

Author: Remigiusz Blicharski

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Abstract:

The issues involving termination of construction contracts are considered to be particularly complicated and controversial. The rules concerning termination of contract can be divided into three main groupings: 1. Grounds for termination, 2. Scope of the right to terminate, 3. Effects of termination. The article extensively covers the first two issues with regard to construction contracts in particular.

The first part of the article describes legal requirements to terminate construction contracts under Polish civil code. The grounds for termination of construction contracts were divided into four groups: 1. Termination for anticipatory breach of contract (art. 635, art. 636 of the civil code), 2. Termination for non-performance (art. 491, art. 635 of the civil code), 3. Termination for deficient performance (art. 560 of the civil code), 4. Client's right to terminate (art. 644 of the civil code).

The relationship between art. 491 § 1 and art. 635 of the civil code is highly controversial in particular (Termination for non-performance). The prevailing view in the Polish jurisprudence seems to be that art. 635 of the civil code is the ground for termination if investor terminates the contract due to debtor's non-performance. According to minority view art. 635 of the civil code may apply only in the case of anticipated non-performance. As the Supreme Court noted however, art. 635 of the civil code states that client may terminate the contract 'even before' performance has become due, and therefore a fortiori art. 635 of the civil code may apply after the due date. The author defends the prevailing view with historical, as well as comparative arguments. Due to the application of art. 635 of the civil code investor may terminate the contract for excused non-performance without setting additional period of time.

The second part of the article describes the scope of the right to terminate construction contracts. In particular the issue of divisibility of contractor's performance is considered to be highly controversial both in theory and in practice. The author rejected all four views that had been previously expressed and proposed his own solution. Until now the divisibility of performance under art. 491 § 2 was understood according to the definition as laid down in art. 379 § 2 of the civil code. The purpose of art. 379 § 2 of the civil code was to divide responsibility among multiple debtors, which is not the issue in applying art. 491 § 2 of the civil code. As a result divisibility under art. 491 § 2 of the civil code should have a broader meaning. The author comes to a conclusion that in principle contractor's performance is divisible under art. 491 § 2 of the civil code, and the scope of the right to terminate is limited.