

## Tolerable irregularity

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### **Abstract**

What does a "tolerable irregularity" mean?

The freedom from defects required by the contract, whereby such irregularities are within the scope of the contract and thus do not trigger defect rights.

When is a defect acceptable, and when must it be accepted?

The freedom of disposal of purchasers according to § 634 of the German Civil Code (BGB) to have just-built objects dismantled and re-manufactured if necessary because of flaws, which are also defects, diametrically contradicts article 20 a of the Basic Law, the 'green deal' recognised by Germany, the European legislation on recycling management and the national recycling law.

Due to the changed legal assessment in the case law [in particular, due to the BGH (Federal Court of Justice) ruling of 22 February 2018, VII ZR (civil law) 46/17], and as a reaction to the discussions held in the meantime and the resulting findings on these topics, the previous approach was reworked. In § 633 of the BGB, the civil law initially only makes a distinction on the basis of defect-free and flawed performance. According to legal claims, and pursuant to § 634 of the BGB, it may also be possible for purchasers to have construction work which is suitable for use but which does not (completely) comply with the contractual agreements and is therefore flawed, destroyed and rebuilt if the completely defect-free performance can only be achieved in this way. Although the law provides for an intermediate stage of accepting a flawed performance in exchange for a reduction of the works compensation, in practice this is treated restrictively. The case law usually interprets the legal regulations in favour of individual purchasers. This is understandable from this particular point of view, as reductions according to previous calculation methods often only translate to unacceptable amounts of money in relation to the total works compensation. However, this often leads to the unnecessary repetition of construction work.

Therefore, a comprehensive reconsideration is required to rebalance the handling of defects on the basis of legal necessity. On the one hand, this must not lead to an unreasonable restriction of purchaser interests. On the other hand, construction work must not have to be repeated to the detriment of the environment and the community of consumers through unnecessary consumption of resources, CO2 emissions, violation of the requirement to avoid waste as far as possible and unnecessary economic losses.

According to the law, at the time of acceptance, defect-free performance is owed, and existing, valid defects should be rectified. However, what does 'rectify' mean?

According to § 631 of the BGB in conjunction with § 633 of the BGB, a defect exists if the agreed-upon quality is not achieved, or if the suitability for use required by the contract, the usual suitability for use, a customary quality for the same type of work or the purchaser's expectation on the basis of the type of work has not been achieved.

Agreements on quality are made by including textual descriptions in contracts, and by means of documents referred to in contracts, such as plans, service specifications, descriptions in brochures etc. This raises the question of whether all of this can and should correspond to the real will of the parties, or whether corrections are necessary taking into account § 133 of the BGB and § 157 of the BGB. It will certainly be necessary to distinguish whether something has been precisely described and expressly agreed on a case-by-case basis from what is used several times in standard texts.

However, the essential part of the contract will be the function, the suitability for use and the usual quality for the same type of work. These characteristics are a central part of this research work, which describes common trade-related characteristics.

These criteria are an important building block in deciding whether defects exist according to the legal regulations of § 633 of the BGB, and how significant they are in each case. It is not so much a matter of 'arranging' deviations that are more than a 'tolerable irregularity' and which thus constitute a defect according to contractual requirements, into a defect-free work. That would indeed be somewhat more convenient, because one would no longer have to worry about how to deal with defects.

It is more about the question of how defects should be dealt with. These can exist in small things as well. Defects, whether insignificant or serious, do not necessarily lead to the comprehensive rectification obligation through demolition, disposal and new construction with resource consumption, environmental impact, economic consequences and time, as well as burdens on and in buildings during the measures.

Substitutions, earlier maintenance or compensation for damages on the basis of risk analyses are alternatives that have not been sufficiently considered so far. In the case of small things, in the case of technical or legal impossibilities or in the case of improvements in value which cannot be expected through backfilling, reductions on the basis of reduced values can be considered. These solution approaches, if chosen correctly, do not impair objective purchaser interests, they spare the burdens on the community and the environment. Then they are even to be understood as prescribed by law.

If alternatives attain the same value of the purchased performance, they do not trigger any reductions, because the existing work has the same value as the purchased work. Although it may disappoint the purchaser, the law stipulates that contracts make work performances equivalent to the works compensation, and that equivalence does not trigger a reduction when contractual standards are taken into account.

In the case of defects, a distinction should be made as to whether solution approaches can be found through the creation of variants, and thus with measures that can preserve executed construction work. If the suitability for use is ensured by substitutions in the same way as in the case of execution in accordance with contractual agreements, the way is opened up to avoid unnecessary construction work and the associated unnecessary consumption of resources, unnecessary increases in piles of rubbish and unnecessary CO<sub>2</sub> emissions, while accommodating the legitimate interests of purchasers. If it is to be expected that the suitability for use would be secured but not unrestricted, e.g. the expected useful life would be shortened, risk considerations open up the alternative possibility of determining a damage in the amount of

the risk associated with, for example, repairs that are to be brought forward in time, and taking the proportion of suitability for use into account as a value.

In these considerations, an essential aspect is the determination of the customariness for the same type of works. These customary natures are explained comprehensively with regard to the trade in the second part of the research report. This is not about justifying shoddy construction, but about solving problems with smaller deviations that can satisfy all participants. Nothing is less sustainable than destroying what has just been made and replacing it with similar components. The result of the research should serve to avoid unnecessary repetition of construction work and the associated burden on the environment in order to protect the natural bases of life, to protect both the economy and thus the conservation of the interests of community consumers, and also to counteract legal disputes in advance. For this purpose, border areas are defined, which are to be classified within the framework of the usual quality. By continuing an open discussion in the technical and legal fields, uniform standards and procedures should emerge, not only to cope appropriately with disputes over minor matters, but also, in particular, to ensure that the environment is not burdened unnecessarily.