

Nature and significance of construction works acceptance

The legal significance and functions of construction works acceptance still raise a lot of controversies, which are largely due to the ambiguity of the term. The issue is not clearly regulated in any legal act, which gives rise to deviating interpretations but also requires the parties to the construction works agreement to exercise due diligence.

Pursuant to Art. 647 of the Civil Code, the investor's obligation is to accept construction works. However, there are no guidelines as to the timeframe of acceptance, its terms and conditions or the course of the acceptance procedure. It is clear that the investor is required to accept the works only when the contractor has announced the completion of the works. It is also acknowledged that if the works have been performed defectively to an extent that the contract cannot be regarded as completed or the works have not been performed at all, the investor may refuse the acceptance of the works. Likewise, if the nature of the defects prevents the structure from being used in accordance with the purpose defined in the contract, the investor may also refuse to accept the works. Nevertheless, the fact of undue performance of the works does not authorise the investor to refuse to accept the works – it would compromise the contractual balance of the parties to the contract to require the contractor to deliver the works in a perfect condition and to make the payment conditional thereon. Indeed, it should be noted that it would be difficult to achieve the perfect condition, in particular in the case of large-scale projects, where the construction works acceptance would never happen at all. It is considered that a provision in the contract to the contrary would be ineffective – the provision of Art. 647 of the Civil Code refers to "acceptance", not "acceptance without defects", while the parties to the contract may not introduce the premise of acceptance which is not stipulated by the law. However, the consistency with the building permit design and compliance with the rules of technical knowledge may be considered as eligible criteria for acceptance of construction works.

Rudimentary regulation is also contained in Art. 654 of the Civil Code, which stipulates that – unless the contract states otherwise – the investor is required to accept completed works piece by piece, as they are completed, against payment of a relevant portion of remuneration.

However, it should be noted that the nature of the provision is only auxiliary as it refers to the approval of the works which it will be impossible to accept afterwards as they are the works which will be covered, not to the acceptance of the works. The case-law has acknowledged that the acceptance of part of the works and payment of remuneration for the works shall not lead to the expiry of the commitment in this respect. Nevertheless, Polish Norm PN-ISO 6707-2:2000 "Construction. Terminology. Terms used in contracts" defines partial acceptance, which concerns works which will be covered or removed from sight, works involving completion of a part of a building (stage) or works comprising the entire body of works ordered from a single subcontractor. Yet, according to the regulation, final acceptance signifies the process of handing over the works to the contracting authority with or without reservations. Due to these inconsistencies, one should exercise sufficient care to use in the contract the wording in the proper context so as to avoid any doubt whether we deal with partial approval or partial acceptance and be aware of what their consequences are.

As indicated above, the very fact of acceptance does not mean that the contractor has performed the contract in a due manner. In particular, it does not obstruct the exercise of the rights under warranty or guarantee. On the contrary – the periods of limitation for claims under warranty and guarantee start running upon acceptance. The contractors frequently claim that acceptance of defective works releases them from liability under warranty under Art. 557 of the Civil Code given that the investor confirms upon acceptance that they are aware of the defects upon the delivery of the goods – with respect to defects which do not authorise the investor to refuse acceptance. For the sake of the investor's security, it is advisable to include an express reservation that the investor may exercise its rights under warranty if the accepted work has defects identified at acceptance.

Importantly, obtaining a permit to use the building structure is not tantamount to acceptance as in no way does this administrative and judicial act determine that mutual obligations of the parties to the construction works agreements have been performed in a due manner. Therefore, it should be noted that the investor may refuse acceptance even if the final permit to use the structure has been issued.

By its very nature, acceptance should be considered a legal act – it is the investor's declaration of knowledge, in which the investor confirms that the structure has been completed in a due manner and, in principle, in accordance with the contract. This conclusion is not precluded by the fact that, in point of fact, acceptance involves the actual acquisition of control of the structure, including transfer of all burdens and benefits and the risk of accidental loss of goods.

Given major effects of acceptance, contractual terms provide for a wide range of regulations should one of the parties not take part in the acceptance procedure. It is questionable whether a unilateral acceptance procedure by the contractor is allowed. Case law provides that it is admissible especially when the payment of remuneration is conditional on acceptance – otherwise, the investor could fairly easily withdraw from a binding contract and postpone payment indefinitely. Meanwhile, as regards acceptance, the investor is the contractor's debtor – unjustified refusal of acceptance is equal to the debtor's default, while the results of acceptance (including the obligation to pay remuneration) arise upon the time when acceptance is due to take place.

In summary, acceptance of construction works is of great importance to the parties as it confirms fulfilment of an obligation, failure to perform it or undue performance thereof, and allows the parties to bring claims for non-performance or undue performance, while not precluding, in principle, claims under warranty even for defects of which the investor was aware at acceptance. Furthermore, the investor's obligation to accept the works is not absolute – the investor may avoid it depending on the nature of defect.

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