

## Legal News: Tacit acceptance of construction works

In a judgement of 30 January 2019 (3<sup>rd</sup> Civil Chamber, 30 January 2019, no. 18-10.197), the Third Civil Chamber of the French Court of Cassation clarified the notion of tacit acceptance and rescinded the decision of the Court of Appeal of Rennes.

In the instant case, the project owner assigned structural works and earthworks for the construction of a construction project connecting two residential buildings and covered by decennial liability insurance. Due to damages, the project owner filed a claim based on decennial liability against the building contractor in charge of the structural works and earthworks.

The trial judge considered that the project owner had not declared his unequivocal intention to accept the construction work by paying the final invoice and thus considered that the conditions for a partial tacit acceptance had not been fulfilled. Consequently, the contractor could only be held responsible with regard to contractual liability.

*“that by giving this ruling, even though the completion of the entire construction is not a condition for the taking possession of a section of the construction work and its acceptance, and even though the payment for the entire work of a section of the construction work and the taking possession of it by the project owner is presumed to be tacit acceptance, the Court of Appeal violated the above-mentioned text.”*

The question concerning the final acceptance of a construction project is at the heart of construction litigation, as the date of acceptance marks the starting point for the specific warranties affecting French construction law: warranty of perfect completion (*garantie de parfait achèvement*), warranty of fittings (*garantie de bon fonctionnement*) and ten-year building guarantee (*garantie décennale*).

This judgement brings two lessons with regard to the acceptance of a construction work. Firstly, the court confirmed that the taking possession of the construction work and thus its acceptance can take place section by section. Even if article 1792-6, that the court referred to, refers to the construction work in the singular, the project owner actually has to accept the work from each contractor. Therefore, it is common for several protocols of acceptance to be established, when there are different contractors working on the same construction project.

For many years, doctrine has been opposed on this issue, as in fact parts considered that the acceptance of the different sections of a construction work is put back until the completion of the entire construction project. However, the Court of Cassation has been contradicting this position since 2010 (3<sup>rd</sup> Civil Chamber, 10 November 2010, no.10-10.828) and affirmed that the work referred to in article 1792-6 does not refer to the entire construction, but to the work performed by each contractor during the construction process.

The commented judgement is in line with this point of view and confirms that a principle of unity of dates of acceptance does not exist. Therefore, it is possible that there are many acceptances by sections for one and the same construction work. Hence, it is advisable to pay

attention to the different starting points of guaranties, which may become as numerous as the acceptances of sections.

The second lesson of the judgement concerns the conditions for tacit acceptance. According to the Court of Cassation, the taking possession of the construction work and the payment of the entire works are presumed to be tacit acceptance. As it is question of a presumption, the party contesting the said tacit acceptance has to prove its contrary. By this judgement, any reference to an unequivocal intention is abandoned and the observation of (i) the taking possession and (ii) the payment of the price of the section suffice to establish the presumption.

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