

2009

Minor Defects in Construction Projects: A Comparative Approach

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Construction Law Journal

INCORPORATING TECHNOLOGY AND CONSTRUCTION LAW REPORTS

2009

Vol. 25 No. 5

Editorial

Articles

- Protection Against Contractor Insolvency by Bonds
Jane Jenkins and Pauline Page
- Minor Defects in Construction Projects: A Comparative Approach
Eric Franco Regjo
- Weather Warning: Adjudication Hot-House Meets Depression. Precipitation Expected
Alexander Hickey

Construction Act Review

- Severability of Adjudicators' Decisions: Revisited

Cases

- SWI Ltd v P&I Data Services Ltd
- Woolley v Haden Building Services Ltd

Technology and Construction Law Reports

- Siemens Building Technologies FE Ltd v Supershield Ltd

Minor Defects in Construction Projects: A Comparative Approach

By Eric Franco Regjo*

^{LT} Acceptance; Comparative law; Construction contracts; Construction industry; Defects; Hong Kong; Peru; Practical completion; Spain; Substantial performance

Introduction

The final part of a project is not as publicised and celebrated as the beginning. It is very difficult to end a project well. The employer will usually pay attention to minor defects¹ (if there are no serious ones) and they will leave the employer and the contractor at least with a bitter taste.

In this article, I am going to discuss from a comparative standpoint what the rights and obligations of the parties are in case there are minor defects before acceptance of the works. Can the employer terminate the contract or reject the works? Is the employer released from the obligation to pay the price or any amount due? Can employers require contractors to make good the defects or make them good himself or through a third party and make contractors liable for the costs? Can the employer reduce the price? Can the employer only claim damages? Does the contractor have the right to get the works accepted by the employer in any case?

The applicable law and the agreement between the parties determine the remedies available, but depending on the circumstances it could be unreasonable or excessively harsh for the contractor to apply some remedies. In some cases there are trivial minor defects that can be acceptable, but in other cases an apparently trivial defect may be important for the employer. There are also cases where the defect is minor at the moment of completion, but it can develop into a serious defect after some time.

Is there a defect?

The starting point is determining whether in fact there is a defect, or not. Remember, for example, the case of the Millennium Bridge in London. It was

* This article is based on part of the dissertation submitted by the author in part fulfilment of an MSc Degree in Construction Law & Dispute Resolution, King's College London.

¹ For the purposes of this article, it should be understood that "defects" include "omissions".

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a high profile project to celebrate the Millennium and consisted of a 325 metre steel bridge linking the City of London at St Paul's Cathedral with the Tate Modern Gallery at Bankside. The project was developed by top architects and engineers and was highly publicised.

The bridge opened to the public on June 10, 2000 when an estimated 80,000 to 100,000 people crossed it. The bridge, as all structures, had a degree of movement when people walked on it. However, due to the large amount of people who were crossing it on the days following its inauguration, the movement was greater than expected. The movement was caused by a "positive feedback" phenomenon, known as Synchronous Lateral Excitation. There was a negative reaction from the public and the press and the bridge was closed two days after its inauguration to investigate and resolve the problem.

The details of the discussion (or dispute) between the authorities and the contractors are unknown, but somebody assumed the high cost of reducing the allegedly excessive wobbling.²

It is not clear whether or not the wobbling was in fact a defect. Did the specification say something about the tolerable wobbling of the bridge? Was the amount of people required to produce the effect under or over the amount estimated? Was there a degree of negligence by the contractor, the architects or the engineers? Was this a serious or a minor defect?

We do not know the answers to these questions, but this case illustrates that sometimes it is not easy to determine whether or not the works are defective. The discussion about what constitutes a defect exceeds the limits of this article, but it is important to mention the close relationship between determining what are the remedies available when there are minor defects and deciding whether there is a defect at all.

Minor defects

As mentioned before, completion and acceptance of construction works are areas where parties are likely to enter into conflict. At that moment the success of the project is tested. There can be different degrees of non-performance by the contractor, including:

- substantial non-performance to a degree that the works are not useful for their intended purpose;
- serious defects that affect the achievement of the intended purpose of the works; and
- minor defects that do not prevent the works from achieving their intended purpose and the works can still be considered substantially completed.

When a person invests in a construction project, quality is a main concern, not just time and cost. It can be a project to refurbish a house, build a hotel, bridge, road, refinery or power plant. In any project the employer will have to pay close attention to the diligent use of funds and will want to get good value for money.

² For more details about the Millennium Bridge project see <http://www.arup.com/arup/newsitem.cfm?pageid=797> [Accessed May 6, 2009].

Imagine for example a case where cracks are found on the slab of the main entrance of a hotel or the headquarters of a large corporation. How big should the cracks be in order to be considered a defect, either minor or serious? What should be the remedy available? Should the contractor make good the defect by relaying the concrete or just pay damages? Can the employer instruct another contractor to relay the concrete? Can the employer terminate the contract or avoid paying all or part of the price? What would be the reasonable remedy?

Imagine a case where the air conditioning, or the heating system of a hotel or an office block is not able to maintain a comfortable temperature. Or cases where the lifts of a building are too slow and make people wait for a long time.

Moreover, if the available remedy is the payment of damages to the employer, how should they be assessed? The discussion about the different criteria for assessing the damages payable to the employer exceeds the limits of this article, but it is an important related aspect, especially after the *Ruxley Electronics & Construction Ltd v Forsyth*³ case introduced the concept of loss of amenity as a measure for damages suffered by the employer.

Attitudes towards minor defects

The employer can adopt an over-zealous approach towards imperfections in the works mainly because (a) the importance of the project for commercial or budget reasons, or (b) the employer wants to delay payment or is not interested in the project any more.

In contrast, most of the time all the parties will be in a rush to finish the project. At the final stage of the project everyone wants completion to take place as soon as possible. The employer wants to take over its new refinery or building to be able to benefit from its commercial revenues. On the other hand, the contractor wants to finish the job, recover its retention money, get paid, cut off its liability for delay, be released from the burden of project insurances and focus on new projects. Moreover, there are also usually a number of contractors waiting in line to start their job after completion (or substantial completion) is reached.

These competing interests have been reflected in many cases. A good recent illustration of this can be found in *Skanska Construction (Regions) Ltd v Anglo Amsterdam Corp Ltd*,⁴ where the employer took over the works and started operating a hotel even when the air conditioning was not finished.

Completion, substantial completion, handover and acceptance

The concepts used in most international construction contracts in relation to the last stage of construction projects might be confusing. There are two basic concepts to bear in mind regarding the final part of a construction project. One is "acceptance" of the works and the other one is "handover". By "accepting" the works the employer releases the contractor from its obligation to perform. Acceptance can be express or implied, total or partial, provisional or final. On the other hand, the transfer of the possession of the works, "handover", is usually

³ *Ruxley Electronics & Construction Ltd v Forsyth* [1996] A.C. 344; (1995) 11 Const. L.J. 381.

⁴ *Skanska Construction (Regions) Ltd v Anglo Amsterdam Corp Ltd* 84 Con. L.R. 100.

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linked to a number of legal and contractual changes in the rights and obligations of the parties, but does not release the contractor from its obligation to perform. Handover can be total or partial, but not provisional.

In international construction contracts, substantial completion is a concept that is closer to the concept of acceptance than to the concept of handover. It is related with the release of the contractor's performance obligations and with the right of the contractor to claim any amounts due or at least part of them. According to English common law, substantial completion has the same effect as acceptance. Nevertheless, most construction contracts distinguish both concepts and only allow acceptance to take place after the defects liability period and the remedy of any defects found at the moment of provisional acceptance and during the defects liability period.

Completion, substantial completion,⁵ handover and acceptance of the works are not valuable moments per se. They are valuable in defining stages in the process that lead to the discharge of the parties' obligations by performance. They mark a breaking point in the contractual relationship between the parties. It is these consequences which the parties are usually trying to cause or prevent. This is the reason why the discussion of this topic is important. The usual contractual and legal effects are that:

- all or part of the retention money becomes due for release;
- a milestone payment becomes due;
- liability for damage passes to the employer;
- the burden to identify and prove deficiencies in the works for the purposes of recovery of damages by way of breaches of contract is placed on the employer;
- any obligation on the contractor's part to pay liquidated damages for delay ceases, as also does the contractor's entitlement to claim loss and expense;
- contractor's insurance obligations under the contract cease;
- the defects liability period commences;
- the limitation period starts running;
- this marks the time when the contract administrator ceases to have power to vary the works;
- on projects where there have been delays, the date on which practical completion is certified usually serves to crystallise contractual disputes.

Remedies for dissatisfaction upon completion

Contracts can be discharged in various ways such as agreement, performance, operation of law, frustration, breach, illegality and limitation. Naturally, the most common of these is discharge by performance.

⁵ For the purposes of this article it should be understood that there is no difference between "substantial performance", "substantial completion" and "practical completion".

As the editor of the *Hudson's Building and Engineering Contracts* (Ian Duncan Wallace Q.C.) states,⁶ many of the legal problems related to performance are only rarely the subject of detailed express provisions even in formal written contracts.⁷ The opposite is true in contracts for the construction of large projects where the owner tends to be sophisticated and there are a number of quality assurance mechanisms, such as the contractor's obligation to comply with industry standards, to implement a quality assurance system, to conduct tests and submit progress reports.

Under English law, construction contracts are subject to an implied obligation to "carry out and complete the works in accordance to the contract".⁸ One of the consequences of this implied obligation is that the owner must accept the works. It is required to have a defining moment to verify the fulfilment of the contractor's contractual obligations, and that moment is generally substantial completion of the works.

In construction projects, it is unreasonable to search for perfection. As H.H. Judge Newey Q.C. said in *Emson Eastern (In Receivership) v EME Development*⁹:

"(. . .) building construction is not like the manufacture of goods in a factory (. . .) [it is] virtually impossible to achieve the same degree of perfection as can a manufacturer. It must be a rare new building in which every screw and every brush of paint is absolutely correct (. . .) Because a building can seldom if ever be built precisely as required by drawings and specification (. . .)"

English courts evolved the doctrine of substantial performance to deal with cases where there are defects that do not prevent the works from achieving their intended purpose and prevent an owner unwilling to pay the whole or part of the price arguing that there are minor defects.

This doctrine was developed for two purposes. First, to know whether a party has completed its major obligation to complete the work (despite the existence of minor defects) and secondly to allow the other party to obtain payment when there are still minor defects.

The doctrine of substantial performance has been widely discussed and its application to specific cases still raises many challenging issues. Nevertheless, it is widely accepted that the law says only where mutual covenants go to the whole of the consideration on both sides, will they be considered mutual conditions, but where they go only to a part, the breach shall be paid in damages.¹⁰ Thus, minor defects will not prevent substantial completion from taking place as long as the contractor has not committed a repudiatory breach and the works can still serve their intended purpose.

⁶ *Hudson's Building and Engineering Contracts*, edited by Ian Duncan Wallace, 11th edn (Sweet & Maxwell, 2003).

⁷ *Hudson's Building and Engineering Contracts*, (2003), para.4-001.

⁸ This obligation has been widely developed by case law. For example see *Hudson's Building and Engineering Contracts*, (2003), para.4-003-4-004. The editor Ian Duncan Wallace lists six consequences derived from the implied obligation to "carry out and complete the works in accordance with the contract".

⁹ *Emson Eastern (In Receivership) v EME Development* 55 B.L.R. 114; 26 Con. L.R. 57 at 63-64.

¹⁰ *Boone v Eyre* (1779) 2 Wm. Bl. 1312.

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The use of standard forms of contract is widespread and thus many of the authorities related to the doctrine of substantial performance arose from cases where this type of contract and the concept of "practical completion" were used. Nevertheless, the authorities dealing with the existence and content of the doctrine of substantial performance can be considered of general application.¹¹

Moreover, the recent Hong Kong Court of Final Appeal case *Mariner International Hotels Ltd v Atlas Ltd*¹² is likely to become an authority that provides a definition of "practical completion" in common law jurisdictions.

The case arose out of a contract for the sale of the shares of a company whose main asset was a hotel which was being constructed. Completion of the purchase was "conditional upon" the vendor (i) procuring the practical completion of the hotel by June 30, 1998 and (ii) proving good title to the property. The dispute was about whether or not the two conditions had been achieved. Each side accused the other of having repudiated the sale agreement.

In that case, Mr Justice Bokhary P.J. provided an authority about what the expression "practical completion" is understood to mean in building contracts in general. He backed the purchaser's arguments and said in [13] that:

"(. . .) [I]n building contracts, 'practical completion' is a legal term of art well understood to mean a state of affairs in which the works have been completed free from any patent defects other than ones to be ignored as trifling."

To arrive at this conclusion, Mr Justice Bokhary P.J. considered most of the usual relevant cases quoted in this respect. This case is of particular importance because it provides a general definition of "practical completion" and is not linked to any particular form of contract, providing a general statement about the law.

Thus, under English law, the owner could not terminate the contract, or reject the works, after practical completion; the owner could only deduct from the price the amount that corresponds to the defects and pay the price, or pay the price and claim for any damages.

Despite the extended use of the doctrine of substantial performance in common law jurisdictions and internationally, it should be borne in mind that there are some jurisdictions where it could find some resistance. For example, the case of Peruvian law will now be analysed.

Minor defects: Peruvian law

The Peruvian Civil Code has a special section dealing with construction contracts (*contrato de obra*), which is enshrined in the general contract law.

Articles 1771, 1774.1, 1148 and 1362 of the Peruvian Civil Code contain the core obligation of contractors to complete the works. Articles 1771 and 1774.1

¹¹ For a more complete description of the case law on this matter see for example *Keating on Construction Contracts*, edited by S. Furst and V. Ramsey, 8th edn (Sweet & Maxwell, 2006) or *Hudson's Building and Engineering Contracts*, 2003.

¹² *Mariner International Hotels Ltd v Atlas Ltd* [2007] 1 HKLRD 413 (CFA (HK)).

deal with the main obligation of the contractor under the construction contract; while art.1148 contains the general contract law rule in this regard. Moreover, art.1362 provides that contractual obligations shall be performed in good faith and according to the mutual intention of the parties.

Handover and acceptance

There is little regulation about acceptance of construction works in the Peruvian Civil Code. This lack of regulation is common in many civil law countries, as is the case in Spain for example.

The commentaries that can be found about this aspect of Peruvian law are very general and usually will not be much guidance. The case law is not organised, it is difficult to find and the decisions of the tribunals are hardly used to argue a case in Peru anyway, even in court proceedings.

The customs of the trade are a source of Peruvian commercial law. There is an ongoing debate regarding the interaction between the Civil Code and the customs of the trade in case of contradiction, but for the purposes of this article it is relevant to mention the customs of the trade are a source of law to consider.

In addition to the sources of law listed before, other relevant sources of law are the general principles of law and the opinions of foreign commentators and foreign case law as an aid to construct the law in a reasonable manner.¹³

The terms commonly used in Peru in relation to the last stage of construction projects might be confusing and, at times, imprecise. The confusion of terms is caused by the inaccurate use of the terms "reception" (*recepción*) and "acceptance".

The Peruvian Civil Code makes reference to the term "reception" (arts 1778, 1782 and 1783) and "acceptance" (arts 1778, 1779, 1780, 1781 and 1784). It does not define or provide a clear concept of what should be understood by each term; but a systematic interpretation of the articles mentioned would lead one to consider that the Civil Code distinguishes between "reception" and "acceptance", the former referring to "handover" and the latter used in its natural sense. This can be seen for example in art.1778, where it says that the employer has the right to verify the works before their "reception" takes place. If the employer fails to do it without a justified reason or does not communicate the result of the verification to the contractor, then the works are deemed accepted.

Nevertheless, it is common to find the term "reception" also being used in the sense of "acceptance" in construction contracts and commentaries of the law. Moreover, the Public Procurement Law and its regulations¹⁴ refer to "reception" in the sense of "acceptance". It is also common to use the term "provisional

¹³ According to Peruvian law, comments on the law by commentators (called "*doctrina*") is a source of law, even if it is produced by foreign commentators or relates to foreign law as long as they provide some relevant guidance to construe the law. The general principles of law are also a source of law and it is accepted to use foreign law and commentators to explain the content of those principles.

¹⁴ Ley de Contrataciones del Estado (D.L. N° 1017) and Reglamento de la Ley de Contrataciones del Estado (D.S. N° 184-2008-EF).

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reception" (*recepción provisional*), which would make no sense unless it is used as meaning "provisional acceptance".

In other jurisdictions, such as in Spain, the terms used are "delivery" (*entrega*) and "reception". The term "reception" is used in the sense of "acceptance".¹⁵ The Spanish Civil Code contains little regulation regarding acceptance of construction works (arts 1592 and 1598); but it allows interpreting that reception (acceptance) of the works can take place before, simultaneously or after the delivery (handover) of the works. Nevertheless, the Construction Act 1999 (*Ley de Ordenación de la Edificación*)¹⁶ contains a definition of "reception" (art.6) that merges both traditionally distinguished concepts. This also contributes to the confusion between the two main concepts we are discussing.

The ambiguity of the terms should be born in mind when dealing with construction projects in civil law countries. The real meaning and legal implications of these concepts would depend more on the way they are used than on their intrinsic meaning.

Acceptance

The Peruvian Civil Code distinguishes between two types of "acceptance". One is the "acceptance" required for any type of works and the other is the one required when the employer has specifically required that the works shall be executed "to his satisfaction" (art.1780).

It is common to find a clause in construction contracts saying that the works shall be done "to the satisfaction" of the employer. This provision certainly seems to protect the employer and to give him more leverage to oblige the contractor to comply with the technical specifications and any other apparently subjective criteria. It would give the impression that the employer could impose any requirements according to the employer's will.

Nevertheless, it is not clear whether or not there is any difference at all between these two types of acceptance, because in both cases the works should not be rejected without justified reasons and without observing the principle of good faith (*arbitrum boni viri*).

Moreover, in case the employer considers that the works have not been executed "to his satisfaction", the only consequence would be that an expert would be asked to decide whether or not the works are ready for acceptance. In those cases, the third party would be allowed to decide based on equity principles, but in my opinion the third party shall decide based on objective criteria and the contract specifications even then. The Spanish Civil Code contains a similar provision and the Spanish case law considers that acceptance shall always be subject to objective criteria.¹⁷ Thus, there would be no substantial difference between the regular acceptance and the one required when the works are required to be executed "to the satisfaction" of the employer.

¹⁵ See for example the rulings of the Spanish Supreme Tribunal dated July 16, 1996, February 5, 1985 and October 14, 1968.

¹⁶ Ley de Ordenación de la Edificación, Law 38/1999, November 5, 1999.

¹⁷ T. San Segundo, *La recepción en el contrato de obra* (Madrid: CISS, 2001), pp.135-169.

Defects before acceptance

This article focuses on the defects that the employer may discover before acceptance and how they can affect the acceptance process. For this purpose I shall start by mentioning art.1782 of the Peruvian Civil Code, which mentions that the contractor is liable for any defects. It also mentions that if the employer "receives" the works without complaints the contractor is released of liability for any patent defects.

Article 1782 contributes to the confusion of the terms mentioned above; it releases the contractor of its obligation to perform (in relation to patent defects). As I mentioned above, "reception" without complaints from the employer is an event that causes deemed acceptance (art.1779), thus art.1782 would be clearer if it had mentioned that if acceptance of the works, either deemed or otherwise, takes place without complaints from the employer then the contractor is released of liability for any patent defects.

Remedies available in case of defects

The only article in the part of the Civil Code that deals with construction contracts that mentions the remedies available in case of defects is art.1783. It mentions that employers can choose to request the contractor to make good any defects at the contractor's own cost or to reduce the price in proportion to the harm that the defects cause him. It adds that if the defects make the works useless for their intended purpose then the employer is entitled to terminate the contract and claim damages. Finally, it mentions that the employer shall inform the contractor of the defects no later than 60 days after the "reception" of the works.

To which type of defect is art.1783 making reference? Is it making reference to defects found before or after acceptance? Is it making reference to patent defects, hidden defects or defects that the employer found before acceptance and that are included in a punch list? As referred to earlier, art.1782 mentions that when the employer "receives" the works without complaints the contractor is released of liability for any patent defects. Thus, art.1783 is not making reference to patent defects.

On the other hand, it does not seem to be making reference to defects that were identified by the employer at the moment of "reception" of the works because the article is making reference to defects that are notified after reception.

Thus, it seems that it is making reference to hidden defects that were not identified at the moment of handover.

The remedies listed in art.1783 are reasonable and according to the remedies generally available in case of defects in England and many other jurisdictions. They are also in line with the remedies available under most international standard contracts. Nevertheless, neither art.1783 nor any other articles of the Civil Code mention how defects (minor or material) affect the acceptance of the works.

In this context, we could ask whether the employer could refuse to take over or accept the works in case he finds minor or material defects. This is an area that is not covered by the specific articles of the Peruvian Civil Code dealing with

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¹⁹ J. León
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construction contracts. Thus, it seems that the Peruvian Civil Code implicitly gives the employer the right to reject the works. It does not matter whether or not the employer takes over the works, he would still have the right to reject the works if there are any defects. From a first impression, it would seem that the concept of acceptance is very harsh for contractors.

The lack of regulation in the specific part of the Civil Code shall direct our attention to the general law dealing with the remedies available in case of partial, late or defective performance of contractual obligations. Article 1151 contains those general contract law remedies and if we apply it to construction contracts, it would say that in case of partial, late or defective performance, the employer can choose between the following remedies:

- Require the specific performance of the contract, unless it requires the use of violence against the contractor.
- Carry out the works by others and make the contractor liable to pay the costs.
- If what has been done negatively affects the owner, request the destruction of what has been done or demolish it and the contractor shall pay the costs.
- Consider that the obligation has not been performed if it is no use to the owner.
- Accept the works done, but request a reduction in the price.

The plain wording of art.1151 may lead one to think that the owner is free to choose any of the listed remedies. Nevertheless, a reasonable understanding of the article shows that the owner is not so free.

There are a number of requirements mentioned by commentators that provide some useful guidance to construe this article. In the first place, it should be borne in mind that the first four options are not directly available to the owner. The owner should request judicial authorisation before using these remedies.¹⁸

In the second place, some Peruvian commentators have mentioned that the employer would only be entitled to demolish the works or terminate the contract if the breach is fundamental and the works cannot serve their intended purpose, making the application of this remedy subject to a reasonableness test.¹⁹

It seems that the last option is the most sensible and would be the easiest to apply.

On the other hand, the application of art.1151 should be done in harmony with the principle of good faith. This principle shall inspire a reasonable interpretation of the law and a reasonable use of the remedies available. This principle shall lead one to conclude that the remedies available to the employer must be proportional to the defects found in the works.

¹⁸ F. Osterling and M. Castillo, "Comments to articles 1150 and 1151 of the Peruvian Civil Code" in *El Código Civil Comentado*, 2nd edn (Lima: Gaceta Jurídica, 2007), Vol.VI, pp.129-134.

¹⁹ J. León Barandiarán, *Comentarios al Código Civil peruano, Obligaciones* (Buenos Aires: Ediar, 1954), Vol.II, pp.51-52.

In the context of public procurement, art.40.c of the Peruvian Public Procurement Law and art.168.1 of its regulations allow the public entity acting as the employer to terminate a public works contract in case of any breach by the contractor. Thus, in principle, the public employer could terminate the contract despite the materiality of the breach and not taking into consideration any proportionality criterion. Nevertheless, the discussion about the public procurement of construction works exceeds the purposes of this article and I reserve my comments for another opportunity.

In addition, it could be argued that, according to the customs of the construction industry, minor defects shall not prevent provisional acceptance from taking place, the beginning of the warranty period and the other usual consequences listed above.

As can be seen, art.1151 literally says that the employer can choose any of the options available, making it difficult to argue the contrary, even when it would be reasonable to do so. Nevertheless, the plain application of art.1151 in the case of minor defects would not be acceptable according to the principle of good faith, the customs of the construction industry, the criteria indicated in art.1783 and the law of other relevant civil law jurisdictions, such as I will explain below.

Minor defects: Spanish law

In Spanish law, in case the contractor incurs a fundamental breach, the employer would be allowed to avoid paying the contractor for the work done according to the doctrine of the "contract not duly performed" (*exceptio non rite adimpleti contractus*).

Nevertheless, the mentioned doctrine would only be applicable if the defects are substantial in relation to the intended purpose of the works, making them unsuitable to satisfy the interests of the employer. This is the law according to the case law, as can be seen for example from the rulings of the Spanish Supreme Tribunal of October 22, 1997 and June 12, 1998.

According to those rulings, if the defects found in the works are not substantial enough to be considered a repudiatory breach, or if they are too difficult to be made good, thus making it impossible to achieve the intended purpose of the works, only then could the owner avoid paying the price of the works. This position is based mainly on the principle of good faith. This principle would not allow the owner to terminate the contract if the defects are not substantial.

The remedy available to the owner when non-substantial defects are found would be to deduct a proportional part of the price. In those cases it would be up to the courts to decide the amount of the deduction in case of a dispute. Moreover, the employer always has the right to claim any further damages that the defects may cause him.

International construction contracts and Peruvian law

As has been explained, it would be unreasonable to consider that the employer has the right to choose between any of the remedies listed in art.1151 of the Peruvian Civil Code in case the works have minor defects before acceptance. This restriction would be based on the principle of good faith, the customs of the

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construction industry, the criteria indicated in art.1783 and the criteria generally used in common law and Spanish law when dealing with minor defects in construction projects. Moreover, this is an issue that would benefit from the development of the *lex mercatoria* in the context of international construction contracts.

A reasonable construction of the acceptance of construction works under Peruvian law should lead one to consider that the employer not only has the right to accept or reject the works, but also the obligation to accept the works when they are substantially completed and free from any material defects, without prejudice of the remedies that are reasonably available in those cases. In case there is a delay in the acceptance of the works without a proper justification, the contractor should be released from some of the obligations that depend on acceptance by the employer (liability for delay, insurance, beginning of the defects liability period, and so on).

The success of any argument in this sense would depend on the opinion of the judge or arbitrator deciding the case. It would be up to the judge or arbitrator to assess the proper application of the remedies available to the employer. Nevertheless, the literal interpretation of the remedies available under Peruvian law in case of defective performance, even due to minor defects, show that the owner would also have arguments to reject the works if the owner so wishes. This shows that the doctrine of practical completion is not always readily applicable in some jurisdictions, such as under Peruvian law, which seems odd from a reasonable point of view.

The confusing regulation of Peruvian law would lead one to consider it advisable to take special care when drafting international construction contracts where the contract is ruled by Peruvian law and include proper provisions regarding acceptance of the works.

The use of an international standard form of construction contract would likely deal with the issue successfully as well. For example, the International Federation of Consulting Engineers' (FIDIC) *Red Book* allows for some tolerance towards minor defects at the moment of taking over. Their presence would not prevent the owner from taking over the works as long as they do not affect the intended purpose of the works. This tolerance is only present at this moment. After the defects notification period, any minor defects that remain would basically allow the employer to deduct part of the price or make good the defect and make the contractor liable for the cost and, of course, allow the owner to claim any damages effectively incurred. Nevertheless, the owner would not be allowed to reject the works arguing they have minor defects.

In this example, despite the fact that FIDIC's *Red Book* provides no guidance to what should be understood as "substantial" or "substantially affect". The provisions of the contract are well structured and leave little room for doubt about the tolerance of defects at the end of the works and the remedies available in those cases.

Conclusion

In conclusion, the findings of this article can be summarised as follows:

1. It is inevitable to find minor defects in construction works. They are part of the normal development of the construction process.

2. Minor defects have different degrees of implication at the moment of completion, depending on the applicable law and the parties' agreement.
3. As an international general rule, it seems to be true to say that if there are minor defects that do not prevent the works from achieving their intended purpose then the owner would not be able to reject the works and would be liable to pay the agreed price, minus a deduction for the amount that corresponds to the defects and claim for any further damages effectively suffered.
4. The general rule stated in point 3 above is true in most common law jurisdictions, in some civil law ones and also when a contractual relationship is regulated by most international standard forms of construction contracts.
5. It seems that in some jurisdictions, such as under Peruvian law, there is space to argue that the remedies available in case of minor defects before acceptance allow the employer to choose between the right to reject the works and terminate the contract, make good the defects or dismantle the works done and make the contractor liable for the cost, or accept the works and deduct part of the price.
6. It is important to carefully study the law applicable to international construction contracts, as there may be some odd consequences that the parties are not expecting. In the case of a contract ruled by Peruvian law for example, it would be advisable to agree on the relevant aspects related to acceptance. This is especially true in relation to the remedies available in case of defects.
7. Most international standard forms of construction contracts would likely provide a good alternative to regulate the issues related to acceptance, regardless of the applicable law. The applicable law could be Peruvian law, English law or Spanish law and the remedies available in case of minor defects would not be substantially different.
8. This is an issue that would benefit from the development of the *lex mercatoria* in the context of international construction contracts.

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