shall not be made subject to any contractual agreement between the debtor and the creditor; and
 - (b) the creditor shall be entitled to interest for late payment on the debt on expiry of the period defined in sections 6, 7 and 8.

Public Authority: period for payment.

- 6. Subject to section 7, in a relevant contract in which the debtor is a public authority the period for payment shall not exceed any of the time limits provided for in section 4(b)(i) to (iv) inclusive.

Extension of time.

- 7.(1) The time limits provided in section 6 shall be extended to 60 calendar days in the following cases—

- (a) any public authority which carries out economic activities of an industrial or commercial nature by offering goods or services on the market and which is subject, as a public undertaking, to the transparency requirements laid down in the Public Finance (Control and Audit) Act;
 - (b) public entities providing healthcare which are duly recognised for that purpose inclusive of the Gibraltar Health Authority.
- (2) The Minister shall ensure that by 16 March 2018, a report is sent to the European Commission in accordance with the second paragraph of Article 4 of the Directive.

Ability to agree extension of periods.

8. The period for payment fixed in a relevant contract shall not exceed the time limits provided for in section 6 unless otherwise expressly agreed in the relevant contract and provided such other period agreed is objectively justified in the light of the particular nature or features of the relevant contract in question, and that it in any event does not exceed 60 calendar days.

Procedure for acceptance or verification of conformity.

- 9.(1) In the event that a procedure of acceptance or verification, by which the conformity of the goods or services with the relevant contract is provided for in the relevant contract, the maximum duration of that procedure shall not exceed 30 calendar days from the date of receipt of the goods or services, unless otherwise expressly agreed in the relevant contract and provided that it is not grossly unfair to the creditor.
- (2) Where the debtor is a public authority the 30 calendar days referred to in subsection (1) may be agreed in the tender documents in addition to the relevant contract.

Payments due by instalments.

- 10.(1) Notwithstanding any other provision of this Act and unless otherwise restricted by any applicable law, the parties to any

relevant contract may agree a payment schedule providing for payments under any relevant contract to be made by instalments.

- (2) Any instalment which is not paid on its due date, shall attract the interest and compensation provided for in this Act, and shall be calculated solely on the basis of the overdue amounts.

Compensation for recovery of costs.

11.(1) Immediately that interest for late payment becomes payable in a commercial transaction the creditor shall be entitled in addition to late payment interest on the outstanding debt to the following fixed sums—

- (a) for a debt not exceeding £999.99, the sum of £40;
- (b) for a debt between £1000.00 and £9999.99, the sum of £70.00;
- (c) for a debt of £10,000.00 or more, the sum of £100.00,

which sums are payable forthwith without any demand being made as compensation for the recovery costs of the creditor.

- (2) In addition to the compensation recoverable under subsection (1), the creditor shall be entitled to recover from the debtor reasonable compensation for any recovery costs exceeding the amounts provided for in subsection (1), including the cost of instructing lawyers or employing a debt collection agency, that are incurred due to late payment by the debtor.

Jurisdiction of Supreme Court.

12. The Supreme Court of Gibraltar shall have jurisdiction to determine whether any term of or practice under a relevant contract is a grossly unfair term on the application of any creditor under a relevant contract or of a representative body as provided for in section 14.

Powers of the Supreme Court.

13.(1) If the Supreme Court of Gibraltar determines that any term of or practice relating to—

- (a) the date or period for payment;
- (b) the rate of interest for late payment; or
- (c) the compensation for the recovery of costs,

under a relevant contract is a grossly unfair term as regards the creditor, the court may make a declaration to that effect and may either grant an injunction against the debtor restraining him from using or relying on that offending term or practice or it may grant an award of damages and costs to be paid by the debtor.

(2) In the case of an application by a representative body under section 14, the effect of a determination by the court shall be that the unfair term or practice shall cease to be capable of continued use in any contract governing any commercial transaction and shall be unenforceable if used thereafter.

Unenforceability of terms.

14. For the purposes of sections 12 and 13—

- (a) organisations officially recognised as representing undertakings, or
- (b) organisations with a legitimate interest in representing undertakings,

may, in accordance with any applicable law, apply to the Supreme Court under section 13 on the grounds that contractual terms or practices are grossly unfair, so as to prevent their continued use.

Retention of title.

15. The Sale of Goods Act shall continue to apply to any question regarding the retention of title in commercial transactions for the supply of goods.

Transparency and publicity of rights.

16. The Minister shall ensure transparency of the rights and obligations under this Act, which shall include making the applicable statutory interest publicly available including, where appropriate in the opinion of the Minister, using professional publications, promotion campaigns or any other functional means to increase awareness of the remedies for late payment among undertakings.

Establishment of codes.

17. The Minister may encourage the establishment of prompt payment codes which set out clearly defined payment time limits and a proper process for dealing with any payments that are in dispute, or any other initiatives that tackle the crucial issue of late payment and contribute to a culture of prompt payment in order to ensure the proper functioning of the market and competitiveness.”.

Schedule.

7. The Schedule to the principal Act is deleted.

Dated 15th March, 2013.

N F COSTA,
For the Government.

EXPLANATORY MEMORANDUM

These Regulations amend the Late Payment of Commercial Debts (Interest) Act 2003 for the purposes of transposing into the law of Gibraltar Directive 2011/7/EU.

**Printed by the Gibraltar Chronicle Printing Limited
Unit 3, New Harbours
Government Printers for Gibraltar,
Copies may be purchased at 6, Convent Place, Price £0.60p**