

Legal opinion

Statutory right to renounce a construction contract – general comments

The significance of the statutory right, enshrined in the Civil Code, to renounce a contract for construction work stems from the fact that the Code does not contain any provisions for unilateral termination of such a contract by either party. There is a difference between renunciation and termination, however. Termination has consequences for the future, but does not affect what has already been done. Renunciation, by contrast, in principle “annuls” the legal relationship that arose under the contract. If part of the contract has already been executed at the time of renunciation, the parties have to make a settlement restoring the status quo ante. In most cases, renunciation will also lead to compensation claims.

A base for renunciation may exist in the text of the contract. If it does not, the party intending to renounce can consider the options available in the Civil Code. These can be divided into two categories: those applying to all types of contracts, and specifically to contracts for construction work (or specific-task contracts used in construction projects). Let’s start with the latter category. Most of the relevant provisions provide for the investor’s right to renounce (while the “investor” is meant the party ordering the execution of construction works, who need not necessarily be the investor in the terms of the Construction Law). The investor has a right to renounce a contract under the following circumstances:

- 1)** if the contractor is performing the work in an irregular/incorrect manner, or in a way that contradicts the contract. For example, the contractor might be performing the work in a way that is at odds with the law, the principles of good workmanship, technical norms, the project documents, the investor’s requirements, etc. Before renouncing, the investor has to issue a formal notice calling on the contractor to change his way of working within a specified time period. It is only when this period expires without the contractor changing his way of working that the investor is entitled to renounce the contract – or, alternatively, appoint another person to correct or finish the contractor’s work, at the contractor’s cost and risk (Article 636 in connection with Article 656 of the Civil Code). Importantly, this option can be exercised only while the work under the contract is still being carried out, but not after it has been accepted^[1];
- 2)** if the contractor is late starting or finishing the work and the delay is sufficiently long to render its timely completion doubtful. Importantly, the statement of renunciation has to be issued before the work’s completion date. Unlike in 1) above, a prior notice calling on the contractor to start/finish the work is not required (Article 635 in connection with Article 656 of the Civil Code.);
- 3)** in case of serious defects in the built structure, in line with the Civil Code’s provisions on warranty (Article 560 § 1 in connection with Articles 638 and 656). However, the investor cannot renounce if the defect arose due to damaged or inadequate building materials supplied by the investor;
- 4)** in any circumstances before completion of the work, at the investor’s free discretion and without having to indicate a specific reason, upon payment of the remuneration agreed on; the only amount that the investor is allowed to deduct are the contractor’s avoided costs due to the task being left unfinished, although in practice, this amount tends to be difficult for the investor to estimate (Article 644 in connection with Article 656 of the Civil Code).

The contractor has a right to renounce a contract if the investor fails to provide a guarantee of payment within the period indicated by the contractor, but not shorter than 45 days (Article 6494 § 1 of the Civil Code). This right arises, both when the investor fails to provide any guarantee within the period, and when the substance of the guarantee provided is contrary to what the contractor demanded, or does not meet the requirements set out in applicable laws^[2].

On general terms each party has the option to renounce from reciprocal contract (and construction contract belongs to this type of contracts) if the other party is in delay in performing its obligations under the contract. This option is thus open to both parties, i.e. to the investor (e.g. in case of delays in work progress) and to the contractor (e.g. in case of delays in the acceptance of completed stages of work). But, as with renunciation due to incorrect/irregular work, the party intending to renounce first has to issue a notice calling on the other party to cure the delay within a specified time period, and additionally warning that if the period expires without the delay being cured, it will renounce the contract (Article 491 § 1 of the Civil Code). The statement of renunciation also should specify the part of the contract that is being renounced, because the contractual obligation may be divisible, and only a part of the obligation may be delayed. Construction contract obligations are usually divisible, as the work is divided into stages. The renouncing party can choose between renouncing only the part of the obligation that is delayed, or the entire remainder of the obligation. It can also renounce the entire contract, in case its partial execution would be of no benefit to it, due to the nature of the contractual obligation, or due to the contract's purpose intended by the renouncing party and known to the party in delay (Article 491 § 2 of the Civil Code).

Renunciation without prior notice or warning is possible in case delayed fulfillment of the contractual obligation would be of no benefit to the renouncing party, due to the nature of the obligation, or due to the contract's purpose intended by the renouncing party and known to the party in delay (Article 492, second sentence, of the Civil Code). It is also possible when the other party states that it will not fulfil its obligation under

the contract, without giving a legally legitimate reason for it^[3]. Such renunciation can be made even before the completion date of the contractual obligation (Article 4921 of the Civil Code).

A party also has a right to renounce if the other party, due to circumstances for which it bears responsibility, is incapable of fulfilling its obligation under the contract. It also has a right to renounce when the other party is incapable – for whatever reason – of fulfilling completely its obligation, and its partial fulfillment would be of no benefit to the renouncing party, due to the nature of the obligation or the contract's purpose intended by the renouncing party and known to the other party (Articles 493 and 495 § 2 of the Civil Code).

There may be situations to which more than one of the above provisions apply. For example, if the contractor is late finishing the work, the contract can be renounced both under Article 635 in connection with Article 656 of the Civil Code, and under Article 491 § 1. In such cases, it is worth examining in detail the possibilities that each base offers, the conditions that it sets for renunciation, and its legal consequences, so as to be able to choose the best option for us in the given circumstances.

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^[1] Cf. e.g. the Supreme Court ruling of 3 November 2000., IV CKN 152/00, OSNC 2001/4/63

^[2] Cf. E. Zielińska [in:] Fras M. (ed), Habdas M. (ed), Kodeks cywilny. Komentarz. Tom IV. Zobowiązania. Część szczególna (art. 535-7649), WKP 2018

^[3] Cf. G. Stojek [in:] Fras M. (ed), Habdas M. (ed), Kodeks cywilny. Komentarz. Tom IV. Zobowiązania. Część szczególna (art. 535-7649), WKP 2018