

Under the paragraph 3 of the Circular Letter of the Presidium of the Supreme Court of the State Arbitration of the Russian Federation of 25 November 2008 N 127 "Survey of practice of application by the courts of state arbitration of article 10 of the Civil Code of the Russian Federation" [it says]: "Taking into consideration the peremptory statutory rule of inadmissibility of the abuse of right the possibility of the qualification by the court of the act of the litigant as the abuse of right does not depend on the fact if the other party has referred to the abuse of right from the side of this litigant. The court is entitled to dismiss the legal defence of the right of the abusing person that is following exactly from the content of paragraph 2 article 10 CC RF."

The contractor finally failed with his application to the higher judicial authority, but despite of that, the case as such well illustrates the problems of the contracts of services in Russia.

## Liudmyla Savanets

### Legal Regulations of Liability in Construction Contracts in Ukraine

#### I. Legal Sources Regulating Relations in Construction Contracts

Legal relations arising in the process of construction are governed by the specific legal regulation mechanism primarily due to the particular character of construction activity aimed at carrying out new construction, major repair, reconstruction (technical reinstallation) of already existing buildings (both industrial and residential), performing installation, commissioning and other works which are inseparable from the property location. The main characteristics of work performed under the construction contract are the long duration of the production cycle, significant costs and, as a result, the creation or renovation of immovable property. Construction contracts are regulated by the special provisions in chap. 61 para. 3 and the general provisions in chap. 61 para. 1 of the Civil Code of Ukraine<sup>1</sup> (CC) which governs construction contracts and applies, unless otherwise provided by special provisions regarding particular subjects.

According to art. 875 (3) CC, the provisions of the CC are applicable to the construction contract, unless otherwise provided by other legal acts, which means that the legislator stipulates the priority of special provisions over general provisions. To a certain extent, one of these special legal acts is the Commercial Code of Ukraine<sup>2</sup> (CommC), which regulates the relations under the construction contract in art. 317-323. Under the assumption that commercial relations occur, firstly, when both parties entering into the contract are commercial entities or one is a commercial entity and the other one is a non-commercial entity (legal entity), and, secondly, when the contents of such contract establishes mutual rights and obligations of a commercial nature, the provisions of the CommC apply as special provisions when the contract contains a special subject and a special area of rights and obligations. Furthermore, according to art. 175 (2) CommC, economic obligations arising between the parties of commercial relations are governed by the CC with the particularities as provided by the CommC. A characteristic feature of the analysed norms of the CommC and the CC, respectively, on construction contracts is their referential character. Para. 3 of section 61 CC, which regulates construction contracts, contains five references to other laws and civil legal acts: "unless otherwise provided by the law" (art. 875 (3), art. 884 (1)), "in accordance with the law" (art. 881 (1)), "in cases provided by the law or other regulatory acts" (art. 882 (2)), "in accordance with the requirements of the law" (art. 880 (1)).

Chapt. 33 CommC, which regulates the legal relations under capital construction contracts, consists of seven articles (entirely repeating the provisions of the CC) and contains six references to the provisions of the CC and other legal acts: "in accordance with the provisions of the Civil Code of Ukraine" (art. 317 (2)), "unless otherwise provided by the law" (art. 317 (3), art. 318 (3)), "unless another procedure is provided by the law" (art. 322 (1)), "under the general conditions of the conclusion and performance of capital construction contracts adopted by the Cabinet of Ministers of Ukraine" (art. 323 (1)), "in accordance with the procedure set forth by this Code,

<sup>1</sup> Цивільний кодекс України (Civil Code of Ukraine) від 16.01.2003 № 435-IV/Відомості Верховної Ради України (ВВР) (Supreme Council of Ukraine), 2003, № 40-44, ст. 356.

<sup>2</sup> Господарський кодекс України (Commercial Code of Ukraine) від 16.01.2003 № 436-IV/Відомості Верховної Ради України (ВВР) (Supreme Council of Ukraine), 2003, № 18, 19-20, 21-22, ст. 144.



intergovernmental agreements, and special conditions of the conclusion and performance of capital construction contracts, adopted in accordance with the procedure set forth by the Cabinet of Ministers of Ukraine" (art. 323 (2)). Such legislative approach to the regulation of construction contracts allows for the establishment of basic and fundamental provisions in the CC and the CommC, whereas their further elaboration is to be included in special legal acts.

However, as it was pointed out by *Yavorskaya*, this "referential practice" in legislative regulations can have a positive impact merely if the special acts to which the CC refers will in fact be implemented.<sup>3</sup> Contractual relations under the construction contract are a subject of legal collision. The CommC does not contain any special provisions on the construction contract, but rather regulates such relations by the provisions on the capital construction contract, which differs from the construction contract in its subject structure. As stated in the literature, the legal collision between the CC and the CommC regarding the different names of these contracts is, to a certain extent, levelled down by the identity of their respective contents, taking into account the rule of identifying the character of legal relations according to their contents, rather than according to the mere designation of the contract which governs these relations.<sup>4</sup> In contrast to the provisions of the CC, the CommC provides a broad list of conditions which are essential to enter into the contract (art. 318 CommC). Therefore, according to art. 846 CC [cf. art. 837 CC et seq. – договір підряду (contract for specific work)], the timeframe for the performance of the work or its particular stages is established by the construction agreement, whereas, in the absence of such timeframe agreement, the constructor is obliged to perform the work, and the client has the right to claim performance within a reasonable time pursuant to the substance of the obligation, the nature and the scope of the work as well as common business practices. In the CommC, particularly in art. 180 (1) and (3), it is stated that while concluding a commercial contract the parties shall, in any case, agree on the subject, the price and the timeframe of performing the contract. The provision of the CommC requiring the obligatory indication of the period of agreement, which also determines the period of performance of the parties' contractual obligations, is also confirmed by several acts of delegated legislation such as the Framework conditions of the conclusion and performance of contracts on capital construction approved by the Cabinet of Ministers of Ukraine of 01.08.2005 No. 668.<sup>5</sup> In the author's opinion, this collision shall be resolved in accordance with the rule that the provisions of the CC are of a general nature, whereas the provisions of the CommC are of a special nature, dedicated solely to commercial contracts.

In the Commercial Code it is pointed out that the general conditions of the conclusion and performance under the capital construction contract are regulated by acts adopted by the Cabinet of Ministers of Ukraine in accordance with the law. However, a norm containing such regulation does not appear in the CC.

Contrary to the provisions of the CC, the CommC establishes a stipulated penalty and a special statute of limitations resulting from major construction contracts (1, 3 and 30

<sup>3</sup> О.С. Яворська, Договірні зобов'язання про передавання майна у власність: цивільно-правові аспекти. Тернопіль 2009, с. 27 (O. S. Yavors'ka, The contractual obligation to transfer property ownership: the civil aspects).

<sup>4</sup> Науково-практичний коментар Цивільного кодексу України: У 2 т./За ред. О.В. Дзери (кер. авт. кол.), Н.С. Кузнецової/В.В. Луця, Київ 2006, т. II, с. 4 (Academic and Practical Commentary of the Civil Code of Ukraine, Dzeri/Kuznetsova/Lutsya (eds.)).

<sup>5</sup> Про затвердження Загальних умов укладення та виконання договорів підряду в капітальному будівництві. Постанова Кабінету Міністрів України від 01.08.2005 № 668/Офіційний вісник України, 2005, № 31, с. 364.

years according to art. 322 CommC). For non-performance or improper performance of its contractual obligations the constructor, according to art. 883 (2) CC, shall pay a stipulated payment in the amount set out by the construction contract or the law, and shall fully recover the damages. Also, in accordance with art. 322 (1) CommC, the party which is guilty of non-performance or negligence under a major construction contract shall pay a stipulated penalty and recover the other party's damages in the amount not covered by this penalty, unless otherwise provided by the law. Furthermore, the Commercial Code allows for subsidiary application of the provisions of the CC on the general terms and conditions of contracts for specific work, unless otherwise provided by the CommC (art. 317 (2) CommC). The author shares the view of researchers according to whom such contradictions are reflected in the practical application of the law, because a court practice of filling the legislative gaps by applying the forceful instrument of analogy of law is condemned to failure.<sup>6</sup>

The relations associated with construction works are partly regulated by several legal acts of Ukraine: "On the fundamental principles of municipal planning" of 16.11.1992 No. 2780-XII,<sup>7</sup> "On the regulation of municipal planning activity" of 17.02.2011 No. 3038-VI,<sup>8</sup> "On architectural activity" of 20.05.1999 No. 687-XIV,<sup>9</sup> "On Investment Activity" of 8.09.1991 No. 1560-XII<sup>10</sup>, "On financial and credit mechanisms and property management for housing construction and real estate operations" of 19.06.2003 No. 978-IV<sup>11</sup>, and "On collective investment institutions" of 05.07.2012 No. 5080-VI.<sup>12</sup>

If the realisation of new construction, major repair, reconstruction (technical reinstallation) of industrial and residential buildings, other structures and other construction work is financed from public funds, the conclusion and performance of such contract shall comply with the Ukrainian law "On public procurement" of 01.06.2010 No. 2289-VI,<sup>13</sup> "The procedure of public funding of capital constructions works", adopted by the Cabinet of Ministers of Ukraine on 27.12.2001 No. 1764,<sup>14</sup> and "The procedure of approval of buildings (object) titles the construction of which is realised using budgetary funds or funds of public enterprises", adopted by the Cabinet of

<sup>6</sup> Теоретичні та практичні аспекти розгляду судами спорів, що виникають із договорів підряду/За ред. В.В. Луця, Київ 2010, с.7 (Theoretical and practical aspects of the courts' disputes arising from construction contracts, Lutsya (ed.)).

<sup>7</sup> Про основи містобудування. Закон України від 16.11.1992 № 2780-XII/Відомості Верховної Ради України, 1992, № 52, ст. 683.

<sup>8</sup> Про регулювання містобудівної діяльності. Закон України від 17.02.2011 № 3038-VI/Відомості Верховної Ради України, 2011, № 34, ст. 343.

<sup>9</sup> Про архітектурну діяльність. Закон України від 20.05.1999 № 687-XIV/Відомості Верховної Ради України, 1999, № 31, ст. 246.

<sup>10</sup> Про інвестиційну діяльність. Закон України від 18.09.1991 № 1560-XII/Відомості Верховної Ради України, 1991, № 47, ст. 646.

<sup>11</sup> Про фінансово-кредитні механізми і управління майном при будівництві житла та операціях з нерухомістю. Закон України від 19.06.2003 № 978-IV/Відомості Верховної Ради України, 2003, № 52, ст. 377.

<sup>12</sup> Про інститути спільного інвестування. Закон України від 05.07.2012 № 5080-VI/Відомості Верховної Ради України, 2013, № 29, ст. 337.

<sup>13</sup> Про здійснення державних закупівель. Закон України від 01.06.2010 № 2289-VI/Відомості Верховної Ради України, 2010, № 33, ст. 471.

<sup>14</sup> Про затвердження Порядку державного фінансування капітального будівництва. Постанова Кабінету Міністрів України від 27.12. 2001 № 1764/Офіційний вісник України, 2001, № 52, с. 134.



Ministers of Ukraine on 08.09.1997 No. 995.<sup>15</sup> In the event of default in payment by the constructor under the construction contract, the parties' relations are regulated by the provisions of the Ukrainian legal act "On liability for untimely performance of monetary obligations" of 22.11.1996 No. 543/96-BP.<sup>16</sup>

A significant part of the issues associated with the relations under the construction contract is regulated by acts of delegated legislation such as the following decisions of the Cabinet of Ministers of Ukraine: "On the approval of the procedure of conducting architectural and municipal planning competition" of 25.11.1999 No. 2137,<sup>17</sup> "On the project architect's supervision and technical supervision during the construction of an architectural object" of 11.07.2007 No. 903,<sup>18</sup> "On the licensing of certain types of economic activities associated with the construction of architectural objects" of 05.12.2007 No. 1396,<sup>19</sup> "On the approval of the procedure of approving construction projects and the carrying out of their assessment, and [on] the abrogation of certain decisions of the Cabinet of Ministers of Ukraine" of 11.05.2011 No. 560,<sup>20</sup> "The procedure of carrying out professional certification of competent performers of certain types of work (services) associated with the construction of architectural objects" of 23.05.2011 No. 554,<sup>21</sup> "On the approval of the procedure of enacting municipal-planning conditions and restrictions regarding the development of a plot of land, their inventory and contents" of 07.07.2011 No. 109, and "On the approval of the procedure of public architectural and construction oversight" of 23.05.2011 No. 553,<sup>22</sup> and others.

The following administrative acts play a major role in the system of legal sources regulating construction contracts, in particular: "On the conditions for licencing economic activities in construction associated with the creation of architectural objects", adopted by order of the Ministry of Regional Development and Construction of Ukraine of 06.10.2010 No. 392,<sup>23</sup> and the "Frame regulation on architectural and municipal construction councils", adopted by order of the Ministry of Regional Development,

<sup>15</sup> Про порядок затвердження титулів будов (об'єктів), будівництво яких здійснюється із залученням бюджетних коштів або коштів підприємств державної власності. Постанова Кабінету Міністрів України від 08.09.1997 № 995/Офіційний вісник України, 1997, № 37, с. 17.

<sup>16</sup> Про відповідальність за несвоєчасне виконання грошових зобов'язань. Закон України від 22.11.1996 № 543/96-ВР/Відомості Верховної Ради України, 1997, № 5, ст.28.

<sup>17</sup> Про затвердження порядку проведення архітектурних та містобудівних конкурсів. Постанова Кабінету Міністрів України від 25.11.1999 № 2137/Офіційний вісник України, 1999, № 47, с. 68.

<sup>18</sup> Про авторський та технічний нагляд під час будівництва об'єкта архітектури. Постанова Кабінету Міністрів України від 11.07.2007 № 903/Офіційний вісник України, 2007, № 52, с. 39.

<sup>19</sup> Про ліцензування господарської діяльності, пов'язаної із створенням об'єктів архітектури. Постанова Кабінету Міністрів України від 05.12.2007 № 1396/Офіційний вісник України, 2007, № 94, с. 22.

<sup>20</sup> Про затвердження порядку затвердження проектів будівництва і проведення їх експертизи та визнання такими, що втратили чинність, деяких постанов Кабінету Міністрів України. Постанова Кабінету Міністрів України від 11.05.2011 № 560/Офіційний вісник України, 2011, № 41, с. 69.

<sup>21</sup> Порядок проведення професійної атестації відповідальних виконавців окремих видів робіт (послуг), пов'язаних із створенням об'єктів архітектури. Постанова Кабінету Міністрів України від 23.05.2011 № 554/Офіційний вісник України, 2011, № 41, с. 41.

<sup>22</sup> Про затвердження Порядку здійснення державного архітектурно-будівельного контролю. Постанова Кабінету Міністрів України від 23.05.2011 № 553/Офіційний вісник України, 2011, № 40, с. 27.

<sup>23</sup> Про внесення змін до Ліцензійних умов провадження господарської діяльності у будівництві, пов'язаної із створенням об'єктів архітектури. Наказ Міністерства регіонального розвитку та будівництва України від 06.10.2010 № 392/Офіційний вісник України, 2010, № 82, с. 147.

Construction and Public Utilities of Ukraine of 07.07.2011 No. 108.<sup>24</sup> Many important issues on performing construction contracts are regulated by numerous state and administrative norms and rules, i. e. acts of delegated legislation, on technical matters, establishing mandatory requirements in the area of construction, municipal planning and architecture (art. 1 of the act "On construction norms" of 05.11.2009 No. 1704-VI<sup>25</sup>).

While exploring the regulation of construction contracts it is, in the author's opinion, imperative to focus on the subject matter of numerous academic discussions, i. e. the distinction between construction contracts and other related contractual relations. Making this distinction is very important due to the substantial consequences to the protection of the parties' rights in the event of improper application of provisions regulating other types of contractual relations to construction contracts. The integrity of works and their result represent a primary feature of the subject matter under the construction contract, distinguishing this type of contract from other examples of civil-law contracts, in particular sales contract, service contract and employment contract.<sup>26</sup>

In academic civil law research there are numerous ongoing discussions about the correlation between the ratio legis of construction contracts on the one hand, and service contracts on the other hand. There is an expressed opinion that the contraposition of the terms "work" and "service" shall not be strict, because this distinction is not an end in itself; service is an action which gives benefits or assistance to the constructor, whereas work is defined as any application of the constructor's labour.<sup>27</sup> Several authors relate works as well as services to the generic concept of actions. According to one approach presented in the legal doctrine "service" is considered as a type of work,<sup>28</sup> whereas the other approach considers "work" as a type of services.<sup>29</sup> *Kalmikov* argued that it is more appropriate to consider contracts for specific work as a type of service contract instead of considering service contracts as a type of contract for specific work.<sup>30</sup> *Krotov* expresses his opinion far more categorically, stating that both specific works contracts and service

<sup>24</sup> Про затвердження Типового положення про архітектурно-містобудівні ради. Наказ Міністерства регіонального розвитку, будівництва та житлово-комунального господарства України від 07.07.2011 № 108/Офіційний вісник України, 2011, № 59, с. 345.

<sup>25</sup> Про будівельні норми. Закон України від 05.11.2009 № 1704-VI/Відомості Верховної Ради України, 2010, № 5, Ст. 41.

<sup>26</sup> More details: Науково-практичний коментар Цивільного кодексу України: У 2 т./За ред. О. В. Дзери (кер. авт. кол.)/Н.С. Кузнецової/В.В. Луця, Київ 2006, т. II, с. 439-440 (Academic and Practical Commentary of the Civil Code of Ukraine, fn. 4); М. Біленко, Особливості договору підяду на капітальне будівництво, Юридична Україна 2012, № 2, с. 45 (*Bilenko*, Special features of major construction contract, Legal Ukraine, 2012, № 2).

<sup>27</sup> А.Е. Шерстобитов, Гражданско-правовое регулирование обязательств по передаче информации: дис. [...] канд. юрид. наук: 12.00.03, Москва 1980, с. 10 (А. Е. Sherstobitov, Civil law regulation of obligations on transfer of information); М.И. Брагинский, Договор подряда и подобные ему договоры, Москва 1999, с. 17 (*Braginsky*, Construction contract and other similar contracts).

<sup>28</sup> А.Ю. Кабалкин, Услуги в системе отношений, регулируемых гражданским правом, Советское государство и право 1994, № 8-9, с. 81 (*Kabalkin*, Services in the system of relations regulated by civil law, Soviet state and law 1994, № 8-9); И.Л. Брауде, Договор подряда. Отдельные виды обязательств, Москва 1954, с. 220-223 (*Braude*, Specific work contract. Certain types of obligations).

<sup>29</sup> Б. А. Борисов, Услуги, правовой режим реализации, Москва 1997, с. 11 (*Borisov*, Services, legal regime of their performance).

<sup>30</sup> Ю.Х. Калмыков, К понятию обязательства по оказанию услуг в гражданском праве. Советское государство и право 1976, № 5, с. 42-52 (*Kalmykov*, On the issue of obligation to provide services in civil law, Soviet state and law 1976, № 5).



contracts regulate economic relations based on the provision of services.<sup>31</sup> Supporters of the idea of a clear distinction between works and services substantiate their viewpoint by stating that work cannot be considered as a type of services, as well as service cannot be considered as a type of work (though both categories are types of actions, and actions as objects of contractual rights can have a different character) due to the intention to achieve various aims and results. The difference between work and service has been traditionally based on the distinction between the performance of specific work and the rendition of services in return for payment.<sup>32</sup> We consider that the difference between construction works contract and service contract is determined by the tangible result which is the object of a contract for specific work, and which is transferred to the contractor along with the legal title to it. In art. 177 CC among the list of separate objects of civil rights "result of works" and "services" are mentioned. While analysing this norm we can draw conclusions of equality – rather than dependency or subordination – of these two objects (furthermore, this opinion cannot be contested by the fact that special works and services are regulated by two different chapters, i. e. chapt. 61 and 63 CC, respectively).

While discussing the features of the legal regulation of the relations under construction contracts and analysing its sources, it should be pointed out that the legislator classifies the construction contract as an aleatory (risky) transaction including the following risks: impossibility to accomplish works, accidental destruction or damage of the construction object, accidental destruction or damage of materials provided for the construction, and impossibility to use delivered materials (construction details, structures). The provision of art. 837 (1) CC raises an assumption that the principle of risk cannot be excluded by the parties' agreement.<sup>33</sup>

Thus, it can be noticed that in the sphere of construction contract relations the legislative approaches have been reflecting several positive shifts which are typical of the current approach to the legal regulations of public relations; however, there are still some collisions and norms having a referential character.

<sup>31</sup> М. В. Кротов, Обязательства по оказанию услуг, Москва 1997, Т. 2, с. 540 (*Krotov, Obligations to provide services*).

<sup>32</sup> О.С. Иоффе, Обязательственное право, Москва 1975, с. 488 (*Ioffe, Law of Obligations, Moscow 1975*); В.В. Резникова, Співвідношення понять «послуга» та «роботи», «договір про надання послуг» та «договір підряду», Вісник господарського судочинства 2012, № 3, с. 91 (*Reznikova, Relations between concepts of "service" and "work", "service agreement" and "construction contract", Journal of economic justice 2012, № 3*); Ю.П. Космін, Поняття та види послуг. Договори про надання юридичних і фактичних послуг (доручення, комісія, схов, охорона об'єктів), Цивільне право: навч. посіб. [О.А. Підпригора/Д.В. Боброва/Н.С. Кузнецова/ В.В. Луць/О.В. Дзера та ін.], за ред. О.А. Підпригора/Д.В. Бобрової, Київ 1996, с. 265-266 (*Kosmin, Concepts and types of services. Contracts of legal and actual services (authorization, commission, storage, securing the objects); Г.М. Гриценко, Правове регулювання капітального будівництва за державні кошти: дис. [...] канд. юрид. наук: 12.00.04, Донецьк 2011, с. 39 (Gritsenko, Legal regulations of major construction contract on state funding)*).

<sup>33</sup> For further information on the risks associated with contracts of construction see: А. Гриняк, Розподіл ризиків за договорами підряду, Підприємництво, господарство і право 2012, № 8, с. 15-19 (*Ginyak, Risk allocation under the construction contract; Business, Economy and Law 2012, № 8*); М.И. Брагинский, Договор подряда и подобные ему договоры, Москва 1999, с. 25 (*Braginsky, Construction contract and similar contracts*); І. Банасевич, Розподіл ризиків за договором будівельного підряду, Юридична Україна 2011, № 8, с. 57-60 (*Banasevich, Risk allocation under the construction contract, Legal Ukraine 2011, № 8*).

## II. Definition and Types of Non-Performance of Obligations

In practice, quite often there have been cases of non-performance of required actions on the part of the client or the constructor, where these actions would have represented proper performance of the undertaken obligations established in the construction contracts. According to art. 610 (1) CC violations of obligations include non-performance or performance with some derogations from the provisions determined by the content of the obligation (improper performance). The civil law doctrine distinguishes two types of violations of contract: complete non-performance and improper performance. Complete non-performance means the non-performance of the entire subject matter of the contractual obligations.<sup>34</sup> In the case of construction contracts non-performance occurs when the parties do not take any action to perform works or refrain from performing works in a scheduled time (for example, withholding the construction due to circumstances which could not be prevented by the parties, with the condition of conducting construction in the future (what is most clearly manifested in situations when the client is represented by a subject of state authority, and when the work is financed from state or local budgets)). Improper performance means performance of only a part of the obligation, performance in a non-timely manner, not in the indicated place, or the violation of certain conditions of the obligation. According to *Bodnar*, improper performance occurs when the debtor carries out certain actions in order to perform work; however, these actions do not fulfil the requirements (standards) established in the terms of the contract or in the provisions of legal acts on each element of the performance of the obligation (i. e. the respective actions violate requirements related to the object of the obligation, the way of performance, the subjective structure, or the place and time of performance).<sup>35</sup>

Participants of the obligational relation under the construction contract, and, as a consequence, potential violators of the contract, are: one of the parties (the constructor or the client), third parties entering into the contract for one party pursuant to a subcontract or unilateral transaction supposed to ensure proper fulfilment of the obligations. The client generally does not enter into any legal relations with the subcontractor and, consequently, only the general constructor remains fully responsible to the client for performing the entire works, including the liability for non-performance and improper performance caused by third parties engaged by the constructor (subcontractor). However, in accordance with art. 838 (2) CC, the client and the subcontractor are not allowed to raise counter claims on violations of contracts concluded by each of them with the constructor, unless otherwise established by the agreement or the law, and this fact leads us to the assumption that the parties are allowed to provide a possibility of raising some claims by the client directly against the subcontractor, as well as by the subcontractor against the client. For this reason, while concluding a subcontract it is relevant to harmonise the provisions of the subcontract with the provisions of the construction contract, for the performance of which the subcontractor is engaged.<sup>36</sup>

Based on art. 875-886, 836-864 CC, 317-323 CommC, and the Framework conditions on the conclusion and performance of contracts in capital construction

<sup>34</sup> С.Н. Ландкоф, Лекції з основ цивільного права, Київ 1962, с. 102 (*Landkof, Lectures on the Principles of Civil Law*).

<sup>35</sup> Т.В. Боднар, Теоретичні проблеми виконання договірних зобов'язань: дис [...] докт. юрид. наук: 12.00.03, Київ 2005, с. 242 (*Bodnar, Theoretical problems of performing contractual obligations*).

<sup>36</sup> М. Біленко, Структура договірних зв'язків за договором підряду на капітальне будівництво, Юридична Україна 2012, № 3, с. 62 (*Bilenko, The structure of the contractual relations under the construction contract, Legal Ukraine 2012, № 3*).



adopted by the Cabinet of Ministers of Ukraine of 01.08.2005 No.668, the violations of obligations under the construction contract can be divided into the following categories: 1) delay in performance by the parties; 2) improper performance of the obligations of constructing objects or performing other construction works; 3) non-acceptance or delay in acceptance of the object or completed construction works; 4) non-performance or untimely performance of the client's requirements regarding the removal of defects by the constructor; 5) consent on derogations from provisions of the agreement, or other substantial defects; 6) providing materials required for performing works which are encumbered with third parties' rights; 7) non-providing of the required materials for performing works or providing low-quality materials by the client; 8) evasion of payment of the established price for the work upon acceptance of its results by the client.

The delay in performance of the contractual obligations under the construction contract by the constructor or the client is one of the types of civil wrong which led to the imposition of additional obligations on a violator, since under art. 612 (2) and (3) CC, a debtor who has delayed to fulfil the obligation is liable to a creditor for the losses incurred as a result of the delay, and for the impossibility of fulfilment that has occasionally occurred after the delay. If as a result of the debtor's delay the creditor has lost his interest in the fulfilment of the obligation, he is entitled to refuse the acceptance of work results and claim for the reimbursement.

The concept of "delay" is not explicitly stipulated by the law, whereas the academic literature considers delay in the performance of an obligation to be a non-performance in the indicated time<sup>37</sup> or in a reasonable time following the accrual of the obligation.<sup>38</sup>

In the terms of a construction contract the parties should clearly specify the term of commencement of performing the work, which is reasonable to correlate with the occurrence of specific events that are crucial for the beginning of the construction process. This could be one of the following moments in time: providing access to the construction site, providing project documentation, starting funding of the project, transferring the advance payment, etc. The commencement of the work should be documented by a special bilateral act. Rescheduling of the term is allowed where the work cannot be accomplished due to the reasons beyond the client's control, given that the contractor immediately notifies the client about such circumstances and provides evidence proving that certain circumstances have a negative influence on the timely performance of the work. When there is more than one fact which can be the reason for such rescheduling, the process of such revision should consider the simultaneous impact of all facts. The term for accomplishing the work can be rescheduled in the event of circumstances for which solely the client is liable (lack of financing, delay in performing obligations, request for additional works, etc.); disruption of work for reasons only the constructor is liable for: industrial dispute, blockade of the construction site by the workers, and other actions disrupting the proper performance of the work.<sup>39</sup>

Where the construction contract does not specify the term for accomplishing the work, the provision of art. 846 (2) CC stipulates that the contractor is obliged to perform the work within a reasonable term pursuant to the substance of the obligation, the nature, the scope of work and common business practices. The constructor is not liable for the delay if the work cannot be commenced or accomplished as a result of the client's delay,

<sup>37</sup> В.В. Луць, Строки в цивільних правовідносинах, Львів 1992, с. 85 (Lutz, Terms in civil relations).

<sup>38</sup> О.П. Печений, Прострочення виконання договірних зобов'язань: автореф. дис. [...] канд. юрид. наук, Харків 2002, с. 6 (Pecheny, Delay in the performance of contractual obligations).

<sup>39</sup> Науково-практичний коментар Цивільного кодексу України: У 2 т./За ред. О.В. Дзери (кер. авт. кол.)/Н.С. Кузнецової/В.В. Луця, Київ 2006, т. II, с. 452 (Academic and Practical Commentary of the Civil Code of Ukraine, fn. 4).

when, for example, the client fails to fulfil its contractual obligations to provide the materials (art. 840 CC) or the design documentation and the cost estimates (art. 877 (2) CC), and others.

The client will be liable for the delay in performance of obligations under the construction contract if he refuses to accept the result of properly a performed work, or if he fails to perform actions imposed on him by the contract, legal act or common business practices, where the failure to perform such actions causes the impossibility of performance of the contractor's duties.

The second group of the non-performance of construction contracts pertains to violations associated with the non-performance of a certain work during the construction of the object or performance of the work in an inadequate manner. According to art. 857 (2) and (3) CC, the performed work shall comply, at the moment of its transfer to the client, with the quality defined by the contractual terms, or with the normal requirements of such character of work, and the work results shall be suitable, within a reasonable period of time, for use pursuant to the contractual terms or to the normal use of a comparable work. The correct understanding of the term "quality of work" is a prerequisite for properly establishing adequate requirements and principles with which the respective work shall comply. The legal aspect of the concept of quality comprises that all statutory quality requirements are subject to compulsory enforcement. In the legal literature there are views that any derogation from the client's requirements – even if such derogation does not contravene the suitability or solidity of the result – is considered to be a defect, and that such non-conformity constitutes a violation of the contractual terms.<sup>40</sup>

In general, the author agrees with the previously outlined opinion, however, it should be mentioned that any derogation from the contractual terms and the client's requirements shall be considered to be a defect; but according to the provision of art. 858 (1) CC, the contractor is not held liable for such derogations insofar as the latter does not violate and does not contravene the fitness for purpose of the work result. In such case the client shall be entitled to demand from the constructor strict enforcement of the contractual terms in general, and, in particular, strict enforcement of certain requirements.

According to the legal literature the quality of the construction contract's result shall be understood as an entirety of useful features which provide the opportunity to meet appropriate material, non-material and other social needs.<sup>41</sup> Meanwhile, the economic literature suggests several definitions of the "quality" concept: quality in terms of compliance with standards; quality in terms of compliance with market requirements; quality in terms of fulfilment of requirements and needs of the society, consumers and officials.<sup>42</sup> The majority of legal scholars define "quality" using the term "entirety of certain features" which are legally regulated in international and domestic technical standards, and are able to meet particular needs.<sup>43</sup> Quality of object construction and

<sup>40</sup> Е.Л. Абрамцова, Договор подряда в гражданском праве России: дис. [...] канд. юрид. наук: 12.00.03, Москва 2005, с. 63 (Abramtsova, Specific works contract in civil law in Russia).

<sup>41</sup> А. Гриняк, Якість у договірних зобов'язаннях підрядного типу, Юридична Україна 2012, № 3, с. 65 (Grinyak, Quality in contractual obligations under specific works contract, Legal Ukraine 2012, № 3).

<sup>42</sup> Л. Іваненко/О.Язвинська, Реалізація права споживачів на придбання товару належної якості, Право України 2003, № 8, с. 74 (Ivanenko/Yazvinska, Executing the right to purchase goods of appropriate quality, Law of Ukraine 2003, № 8).

<sup>43</sup> М.М. Кузьміна, Господарсько-правові засоби забезпечення якості продукції: монографія, Харків 2010, с. 24 (Kuzmina, Economic and legal remedies to ensure product quality: monography),



other construction works comprises features (functional, structural, ecological, esthetic, ergonomic safety features) which comply with the requirements established in the contract, the construction design, or the legal acts.<sup>44</sup>

Looking at the international practice of contractual regulations on the quality of performing works, there is a tendency of unifying legal systems, aiming at a simplification of international relations and the elimination of barriers in international trade by establishing legal guarantees of product quality. Hence, art. 5.1.6 of the Principles of International Commercial Contracts UNIDROIT provides that

where the quality of performance is neither fixed by, nor determinable from, the contract, a party is bound to render a performance of a quality that is reasonable and not less than average in the circumstances.<sup>45</sup>

The Principles of European Contract Law created by the Commission on European Contract Law constitute that quality shall be regulated in the contract, but eventually, a party shall render performance of at least average quality.<sup>46</sup> Concluding, under the international norms quality shall not be less than average.

The quality of work performed under the construction contract shall be indicated in the design documentation and cost estimation in the form of (technical) drawings, specifications or by reference to certain legal acts and technical norms. General criteria of work quality, which shall be adhered to where the parties did not specify "quality" in the contract, are the following: requirements which are usually applied to such work, suitability within a reasonable time period, customary use.<sup>47</sup>

In this context it is also worth raising the question of relations between the constructor and the client when the delivered work result turns out to be of a higher quality than specified in the contract. In the author's opinion, claiming for additional payment shall be inadmissible if the contract does not contain any special provision allowing the client to approve such additional payment. In this case, the constructor is entitled to receive payment only as indicated in the contract as a payment for the performed work. Therefore, it is reasonable for both parties to incorporate such conditions into the concluding contract, which provide them higher quality of performed works and secure adequate payment for such extra quality.

*В. Ф. Опришко*, Правовые основы государственного управления качеством продукции: монография, Київ 1986, с. 18 (*Opryshko*, Legal basis of the state regulations on quality control: monography); *В. С. Бельх*, Гражданско-правовые средства обеспечения качества продукции, работ, услуг : автореф. дис. [...] докт. юрид. наук.: 12.00.03 Екатеринбург 1994, с. 9 (*Bielyh*, Civil remedies to ensure the quality of products, work and services).

<sup>44</sup> *Н. В. Трофуненко*, Господарсько-правове забезпечення якості будівельних робіт: дис. [...] канд. юрид. наук: 12.00.04; Донецьк 2010, с. 24 (*Trofunenko*, Economic and legal framework for quality of construction work); *К. С. Мауленов*, Правовое обеспечение качества строительства: гражданско-правовой аспект: автореф. дис. [...] канд. юрид. наук: 12.00.03, Харьков 1983, с. 3 (*Maulenov*, Legal assurance of construction: civil aspect); *Н. С. Кузнецова*, Подрядные договоры в инвестиционной деятельности в строительстве, Киев 1993, с. 10-11 (*Kuznetsova*, Contractual agreements in investment activity in the construction); *А. Х. Бербеков*, Ответственность сторон по договору строительного подряда: автореф. дис. [...] канд. юрид. наук: 12.00.03, Москва 2007, с. 6 (*Berbekov*, Responsibility of the parties to a construction contract).

<sup>45</sup> Принципы международных коммерческих договоров/пер. с англ. *А. С. Комарова*, Москва 1996, с. 8 (Principles of International Commercial Contracts).

<sup>46</sup> Принципи європейського договірної права, Український часопис міжнародного права 2003, № 1, с. 27. (Principles of European Contract Law).

<sup>47</sup> *А. Гриняк*, Якість у договірних зобов'язаннях підрядного типу, Юридична Україна 2012, № 3, с. 69 (*Grinyak*, fn. 41).

As a general rule, the client has the right to exercise quality surveillance of construction works, but the client can also delegate this authority to a specialised organisation or to a specialist, based on a contract defining their respective rights.

Further violations are related to the non-acceptance or delay of acceptance of the object of construction or completed stages of works by the client. According to art. 882 (1) CC, after receiving from the constructor a notification of readiness to transfer the work, the client is obliged to immediately commence its acceptance. In the author's opinion such notification shall be considered as a contractual transaction because of art. 202 CC, due to the fact that it requires a certain action by the constructor, directed at the accrual of civil rights and obligations related to the commencing acceptance of work. With a view to the essence of the obligation under the construction contract and the absence of a requirement of form, the contents and the way of delivery of this notification in art. 882 CC, such notification shall follow the general rules on the validity of a legal transaction, as provided in art. 203 CC. Accordingly, such notification shall have a written form, and shall declare the unconditional readiness to transfer the work performed under the particular contract.

The acceptance of completed works shall be arranged by the client within a reasonably short time upon receipt of the notification, since any delay in acceptance would shift the risk of accidental destruction of the work result. Together with the work result the constructor is obliged to transfer information related to the exploitation or other utilisation of the object of the construction contract, where such duty is prescribed in the contract or without this information it would be impossible to use the work result for the contractual purposes.

The procedure of accepting the work can be arranged in one or two stages and can be performed at the client's expense, unless the contract established otherwise. Where the client is a state-owned enterprise, and the construction works are partly or fully financed from within budgetary appropriation, transfer and acceptance of work shall be conducted in two stages: firstly, the object shall be accepted by the work commission created by the client and the constructor with involvement of the project designer and representatives of competent state authorities, and further shall be accepted by the state admissions commission which composition and level depend on the estimated value and purpose of the object of construction.<sup>48</sup>

Construction work shall be regarded as completed from the moment of signing the act of acceptance and transfer of the completed work by the parties or signing other document in which the parties shall record that the performed work complies with the contractual terms, or record any defects detected in the process of acceptance. A written complaint by the client or his assessment of the existence of defects, made in accompanying documentation of the performed work or other written forms, can also be considered as such "other" document. Acceptance of work can be conducted after preliminary testing if the construction contract establishes so or if such a procedure is contingent on the nature of the work. The client can be deprived of the right to bring claims against the constructor, unless the client raises this issue in the process of acceptance. An analogous rule applies where the client does not inspect the work result at all; in such a case he can be deprived of his right to complain about the defects which could have been detected during the ordinary acceptance of the work. However, the client is entitled to notify the constructor immediately where, after the acceptance of the work, the client detects any derogation from the contract terms or other defects which could not have been detected during the ordinary acceptance of the work (concealed

<sup>48</sup> Науково-практичний коментар Цивільного кодексу України: У 2 т./За ред. *Дзери/Кузнецової/Луця*, Київ 2006, т. II, с. 496 (Academic and Practical Commentary, fn. 4).



defects), or which are deliberately concealed by the constructor. Any disputes over obvious or concealed defects in performed work can be resolved by conducting an examination. The client is entitled to refuse to accept the work if he detects defects which make the exploitation of the object impossible for the purposes envisaged in the contract, and which could not have been eliminated by the constructor, the client or the third party, respectively.

At the same time, the constructor can also be in breach of the contract if he fails to notify, or delays his notification of, the client about the completion of the work and the necessity of its acceptance.

In art. 853 (5) CC, the Ukrainian legislator establishes certain guarantees regarding the protection of rights of the constructor where the client refuses to accept the completed work. The constructor is entitled to sell the work results after double warnings within one month, and to deposit the proceeds reduced by any payment which is due to the contractor, with a notary or notary's office, unless otherwise established by the contract.

The next type of violations is associated with the non-fulfilment or delay in fulfilment (default) of the client's direction to eliminate defects by the constructor. The client shall notify the constructor about detected defects within a reasonable time. The client is entitled to demand from the constructor that the latter eliminates the defects of performed work or defects of the materials acquired solely by the constructor. The elimination of these defects shall be carried out at the constructor's expense and within a certain time. These rights of the client also apply where defects are detected within a warranty period which shall be stated in an appropriate act regulating procedures and terms for eliminating defects. The warranty period shall be ten years starting from the moment of acceptance of the construction object by the client, unless a longer period is established by contract or law. In order to resolve any disputes over technical causes of defects between the parties, the parties are entitled to agree on conducting construction and technical examination.

If the constructor refuses to eliminate the defects at his own expense, the client can eliminate them at his expense and afterwards recover the appropriate amount of money from the constructor. The client has the right to refuse acceptance of the work or to demand price reduction from the constructor if the defects turn out to be unrepairable. The elimination of defects for which the constructor is not responsible is conducted at the client's expense; the client is obliged to pay for appropriate work and other spending pertaining to the performance of the work by the constructor. For instance, the constructor is not responsible for work defects caused by concealed inherent defects of the materials provided by the client.<sup>49</sup>

Another category of violations associated with derogations from the terms of the construction contract or other defects which are considered to be essential include the following violations: performing work by the constructor with derogations from terms of the contract, which deteriorate the work results; performing work by the constructor with other defects which make it impossible to use the results for the purposes envisaged in the contract or for customary use of that type of work.

If the derogations from conformity with the terms of the construction contract or other defects of works occur to be essential, unrepairable or have not been eliminated within the reasonable time indicated by the client, the client has the right to terminate the contract and recover the damages. Where the defects can be detected only after a certain time has already passed, the parties can establish a warranty period during which the

client is entitled to notify the constructor of such defects, and the constructor shall eliminate them. Warranty obligations can cover the entire works result as well as only its particular elements, in accordance with the contract terms. The calculation of the warranty period shall start with the moment of acceptance of the completed work by the client, unless the parties established otherwise (for instance, that calculation of the warranty period shall start with the moment of actual exploitation of the object for purposes envisaged in the contract, etc.). During the warranty period the constructor is obliged to eliminate the defects of the construction work, if he cannot prove that such defects appear as a result of customary use of the object or its elements, of improper exploitation or improper instruction on exploitation, developed by the client or by the third parties engaged by the client. If the client is unable to use the contractual object due to the defects caused by the constructor, the warranty period shall be extended for the appropriate period.

An essential defect of the completed construction work can be caused by the inadequate quality of materials purchased by the constructor if such obligation is imposed on the constructor under the terms of the contract. In such case, the client can claim for the proportional reduction of the price for the work, the elimination of the defects at no extra charge, reimbursement of the client's costs of eliminating defects, the termination of the contract and recovery of expenses of the materials, and/or the replacement of provided materials, etc. While regulating the constructor's liability for inadequate quality of provided materials, the legislator does not establish the constructor's liability for inadequate quality of used resources, such as, for example, involving unqualified workers whose actions could cause deterioration of the performed work.

Where the constructor causes non-essential defects or derogates from the terms of the construction contract and such defects or derogation deteriorate the work result, the client is entitled to claim rectification of these defects within a reasonable time at no extra charge, or he can rectify the defect at his own expense. In the latter case, the client is also entitled to claim reimbursement from the constructor with regard to the cost of rectifying the defect or to claim appropriate reduction of the remuneration.

Furthermore, violations under construction contracts can be related to the provision of materials which are encumbered with the rights of a third party. For instance, if the material is a subject of pledge, the party which provided that material shall warn the other party accordingly while concluding the contract and use the material only upon approval. Thus, the client's interests are protected, especially against the vindication action brought by the third party after transfer of the object. The same regulations apply in the event of providing materials or equipment encumbered with third party intellectual property rights.<sup>50</sup>

Other violations under the construction contracts are associated with non-providing of the materials for work performance by the client, or with providing low-quality materials. The Ukrainian CC presumes that the work is performed by the constructor at his own expense, using his resources and measures, unless the construction contract envisaged otherwise. Pursuant to the freedom of contract principle (art. 627 CC), the parties have rights to conclude such construction contracts in which the client shall provide the materials instead of the constructor. If the client fails to provide the materials or equipment to the constructor, this fact leads to a situation where commencing the work or its further continuation by the constructor becomes impossible. In such cases,

<sup>49</sup> Зобов'язальне право України: Підручник/За ред. Є.О. Харитонов/Н.Ю. Голубевої, Київ 2011, с. 357 (Law of Obligations of Ukraine, *Kharitonova/Golubev* (eds.)).

<sup>50</sup> А. Гриняк, Види правопорушень у сфері договірних підрядних відносин, Підприємництво, господарство і право 2012, с. 22 (*Grinyak*, Types of violations in the field of special works contract, Business, Economy and Law 2012).



the constructor is entitled to impose sanctions on the client in order to protect his violated rights, which can be in the form of non-commencing the work or termination of the work already commenced.

The issue of proper legal regulation of the relations between the constructor and the client relating to the provisions of the materials for performing construction work becomes particularly important if the work is performed completely or mainly from the client's materials.

In the Russian legal literature it is pointed out that the most widespread form of regulating such work is the "mixed" contract. The mixed character of this type of contract is expressed by incorporating into the construction contract the client's obligation to provide certain materials (usually this provision can be found in the chapter on the parties' rights and obligations) or by the establishing two independent obligations regarding the performance of the work, and the delivery of the materials, respectively. Thus, following *Sotnikova's* opinion, the author considers that the parties shall incorporate essential terms of delivery into the construction contract by indicating the designation and the quantity of the provided materials and the date of delivery. It is also suggested that delivery dates of the materials are incorporated into the general schedule of performance of the construction works, and that penalties for the delay (default) in delivery are established. An indication of a certain date can be relevant if the parties have agreed on a strict schedule; in these cases, the client is usually obliged to effect delivery of the materials not before the indicated date (for instance, there might be a lack of storage capacities prior to this date). It would be an acceptable solution to impose an obligation on the party to arrange delivery of equipment and materials to the indicated place and at the expense of this party, i. e. the party which is obliged to supply such equipment and materials.<sup>51</sup>

If the materials provided by the client contain some defects the constructor shall immediately give a warning about this fact to the client, and if the client fails to respond, the constructor has a right to terminate the contract and claim for reimbursement, according to art. 848 CC. While the constructor is accepting the materials provided by the client for the performance of the work, he is obliged to examine their quality since the constructor is responsible for non-performance and improper performance of the work caused by the defects of the materials provided by the client. The constructor shall reasonably manage the use of the materials provided by the client, properly store them, report the usage to the client and return the remains. Therefore, in the contract there shall be established usage rates of materials, terms for returning remains and main wastes of materials as well as terms of the constructor's liability for non-performance and improper performance of his obligations. Regardless of the way of indication of terms for returning remains and wastes, the parties are obliged by the law to impose in their contract punitive measures to secure execution of this requirement. In practice such punitive measures are expressed in a percentage of the value of the unreturned remains and in the indication of a fixed amount per unit of waste for which prices are not settled. If it is established that due to its usage the remains of materials and wastes cannot be collected in kind, the court shall award not only a penalty but also the value of the used materials and wastes for which the constructor has not paid the client.<sup>52</sup>

<sup>51</sup> М.П. Сотникова, Выполнение работ из материалов заказчика: проблемы юридического оформления, Юрист 2009, № 9, с. 18-19 (*Sotnikova*, Performance of the works using the customer's materials: problems of legal registration, The Lawyer 2009, № 9).

<sup>52</sup> Науково-практичний коментар Цивільного кодексу України: У 2 т./ За ред. Дзери/ Кузнецової/ Луця, Київ 2006, т. II, с. 446 (Academic and Practical Commentary, fn. 4).

The constructor shall provide protection of the property in the place of work performance by securing certain objects. Contracts for specific work, particularly contracts of object reconstruction, can include a condition imposing on the client an obligation to secure the construction site and all properties located on it. In such case, the constructor shall be liable only if it is proved that the constructor has taken actions which caused the insecurity of the client's properties which were in the constructor's possession at that moment.

Under art. 850 CC the parties are entitled to incorporate into the contract provisions imposing on the client obligations to co-operate and assist the constructor's performance of the work with indication of its scope and procedure of realisation. Thus, a contract can impose on the client the obligation to co-operate by providing the construction site with water supply, energy etc., and provide other services. Therefore, in the event of non-performance of this obligation by the client, the constructor is entitled to claim reimbursement along with the increase of the price for the work. If the performance of work becomes impossible due to actions or negligence on the client's part, the constructor shall be entitled to be paid the established price regarding the performed part of work, reduced by the amounts which the contractor received or could have received as a result of the client's non-performance of the contract.

A widespread type of violations in construction contracts are violations in the form of the client's refusal to pay for completed works after accepting the results. Performing work in a proper manner and completing work at the prescribed time according to the contract provisions is an obligatory condition for the fulfillment of the client's financial obligations to the constructor. However, the client can refuse to pay for work performed by the constructor and thus violates the interest of the constructor who properly fulfils his contractual obligations. In art. 855 CC the legislator stipulates circumstances under which the constructor can claim payment from the client even if the work result was destroyed or it could not be completed. Such circumstances are as follows: the client provided the constructor with defective materials; the constructor strictly follows the client's instructions regarding the method of performing the work; destruction of the object of the contract or impossibility of completion of construction work due to client's delay (default) in acceptance.

The current Ukrainian legislation also prescribes the situation where the constructor is entitled to payment for performed work in the event of temporary closure of the construction process. Therefore, according to the provisions of art. 321 (7) CommC, under a major construction contract the client shall pay the contractor for the work performed before such temporary closure, and compensate the client for the expenses incurred in connection with such close-down. The CC contains an analogous provision in art. 879 (6). Based on the contents of art. 843 (1) CC, contracts for specific work shall establish the price of the performed work or the method of setting the price. In the absence of such a provision, the price shall be defined by court decision related to usual prices for similar work, while taking into account necessary expenses established by the parties. At this point we should pay attention to the regulation of art. 189 (2) CommC, which defines the price as one of the essential terms of the contract. However, it is a common situation in practice that, instead of explicitly establishing the price in the contract terms, the parties prescribe the method of calculating the price for the moment of accepting the works result. According to the literal interpretation of art. 189 (2) CommC, the above-mentioned type of construction contract shall be considered as non-concluded due to the lack of an essential term. In the author's opinion, this strict approach expressed in the legislation does not facilitate the development and – what is more important – the stability of civil-law relations. We subscribe to the view outlined in the literature by commercial law scholars according to which the price in commercial



contracts shall be regarded as an essential term of contract only if it cannot be set alternatively.<sup>53</sup> The price in construction contracts can be established as a cost estimate, which is divided into rough estimation and exact (hard) estimation. Generally, a cost estimate shall be hard estimate, unless in the contract it is established otherwise, and its variation can be made only after agreement between the parties. If the hard estimate is exceeded, all expenses related to this fact are imposed on the constructor, unless the law established otherwise. When a significant excess of the established rough estimation is the result of the fact that additional work has turned out to be necessary, the constructor is obliged to notify the client accordingly, who can disagree and exercise his right to terminate the contract and pay only for the part of the work already performed. If the constructor fails to warn the client about the necessity of exceeding the rough estimate in a timely manner, he shall be obliged to perform the contract according to the price prescribed by the contract. In the legal literature it is stated that a notification is considered to be timely if it is given after performing half of the work.<sup>54</sup> Neither is the constructor entitled to claim for increase of the hard estimate nor is the client entitled to claim for its decrease where the entire scope of work and all necessary expenses could not have been foreseen at the moment of concluding the construction contract. If there is a significant increase in the prices of the materials or the equipment which shall be provided by the constructor, or in the prices of services provided for the benefit of the constructor by third parties, following the conclusion of the contract, the constructor is entitled to claim such increase of the cost estimate or to terminate the contract. The price under the construction contract includes the compensation of the constructor's expenses and the remuneration pertaining to his efforts. In academic literature, the common elements of the constructor's expenses are as follows: prices of services provided by third parties to the constructor, transportation costs, reduction of the equipment's value due to depreciation, costs of used materials while work is performed using materials provided by the constructor.<sup>55</sup> Payment under the construction contract is usually made by paying after the final acceptance of the work. However, the contract can establish an obligation of pre-payment or payment after performing certain stages of the work. Hence, following the widespread long-standing practice in construction contracts, the method of pre-financing is commonly used to provide the constructor with funds (among 10-20% of the works' cost) required for commencing the work prescribed by the contract.<sup>56</sup> Following art. 856 (1) CC, the constructor is entitled to use one of the methods of ensuring the obligation, i. e. retention of the work results as well as the equipment, the material and other property of the client used by the contractor, in order to force the client into performance of his duty of payment.

In conclusion it can be said that "violation of an obligation of a construction contract" means the non-performance or improper performance of obligations which are established by the contract terms, by the client or the constructor, and the non-compliance with current Ukrainian legal acts and/or common businesses practices, what leads to the application of civil liability with regard to the breaching party.

<sup>53</sup> О.А. Белянич, Господарське договірне право України (теоретичні аспекти), Київ 2006, с. 21 (Belyanich, Economic Contract Law of Ukraine (theoretical aspects)).

<sup>54</sup> Науково-практичний коментар Цивільного кодексу України: У 2 т. / За ред. Дзери/Кузнєцової/Луця, Київ 2006, т. II, с. 446 (Academic and Practical Commentary, fn. 4).

<sup>55</sup> А. Гриняк, Ціна як звичайна умова договору підряду, Підприємництво, господарство і право 2012, № 7, с. 17. (Grinyak, Price as usual term of the specific work contract, Business, Economy and Law 2012, № 7).

<sup>56</sup> Науково-практичний коментар Господарського кодексу України/За ред. В.К. Мамутова, Київ 2004, с. 500 (Academic and Practical Commentary of the Civil Code of Ukraine, Mamutov (ed.)).

### III. Legal Consequences of Non-Performance of Construction Contracts

The prevailing point of view in the civil law doctrine is that the application of civil liability shall be based on the presence of the elements of a civil delict in the actions of the violator.<sup>57</sup> The non-performance of obligations or performance while violating established terms shall be considered as an unlawful action (inaction) of the violator regarding his contractual obligation. However, the mere occurrence of the breach of an obligation is not sufficient for imposing liability on the party who violates the obligation, as, pursuant to the provision of art. 614 (1) CC, the breaching party is liable only if it is guilty, unless otherwise stipulated by the contract or the law.

According to art. 614 (3) CC, an agreement excluding or restricting the liability for deliberate violations of the obligation is void. This means that the parties of the contract can exclude or restrict liability for negligent violations only. In accordance with art. 617 CC, a person who violates an obligation cannot be held liable if that person proves that this violation was caused accidentally or by force majeure. According to art. 7 UNIDROIT, a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken that impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.<sup>58</sup>

In art. 611 CC and rule 112 of the Framework conditions of conclusion and performance of contracts in capital construction adopted by the Cabinet of Ministers of Ukraine of 01.08.2005 No. 668 the Ukrainian legislator established that violations of the obligations under construction contracts can lead to the following legal consequences: 1) termination of the contract by the notice of one party if this right is stipulated by the contract or the law, or termination of the contract by both parties; 2) modification of contract terms; 3) payment of a stipulated penalty; 4) reimbursement for expenses and moral damages.

The unilateral termination by notice of the construction contract, as a legal consequence of the violation of an obligation, is possible by the constructor as well as the client. Moreover, the legislator imposes this obligation only on the constructor where the use of low-quality materials or inadequate materials or following the client's requirements causes threat to human lives and health or leads to the violation of ecological, sanitary regulations as well as safety rules and other requirements. The constructor has the right to terminate the construction contract, if: 1) the client, regardless of timely warning made by the constructor, fails to replace the inadequate materials within an appropriate period, fails to modify instructions for the method of performing the work, or fails to eliminate other circumstances which pose a threat to the

<sup>57</sup> М.М. Агарков, Обязательство по советскому гражданскому праву, Москва 1940, с. 141 (Agarkov, Obligation under the Soviet civil law); Г.К. Матвеев, Вина в советском гражданском праве, Киев 1951, с. 7 (Matveev, Fault under the Soviet civil law); О.С. Иоффе, Ответственность по советскому гражданскому праву, Ленинград 1955, с. 94 (Ioffe, Liability under the Soviet civil law, Leningrad); О.А. Красавчиков, Юридические факты в советском гражданском праве, Москва 1958, с. 57 (Krasavchikov, Legal facts in the Soviet civil law); Н.С. Малеин, Имущественная ответственность в хозяйственных отношениях, Москва 1968, с. 22 (Malein, Property responsibility in economic relation); Гражданское право/под ред. Ю.К. Толстого/А.П. Сергеева, Москва 1996, Ч. 1, с. 490 (Civil law of Ukraine Tolstoy/Sergeyev (eds.)); В.В. Луць, Контракты у підприємницькій діяльності, Київ 2001, с. 74 (Lutz, Contracts in business activity); Цивільне право України/за ред. Р. Б. Шини, Харків 2005, Т. V, Кн. 1, с. 182-187 (Civil Law of Ukraine, Shishka (ed.)); І. Подколізін/І. Дзера, Правові підстави відшкодування збитків, Юридична Україна 2009, № 6, с. 73 (Podkolozin/Dzera: Legal grounds for calculating damages, Legal Ukraine 2009, № 6).

<sup>58</sup> Принципы международных коммерческих договоров/пер. с англ. А.С. Комарова, Москва 1996, с. 8 (Principles of International Commercial Contracts).



quality or the suitability of the work result; 2) does not consent to incorporating into the design documentation and the cost estimate some modifications requiring the performance of additional work if the cost of the latter exceeds 10 percent of the price specified in the contract; 3) the use of materials (elements, structures) or equipment provided by the client leads to the deterioration of the quality of the performed work.

The legislator entitles the client to terminate the contract at any time until the work is completed and pay the remuneration for the damages caused by the termination of the contract. Furthermore, the client is entitled to terminate the construction contract, if: 1) during the performance of the contract it becomes obvious that the work will not be performed in a proper way; 2) derogation from the terms of construction contract during the performance of the work or other defect of works are essential and unrepairable, or the constructor failed to remedy such derogation or defect within a reasonable period indicated by the client; 3) the client does not consent to significant excess of the rough estimation of the costs, caused by the necessity of conducting additional work; 4) the constructor fails to commence the work or performs it so slowly that it becomes obvious that the completion of the work on time is impossible.

The fourth mentioned condition raises the question of an adequate legal regime with regard to a non-completed construction object. As a general rule, according to art. 331 pt. no. 2 CC, the right of ownership of a newly created immovable property arises at the moment of the completion of the construction. Thus, till the end of the construction work, the property exists only physically and is not regarded as an object of law. This provision of the Ukrainian CC also contains a list of other moments in time when the right of ownership arises: the moment when the exploitation of the object commences if this fact is envisaged by the contract, or the moment of the public registration if the ownership right of the immovable property is a subject to public registration pursuant to the law. Art. 331 (3) CC does not consider immovable property which construction is not completed as an object of law. It is worth discussing the correlation of terms used in art. 331 (3) para. 1, 2 CC. While the first paragraph refers to materials, equipment etc. used during the construction process, the second paragraph describes the same property regarding the conclusion of a contract associated with an uncompleted object of construction. This creates the impression that the legislator equates an uncompleted object with a set of materials used for construction. This assumption is completely wrong, because the materials (sand, stone or bricks, wood, glass, metal, etc.) are now inseparable and immovable; they do not even constitute a set of things insofar as they were used in the course of construction, but rather became a building construction, i. e. the highest extent of inseparability of things. These things are inseparable, both among each other and in relation to the land on which the construction is situated. A disconnection or displacement of such a construction is impossible without damaging or depreciating the construction. The abovementioned fact proves that an unfinished construction is an immovable property due to its natural features even before possible registration of its ownership right. The legislator links the moment of time when an uncompleted construction starts to "exist" as an immovable property and, as a consequence, as an object, with the moment of its registration. Thus, public registration is not a qualifying characteristic which classifies an uncompleted object as an immovable property, but rather plays a legally constituting role, and is a prerequisite for its participation as an object in civil-law relations.<sup>59</sup>

<sup>59</sup> Д. Кирилюк, Об'єкт незавершеного будівництва як особливий об'єкт цивільних прав, Підприємництво, господарство і право 2012, № 5, с. 101 (Kirilyuk, Uncompleted construction object as a special object of civil rights, Business, Economy and Law 2012, № 5).

In the civil law doctrine there is no consensus on the issue of the lawfulness of classifying an unfinished construction object as immovable property. Some academics hold that an unfinished construction object is not an immovable property; therefore, upon completion of the construction object (creating an immovable property) and until the moment of its public registration of an according immovable thing, such an object is a movable thing (a complex of materials).<sup>60</sup>

According to an opposing opinion, the legal nature of an uncompleted construction object shall be assessed based on the natural attributes of an immovable property, i. e. the permanent attachment to the land and the impossibility of displacement without deterioration.<sup>61</sup> With this approach, an uncompleted construction object shall be considered to be an immovable thing, though some academics who subscribe to this idea emphasise the impossibility of ownership of this type of immovable thing.<sup>62</sup>

There is also a conciliatory approach which rejects both extreme positions, i. e. the unconditional recognition of an uncompleted construction object as an immovable property as well as the consideration as a movable thing, i. e. a complex of materials. Furthermore, an unfinished construction object is regarded as an object sui generis. In relation to this object there are only rights of obligations, and the protection of the belonging of the construction object is facilitated only by the rules of protection of possession as a legal fact.<sup>63</sup>

Other academics argue that the distinction between movable and immovable things, taking into account the circumstances of contemporary business dealings, is no more a dichotomy. An object of construction is a clear example of a thing, which, apparently, is not movable, but at the same time cannot be regarded as an outright immovable property in the contemporary understanding of this category. According to this approach, the rules on establishing ownership rights do not apply to construction objects (uncompleted objects), though the latter are characterised by some specific features of the dynamics of civil-law relations, an object of which they form.<sup>64</sup>

There is an accepted viewpoint expressed by the Supreme Arbitration Court of the Russian Federation, according to which an uncompleted construction object can be an object of civil-law relations (for the purpose of potential fixation and individualisation) in the event of a close-down of construction work, the termination of the construction works contract and public registration of ownership rights pertaining to this object.<sup>65</sup>

<sup>60</sup> Е.А. Суханов, О понятии недвижимости и его влиянии на иные гражданско-правовые категории, Вестник гражданского права 2008, № 4, с. 10-11. (Sukhanov, The concept of immovable property and its impact on other civil categories, Civil Law Journal 2008, № 4).

<sup>61</sup> Е. С. Болтанова, Понятие и правовой режим недвижимости, Журнал российского права 1999, № 5/6, с. 83 (Boltanova, The concept and legal regime of immovable property, Russian Law Journal 1999, № 5/6); Д. В. Смышляев, Особенности правового положения объекта незавершенного строительства, Актуальные проблемы гражданского права : сб. ст./под ред. С. С. Алексеева, Москва 2000, Вып. 2, с. 69-106. (Smyshlyayev, Features of the legal regime of the uncompleted construction object. Current problems of civil law, Alekseyev (ed.)).

<sup>62</sup> О. Романов, Государственная регистрация прав на недвижимость и сделок с недвижимым имуществом: некоторые проблемы правоприменения, Хозяйство и право 1998, № 7, с. 71 (Romanov, The state registration of rights to immovable properties and transactions of immovable properties: some problems of enforcement, Economy and Law 1998, № 7).

<sup>63</sup> К.И. Скловский, Собственность в гражданском праве, Москва 2008, с. 746-747. (Sklovsky, Ownership in the civil law).

<sup>64</sup> Харьковская цивилистическая школа: право собственности: монография/под ред. И. В. Снацибо-Фатеевой, Харьков 2012, с. 243 (Civil school of Kharkiv: ownership rights: monography, Spasibo-Fateeva (ed.)).

<sup>65</sup> Д. Кирилюк, Об'єкт незавершеного будівництва як особливий об'єкт цивільних прав, Підприємництво, господарство і право 2012, № 5, с. 100 (Kirilyuk, Uncompleted construction object



The modification of the contract terms, particularly of the date of completion of the work, is allowed in the following cases: non-performance or improper performance of the obligation by the constructor (violation of the funding conditions, providing access to the construction site after the specified time, untimely delivery of the design documentation, resources, etc.).

The client is entitled to terminate the construction contract in the event of: 1) significant derogation from the terms of contract, or other essential defects; 2) delay in commencing the performance of the work by the constructor or such slowly performance that it is obvious that the completion of the work on time is impossible. The constructor can terminate the contract if the client rejects the increase in the contractual price for the work resulting from a significant increase in the price for resources and services.

A stipulated penalty for the non-performance under the construction contract shall be paid by the client if the latter fails to perform his contractual obligations or performs them improperly, unless he could prove that the non-performance has occurred without his fault (art. 886 (1) CC). The constructor pays a stipulated penalty in the event of non-performance or improper performance of obligations under the construction contract (art. 883 (2) CC). The amount of the stipulated penalty shall be specified by the parties' agreement in the contract terms or by the provision of law. While the amount is established by the parties' agreement, it shall be fully paid regardless of the compensation of damages. The contract can establish the obligation to compensate only for that part of damages which are not covered by the stipulated penalty, or the right to claim for stipulated penalty without further claims for compensation, or a right of choice for the client between claiming for stipulated penalty or compensation.

A stipulated penalty for non-performance in civil law has a twofold nature: before the moment of non-performance it secures the performance of the obligation, whereas after non-performance, it is a type of liability for non-performance.<sup>66</sup>

Stipulated penalties for non-performance can have two forms: a penalty expressed in a certain amount of money, or an obligation to perform and a penalty expressed as a percentage of the contract value. Stipulated penalties can be expressed in the form of any movable thing identified by both its generic and individual characteristics. For instance, a penalty in the construction contract can stipulate the duty to transfer ownership of certain equipment to the creditor, if such transfer is necessary for the constant maintenance of the constructed object in good condition (utilities to provide water, gas, electricity, etc.), or to transfer automotive facilities which are necessary for further use during the exploitation of the building construction, etc.<sup>67</sup>

If the stipulated penalty is expressed in the form of an obligation to transfer the immovable property, the contract containing this term shall be authorised by a notary because, according to the general rule, any disposal of such property shall be registered publicly.

Where the parties did not establish any stipulated penalty in the construction contract, the creditor can claim for payment of the double lending rate as established by the National Bank of Ukraine, which is current during the period of delay (default) (cf. legal act of the Ukraine "On the responsibility for delay in performing monetary obligations").

Article 549 (1) CC provides that stipulated penalties can be expressed in the form of

as a special object of civil rights, *Business, Economy and Law* 2012, № 5).

<sup>66</sup> О.О. Отрадна, Неустойка в цивільному праві: автореф. дис. [...] канд. юрид. наук, Київ 2002, с. 3. (Otradna, Stipulated payment in civil law).

<sup>67</sup> А. Гулик, Неустойка як спосіб забезпечення виконання підрядних зобов'язань, *Юридична Україна* 2012, № 8, с. 52 (Gulik, Stipulated payment as a means of securing the performance obligations under contracts for specific work, *Legal Ukraine* 2012, № 8).

a monetary amount, or in the form of another property. While the meaning of the expression "monetary amount" is unambiguous, it is interesting to discuss the meaning of the expression "another property". In the academic literature, there is a list of conditions which shall be fulfilled by the object to be considered as "another property". The first condition is that such object shall be a part of a general legal regime of things. Thus, a stipulated penalty cannot consist of things excluded from civil-law dealings, or things with limited access to it. Secondly, for the moment of the conclusion of the construction contract the object shall be owned by the contracting party, or the contracting party shall be obliged to purchase it in the future. Thirdly, the decision about the transfer of such property shall be made independently by the debtor, without any special permit by the relevant authorities or third parties. Fourthly, the performance of this additional obligation shall not be connected with any third party rights (secondary, subordinate rights, etc.). Fifthly, during such transfer and acquisition of this property both debtor and creditor shall have special legal capacity.<sup>68</sup>

Reimbursement, according to the CC of Ukraine, is one of the ways to protect civil rights and interests. Similarly, the UN Convention on Contracts for the International Sale of Goods (1.04.1980)<sup>69</sup> considers reimbursement as one of the measures of legal protection of the injured party, which restores the position in which the party would be had the contract been performed. Damages shall be understood as: 1) losses suffered by the party due to destruction or damage of the thing or expenses the party has incurred or shall incur to restore its violated rights (real losses); 2) income that the party could have received under normal circumstances if his rights had not been violated (loss of income). Under general rule established in the CC damages shall be fully recovered, unless the contract or the law established recovery in a smaller or larger amount. However, in art. 322 (1) CommC, it is established that the party guilty of non-performance or negligence under a major construction contract shall pay a stipulated penalty and compensate to the other party for losses in the amount due after payment, unless otherwise provided by the law. Recovery of the damages is possible in the event of non-performance and only where the damages are actually incurred by the person who believes that its rights have been violated. Taking into account the provisions of art. 614 (1) CC, only damages caused as a result of the creditor's violation of the obligation and only damages which are causally related to the violator's misconduct shall be recoverable. It is an indisputable axiom, without any exception, that if there are no established losses to property, no liability in the form of compensation for such damages shall be imposed. In such circumstances, also other measures of civil liability can be applied to the violator of the obligations (for example, liquidated damages in accordance with art. 550 (1) CC).<sup>70</sup>

It is worth mentioning that damages caused by failure or improper performance of obligations under the construction contract by the client shall be fully recovered, unless the client proves that the non-performance was not caused by his fault (opposite rule applies to the constructor).

Both the constructor and the client have the right to claim for damages caused by the modification or termination of the contract. Moreover, the client is entitled to claim for damages if: 1) the constructor fails to commence the work or performs it so slowly that it

<sup>68</sup> А. Гулик, Неустойка як спосіб забезпечення виконання підрядних зобов'язань, *Юридична Україна* 2012, № 8, с. 55 (Gulik, fn. 67).

<sup>69</sup> Конвенція Організації Об'єднаних Націй про договори міжнародної купівлі-продажу товарів від 11.04.1980/Офіційний вісник України, 2006, № 15, с. 438 (UN Convention on Contracts for the International Sale of Goods).

<sup>70</sup> І. Подколзін/І. Дзера, Правові підстави відшкодування збитків, *Юридична Україна* 2009, № 6, с. 78 (Podkolzin/Dzera, fn. 57).



becomes obvious that the completion of the work on time will be impossible; 2) during the performance of work it becomes clear that the work will be performed improperly; 3) the works consists of significant derogations from the contract terms or other significant defects.

The constructor is entitled to claim for damages if: 1) the client fails to replace the inadequate or low-quality materials, does not change its instructions on the method of performing works, or does not eliminate other circumstances which threaten the quality or suitability of the work result; 2) the use of low-quality materials or inadequate materials or adhering to the client's requirements causes threat to human lives and health or leads to the violation of ecological, sanitary regulations as well as safety rules and other requirements; 3) the client terminates the construction contract at any time before the work is completed; 4) the client fails to perform its obligations to co-operate and assist the constructor's performance of the work with regard to the cases, the scope and the procedure established in the contract; 5) the client fails to respond in reasonable time to the constructor's notification about the exceeding of the cost estimate caused by the necessity to perform additional work, and this fact was not specified in the design documentation; 6) the client does not consent to the amendment of the contract as to the performance of additional work the cost of which exceeds 10 percent of the price specified in the contract; 7) the use of materials (details, structures) or equipment provided by the constructor influences the quality of the performed work.

Thus the legislator gives the parties to a contract – along with the general form of civil-law liability, i. e. recovery of damage which is to be applied in every case of a violation of an obligation, owing to the stipulated penalty as a special form of civil-law liability, – the possibility to modify the scope of their statutory liability. It establishes a special form of responsibility. For instance, the parties can establish a stipulated, contractual penalty in order to increase the scope of liability.

In the literature it is stated that moral damages (non-economic) shall be understood as consequences of violations which do not have any economic character, and their value is expressed, particularly, through physical pain, mental anguish, or humiliation of honour and dignity of the individuals.<sup>71</sup> For quite a long period, the general rule of recovery merely for economic damages under the construction contract has remained broadly applicable. Recovery for moral (non-economic) damages was granted only in the event of liability for delict (tort). In the current legal doctrine there are also views that recovery for moral damages is not possible through monetary compensation or any other material form, but only in the form of non-contractual obligations.<sup>72</sup> Numerous authors believe that recovery of moral damages in contractual relations can be granted only where strictly prescribed by the law or the contract.<sup>73</sup> Following this logic, the same requirements (to be prescribed by the law or the construction contract) would have to be applied, according to art. 611 (1) pt. no. 4 CC, to the recovery of economic damages, what would obviously, be nonsense. In general, it shall be pointed out that the principle of damage recovery for non-performance is based on placing the creditor into the

<sup>71</sup> Цивільне право України. Академічний курс: підручник: у 2 т./за заг. ред. Я. М. Шевченко, Київ 2006, Т. 1. Загальна частина, с. 114 (Civil law of Ukraine. Academic course, Shevchenko (ed.)).

<sup>72</sup> С.Е. Сиротенко, К вопросу о договорном и недоговорном характере морального вреда, Личные неимущественные права: проблемы теории и практики применения: сб. статей и иных матер./под ред. П. А. Стефанчука, Киев 2010, с. 340 (Sirotenko, On the question of the contractual and non-contractual nature of moral damage. Personal non-economic rights: theory and practice, Stefanchuk (ed.)).

<sup>73</sup> Цивільне право України. Академічний курс: підручник: у 2 т./за заг. ред. Я. М. Шевченко, Київ 2003, Т. 2. Особлива частина, с. 388 (Civil law of Ukraine: Academic course, Shevchenko (ed.)).

position as if the obligation had been properly performed.<sup>74</sup> Art. 23 (1), (2) and (3) CC establish that the party has the right to claim moral damages caused by the violation of its rights regardless of the scope of economic damages. Moral damages are recovered fully at the same time, unless the contract or law established otherwise. This means that the law allows the subject of the legal relation to regulate, at its sole discretion, the procedure of recovery for moral damages in the contract.

As to the amount of the compensation for the moral damage, Zawarza points out that Ukrainian law does not prohibit the regulation of this aspect in the contract terms. However, there is no practice of regulating the amount of moral damages in the contract because of the impossibility to pre-define the non-economic consequences of a violation of the right of the injured party.<sup>75</sup>

It is worth mentioning that in art. 225 CommC the list of possible damages also includes the compensation for moral damages. Such content of this CommC provision contradicts the CC regulations which separately consider the concepts of damages and moral damages (art. 22, 23 CC), and in art. 611 these two concepts are completely opposed to each other. Moreover, the compensation for moral damages shall be conducted separately and the amount of compensation for economic damages shall not have any impact on the amount of compensation for moral damages. The application of these provisions of the CommC as a special rule of legal responsibility of contractors would accordingly influence the modification of law enforcement practice. This could lead – and is already leading – to significant collisions in the application of the institute of moral damages in the contract law in general and in particular in construction contracts. The questions of compensation for moral (non-economic) damages, in the event of non-performance of the construction contract, to a relevant extent depends on the victim, as in practice it is difficult to establish whether a certain unlawful action is connected with the performance of the contract. Because of the significant differences in the legal regulations of contractual and tort liability (terms of occurrence, evidence of guilt, statute of limitation, possibility of inheritance of the right to claim for damages, etc.) it is important for the injured party to have a possibility of determining the legal base for the claim (contract or delict/tort). Thus, the legislative provisions restricting moral damage only to the life or health of participants of contractual relations or other persons do not ensure adequate protection of non-economic rights. Such protection could be achieved by introducing amendments to the civil legislation of Ukraine according to which the legal consequence for the violation of the rights of the participants of a contract for work (if such violation turns out to be dangerous to their life or health) would comprise a compensation for both the economic and the moral damage.<sup>76</sup>

<sup>74</sup> А. Гриняк, Особливості відшкодування моральної (немайнової) шкоди в підрядних зобов'язаннях, Юридична Україна 2012, № 11, с. 52 (Grinyak, Features of estimating moral damages in special work contracts, Legal Ukraine 2012, № 11).

<sup>75</sup> Т.В. Заварза, Відшкодування моральної шкоди за порушення прав споживачів, не пов'язане із завданням шкоди життю чи здоров'ю, Актуальні проблеми цивільного, житлового та сімейного законодавства: матер. міжнар. наук.-практ. конф., присвяч. 90-річчю з дня народження докт. юрид. наук, проф. В. П. Маслова; Нац. ун-т «Юрид. акад. України імені Ярослава Мудрого», Харків 2012, с. 340 (Zawarza, Compensation for moral damages for violation of consumer rights not associated with the threat to life or health. Current problems of civil, housing and family law, Kharkiv).

<sup>76</sup> А. Гриняк, Особливості відшкодування моральної (немайнової) шкоди в підрядних зобов'язаннях, Юридична Україна 2012, № 11, с. 54-55 (Grinyak, fn. 74).



#### IV. Conclusion

Under present circumstances in Ukraine, a certain regulatory and legal framework of the construction contract is being developed, which is included into the CC, the CommC and other legal acts of Ukraine. Currently, however, not all of the issues pertaining to the legal regulation of the construction contract are resolved. In a large part of the legislative acts several referential rules and collision could be identified. So, unlike the CC, the CommC establishes a broad range of conditions which are considered to be essential for the contract; the acts of the Cabinet of Ministers of Ukraine regulate the general conditions of the conclusion and the performance of such contracts, in accordance with the law; a stipulated penalty and a special statute of limitations for claims arising from such contracts has been established. Moreover, the CommC allows for subsidiary application of the provisions of the CC on the general conditions of the construction contract, unless otherwise provided by the CommC.

An analysis of the legislation in the sphere of construction contracts indicates the lack of a systematic approach to the legal regulation of these relations. The approach stipulated in the legal acts reflects the legislator's aspiration to regulate the rights and obligations of the parties of construction contracts and establish a list of essential conditions which shall be constituted by the parties. The positive aspects of this approach are expressed in the fact that defining the rights and obligations of the parties under a construction contract in legal acts fosters their unambiguous understanding by the parties during the performance of the contract, without the need for specifying these rights and obligations directly in the construction contract. The legislator's aspirations to establish an increasingly broad range of essential conditions for construction contracts, particularly in the commercial legislation, is alarming to some extent, and threatens the principle of discretionary legal regulation of private relations.

The conducted analysis revealed the following types of violations under the construction contract: associated with delayed commencement of work by the contractor or performing the work too slowly or improperly; failure or delay in the performance of the client's requirements to eliminate the derogations by the contractor; provision of materials and equipment of low quality, or encumbered with third party rights; non-acceptance or delay (default) in acceptance of the results by the client; the client's evasion of payment for performed work after the acceptance of the result; non-delivery of information regarding exploitation or other use of the subject of the contract along with the work result; derogations from the terms of contract, or other essential defects.

*Übersetzt aus dem Russischen von Anna Grzywna, Krakau*

### Nikola Mijatović, Šime Jozipović Die Bedeutung des neuen kroatischen Finanzrechts für die Angleichung an die fiskalischen Standards der EU

#### I. Einleitung

Seit dem 1.7.2013 ist die Republik Kroatien das 28. Mitglied der Europäischen Union. Kroatiens EU-Beitritt ist jedoch nicht gleichbedeutend mit der sofortigen universellen Integration in alle Aspekte der EU.<sup>1</sup> Neben dem Beitritt zum Schengen-Raum sieht Kroatien insbesondere die Einführung des Euro und eine umfassende Eingliederung in alle Finanzintegrationen innerhalb der EU als strategische Ziele an.<sup>2</sup> Das Erreichen dieser Ziele steht jedoch in direkter Korrelation zur finanziellen Lage des Landes. Trotz eines äußerst langwierigen Beitrittsverfahrens, in dem steuerrechtliche und verwaltungsrechtliche Problemstellungen intensiv angegangen wurden, hat die Republik Kroatien lange gezögert, einen Schritt in Richtung eines nachhaltigen Steuersystems zu machen. Die zahlreichen Steuerreformen, die seit 2006 viele Bereiche des kroatischen Steuerrechts umformten, waren vielmehr lediglich Ausdruck der Angleichung an den Wortlaut der Vorschriften der EU, und nicht auf die Behebung faktischer Probleme ausgerichtet.<sup>3</sup>

Insbesondere der Verlauf der Finanzkrise in Europa zeigte schmerzhaft die ohnehin schon offensichtliche Tatsache auf, dass gerade der sehr eingeschränkte Einfluss der EU auf die mitgliedsstaatlichen Steuer- und Finanzpolitiken keineswegs ein Garant für eine Stabilität der nationalen Finanzlagen ist.<sup>4</sup> Auch in Kroatien stellte die staatliche Finanzlage immer mehr die zentrale Hürde für die wirtschaftliche Entwicklung dar. So erlitt Kroatien alleine im Jahr 2009 parallel mit der Entwicklung der Wirtschafts- und Finanzkrise einen Fall seines BIP um 6,9%. Der Trend der wirtschaftlichen Stagnation setzte sich auch in den folgenden Jahren gemeinsam mit der Kumulierung des finanziellen Drucks auf den Staat fort.<sup>5</sup> Als wesentliche Gründe für die finanzielle Schieflage des

<sup>1</sup> Siehe unter anderem Teil B, Kapitel IV des Vertrages über den Beitritt der Republik Kroatien zur EU.

<sup>2</sup> Kroatiens Zentralbankchef *Boris Vujčić* setzt sich intensiv für eine schnelle Übernahme des Euro ein. Dies begründet er darin, dass die Einführung des Euro lediglich eine Institutionalisierung der ohnehin bestehenden faktischen Lage darstelle. Für Kroatien seien mit der Übernahme des Euro wenig Kosten verbunden. Schon heute könne man den Wechselkurs nicht als unabhängiges Instrument der Geldpolitik nutzen, da 80% der Bankeinlagen in ausländischer Währung, davon 90% in Euro seien. Daher gäben die Banken auch ihre Kredite an den Euro indexiert aus, um das Währungsrisiko an die Kreditnehmer zu transferieren. Der einzige Weg, dieses Risiko zu eliminieren, sei die Übernahme des Euro. Dann wären die Ersparnisse im einzigen gesetzlichen Zahlungsmittel definiert und ebenso die Kredite. Neue Zürcher Zeitung, Interview v. 1.7.2013, ebenso Jutarnji List, Interview v. 2.7.2013.

<sup>3</sup> Vgl. hierzu z. B. das Gesetz über die Änderung des Gesetzes über die Umsatzsteuer vom 1.1.2010 – Zakonom o izmjenama i dopunama Zakona o porezu na dodanu vrijednost, Narodne novine (Amtsblatt der Republik Kroatien, im weiteren Text NN) 87/09, welches an die Richtlinien 2006/112/EZ, 86/560/EEZ, 83/181/EEZ, 2007/74/EZ und 2006/79/EZ angepasst wurde; oder das Gesetz über die Änderung des Körperschaftssteuergesetzes – Zakonom o dopunama Zakona o porezu na dobit NN 146/08, welches an die Richtlinien 90/434/EEZ, 2005/19/EZ, 90/434/EEZ und 2003/49/EZ angepasst wurde.

<sup>4</sup> Vgl. *Mestmäcker*: Herausforderungen der Wirtschafts- und Währungsunion. EuR- 2011 S. 17ff; *Horn*: Die Reform der Europäischen Währungsunion und die Zukunft des Euro, NJW 2011, S. 1401.

<sup>5</sup> Siehe S. 10 Leitlinien der Wirtschafts- und Fiskalpolitik 2013-2015 des Ministeriums für Finanzen, <http://www.mfin.hr/adminmax/docs/Smjernice%20ekonomske%20i%20fiskalne%20politike%202013.%20-%202015.pdf>.



Im Auftrag der  
DEUTSCHEN GESELLSCHAFT FÜR OSTEUEUROPAKUNDE e. V. ©

herausgegeben von Prof. Dr. Burkhard Breig, Berlin, Prof. Dr. Caroline von Gall, Köln, Richterin am Europäischen Gerichtshof für Menschenrechte Prof. Dr. Dr. h.c. Angelika Nußberger M. A., Straßburg/Köln, Dr. Carmen Schmidt, Köln, Prof. DDr. Bernd Wieser, Graz, Prof. Dr. Dr. h.c. Fryderyk Zoll, Osnabrück

unter Mitwirkung von Prof. Dr. habil. Bogusław Banaszak, Breslau, Prof. Dr. F. J. M. Feldbrugge, Leiden, Prof. Dr. Dr. h.c. Martin Fincke, Passau, Prof. Dr. Anders Fogelklou, Uppsala, Prof. Dr. Michael Geistlinger, Salzburg, Verfassungsrichter Prof. Dr. Pavel Holländer, Brunn, Prof. Dr. Peeter Järvelaid, Tallinn, Richter am Gerichtshof der Europäischen Union Dr. Egil Levits, Luxemburg, Prof. Dr. Otto Luchterhandt, Hamburg, Botschafter a. D. Dr. Klaus Schrammeyer, Bonn, Prof. Dr. Dres. h.c. Friedrich-Christian Schroeder, Regensburg, Prof. Dr. Theodor Schweisfurth, Heidelberg, Prof. Dr. Dr. h.c. László Sólyom, Staatspräsident a.D., Präsident des Verfassungsgerichts a.D., Budapest, Prof. Dr. Alexander Trunk, Kiel

#### REDAKTION:

Prof. Dr. Burkhard Breig, Prof. Dr. Caroline von Gall, Munir Qureshi (Dipl.-Übers.), Dr. Carmen Schmidt, Prof. DDr. Bernd Wieser

#### Anschrift:

Dr. Carmen Schmidt  
Institut für Osteuropa-Recht der Universität zu Köln  
Klosterstr. 79d  
50931 Köln

E-Mail: oe-recht@dgo-online.org, Aus dem Schrifttum: bernd.wieser@uni-graz.at, Aus Justiz und Rechtsprechung: cvgall@uni-koeln.de, Aus der Forschung: burkhard.breig@fu-berlin.de

Die in OSTEUEUROPA-RECHT veröffentlichten Beiträge mit Verfasserangabe geben die Ansicht der betreffenden Autoren wieder, nicht die der Herausgeber oder der Redaktion.

#### OSTEUEUROPA-RECHT

*Erscheinungsweise:* dreimonatlich. *Bezugsmöglichkeiten:* Bestellungen nehmen der Verlag und der Buchhandel entgegen. Bezugszeit: Das Abonnement gilt zunächst für ein Jahr; es verlängert sich, wenn nicht drei Monate vor Ablauf dieses Jahres schriftlich gekündigt wird. Darüber hinaus sind Kündigungen jeweils drei Monate vor Jahresende der Abonnementverwaltung mitzuteilen. Bezugspreise: Einzelheft 22,- €. Jahresabonnement Printausgabe 76,- € (für Mitglieder der Dt. Gesellschaft für Osteuropakunde e. V. sowie für Studierende (gg. Nachweis) 57,- €). Jahresabonnement Kombiversion (Print + digital) 98,- € (für Mitglieder der Dt. Gesellschaft für Osteuropakunde e. V. sowie für Studierende (gg. Nachweis) 74,- €). Alle Preise für ein Jahresabonnement inkl. MwSt., zzgl. Versandkosten (8,80,- € Inland/16,50,- € Ausland) bei Printausgaben. Preise der Print- und Onlineausgabe für Institutionen mit IP-Zugang auf Nachfrage beim Verlag.

*Verlag und Abonnementverwaltung:* BWV • Berliner Wissenschafts-Verlag GmbH,  
Markgrafenstraße 12–14, 10969 Berlin, Telefon (030) 84 17 70-0, Telefax (030) 84 17 70-21,

E-Mail: bwv@bwv-verlag.de

Gedruckt auf alterungsbeständigem Papier  
ISSN 0030-6444

# osteuropa recht

Fragen zur Rechtsentwicklung  
in Mittel- und Osteuropa sowie den GUS-Staaten  
60. Jahrgang, Heft 2/2014

„Dienstleistungsrecht“

## INHALT DIESES HEFTS

### AUFSÄTZE

Christian Alunaru	Die Bedeutung der Begriffe „obligation de résultat“ und „obligation de moyens“ im rumänischen Schuldrecht	S. 117
Iwona Karasek-Wojciechowicz	Die Klagbarkeit und Vollstreckbarkeit von Ansprüchen auf Naturalerfüllung von Dienstleistungsverträgen nach polnischem Recht	S. 131
Wojciech J. Kocot	The Juridical Nature of Distribution (Network) Contracts from the Polish Perspective	S. 143
Nataliya Kvit	Die zivilrechtliche Regelung medizinischer Dienstleistungen in der Ukraine	S. 164
Marlena Pecyna	The Russian and Polish Concept of the Law of Services – A Comparative Review and Some Remarks de lege ferenda	S. 171
Dominika Rogoń	Regelung der Kreditkosten im polnischen Recht	S. 181
Anton Rudokvas, Marina Nokhrina	The Contract for Services under the Civil Code of Russia and under the Draft Common Frame of Reference (DCRF)	S. 198
Liudmyla Savanets	Legal Regulations of Liability in Construction Contracts in Ukraine	S. 207
Nikola Mijatović, Šime Jozipović	Die Bedeutung des neuen kroatischen Finanzrechts für die Angleichung an die fiskalischen Standards der EU	S. 231

### AUS DER FORSCHUNG

Tim René Salomon, Law of International Trade in the Region of the Caucasus and Central Asia: Between Regional Integration and Globalization – Konferenzbericht, S. 245