Construction Contract

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ABSTRACT

The article describes the construction contract in Slovenian law (Articles 649 – 665 Obligations Code). A construction contract is a version of a contract to produce a work whose rules also apply to the construction contract. The provisions, valid only for a construction contract, refer to definition of a construction contract, the unforeseen works and change in prices if the basis for the calculation of prices has changed. Both the definition of a construction contract and details on change in prices are deemed unclear and ambiguous. Rules on material defects, warranty periods, the customer's duties to examine and notify material defects but also customer's rights in a case of a material defect described in detail. The customer's rights are deemed imbalanced to the detriment of the customer.

Keywords: Slovenian law – construction contract – contract to produce a work – unforeseen works – change in prices of elements on which the price was based – material defects – apparent and concealed material defects – warranty period – examination and notification of material defects - customer's rights in the case of defects – remedy of the defect – abatement of price – rescission of a contract – claim for damages

Gradbena pogodba

POVZETEK

Članek opisuje gradbeno pogodbo po slovenskem pravu (649. do 665. Člen Obligacijskega zakonika). Gradbena pogodba je varianta podjemne pogodbe, katere pravila se uporabljajo tudi za

gradbeno pogodbo. Določbe, veljavne le za gradbeno pogodbo, se nanašajo na opredelitev gradbene pogodbe, nepredvidena dela in spremembo cen, če se je spremenil temelj za kalkulacijo cen. Tako definicija gradbene pogodbe kot tudi podrobnosti o spremembi cen so nejasni in dvoumni. Pravila o stvarnih napakah, jamčevalnih rokih, naročnikovih dolžnosti pregleda in notifikacije stvarnih napak, vendar tudi naročnikove pravice v primeru stvarne napake so opisane podrobno. Naročnikove pravice v primerjavi s podjemnikovimi pravicami so urejene neuravnoteženo v naročnikovo škodo.

Ključne besede: slovensko pravo – gradbena pogodba – podjemna pogodba – nepredvidena dela – sprememba cene elementov, na katerih temelji cena – stvarne napake – očitna in skrita stvarna napaka – jamčevalni rok – pregled in notifikacija stvarnih napak – naročnikove pravice v primeru napak – odprava napake – znižanje cene – odstop od pogodbe – zahtevek za povrnitev škode

The purpose of this article is to describe the main features of the construction contract in Slovenian law. The provisions on construction contract and the related contract to produce a work are basically unaltered since 1978. On the one hand, literature on the construction contract is scarce. On the other hand, the number of court decisions is sizeable, which shows the great significance of the construction contract.

A construction contract is defined as a contract to produce a work whereby the contractor undertakes to construct, according to a specified plan and within an agreed time limit, a specific construction on a specific piece of land or to carry out other construction work on such land or on an existing building. The contractor undertakes to pay him a specified price (Article 649(1) Obligations Code).

A construction is deemed a construction work only if it requires major and complex works. Examples of constructions are buildings, dams, bridges, tunnels, waterworks, sewers, roads, railways, and wells (Article 650(1) Obligations Code). Other construction works are works on land.

The construction contract itself is a contract to produce a work. The rules on contract to produce a work therefore also apply to the construction contract. Article 660 specifically, but unnecessar-

ily, provides for this regarding the rules on liability for material defects under a contract to produce a work.

The basic law on contracts is the Obligations Code. The construction contract is regulated in Chapter 12 of the Special Part of the Obligations Code, Articles 649 to 665.

The contract to produce a work is regulated in Chapter 11 of the Special Part of the Obligations Code. Its regulation is relatively comprehensive. It covers all possible aspects that could arise in connection with this type of contract. The chapter on the construction contract, however, is structured differently. It deals only with all the ways in which a construction contract differs from a contract to produce a work.

For the sake of simplicity, it can be said that the focus of the regulation of the construction contract is on its definition, the rules on change in prices and the rules on liability for defects.

All references to articles in the following will therefore refer to the Obligations Code. As all references to articles refer to the Obligations Code, the specific references to it will be omitted, as they are not necessary for understanding of this article.

1. Characteristics of the construction contract

The contractor undertakes in the Construction Contract »to carry out ... the construction works«. He owes performance, i.e., success. The risk of failure is normally borne by the contractor. This is settled case-law e.g., CA VSL I Cpg 1444/2010, CA VSL I Cp 761/2009. There is no difference in principle in this respect compared to a contract to produce a work.

The contractor shall not be bound to use any particular means or method to achieve success, unless otherwise agreed. The choice of means and method is his unless he has bound himself by the contract to use a particular means or methods. This affects both the performance of the works and the claim for remedy of defects.

It is typical of a construction contract that the contractor will have to carry out several different works. The Obligations Code mentions this in several places. Article 650, in defining structures, provides that a construction must require major and complex works. In regulating the price, the Obligations Code (Articles 654

and 659) assumes that the contractor will carry out the »agreed works«, i.e., not just one work, and specifies certain ways of agreeing on the price. The construction contract is therefore a complex contract in its content.

The contractor must build »according to the plan«. It is not the contractor's duty to provide a plan; it is the obligation of the customer. The Obligations Code does not otherwise provide for anything with respect to a plan. It can therefore be notified orally or in writing, and it can be very general or precise.

The contractor undertakes to build »within a time limit«. The works are carried out over a period of time, in exceptional cases years or even longer. The conclusion of a construction contract establishes a continuing obligation which is limited by a time limit. While this conclusion may be drawn directly from the definition of the construction contract itself, no further norms of the Obligations code have been provided for this specific situation. So, for example, if a party decides to rescind a construction contract, the contract becomes invalid ex tunc which is highly impractical, and not ex nunc.

There are two real difficulties in applying the rules on construction contracts. The first is how to distinguish a construction contract from a contract to produce a work? The second is how to interpret the requirement for a construction contract to be in writing.

A construction contract is merely a type of contract to produce a work. The definition of a construction contract already says so. After all, any construction work is - a work. The similarity between both types of contracts is apparent.

For a construction contract, the contractor must carry out the construction work. If the construction work is »construction«, such construction work must be »major and complex«. This is where a contract to produce a work differs from a construction contract.

However, such a criterion of distinction is unclear. The delimitation between a contract to produce a work and a construction contract is therefore often only uncertain and inconclusive. In only one case to date has the Supreme Court of the Republic of Slovenia attempted to distinguish a contract to produce a work from a construction contract in a general and abstract way. A construction contract is characterised by larger and more complex

works requiring a greater number of contractors, preparations, a building permit, a project (SC VSRS III Ips 11/93). However, even this attempt at delimitation does not lead to a conclusive delimitation of the two types of contracts.

However, there are several court decisions on the question of whether a contract to produce a work or a construction contract should have been concluded.

For example, if the contractor owes to renovate the roof (CA VSL I Cpg 13/2013) or reconstruct the building and carry out maintenance work, e. g. on mechanical installations (CA VSL I Cp 3442/2010), the contract is not a construction contract. However, it is still not a construction contract if the contractor is obliged to install equipment in an existing building (CA VS VSL I Cpg 796/2012), to build a porch (CA VSM I Cp 1170/2009), to transport and install asphalt (CA VSL I Cpg 733/2011), to lay out an access road and yard (CA VSL II Cp 2526/2009), to lay an in-ground water pipeline (CA VSK Cpg 165/2012), and to asphalt the yard (CA VSL II Cp 105/2012). In some of these decisions, the court's decision is relatively understandable. Both the transport and installation of asphalt and the asphalting of the yard are not particularly complex works. However, in some of the other decisions cited here, it is not so clear why a contract to produce a work rather than construction contract was concluded.

Performing a construction work can be challenging because it might be interdependent with the other works and there may be many of them. These works need to be coordinated with each other. Even though individual works may be simple in themselves, their coordination can be challenging both technically and in terms of time. Installing screed is not particularly difficult, but before that, for example, electrical wiring, plumbing and central heating must be laid. In such cases, the question naturally arises as to whether the contract is a construction contract or a contract to produce a work.

The courts generally rule that it is not a construction contract, but they have not gone into the question if the complexity of the works does not qualify a contract as a construction contract either. In one case, the court held that there was no construction contract even when a series of construction works had to be carried out: laying boards on the existing roof, replacing the roofing, building up the porch, insulating the slab with screed, install-

ing windows, extending the roof over the porch, building an air bridge over the entire roof, replacing gutters, wind and chimney trimmings and building a carport (CA VSM I Cpg 345/2012; similarly in CA VSL II Cp 195/2012).

Article 649(2) expressly provides that a construction contract must be in writing. This is a second fundamental problem with the definition of a construction contract. However, the legal consequences are not specified. It could be inferred from the wording that a construction contract not concluded in writing is null and void. However, there are already court decisions which have ruled that such a contract is valid (SC VSRS, III Ips 15/2015, CA VSL I Cp 481/2014). The justifications of what is actually a quite important interpretation of one of the features of a construction contract is extremely short. The Supreme Court believes that the written form is provided "for the sake of protection of interest of parties and for ease of evidence". No further justifications were provided. In CA VSL I Cp 481/2014 the court stated that the written form is not a prerequisite for validity and that its purpose is solely to keep the evidence of conclusion of the contract and its provisions. Again, no further, more elaborate justification has been provided.

2. The customer's instructions and the unforeseen works

The customer may give instructions to the contractor (Article 622). While Article 622 uses the term »instructions«, Article 664(1) uses the term »request of the customer«. There is no substantive difference between the two terms. The right to give instructions does not entitle the customer to modify the construction contract unilaterally. He may, by means of its instructions, merely give more precise information on how the contractor must carry out the works unless otherwise provided for by a construction contract itself.

The type and quantity of work due is determined by the contract. However, it is common in construction to add some works that should be carried out by the contractor or omit the others. In addition, there are almost inevitable deviations from the quantity of work carried out from the plan which is submitted by the customer.

The reasons for this are manifold. During construction, it often becomes apparent that a work needs to be carried out which was not foreseen in the construction contract. This may be because a particular type of work was inadvertently omitted when the construction contract was drawn up. Such work is necessary but has been overlooked.

It is also possible that, during construction, additional work may have become necessary due to unforeseen circumstances. For example, when excavating a construction pit, the walls of the pit start to slide unexpectedly. As the plan did not foresee this, the construction contract did not provide for any work that should be done to consolidate the pit, nor the price for such a work. Therefore, since the circumstances are different from those envisaged in the construction contract, the walls of the construction pit must be consolidated. This is then additional work.

It may also be necessary to increase the quantity of the work which is stipulated in the contract. For example, in the case of construction, it may be necessary to build a substantially more massive foundation due to the nature of the land. For example, the use of concrete and concrete reinforcement will be greater.

The scope of the work due may also be altered by subsequent orders from the customer to carry out work that was not stipulated in the construction contract itself nor were such works overseen or necessary.

All additional works have a common characteristic: they were not stipulated in the contract. They have not been foreseen in it.

There are several issues to be addressed in relation to unforeseen works. Firstly, it must be settled whether the customer's consent is required. Then it must be settled whether the contractor is entitled to additional payment. If he is entitled to additional payment, the price for such work should also be determined.

For any unforeseen work, the contractor shall have the written consent of the customer. If he carries out the work without written consent, he cannot claim an increase in the agreed price (Art. 652). However, the law does not specify what price the contractor may ask the customer to pay. Obviously, he can ask for an agreed price if it was provided in the contract. However, this is unlikely. If the price was not agreed in advance, the provisions on the contract to produce a work are applicable (Art. 649(1) since there are no specific rules on this in the chapter of the Obligations Code

on the construction contract and a construction contract is only a version of a contract to produce a work. The contractor may therefore demand a reasonable remuneration (Article 642(1) and (2)).

However, there is an important exception to the rule in Article 652. The contractor does not need consent for unforeseen works if they are urgent. Urgent works are the works caused by an extraordinary and unexpected event. Such events are, for example, the unexpected difficult nature of the land and the unexpected occurrence of water. However, the contractor may carry out such works only if they are necessary to ensure the stability of the structure or to avoid damage. Finally, the circumstances must be such that the contractor has not been able to secure the customer's consent (Article 653(1) and (2)). However, the contractor must immediately inform the customer of the unexpected event and of the work carried out (Article 653(3)).

Urgent and unforeseen work must, of course, be remunerated. The contractor may claim fair payment (Article 653(4)). The price for it cannot be fixed by the contract in advance. Obviously, the price will have to be determined according to the circumstances of the case. The determination of the fair remuneration will certainly be influenced by the normal remuneration for the type of work (Article 642(2)). This is in line with the regime in the contract to produce a work.

The whole set of rules for urgent and unforeseen work is in fact just a special case of agency of necessity (Article 199 et seq.). Its rules supplement the provisions of Article 654 if necessary.

3. Price of works

3.1. Method of fixing the price of the works

There are two basic ways of fixing the price, which are merely defined in Article 654. The parties may freely choose between these two methods, combine them, or choose any other method they may consider appropriate to them.

The price of the works may be determined for a unit of measurement for the agreed works. Such a price is also called a unit price. This means that a list of the agreed works is made and for

each of the works the price and the estimated quantity are fixed. When the works have been completed, the completed works shall be examined. The purpose of this examination is to determine the quantity of work carried out. Only the quantity of work completed shall be paid for. This is the consensus view in the literature (Koršič Potočnik, Furlan and Sodja, 2019, p. 151; Plavšak, 2004, p. 996; Plavšak and Furlan, 2020, p. 821).

The price of the work may also be fixed as a total amount for the entire structure, i. e. as a lump sum. The quantities provided for the contractually stipulated works are not relevant. There is only one price for all of them, and this price is a lump sum. It is therefore not possible to determine how much each work costs. Even if the price for specific works is defined, it is irrelevant.

Neither of the two basic pricing methods refers to unforeseen works. These must therefore be paid for separately.

A variant of the price fixed as a total amount for the entire structure is a "turnkey clause" (Plavšak and Furlan, 2020, p. 823). The definition of a turnkey construction contract is important for the understanding of the turnkey clause. A construction contract with a 'turnkey' clause is one in which the contractor undertakes to carry out all the works necessary for the construction and use of the building.

In the case of a turnkey price clause, the price shall include the value of all unforeseen works but also the excess quantity of the works. The impact of missing works on the price set in a contract is excluded (Article 659(2); SC VSRS III Ips 135/2015). Thus, the contractor cannot request an increase in the price if he must carry out unforeseen works, even if they are necessary. Nor can the contractor claim payment for all those works which exceed the foreseen quantity; conversely, the customer cannot claim a reduction in the price if any work does not need to be carried out (SC VSRS III Ips 52/2010). The contractor is, however, entitled to payment for subsequently ordered works, as they exceed the obligations of the contractor assumed by the contract itself (CA VSL I Cpg 784/94).

In two separate cases courts of appeal have interpreted the clause in the contract that the price is fixed as a clause having the same meaning as a turnkey price clause (CA VSM I Cp 230/2023 and CA VSL II Cp 1672/2012).

3.2. Change in prices

The contractor may request an increase in the price for the works if, between the conclusion of the contract and its performance, the prices of the elements on which it was based have increased. However, he may request an increase in the price only if that price should have been increased by more than two per cent. If the contractor can request a price increase, he can only request a price difference exceeding two per cent (Article 655(1) and (3)). The provision itself is not clearly worded. It is already unclear what is meant by »price per element«. Does it refer to the price of a certain work that must be performed as a part of the construction contract? Or does it refer to the calculation basis for a single work, provided that not only a single work has to be performed? In this case a price per element would refer to the calculation basis, e. g. for material, machines or workforce which are necessary to perform a work. Not a single decision of any court addressed this question until now.

But that is not all. On the one hand, Art. 655(1) and (3) speaks of an increase in the price of elements as a cause, and on the other hand of an increase in the price of works as a consequence. It seems that it wants to stipulate that the price can only be increased if the increase in the prices of the elements would be such that the final price for all the works combined would be higher. There is also a different view, but it refers only to the price of the works for a unit of measurement of agreed works. This view holds that the price may already be increased if the price of at least one element is increased by 2% (Juhart in Juhart et al., 2022, p. 107). However, it is not even clear whether such a view refers to a price increase (exceeding 2%) for an individual element or to a price increase for a unit of measurement based on that.

Indeed, all the provisions on price increases and decreases link the change in prices to the change in the prices of the elements on the basis of which it was fixed. This means that a change in prices cannot be requested if there is only a change in the general level of prices. A price increase cannot be requested because of inflation, e. g. in consumer prices, but specifically because of an increase in the prices of what is used in the execution of the specific works. Price increases are, of course, easier to calculate for unit prices. The unit price is the element which

is one of the basis for the total price of the works. It is difficult to implement the provision on a price increase when a price is set as a total amount for the entire structure as the unit prices are not known.

The situation is even more complex if the contractor is in default. He can ask for a price increase, but only if the prices for the items have increased by the time the work should have been completed under the contract. He can only request an increase exceeding 5%, but he cannot request an increase in the prices of the elements if the prices have increased after he has been in delay (Article 655(2) to (4)). It is logical that he cannot request an increase in the price which occurs during the delay. If he had not been in default, there would have been no price increase during the default either.

However, no specific reason can be found for threshold of 5 % instead of 2 % for a change in prices for a contractor during a period when he was not yet in default compared to a contractor who was not in default at all.

The parties may agree that prices will be fixed. However, such an agreement leads only to the contractor being able to claim a price increase if prices rise by more than 10 %. In such a case, he may claim, in addition to the agreed price itself, the difference exceeding the 10 % increase (Article 656). The problems of interpretation are like those of Art. 655(1) and (3). Similarly, not a single decision of any court addressed the interpretation issues until now.

Only the provisions on price increases are of practical relevance. Similar arrangements apply in the case of price reductions for elements. The thresholds are also the same, at 2% and 10%.

4. The contractor's duties

The contractor has a duty to warn the customer about any defects and to any circumstances which may be relevant to the work ordered or to the timely performance of the work (Article 625(3). The contractor has also a duty to warn the customer about defects in materials, if they were provided by the customer (CA VSL I Cpg 539/2019, CA VSL II Cp 2207/2011) and about unsuitability of the material (Plavšak, 2004, p. 775).

Even if the architect warns about a defect, the contractor re-

mains liable if it did not warn about the same defect himself (CA VSL I Cpg 424/2018).

The liability of the contractor is limited by the provision of Article 625(3). The contractor has a duty to warn only if he knew or should have known of the defect or circumstances. Such a limitation is reasonable and necessary. The main duty of the contractor is to carry out the work, not to carry out a detailed examination. He is not qualified to do that. He must warn about a deficiency in the instructions in the plans or in the customer's subsequent declaration of will, if it was obvious to the contractor (Plavšak, 2004, p. 1047) regarding project documentation (with further references).

The contractor must allow the customer to supervise the works and the materials used at all times (Article 651).

5. Definition of the material defect and warranty periods

The work must be performed in such a way as to comply with the agreement and must be in accordance with the rules of the craft (Art. 626(1)). The agreement and the rules of the craft therefore also determine the qualities owed.

The rules of the craft should be rules which are recognised by science as theoretically correct and which, on the basis of practical experience, are also recognised as correct in the professional circle of people of same profession (Plavšak, 2004, pp. 791-792; Ratnik, 2001, p. II). Rules of the craft mean that the contractor must act in accordance with the rules that are considered to be correct at the time of the performance of the work in the performance of the same type of work. E.g., a carpenter must act in accordance with the rules of the craft of carpenters. The rules are not static; they do change in the course of time.

A defect exists if the work carried out does not have the characteristics due. This includes not only the characteristics that the work must have when it is used, but also its general safety and safety in case of emergencies.

There is a general warranty period for material defects. This is 2 years (Art. 634(2)). Liability for the stability of the construction is specifically regulated by law. The construction must be built in a way that is stable. The warranty period is 10 years (Article 662(1)).

Stability means that something is free from defects because it has the desired quality. Court decisions understand the concept quite broadly. They include all those defects in all works which should have performed their function within the 10-year period without the defects caused by the normal use of the construction having begun to show. So, for example, in a decision of court of appeal VSL I Cpg 55/2020. Such a definition seems reasonable. However, it is too vague to allow a reliable distinction to be made between defects in the stability of construction and other defects. Other material defects are those that do not relate to the stability of the construction, i. e. the material defects for which the warranty period is two years.

The case law on what constitutes defects affecting the stability of a construction is not very diverse. As a rule, leaking and seeping of water is considered a defect in the stability of the construction (all the judgements have been taken by the courts of appeal: VSL I Cpg 316/2016, VSL I Cpg 83/2014, VSL I Cpg 3192/2015, VSL I Cpg 26/2020, VSL I Cpg 923/2017, VSL I Cpg 166/2016, VSL II Cpg 2132/2018. However, in the decision of the court of appeal VSL I Cpg 166/2016, the court held that, given the circumstances of the case, this was not the case. Other types of defects in the stability of construction are rarely addressed in court decisions. For example, in one case the court held that defects affecting the solidity of the construction are cracks in the ceiling, in particular in the ceiling above the living room, which affect the static stability of the building (CA VSK Cp 503/2013).

The Obligations Code also specifically mentions »defects in the land" (Art. 662(1) and (2)). The warranty period for these defects is 10 years. The wording of the provision on liability for defects in the land does not refer to defects which appear in the construction and are caused by defects in the land. The provision expressly refers to defects in the land. No intelligible explanation can be found for holding the contractor liable for something which is not even his contractual duty, namely, to provide land.

However, Furlan (2018, p. 36) believes that Article 662(1) and (2) govern liability for defects in the construction caused by defects in the land even though Furlan makes observation that its text refers only to defects in land. Even such interpretation does not make much sense. Since the land must be provided by the customer, it is the customer who must bear all the consequences

of the unsuitability of the land for construction, and certainly not the contractor.

The Obligations Code provides reduction or of full exemption from liability if an expert opinion assessed that the land was suitable for construction and no events during the construction triggered any doubt over the justification of the expert opinion (Article 662(1). However, this might attenuate the situation of the constructor but does not justify the liability.

6. Apparent and concealed defect

The distinction between apparent and concealed defects is crucial. They are subject to different rules for the exercise of the customer's rights.

A defect is apparent if it could have been spotted by a diligent person with average knowledge and average experience during a normal examination. If the contractor changes the location of the car park and the number of parking spaces and resurfaces the old car park instead of building a new one, it is an apparent defect (CA VSL I Cpg 894/2014). It is also an apparent defect if there are minor unevennesses in the base slab (CA VSM I Cp 421/2011) or if the floor slab is located 10 cm away from the position provided by the contract (CA VSK Cp 824/2008).

All other defects are concealed. A defect may become visible if special circumstances are given. This defect is a concealed defect. For example, rainwater infiltration into the façade only occurs during rainfall (CA VSL I Cp 83/2014).

7. Examination and notification of material defects

7.1 Examination, acceptance, and notification of an apparent defect

The work performed must be examined by the customer as soon as this is possible in the ordinary course of things (Article 633, paragraph 1).

If there is any apparent defect, it may be notified by the customer. This means that the customer must describe the defect and inform the constructor of it. The description of the defect must

be specific (e.g., SC VSRS III Ips 71/2009, CA VSL I Cpg 746/2020). This applies to any defect, even concealed ones. The customer is not obliged to investigate the cause of the defect which is now a settled case law supported by Plavšak (2004, p. 848). A description such as a non-expert can give is sufficient. The customer must notify without delay (Article 633(1)).

If the work carried out is has an apparent defect, a customer may refuse to approve the work carried out and refuse to pay for it (Article 642(1)).

The approval of the work is called acceptance. The customer's acceptance has two consequences. The first is that the customer must make the agreed payment (Article 642(3)). The second consequence is that the contractor is, as a rule, no longer liable for apparent defects (Article 633(3). Exceptions exist based on Articles 636 and 663(3).

While the contractor usually has a considerable amount of time to carry out the work, the customer has little time to examine it. Namely, the customer may not trigger the reproach that he has failed to examine the work in the ordinary course of things (Article 633(1)). This would give rise to a fictitious acceptance which will be discussed later in the article. There is an apparent and, overall, unjustified benefit for the contractor since the customer can only notify apparent defects up to the end of the examination and acceptance. After acceptance, liability for apparent defects ceases.

This imbalance to the detriment of the customer was partially addressed in the now abolished Consumer Protection Act of 1998 (Article 38(2)) in favour of the customer if he was a consumer. However, the new Consumer Protection Act (of 2022) does not provide any specific rules on inspection or acceptance (see Articles 99 to 101) so that the general rules of the Obligations Code are applicable.

After an acceptance, the contractor must pay the agreed price (Article 642(3)). He may, however, reasonably expect that concealed defects will be discovered later as this is frequent the case with any construction simply due to the characteristics of construction works.

Notwithstanding the substantial likelihood that defects will be discovered later, the customer must pay the full price. Although the contractor is obliged to remedy the defects, the customer is nevertheless in a difficult position. The contractor's interest to

remedy the defects will normally be low or non-existent as he cannot expect any additional remuneration for this. The customer has therefore no guarantee that the contractor will fulfil his obligation although there is no doubt that it exists.

In addition, during the entire interim period until the concealed defects are discovered and remedied, there will be a risk that the contractor will become insolvent. If the contractor becomes insolvent or ceases to exist by reason of liquidation, the loss due to the concealed defect shall be borne by the customer.

None of both acts on consumer protection (Consumer Protection Act of 1998 and of 2022) provided any specific norms on payment that would alleviate the position of a customer who is a consumer.

Any avoiding of examination in due time or acceptance by the customer shall lead to a fictitious acceptance (Article 633(2)). Acceptance shall be deemed to have taken place even if it has not actually taken place.

After the notification, the customer has one year from the date of notification to assert his rights in court as a plaintiff (Article 635(1)). After the expiry of one year this right ceases to exist. Afterwards the customer may abate the price or claim damages, but he can use only these two rights and only as a defence. If the customer raises either of the two warranty defences, he bears the burden of proof (VS RS III Ips 14/2009). He must state specifically and with certainty what the defect was, when it was discovered and when it was notified (CA VSL I Cpg 1073/2011 and CA VSL I Cpg 1303/2010). These provisions apply to apparent and concealed defects.

In the two cases which are exceptions to the rule, the customer is not limited by Articles 633 to 635 in exercising his rights. These rules apply to apparent and concealed defects equally. The first of the two cases is that the defect relates to facts which could not have remained unknown to the contractor or were known to him. The second is that he has, by his conduct, deceived the customer into not exercising his rights in time (Article 636).

7.2 Notification of a concealed defect

If a concealed defect becomes apparent within two years of acceptance, the contractor may still exercise the rights which he has

because of the defect (Art. 634(2)). In any event, he must notify the contractor of the concealed defect within one month of the discovery of the defect at the latest (Art. 634(1)).

7.3 Notification of a concealed defect in the stability of the construction and defect in land

As regards defects in the stability of the work, the contractor may give notice of the defect within six months of discovering the defect (Article 663(1)) and if the defectiveness becomes apparent within 10 years of acceptance. There are no specific provisions on the details of notification. The general provisions on contract to produce a work must apply. The same rules apply to defects in land.

8. The customer's rights in a case of material defect before the expiry of the period agreed for the performance of the works

As a rule, the contractor may not be held to be in breach of the contract before the time limit for performance has expired.

An exception to the rule described above is in Article 627, namely that the customer may already rescind the contract before the expiry of the time limit during the performance of the work and, after rescission, claim damages. He may do so if the contractor breaches the terms of the contract, "does not work at all as he should" and the work performed is expected to be defective. Rescission of the contract is therefore possible, but only in the case of serious breaches of contract which the contractor cannot remedy by the expiry of the time limit.

The practical significance of this norm has so far been negligible.

9. The customer's request for remedy of defects before the expiry of the time limit for performance of the works

The customer may demand remedy for defects (Articles 639). It may be inferred from these provisions that the customer may

not claim damages in lieu of remedy of the defect. This does not mean that the contractor cannot claim damages at all. He can therefore claim both remedy and damages, but not damages in lieu of remedy.

The contractor may, as a rule, claim remedy of defects after the contractor has invited him to examine and accept the work and if the customer refused to accept the work for a good reason (Article 633(2)). There are two exceptions to this rule.

The customer may immediately rescind the contract if the work performed is either useless or contrary to the express terms of the contract (Art. 638). This is the first exception.

The second exception is governed by Article 637(3). The contractor may refuse the customer's request to remedy the defect if remedying the defect would entail excessive costs. Even if the contractor refuses to remedy the defect, the customer retains the other rights he has under Articles 637(2) and 639(3).

The contractor has a right to require the customer to allow him to remedy the defect (Article 639(1)). If the customer does not allow the contractor to remedy the defect, he is in breach of his duty owed to the contractor. The consequence is that the customer's warranty claims are extinguished (CA VSL I Cpg 335/2010).

The customer requires the defect to be remedied by notifying the contractor that he must remedy the defect. The customer may also seek remedy of the defect in court (CA VSL I Cpg 816/2011).

As a rule, the customer cannot contractually require the contractor to perform the work in a certain way, unless otherwise agreed. If the work performed is defective, the situation for the contractor may not and does not change. He still owes (only) to perform the same work and in the same way as he has owed all along, so that the customer cannot demand that the defects be remedied in a particular way (CA VSL II Cp 1789/2021; Plavšak, 2004, p. 868).

The customer may set a reasonable time limit for the remedy of the defect (Article 637(1) and Article 639(2)), which it must set himself. During this period, the customer may not exercise any rights which he would otherwise have under Article 639(3) or (5). The costs of remedying the defect must be borne by the contractor (CA VSM I Cpg 196/2013).

The contractor may again request examination and acceptance after the defect has allegedly been remedied. The customer is in

the same legal position as if the contractor had offered defect-free work at a prior attempted acceptance. The customer has the duty of examination and notification of any defects (CA VSL I Cpg 436/2012).

10. The customer's rights in the event of failure to remedy defects

In addition to the claim for remedy of the defect, the customer shall have other rights. These rights are described in more detail below. The customer may exercise these rights if the following conditions are met (Article 639(3) and (5)):

(a) the customer has set a time limit for the remedy of the defect,

(b) the time limit has expired,

(c) the work is still defective,

(d) the period of one year from the date of notification has not yet expired.

After the expiry of the time limit for remedy of the defect, the customer may remedy the defect himself, he may abate the price, or he may rescind the contract (CA VSL II Cp 1644/2017).

The purpose of these rights is to compensate the customer for the loss suffered because of the contractor's breach of contract. The purpose of exercising each of these rights is to achieve equivalence of the mutual performances of the two contracting parties.

The rights conferred by Article 639(3) are alternative (CA VSL II Cp 1040/2021). The customer may exercise any of them, but not two or even three at the same time. This is also the case-law: the customer may choose one of them, but not two (CA VSL I Cpg 1240/2010) or even all three at the same time.

If the defect has been notified and remedied, the customer may also claim compensation for the damage caused to him. After the expiry of the time limit without result, he may claim additional damages too. However, the customer may not claim damages for diminished value of the work resulting from the defect. He can only claim any of the three alternative rights of the customer (Article 639(3)) and compensation for other damages caused by the defect.

The rights which the customer may exercise under Article 639(3) and (5) are therefore:

(a) remedy of the defect at the contractor's expense and a claim for damages,

(b) abatement of the price and claim for damages,

(c) rescission of the contract and claim for damages.

After the notification, the customer has one year from the date of notification to assert his rights in court as a plaintiff (Article 635(1)). The one-year time limit is a preclusive period. It starts from the date on which the customer should have known of the defect or from the date on which he knew of it. That is when he had the information about the existence of the defect. It can be inferred from the decision of the Supreme Court VSRS II Ips 241/2016 that this is the position of the Supreme Court of Slovenia. The decisive moment is therefore when the customer could claim rights for defects.

Exceptionally, the one-year time limit does not apply if the contractor (Art. 636 and Art. 663(3)):

(a) knows or ought to have known the facts relating to the defects and has not communicated them to the customer; or

(b) has misled the customer by his conduct into not exercising the rights in time.

There is extensive and settled case law on both exceptions.

The first exception relates to fraudulent concealment and related cases of concealment of the facts (Supreme Court decisions VSRS II Ips 329/99 and VSRS II Ips 162/2010).

The second exception relates to misrepresentation. Misrepresentation includes conduct from which the customer may infer that the contractor intends to remedy the defect voluntarily, as well as a failed attempt to remedy the defect (see decisions of the Supreme Court VSRS II Ips 658/2006, VSRS III Ips 69/92, VSRS II Ips 309/2005 and VSRS II Ips 29/2006). The contractor's failure to respond does not constitute misrepresentation. That was the decision of court of appeal VSL I Cp 2413/2017.

If the contractor starts to remedy the defects, the claim for remedy is subject to a general limitation period of five years (SC VSRS II Ips 7/2011). If a commercial contract has been concluded, a limitation period of three years applies.

The same time limit of one year is laid down in respect of a defect in a solidity of a construction and for a »defect in the land« (Article 663(2)).

10.1 Remedy of the defect at the contractor's expense

The contractor has the right to remedy the defect (Article 639, paragraph 1) until the expiry of the time limit for remedy of defects.

The customer may decide to remedy the defect himself. This option is provided for in the first of the three alternatives set out in Article 639(3). He may claim reimbursement of the costs incurred in doing so from the contractor.

The customer either claims reimbursement of the actual expenditure incurred to remedy the defect or the estimated expenditure to remedy the defect (CA VSL II Cp 1040/2021 and Plavšak, 2004, p. 871).

The exercise of such a right does not lead to the rescission of the contract. The contract does remain valid.

10.2 Abatement of price

It is the customer who may abate the price after an attempt to remedy a defect has failed. This is provided for in Article 639(3); see also the decision of the Supreme Court in a case concerning a contract of sale (SC VSRS II Ips 38/2012). The customer may also exercise this right outside the court proceedings by making a declaration of will.

An abatement of price is possible even after the expiry of the one-year time limit for judicial enforcement by way of an action (Art. 635(1)). It can only be enforced in any court proceedings by way of an objection (Art. 635(2)).

In abating the price, the payment is to be reduced in the ratio of the value that the defect-free work would have had to its actual value at the time the contract was concluded (Article 640).

This method fails if the defective work is not available on the market. For example, what is the value of a building with a leaking roof on the market? There is simply no market for such buildings and therefore no values to compare with. The implementation is impossible. Case law in such cases considers the valuation carried out by an expert. Very informative was the description of the difficulties the court faced when it had to decide on an abatement of price and how it dealt with (CA VSL I Cp 3015/2012): »The expert did not give the market value of the flat, and supported this by stating that it was not possible to estimate it at all,

because no buyer would have bought a flat with such defects. He therefore determined the technical value of the apartment, which he estimated to be at least 60 % lower because of the defects and lack of usability ...".

If the defect is remedied, the customer is no longer entitled to an abatement of price (CA VSC Cpg 195/2012).

The customer must notify the contractor by how much the price is abated (SC VSRS III Ips 6/2010). After the customer has abated the price by a declaration of will, the payment is reduced.

10.3 Rescission of a contract

The customer may also rescind the contract if the defect has not been remedied and is not insignificant (Art. 639(4)). What has been received is to be returned (Art. 111).

In exercising the rights resulting from the rescission from the contract, the customer is not bound by the time limit laid down in Article 635(1) (CA VSL I Cpg 1240/2010).

10.4 The customer's claim for damages for defects under Article 639(5)

The customer has »in any event« a further right to damages (Article 639(5)). The customer can only claim damages in conjunction with any of the rights he has under Article 639(3). Damages cannot therefore be claimed to make good the disadvantage suffered by the customer as a direct result of the defect. The disadvantage is rectified by remedying the defect at the contractor's expense, by reducing the price, etc. A claim for damages may consequently only seek compensation for other disadvantages (CA VSC Cp 460/2011). Only damages that are closely and directly related to the defect and its remedy, such as costs for failed acceptance, costs for technical or legal assistance, etc., are considered.

Of course, claims for damages may also arise on other legal grounds because of the defective performance of construction work. These claims are not subject to the one-year preclusive period (Article 635).

11. Conclusions

A contract whereby a contractor undertakes to carry out construction work is quite different from a contract to produce a work. The legislator's decision to regulate the construction contract as a special type of contract was a reasonable one; the same may be said for the choice of the norms of contract to produce a work as the basis for the construction contract. The same technique is, for instance, applied in the German Civil Code. See insofar Title 9 Subtitle 1 of the Special Part and sections 631 and 650a of the German Civil Code).

Nevertheless, the provisions on the construction contract in Slovenian law leave a lot to be desired. There is no clear delimitation between a contract to produce a work and a construction contract. The provisions on price changes are too ambiguous and unclear. Provisions on the warranty for defects favour the contractor; they are in a complete imbalance with the rights of the customer without proper justification. The decision to set two different warranty periods is difficult to implement. The liability for defects of the land is contrary to the fundamental obligations of the contractor.

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