

Legal opinion

The legal nature of the contractor's obligation under the construction works contract

Few areas of construction law have generated more controversy in jurisprudence and court practice in Poland than the nature of the performance that the construction works contract imposes on the contractor. The debate comes down to the following point: is the obligation – which according to Article 647 of the Civil Code¹, consists in the delivery to the investor of the structure envisaged by the contract, built in accordance with the design and with technical standards – a divisible obligation? In other words, is it a type of obligation that can be rendered a performance in parts without this fundamentally altering its object or value (Article 379 § 2 of the Civil Code)?

Despite more than 20 years of judicial interpretation, this issue has yet to be unequivocally resolved. There are as many rulings that support the divisibility thesis as there are ones that reject it². Given the crucial role of the construction works contract, this state of affairs is a most unfortunate one, and merits an in-depth analysis.

¹ Act of 23 April 1964 – Civil Code (Journal of Laws 2020 item 1740);

² Cf. two recent contradictory rulings: the decision of the Appeals Court in Krakow of 12 February 2015, I ACa 1628/14, LEX no. 1679931, and the decision of the Appeals Court in Poznan of 12 July 2018, I AGa 118/18, LEX no. 2582659. The controversy is best illustrated by two rulings of the Supreme Court, issued in the same case but which are mutually exclusive: the decision of 14 March 2002, IV CKN 821/00, LEX no. 54375, and the decision of 19 March 2004, IV CK 172/03, LEX no. 112927.

Consequences of the contractor's obligation being classed as divisible

Whether the obligation that the construction works contract imposes on the contractor is classed as divisible or not has fundamental implications for the legal situation of the parties. That is because, under Article 491 § 2 of the Civil Code, if a party is in delay with the performance of a contract where the obligation is a divisible one, the counterparty is entitled to terminate the contract *ex nunc*, i.e. from now on. In our context, this means that the investor can pay the contractor for the part of the work that has been completed, and appoint a new contractor.

But if the obligation is an indivisible one, the counterparty is entitled to terminate based on Article 491 § 1 of the Civil Code. And it follows from Article 494 that such a termination applies *ex tunc*, i.e. from the outset³. In other words, the contract is voided as if it had never been entered into. The parties have to return everything they received under the contract. In the construction context, the consequences are really severe: the contractor effectively has to demolish the unfinished structure at their own cost, no matter what the stage of the building process. From the investor's perspective, this is often economically totally unreasonable.

On the other hand, divisibility has negative consequences where there are multiple persons forming one side of the construction works contract, because both the amount owed and receivable are divided into as many independent parts as there are debtors or creditors (Article 379 § 1 of the Civil Code). Thus if the construction works contract is between, say, a contractor and four investors, and there is no solidarity clause, then the contractor has to seek payment separately from each of the four investors. This does not sit well with the principle of equal protection of the rights of all sides to a contract.

³ The scope of this article does not permit a discussion of withdrawal from a construction works contract on the basis of Article 635 of the Civil Code. The reader is kindly referred to the following publication: A. Więcek, Odstąpienie od umowy o dzieło na podstawie art. 631, 635 i 644 kodeksu cywilnego na tle ogólnych przepisów o zobowiązaniach umownych, IPP UJ, 2016, no 6.

Definition of a divisible obligation

Pursuant to Article 379 § 2 of the Civil Code, a divisible obligation is one that can be fulfilled in parts without this fundamentally altering its object or value. How should we understand this? Can this be said of the obligation that the construction works contract imposes on the contractor?

The judges and legal scholars who claim that it can commonly use the following argument: the nature of this obligation is such that it can be performed in separate parts at different points in time, and by different contractors – it often happens that one company erects the frame, another installs the electrical system, etc. – hence it is divisible. So a distinction is made here between the object of the obligation, i.e. the structure, which indivisible, and its performance, which is, because it consists of a sequence of separate activities⁴. This reasoning is further supported by citing Article 654 of the Civil Code, which expressly establishes an exception to the rule of simultaneous performance of mutual obligations (Article 488 § 1 of the Civil Code).⁵

This reasoning is flawed, however. It confuses a divisible obligation with another category recognised in contract law, namely that of a portion obligation⁶. The latter refers to obligations that, by their very nature, can be performed in portions, understood as stages or periods, regardless of whether they concern the delivery of a generic or determinate thing (e.g. the payment of a price in several instalments, or the writing of a book). But this does not prove divisibility. Divisibility plays a totally different role in contract law.

⁴ Cf. the decision of the Appeals Court in Katowice of 14 March 2014, V ACa 791/13, LEX no. 1448540; and the decision of the Supreme Court of 9 July 2009, III CSK 341/08, LEX no. 584753.

⁵ P. Jochemczyk, Podzielność świadczenia wykonawcy z umowy o roboty budowlane, MOP, 2020, no. 16, p. 875

⁶ Por. art. 450, 456, 465 § 1 zd. drugie, 484 § 2, 493 § 2 k.c.

Divisibility refers, not to the way an obligation is performed, but mainly to situations where there are multiple debtors or creditors among whom the obligation is divided. Its definition in Article 379 § 2 should be interpreted as follows: a divisible obligation is an obligation that can be divided into parts that are independent obligations of the same kind. Only in such cases is it possible to divide the obligation into equal parts that accrue to individual creditors (Article 379 § 1)⁷. An obligation that involves an action (*facere*) is divisible only if the action is a homogenous one (and if it happens over a period of time or is repeated, e.g. the weekly cleaning of a staircase).

But the obligation that the construction works contract imposes on the contractor, while performed over a period of time, is not a homogenous action: it consists of a complex set of activities that are very different from each other. An attempt to divide it among creditors on this basis would create a totally unnatural situation. The contractor would owe a different kind of obligation to each creditor: one would be entitled to demand the erection of the frame, another the staircase, yet another the installation of the lighting fixtures, etc. This would be, not only impractical but also totally at odds with the very idea of divisibility, in which all persons forming one side of a contract are entirely independent creditors.

Possibility to withdraw from part of a construction works contract under Article 491 § 2 of the Civil Code: conclusion

Given all of the above, only one conclusion can be drawn: the obligation that the construction works contract imposes on the contractor is not a divisible one. It follows that the contract can only be terminated *ex tunc*, and not *ex nunc* – obviously a very unwelcome situation from the point of view of construction projects. How can this problem be solved?

⁷ The decision of the Supreme Court of 14 March 2002, IV CKN 821/00, OSG 2004, no. 8, item 103.

It appears that the best solution is the one that M. Lemkowski suggested in a commentary to a 2004 ruling of the Supreme Court⁸. Applying a functional and systemic interpretation, he pointed out, correctly, that the text of Article 491 § 2, under which only contracts where the obligation is a divisible one can be terminated *ex nunc*, allows a broader reading that would cover contracts involving portion obligations, too. Construing it this way would represent an effective compromise between economic pragmatism and the science of law.

To conclude on an optimistic note: there has been a noticeable tendency on the part of the courts of late to issue rulings that are in line with what this article has been arguing. As the Appeals Court in Krakow said in a recent ruling: "the obligation in the construction works contract is, in principle, indivisible – in the sense that its object, the structure to be built, is indivisible. However it can be divided in the sense that it can be executed, and the costs incurred in its execution can be settled, in parts which means that the investor can keep the portion of the structure that has been completed as long as the contractor receives the corresponding portion of the compensation."⁹.

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⁸ M. Lemkowski, Glosa do wyroku SN - Izba Cywilna z dnia 19 III 2004 r. IV CK 172/03, Rejent, 2016, no. 1

⁹ The decision of the Appeals Court in Krakow of 9 January 2019, I ACa 320/18, LEX no. 2740704. Cf. also the decision of the Supreme Court of 26 June 2015 r., V CSK 705/14, LEX no. 1797078.