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## LIABILITY IN CONSTRUCTION CONTRACTING REGULATED BY THE LEGISLATION IN FORCE BY

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**Abstract.** Construction contracting is the most common type of enterprise. It presents a great practical importance, because according to this contract, works of great value, importance and complexity are carried out, such as construction of buildings with different destinations, and repair, strengthening to construction and related facilities and more.

Entry into force of the new Civil Code in October 2011, as well as the amendment of regulations governing construction, namely Law no. 10/1995 regarding construction quality, respectively, Law no. 50/1991 on authorizing construction works, require an analysis of the liability that comes from construction contracting, in the case of appropriate non-performance or non-construction work performed by contractors under contracting contracts.

**Key words:** liability; contractors; vices; constructions; law.

### 1. Introduction

The concept of contracting is general, so under this contract are executed construction, plumbing, services. The rules concerning to contractors apply, in the absence of specific regulations or alongside them, to works such as intellectual (professional advice, etc.).

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The essence of the contracting contract is that, regardless of work performed by its contractor, is bound by the client (customer) to perform certain work and to hand over its outcome, performing work on his own risk.

Construction contracting has a widespread practice. Based on this contract works are of great value, complexity and importance, as construction of buildings with different destinations (headquarters of banks, foundations, state public institutions, commercial complexes, business centers, hotels, etc.), but also repair, strengthening to construction and related facilities, etc.

If such services are provided to the population, the quality of entrepreneur (contractor) can be both a legal entity (company profile), and an individual.

## 2. Construction Contracting Liability

The execution of construction, installation works as well as their cancellation can be done only under a permit issued by the authorities mentioned in the Law no. 50/1991, namely the mayors, that the mayor of Bucharest, presidents of County Councils.

Related to this issue, the new Civil Code provides in art. 1874 that "by the contract for construction works, the contractor undertakes to perform works that, according to the law, require the issuance of the construction authorization". However, the obligation to obtain all authorizations required by law for carrying out the work is customer's responsibility

Law nr.10/1995 regarding quality construction provides special rules relating to contractor's liability as follows:

a) The contractor is responsible for all hidden defects of construction, arising within 10 years after receiving the work.

b) The contractor is responsible for defects in the structure of resistance, failure to comply with standards of design and execution in force at the time of its completion, ***for the entire duration of construction***.

Establishing an extended warranty for a construction is motivated by the fact that on the hidden part of the building can not be observed in the short term and, on the other hand, in most cases the client is not a specialist to be able to realize the construction defects.

c) In relation to enterprise, apparent defects of construction can not be brought after the taking over (delivery and reception) of the work unless a guarantee is established by law or by contract.

d) Are not allowed in the contract clauses limiting or removing liability of the contractor, but are admitted clauses of worsening it.

e) Liability for construction defects is both contractor's and designer's responsibility. Designer's liability will be involved only if construction will prove that the construction defects come from a defect in the designer's plan and the contractor will be responsible for the execution faults.

Usually, for the performance of a building, the beneficiary (client) concludes the contract with one contractor. If not otherwise agreed by contract, the contractor may entrust the execution of works such as heating, telephone, natural gas, etc., of some specialists on the basis of subcontracts. In this respect, art. 1852, par. (1), of the new Civil Code provides that the contractor may subcontract to one or more subcontractors the execution of parts or elements of the work or services, unless the works contract was completed in consideration of person (in personal names). To the beneficiary of the work, the contractor is responsible for the deed of the subcontractor as if it was his own deed.

If subcontractor fails to perform or improperly performs its obligation under the contract, the contractor is held liable to the client for any damage caused, but will take recourse action against subcontractors guilty.

If subcontractors are employed directly by the client, they respond only to the client for the works performed by them or by others who attended to the contracted works. However, when subcontractors' contract works only with the contractor, the client can not have any contractual action against them.

### **3. Disclaimer**

In order to make the contractor responsible, the client will have to prove the existence of a defect.

If the contractor can prove that the defects result from deficiencies of expertise or project achieved by the architect or the engineer selected by the beneficiary, in this case he may be exempted from liability.

In this respect, art. 1879 of the Civil Code provides that "the architect or engineer is exonerate of the liability for defects of works only if he proves that they don't result from deficiencies of expertise or plans that he provided and, if applicable, of any lack of diligence in coordinating or supervision of works".

Regarding the subcontractor, he is not exempt unless he proves that defects result from the decisions taken by the contractor or from the architect's or engineer's plans expertise.

The architect and contractor may be exempted from liability if they prove that these defects result from decisions required by the customer in choosing soil or materials or in choosing subcontractors, experts or construction methods. Disclaimer does not operate when these defects, although they could be provided during the execution of work, were not notified to the beneficiary.

The Civil Code in force provides for the novelty to art.1858, that the contractor is obliged to immediately inform the beneficiary that finds that the normal execution of the work, its durability or use according to its destination would be jeopardized because of: materials, improper instructions given by the beneficiary or the occurrence of circumstances for which the contractor is not forced to answer.

If the beneficiary, although advised by the contractor in accordance with Art. 1858, does not take necessary measures during a proper period of, the contractor may terminate or continue its execution on the beneficiary's risk, notifying him about this. Once notified, the contractor transfers the risk to the beneficiary.

If one of them (architect or contractor) will cover all damages under the contract they were involved, the one who bore the expense will have an action for recovery (it means that he can recover the amount advanced to him from the other), proportional to the severity of fault.

Establishing liability to the client for the non execution of the work is done according to the common law (clause criminal damages, sometimes being possible to order the execution of work by forcing the contractor under penalty sanction of periodic penalty payments).

Periodic penalty payments, which are called *constraint penalty*, represent money that the debtor of an obligation is constrained by court order to pay for each day of delay until execution of the obligation he was engaged to.

It should be noted that these penalty payments are rather a mean of constraint for the execution of the obligation and does not represent a compensation for the losses caused as a result of default by either party.

Penalty clause, which involves incurring penalties due to the delay of works by the contractor, will be invoked only if stipulated by an express clause in the contract or by law.

A penalty clause is an agreement that governs the amount of advance compensation payments or default to be due to the fault, in case of default contract or, otherwise, penalty clause is a way to advance assessment of the damage caused.

Essential to remember is that the taking over of works from the client – no objections and reservations (if these were not obtained by fraud) – is equivalent to contractor's release of liability towards the client and the impossibility of the latter to invoke further apparent faults of the work. For these defects, contractor liability can be incurred only if, by law or contract, he owes warranty within the established deadline for work performed.

#### **4.The Prescription Regarding Liability for the Vices of Work**

According to art. 1880 of the Civil Code, the prescription of the right of action for apparent vices starts from the date of final acceptance or, where appropriate, when the expiration date given to the contractor receiving the final minutes is completed, in order to remove the detected defects.

As for the prescription of the right to action for the defects of the design work, this starts once with the prescription of the right to action for the defects of the works done by the contractor, in which case the limitation shall begin after their discovery (art.1880 paragraph. (2), Civil Code).

Regarding the responsibility for the hidden defects of the work, the art. 2513 of the New Civil Code stipulates that if the law does not provide otherwise, the prescription of the right to action for hidden defects starts as follows:

a) In the case of a transmitted good or executed work, other than a building, at the end of one year from the delivery date or final acceptance of goods or work, unless the defect was discovered before the prescription shall begin on the date of discovery.

b) In the case of a building, at the end of three years from delivery date or final acceptance of construction, unless the defect was discovered before, the prescription begins from the date of discovery.

If by the demolition of that building, there will be other people who have suffered any damages, the contractor will be responsible to the latter under the provisions of art. 1349, par. (1), Civil Code, provisions that provide that: everyone has a duty not to harm through action or inaction of its rights or interests of others, the one who, with discernment, violates this duty is responsible for all damage caused, being obliged to fully fix them.

Also, a person is required to repair the damage caused by someone else's deed, of things or animals under his guard as well as by the ruin of the building (Art. 1349, Paragraph (2)).

## 5. Conclusions

The responsibility for quality and durability of the construction returns always to the contractor. He will answer in all cases for the hidden defects of construction and structural strength for defects, failure to comply with standards of design and execution in force for achieving it.

For construction defects, the responsibility is shared between the contractor and designer (architect). The responsibility of the architect will be involved only if construction will prove that the failure comes from a defect in the plan of the designer and the contractor will be responsible for faulty execution.

Both the architect and contractor may be exempt from liability if they prove that these defects result from decisions required by the customer in choosing soil or materials or in choosing subcontractors, experts or construction methods.

Disclaimer does not operate when these defects, although they could be provided during the execution of work, were not notified to the beneficiary.

Under the legislation, are not allowed in the contract clauses limiting or removing liability of the contractor, but are admitted clauses for worsening it.

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- \* \* Legea nr. 50/1991 privind autorizarea executării lucrărilor de construcții.

## RĂSPUNDEREA ÎN ANTREPRIZA DE CONSTRUCȚII, REGLEMENTATĂ DE

### ACTELE NORMATIVE ÎN VIGOARE

(Rezumat)

Antrepriza de construcții este cel mai cunoscut tip de antrepriză. Ea prezintă o importanță practică deosebită, deoarece pe baza acestui contract se execută lucrări de mare valoare, complexitate și importanță, precum construirea de clădiri cu diverse destinații, dar și reparații, consolidări la construcții și la instalațiile aferente acestora și multe altele.

Intrarea în vigoare a noului Cod Civil, în octombrie 2011, precum și modificarea actelor normative care reglementează domeniul construcțiilor și anume Legea nr. 10/1995 privind calitatea în construcții și, respectiv, Legea nr. 50/1991 privind autorizarea executării lucrărilor de construcții impun o analiză a răspunderii ce rezultă din antrepriza de construcții, în cazul neexecutării sau neexecutării corespunzătoare a lucrărilor de construcții executate în baza unui contract de antrepriză.