CURRENTLY ON THE WORK CONTRACT

JOZEF KRÁLIK[1], KAREL MAREK[2], KRISTÍNA KRÁLIKOVÁ[3]

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[1] Danubius College in Sládkovičovo, Sládkovičovo
Slovakia
[2] University of Defense in Brno, Brno
Czech Republic
[3] Academy of Police Corps in Bratislava, Bratislava
Slovakia

Contact: Prof. JUDr. Jozef Králik, CSc., MBA - prof.kralik@gmail.com
Prof. JUDr. Karel Marek, CSc. - marekka@prf.cuni.cz.
Prof. JUDr. Dipl. Ing. PhDr. Kristína Králiková, PhD., MBA - doc.kralikova@gmail.com

Abstract:

The preservation of human society, and even more so its development, cannot do without further investment. It is enough to mention the current challenges in the form of reconstruction and construction of transport infrastructure, dealing with the energy future, the massive development of technology, as well as dealing with the consequences of various natural disasters and ensuring defense. To ensure the preparation and implementation of such investments, a contractual type of work contract will be primarily used.

The regulation of the work (according to Sections 2586 - 2635 of the Civil Code) eliminates the dualism of the regulation of non-commercial and commercial contracts for work. The basis for the new draft regulation is the commercial code regulation, considering some foreign adaptations, because the concept of a contract of work in the former Civil Code followed its original concept of 1964 and the model of the Civil Code of 1950. In certain respects, account is also taken of certain provisions of the former International Trade Code (ITA), the normative structures of which were adopted by the Commercial Code, but which were often formulated more precisely and clearly in the ITA.

The current issues of the works contract are the focus of this treatise.

Keywords: business code, civil code, obligations, contracts, contract for work

Introduction and terminology

The aim of this paper is to analyze the legal regulation of the work contract and to propose possible changes. It can be used in the eventual implementation of the amendment to the Civil Code in the Czech Republic, possibly in the recodification in the Slovak Republic. In addition to the use of the analytical and synthetic methods, however, it was not possible to completely avoid the use of the descriptive method to express the activities in question.

The preservation of the existence of human society, and even more so its development, cannot do without further investments. Just think about the current challenges of reconstructing and building transport infrastructure, dealing with the energy future, the massive development of technology, as well as dealing with the consequences of various natural disasters and ensuring defense. Investment is used to renew and expand the assets of territorial units, business entities and the assets managed by the state's organizational units, with the bulk and scale of investment always taking place in the industrial sector.

For this reason, the paper also tries to focus on construction and technological supplies, which should be crucial for overall development, although we also address broader issues. Deliveries will require contractual security using the contractual types of the Civil Code, but also using different contracts. Often, however, contracts of sale and, in particular, contracts for work will be used. We therefore focus on the above-mentioned topic.

We point out the correspondences and drafting of the previous commercial law regulation and also the differences of the legal provisions compared to the previous legislation.

The regulation of works in the Czech Republic (according to § 2586 - 2635 of the Civil Code) eliminates the dualism of the regulation of non-commercial and commercial contracts for works. The basis for the new draft regulation is the commercial code regulation with consideration of some foreign adaptations, because the concept of a contract for work in the current Civil Code followed its original concept from 1964 and the model of the Civil Code from 1950. In certain respects, account is also taken of certain provisions of the former International Trade Code (ITA), the normative structures of which were adopted by the Commercial Code, but which were often formulated more precisely and clearly than the ITA.

Even though the legal regulations have been 'unified', it is important to note the specificity that for relations between businessmen, the determined commercial practices are in principle applied before the dispositive provisions of the Civil Code (unless the contractual arrangements exclude it).

The work is understood as a standard activity, or as the result of an activity (including the performance of demolition works), while the work as the performance of a work contract differs from the work provided by an employee under an employment contract in particular in that under the work contract the contractor performs the work independently, according to its own schedule, with its own resources and at its own risk, not subject in principle to either the continuous supervision or the management of the client. In this respect, it may be noted that there are a number of cases in which, however, the technical supervision of the client is carried out on an ongoing basis (e.g. during construction).

The contractor shall only carry out the work personally or have it carried out under his personal direction if this is necessary due to his personal characteristics or the nature of the work, or if this results from commercial practices or contractual arrangements. If this is not the case, the contractor may entrust another person with the execution or management of the work, but he shall be liable for the proper performance as if he had carried out the work himself.

In practice, it is increasingly common for clients to insist on the performance of the work by the chosen contractor because of its ability to perform the work to the required quality. In the case of construction delivery, this is also manifested, for example, by the clients approving subcontractors or insisting on the nomination of a specific construction manager. This is the result of not always good experience with "managerial" construction delivery.

It is also specific to the delivery and implementation of software systems (e.g. information systems), where negotiations on the staffing of the implementation team tend to be the most complex. This is a consequence of the past practice where software companies often send a managerial 'first league' to bid and present the program and then a 'tenth league' for the actual implementation.

Very often, the client's cooperation in various forms is required for the execution of the work (allowing access to the plant, building, house or apartment, handing over the construction site, etc.). The Civil Code addresses various aspects of these situations at a general level. The contractor is not the principal of the client and is therefore not in principle subject to the client's instructions, but this may be agreed to a certain extent. Similarly, it may (and sometimes for certain cases must) be agreed that the client will supply the contractor with the item or material to perform the work, etc. For these cases, the solution is that the contractor, as the person who carries out the work under his own responsibility, must examine any orders from the client as well as any items possibly handed over by the client for the execution of the work with sufficient care and point out any defects.

The situation where the client, although contractually obliged to do so, fails to deliver the item which he should have delivered to the contractor as consideration is also addressed.

Precisely because it is the rule that the contractor is not subject to the client's orders when carrying out the work, the law must reserve the right for the client to control the execution of the work. In this respect, the earlier concept of the Civil Code and the Commercial Code is adopted and the client has the right of control.

The contractor fulfils his obligation to carry out the work by completing and handing over the work, and the client fulfils his obligations by accepting and paying the price. Special cases are also dealt with where the work is handed over in parts, where the price is only an estimate, where the work is thwarted for various reasons, etc.

With regard to defects in the work, reference is made to the appropriate application of the provisions of the contract of sale, in line with the earlier provisions.

Today, the work contract also concerns an activity which does not have to be materially recorded. We consider this extension of the use of this type of contract to be appropriate.

As the new legislation is based on the existing commercial law regulation, it appears to be more understandable for business than for other entities.

The works contract is often used in construction, where the starting point is the mastery of the terminology that has developed and where the use of the relevant term with its given content, often developed as a commercial convention, can be the starting point for determining the obligation of one of the contracting parties. We therefore address these issues first.

Construction means a work of construction, irrespective of its structural and technical design, purpose and duration. In addition to simple or linear buildings, a building (especially of an industrial nature) is regularly divided into: *the construction part of the building* (which, however, also includes non-construction supplies, namely those supplies which belong to the construction part, e.g. light wiring, medical technology, heating distribution, etc.) and the technological part of the building (also called the mechanical-technological part of the building).

Division of construction

1. The construction part of the building is divided into building objects. A building object is defined as a spatially integrated part of a building, which is its basic part. The building part is therefore subdivided spatially.
2. The technological part consists of elements formed functionally, according to the extent (degree) of complexity of the functional designation, when the simplest element is a single machine and the most complex is an operational unity.
3. The operating unit (OU) represents the sum of functionally interconnected operating sets performing a complete technological process, or a complete special technological process[1].

Of one type, specified by the construction documentation and put into operation usually at a continuous time.

The operating unit is characterized in its main features by the type of process for which it is being built.

An operating unit is divided into operating sets, usually into several operating sets of mechanical, electrical and other equipment for the basic technological process (or special technological process) and other operating sets for additional technological processes. A complete process plant, e.g. for an engineering plant or a wastewater treatment plant, is considered to be an operational unit.

For complex production buildings, the process plant may be subdivided into sub-process units. The operating unit of such buildings is characterized by the completeness of the technology from the input of raw materials, semi-finished products and other materials to be processed to the output of the final products, including packaging and dispatch, where appropriate.

1 Lukáš Klee, *Stavební smluvní právo*, Wolters Kluwer 2015, 504. p.

A sub-operating unit (SOU) is a set of functionally interrelated operating sets, performing a sub-part of a complete technological process, or a sub-part of a complete special technological process, specified by the construction documentation and put into operation usually in a continuous time.

The sub-operating unit is also subdivided into operating units; in the case of production buildings, it is characterized by a closed technological process, which is usually terminated at the inlet and outlet by a partial interruption (intermediate storage, silo, landfill, etc.). The design of the subdivision should be based on ensuring the complexity of the function of the relevant sub-unit so as to ensure that separate complex tests of the sub-units can be carried out and that they are progressively handed over and prepared for subsequent test operation (and warranty tests).

An operating set (OS) is a functionally complete part of an operating unit, a sub-operating unit or a technological part of a building (a set of machines and equipment forming a separate functional unit), consisting of a set of technological equipment, performing a complete sub-technological, i.e. a separate process, or a special technological process, or a complete supplementary technological process, determined by the building documentation and put into operation usually in a continuous time.

The operational set is normally subdivided into operational units or operational units and basic units or directly into basic units. Where it is expedient (e.g. for the contractor's provision of construction), the operational file shall be subdivided into sub-operational files.

A sub-operating set (SOS) is a functionally complete part of an operating set, consisting of a set of technological equipment, performing a separate sub-technological process (or a special or additional technological process), specified by the construction documentation and put into operation usually in a continuous time. It is used only exceptionally for very structured and complex installations where it is expedient or necessary to insert an additional intermediate stage between the operating set and the operating unit. It is subdivided into operating units or into operating units and basic units or directly into basic units.

An operating unit (OU) is a functionally complete part of an operating ensemble or sub-operating ensemble, consisting of a set of technological equipment and performing a complete part of a sub-technological process specified in the construction documentation.

An operating unit may be subdivided into basic units. The functional composition of an operating unit shall be specified in the construction documentation and its function can only be verified by simultaneous testing of all the basic units comprising it.

A basic unit (BU) is a product, usually supplied by a single manufacturer, which as a whole has an independent purpose, performs a defined and permanent main or auxiliary operational and technical function and forms a structurally closed unit which cannot be divided into two or more functional units without any remainder. The basic unit is not subdivided in the construction documentation. The concept of basic unit is essentially that of a "unit delivery"; it is the designation of a single machine or piece of equipment.

The subdivision of the construction is described in the specific construction documents and is of fundamental importance for the preparation and execution of the construction and is reflected in the way the construction is carried out. The method of construction can be distinguished according to the extent to which the various participants contribute to the execution of the construction. That is, what is the delivery system. The delivery system determines which entities are in direct relation to the client (investor) or in relation to other entities and how they deliver. There may be different types of deliveries.

The general delivery is based on the scope of the entire construction or technological part of the construction. For the technological part of the construction, it is based on the level of the operational unit. The final delivery is the delivery at the level of the operational set and the final sub-delivery at the level of the sub-operational set.

If it is a machine(s), equipment, which are delivered, assembled and tested at the same time, not providing the function of the (technological or non-technological) process, it is the so-called delivery of assembled machines.

Especially from the point of view of practice, the designation and definition of operationally untested machines and equipment is of course of importance. Untested machinery and equipment is specific in that it is delivered to the site without having been fully tested for its operability under conditions corresponding to the specific operating conditions of the site. Neither the Civil Code nor any other generally binding regulation deals with their specifics regarding commissioning, guarantees and liability for defects, leaving full scope for commercial practice and, in particular, contractual arrangements.

Customized deliveries are then understood as deliveries of the entire construction (i.e. the construction part and the technological part).[2]

Construction participants

The investor is the person who prepares and provides the construction for himself or for another person / subject It is an entity that enters into contracts with other construction participants for the preparation and implementation of the construction. In relations with direct contractors and within the meaning of the Civil Code we call this person a customer / client.

If the investor is not suitably equipped procedurally (it does not have an internal qualified department or staff with the necessary expertise), the investor may have the investor's activities carried out by a specialized entity (e.g. so-called engineering or project-engineering organizations), usually on the basis of a contract of assignment or a different contract for investor activities.

Contractors are then understood as persons who provide (carry out) supplies for the construction, whether on the basis of a works contract or other contracts. In terms of the terminology of the Civil Code, these are of course contractors, which we refer to as suppliers for the purposes of this discussion, using commercial conventions.

Depending on the extent of their involvement in the construction (see also the breakdown of construction as mentioned above), contractors fall into several categories. A special place is occupied by so-called higher contractors, i.e. general contractors (at the level of the construction section or operational unit), final contractors (at the level of the operational unit), final subcontractors (at the level of the sub-operational unit).

Piece deliveries are deliveries of goods under purchase contracts or sub-assemblies under works contracts; their suppliers (vendors, contractors) are designated as piece suppliers.

Professional supplies are those supplies which are provided by a supplier for all parts of an operating unit or operating package in accordance with the relevant profession (e.g. electrical wiring of power lines).

In particular, this includes general contracting systems, including turnkey and final deliveries, as well as construction management (the work is divided into so-called packages).

2 KRÁLOVÁ, K.., MAREK, K. *Obchodní podmínky, vykládací pravidla a obchodní zvyklost*i in Acta Iuridica Sladkoviciensia XVII, 2021, p.135-152.

The above-described contractor / supply structure ensures the actual implementation of the construction. There is also another important participant in the construction, which is the supplier of the construction documentation, i.e. the supplier of a work specific in its nature, including aspects of an intangible, original work.

Construction documentation

Construction documentation is a set of progressively elaborated and refined documents (plans) through which the intended construction (investment) is defined and described, from the formulation of the initial intention to the detailed documents according to which the construction is implemented. In this context, the different stages (phases) of documentation preparation are referred to, namely preparatory, implementation and post-implementation documentation.

In the preparatory phase, the investor verifies the feasibility and economic sense of the investment plan by means of variously oriented studies (e.g. technical-economic, building, volumetric, investment, or a study of a set of buildings if it intends to prepare several related buildings at the same time). The purpose and objective of the studies is to assess and evaluate the feasibility of the project under consideration from the technical, economic and environmental point of view.

Once the studies have confirmed the reasonableness and feasibility of his investment plan, the documentation must be prepared in accordance with the requirements of the Construction act.

In the second stage (phase) the following is processed:

- Construction documentation (CD)

The following is also being prepared:

- Construction Delivery Documentation (CDD); prepared by the contractor according to his needs
- Contractor Selection Documentation (CSD); prepared as required, in particular for public contracts
- Documentation - Conceptual project for the technological part of the construction (CP) is prepared only if necessary, i.e. for a more detailed clarification of the proposed technological processes at the stage when the CD will be prepared later (the CP does not contain a more detailed solution of the technological part of the construction according to the practice and according to the requirements of the building authorities), i.e. before the start of work

on the DPS, so that this clarification is already binding for the DPS preparer. This is desirable when the design for the construction project (CD) is prepared directly by the selected contractor.

If a building permit is not required for the construction, but only its announcement is sufficient, the documentation for the announcement of the construction (AOC) is processed.

After the completion of the construction, the Documentation (drawings) of the actual design of the construction and various types of user documentation according to the nature and purpose of the construction (operating manuals, etc.) are obligatorily processed.

Of course, not all types and levels of documentation may always be prepared for all buildings, and some types of documentation may fulfil more than one function. The extent of the documentation required must be carefully considered so that its functions are safeguarded without spending resources on duplicate documents.

Examinations / Controls

We should not neglect the provision of tests in the work contract to prove the fulfilment of the obligation. Tests verify the characteristics of the performance (deliverables) to be tested and their suitability. There are different types of tests, ranging from the technically relatively simple to the technically very complex.

Tests are often defined by legislation, technical regulations or technical standards. However, they are mainly specified (including their content) in the project documentation and agreed in the contract or arising from commercial practice. It is not advisable to rely entirely on commercial practices in the case of tests, because, while commercial practices can replace the arrangements on the nature and extent of the tests, they cannot replace the setting of the performance parameters to be verified, which are always individual.

Individual testing is the term used in practice for the contractual obligation of the contractor or supplier either to deliver the assembled product or to assemble or to carry out the assembly work. It means the testing of a machine, equipment or technical system to the extent necessary to verify its completeness and its functions and at the same time to verify the proper execution of the assembly, or only to verify the proper execution of the assembly (if only assembly work is involved).

Comprehensive testing is the testing of the work in the part that consists essentially of a set of machines and equipment (e.g. operating set). The supplier-contractor demonstrates that the work is of good quality and that it is capable of test operation, if agreed, or that it is capable of being handed over, if test operation is not agreed as part of the scope of performance. The term comprehensive testing means that all parts of the work shall be tested comprehensively and simultaneously.

The test run is a follow-up to the comprehensive test. We recommend that it be specified who is to perform it, as without explicit agreement, different conclusions could be reached when interpreting the other provisions of the contract. In general, the tendency is client providing the test operation to the contractor as per obligation to do so. The test operation verifies whether the plant will be capable of operating under the expected operating conditions within the scope of the test operation specified in the documentation.

The test operation is the initial phase of use (operation) of the construction. During the test operation, a ramp-up curve, i.e. a trajectory (path) along which the design objectives (performance parameters of the structure) are progressively met, is usually implemented. During the trial run, the deficiencies that arise are eliminated and the operation of the process equipment is fine-tuned and optimized to achieve routine operation. At least in the final phase, it must already be operating under standard operating conditions.

Follow-up warranty tests prove that the equipment achieves the values and indicators explicitly agreed in the contract and that the process equipment is capable of routine operation.

Whether individual testing, comprehensive testing, trial operation and warranty tests are carried out, or whether only some or all of these tests are carried out in sequence, is a matter of contractual agreement and is based on the nature of the work. If, under the contract, the proper execution of the work is to be demonstrated by the performance of tests, the execution of the work shall be deemed to have been completed only after those tests have been successfully carried out.

The standard tests of technical equipment (e.g. gas, water, heating, etc.), which are prescribed by technical standards and regulations, must be distinguished from the tests of technological equipment described above)[3].

3 KRÁLOVÁ, K., MAREK, K. *Obchodní podmínky, vykládací pravidla a obchodní zvyklosti* in Acta Iuridica Sladkoviciensia XVII, 2021, p.135-152.

Basic provisions

Significant features of the contract

The basic provisions of the contract stipulate that the contractor undertakes to carry out the work at his own expense and risk for the client and the client undertakes to accept the work and pay the price.

Compared to the earlier wording of the Basic Provision in the Commercial Code, the text is thus enriched by the text “performance at the contractor’s expense and risk”, which was only specified in the Commercial Code in the provision of Section 537, which followed the Basic Provision. The text of the Basic Provision was then enriched by the inclusion of the obligation to take over the work, which was also in the Commercial Code in section 537. We consider this to be correct.

The written form of the contract is not prescribed. However, it can only be recommended, especially in construction.

The case law on this determines that a contract can be concluded partly in writing and partly orally. According to the case-law, the fact that certain works have already been carried out before the conclusion of the contract does not affect the validity of the contract. However, in our opinion, it is not advisable to make use of these options in practice. This will avoid a number of disputes.

Differently than before, the Basic Provision regulates the price. The price of the work shall be deemed to be agreed with sufficient certainty if at least the method of determining it is agreed or if it is determined at least by estimation. If the parties intend to conclude the contract without specifying the price of the work, the price paid for the same or comparable work at the time of conclusion of the contract and under similar contractual conditions shall be deemed to be the agreed price. In addition, we note that entering into a contract at the will of the parties, without determining the price of the work or by estimation, cannot be recommended in construction; it could also lead to disputes that are difficult to resolve.

According to case law, unless otherwise agreed in the contract, value added tax is part of the price (where the obligation to pay VAT is specified).

In Commercial Code the determination of the work was defined in the Basic Provisions in section 536, in relation to the Basic Provisions of the Purchase Agreement in section 409 and to the provisions of section 410.

In the Civil Code § 2587 addresses this issue and provides that **work means the making of a thing, unless it is covered by a contract of sale, and the maintenance, repair or alteration of a thing or an activity with a different result.** A work is always the construction, maintenance or alteration of a structure or part thereof.

Under the current legislation, the work does not have to be materially recorded today, allowing for a broader implementation of this type of contract (e.g. negotiation of remote data transmission activities).

The basic provision does not expressly state that the works contract applies if the subject matter of the performance is assembly. However, if a substantial part of the performance consists of assembly, then it will be a works contract, as assembly is also an activity. However, it would not be wrong if the law expressly referred to assembly.

Other features of the contract

In our view, when entering into a contract, customers in particular (like purchasers in a contract of sale) should consider including (and we recommend its inclusion) a "Meaning and Purpose of Contract" clause. The content of this article may not be a mere proclamation, but it may have serious legal consequences in relation to the regulation of other provisions (in their interpretation) if such provision formulates what is expected of the performance of the contract or the work.

The construction contract should also not lack basic information about the construction. We believe that it is advisable to include a statement by the client (builder) that the construction is properly permitted (where a permit is required), as any penalties or stoppage of the unpermitted construction will not only affect the client, but will also cause a number of problems for the contractor. It is advisable to agree when the client will hand over (notify that the building permit has been issued) to the contractor (if it has not already been issued before the contract is concluded). It should be handed over at the latest on handover and acceptance of the construction site day.

If the client has not provided the building permit in time, it means that the client has not provided the necessary cooperation to enable the contractor to fulfil his obligation.

However, it may also be agreed that the contractor shall procure the building permit.

In particular, we may also recommend specifying the name and location of the building and its characteristics (e.g. that it is a permanent, temporary, etc.) in the contract. If the details of the importance and purpose of the building are not fully indicative, a clause on the importance of the building may also be included in the contract. This may assist in the interpretation of certain provisions of the law and the contract.

In any case, the most precise identification of the project documentation and other source papers (documents) according to which the construction (work) is to be carried out should not be missing. In the case of project documentation, it is also appropriate to lay down the principles for approving any changes to it.

In addition to the precise identification of the contracting parties, it may be advisable - in the case of construction - to state in the contract:

- Other construction participants.
- Details of the investor (or details of the future user).
- At least the basic design of the delivery system (i.e. which entities and how they deliver to the investor) and the anchoring of the contracted performance in it, including the identification of the functions of the general customer (contractor) of the technological part of the construction and the general contractor of the construction part of the construction, if a system with general contractors is chosen. At the same time, it is advisable to stipulate to what extent the contractual system of subcontractors may be changed only with the prior consent of the investor.
- In addition to the precise identification of the subjects of the contract being negotiated (including the organization identification number), i.e. the contractor and the client, it is possible - and very practical - to indicate their statutory representatives and the persons (officers, employees) who are authorized to negotiate possible contractual amendments.
- In order to facilitate the fulfilment of the obligations arising from tax regulations (in particular the Value Added Tax Act), the tax identification number (TIN) is indicated.
- If the goods from which the work is created are sent to the client's warehouse(s) prior to the commencement of work, for example, the contract should not lack transport arrangements, i.e. the address of the recipient, the agreed method of transport and the destination (it is also possible to agree on the method of packaging, or what equipment is intended for covered tempered warehouses). It is advisable to sign (mark with an agreed code) the equipment delivered in

packaging or loose, so that it is clear for which facility or operating set it is intended. This will facilitate distribution on site.

- It is also advisable to agree who will act as the contractor's works manager (construction manager) and who will act as the investor's technical supervisor (technical supervisor), and to decide as to who is authorized to make entries in and certify the construction (assembly) log and to check the work carried out on the site. If the subject of the work contract is the implementation of a software programme, it is usual to name the entire implementation team, even including substitutes.
- In the case of more complex constructions, other persons may also be specified in the contract, e.g. representatives for technical matters (to resolve technical issues, or to submit technical documents for draft amendments to the contract resulting from proposed technical changes), head of the "ramp up group" (to manage individual types of tests), coordinator (in charge of coordinating the work of subcontractors, possibly also other contractors supplying directly to the investor), persons responsible for safety of work on the construction site, etc. However, these officials are generally not authorized to negotiate changes to contracts (e.g. technical representatives may be authorized to agree on minor changes to the project and to indicate them in the project in a consistent manner, e.g. a change in the dimension indicating the distance of the machines from each other, provided that this does not violate safety regulations).
- In the case of larger constructions, it may also be agreed who is authorized personnel to carry out the handover and acceptance of the work on behalf of the parties, or who is the so-called responsible surveyor of the contractor and the client.
- As a rule, the person performing the so-called author's supervision of the designer will also be mentioned in the contracts (especially in the case of subcontracting at a lower contractor level)[4].

On the FIDIC contractual provisions

The content of a contract may generally be determined by reference to trade practices, commercial terms, general terms and conditions and rules of interpretation. The FIDIC Conditions of Contract are also used. FIDIC contracting is expanding not only abroad but also domestically.

A set of basic model contract conditions is contained in the FIDIC documents

4 ŠTENGLOVÁ, I. Smlouva o dílo, vyd. C.H.Beck 2018.

Conditions of Contract for Construction / Contract Conditions for Construction of Civil and Engineering Structures Designed by the Client (abbreviation CONS, Red Book), which are conditions with a balanced allocation of risks and whose use is assumed for projects where the risks associated with the project documentation are borne to a greater extent by the client. CONS are the contract terms for Design-Bid-Build projects using the client's specifications and drawings for the granting and execution of the contract and measuring the actual work performed by the construction manager using lump sum item prices. Conditions of Contract for Plant and Design-Build / Conditions of Contract for Supply of Technological Equipment and Design and Construction of Electrical and Mechanical Works and Civil and Engineering Structures Designed by the Contractor (abbreviation P&DB, so-called Yellow Book), which are conditions with a balanced allocation of risks and whose use is assumed for Design-Build projects where the risks associated with the design documentation are borne to a greater extent by the contractor. Unlike CONS, the P&DB conditions no longer use the client's specifications and drawings to specify and execute the contract; they work with the client's requirements, which mainly define the purpose, function, scope, standard, performance and other projection and technical criteria of the work according to the client's ideas.

Based on the client's requirements, the contractor creates his proposal, which becomes part of the contract. Although the total price is conceived as a lump sum and, unlike CONS, there is no measurement of the work actually performed, it may be adjusted through changes to the work (variations) and as a result of claims for additional payments and time. Again, a construction manager is used for this model.

Conditions of Contract for EPC/Turnkey Projects (abbreviation EPC or EPCT - Engineer, Procure and Construct, so called. Silver Book), which are typical for Design-Build projects with a shift of a greater degree of risk (mainly risks related to design documentation, responsibility for control of the contract award and control of the physical conditions of the site) to the contractor and are recommended for the delivery of capital units (e.g. power plants) where greater reliability of assurance of the overall price and construction time is required. EPCs are also subject to the fact that the price is conceived as a lump sum, no measurement of the actual work carried out is made, but may be adjusted (to a limited extent) through changes to the work (variations) and as a result of claims for additional payments and time.

To distinguish between P&DB and EPC conditions, FIDIC lists the cases where it is recommended to use P&DB conditions. These are situations in which the bidders for the contract do not have sufficient time and information to check and elaborate the client's requirements in the tender documents, some parts of the construction or the whole construction are underground or it is difficult to explore conditions, the client wants to supervise the execution of the works to a greater extent or to approve the contractor's design documentation, regular control of invoicing by the client is expected.

The decision as to which conditions apply to a given project is in principle made by the person who finances it.

There are three basic contract templates most commonly used today for the delivery of construction work. The terms and conditions of works and supply contracts include the Short Form of Contract (Green Book), which are contract terms and conditions designed for projects with a low expected value. Mention should also be made of the DBO (Design, Build and Operate Projects) Model Conditions of Contract, which were issued in 2008 and are a variant of the conditions for projects under which the contractor is also expected to operate the works. It is also worth drawing attention to the Model Conditions of Subcontract for Construction (Conditions of Subcontract for Construction) issued by FIDIC for use in combination with CONS. In any case, each model should be approached with the understanding that it is only a methodological aid which cannot adequately address the particularities and individualities of a specific construction).[5]

Rights and obligations of the parties to contract
The work's attachment to specific persons

Section 2588(1) regulates cases where the work cannot be performed by anyone other than a specific contractor, since the performance of the work depends on the contractor's special personal skills. Such skills may be possessed, for example, by an artistic blacksmith or metalworker who has undertaken to create a specific original work. In this case, the obligation is extinguished by the loss of his capacity (e.g. by accident or illness) or by his death. However, this does not apply if the work can be carried out by the person who has taken over the contractor's activities as his successor in title.

According to Section 2588(2), the death of the client does not in itself terminate the obligation, unless this makes performance of the obligation impossible or unnecessary.

The work does not have to be tied to the personal characteristics of the

5 L. Klee as per Used literature list.

contractor - or it is not necessary due to the nature of the work. In such cases, the contractor does not have to carry out the work personally and may have it carried out by a subcontractor. However, if these are not the cases mentioned, then the contractor shall carry out the work personally or under his personal direction.

Of course, the law takes into account the position of the contractor and the nature of the work when defining the cases where the contractor is obliged to perform the work personally. From the client's perspective, the aspect of trust in the contractor must also be taken into account. It is not unusual for the client to require the contractor to perform in person precisely because he has a trust in the contractor which he may not have in another contractor. The scope for agreement between the parties in this case is sufficiently wide.

Unless otherwise agreed, the contractor shall provide everything that is necessary for the performance.

If no **period of performance** is agreed, performance shall be affected without delay within a reasonable time. The period of performance shall be fixed in favor of the contractor in the case of a works contract. This means that the contractor could, unless the contractual agreement excludes it, perform earlier than the agreed performance period.

Period of performance

The period of performance will often not be negotiated as a single period - the total period - but will often be negotiated for partial performance and consideration. The specific contract should regulate these issues in some way.

If the subject matter of the delivery is a larger work, it is not sufficient to draw up a schedule of the subject matter and time of performance, but a so-called construction organization plan (COP) is drawn up describing the sequences of individual deliveries and works on the construction site so that everything is carried out in the necessary sequence.

The usual part of the arrangement on performance deadlines is also the solution of the impact of extreme weather conditions on the course of construction and the effect of the client's delay in providing cooperation on the contractor's performance of the deadline obligations. This is a very important part of the contract, the lack of which is often the reason for lengthy disputes about the timeliness of completion of the work. This matter would deserve a separate discussion, so we can only note at this point that the usual mathematics of "how much the client is in delay, by how much the performance period is extended" is somewhat tricky. This need not be the case.

Normally, the project documentation is provided by the client (the investor), who then provides it to the contractor together with the final building permit as the basic starting basis. However, it is not excluded that the contractor may arrange for the preparation of the construction documentation (part of it) as part of its delivery, including securing the issue of a building permit. In such a case, it is appropriate that the commitments for these deliverables have a separate handover date.

It is also advisable to agree at what point the individual project works will be completed and what negotiations will be carried out between the parties beforehand.

The period of **'handover of the site'** by the client to the contractor (i.e. handover of the site in a condition allowing the construction work to be carried out) should also be agreed, which, especially for larger constructions, may also be carried out in agreed sub-periods in stages.

It is also necessary to agree on the handover of "**construction readiness**", which means the advanced state of the construction work that allows the commencement and smooth execution of delivery and installation work by the contractor of the technological part of the construction. It is also agreed that the so-called "**assembly readiness**" is a very advanced state of the assembly works falling under the technological part of the construction, which will allow the works of the construction contractors for the full completion of the construction works (e.g. floor screeding, tiling, painting and other finishing works).

The individual consideration (the performance of the client towards the contractor) may include in particular the time of handing over of the marked out construction site, determination of intermediate areas, depositories and dumps, determination of earthwork, marking out and stabilization of basic directional and height points of the construction, use of the access road, placement (relocation) of traffic signs, handing over of connection points of energy and water sources, etc. For the performance of the contractor and the client, a **timetable of activities** (including the time of transport of critical supplies to the construction site) may be prepared, which either in its entirety or only some of its parts, or a summary of critical activities, may also form part of the contract.

Section 2591 provides that if the client's cooperation is necessary for the execution of the work, the contractor shall give the client a reasonable period of time to provide it. If the time limit expires in vain, the contractor has the right, at his option, either to arrange for substitute performance at the client's expense or, if he has notified the client, to withdraw from the contract. This provision applies in particular (but not only) to the materials which the client has undertaken to provide to the contractor (but may also apply to certain documentation, etc.).

Thus, if the client fails to provide the items which the client has undertaken to provide in time, it is stipulated that the contractor may give the client a reasonable period of time to do so and, after the expiry of this period, may provide the items himself at the client's expense after prior notice. The client shall then be obliged to pay the price thereof and the reasonable costs thereof without undue delay after the contractor has asked him to do so. The contractor is obliged to procure the items which are necessary for the execution of the work and which the client is not contractually obliged to procure.[6]) Withdrawal of the contractor from the contract for failure to provide cooperation should only occur exceptionally, in cases where such cooperation is necessary for the execution of the work, in other words, without which the work cannot be executed. Otherwise, i.e. if the cooperation is not of such a nature but is rather an excuse to get out of the obligations, it could also constitute an abuse of rights within the meaning of Section 8 of the Civil Code.[6]

The related provision of § 2592 (and the provision of § 2593) corresponds to the former regulation of Commercial Code. It provides that the contractor proceeds independently when performing the work. The opposite applies and he is then bound by the client's instructions only if this has been agreed and if it is customary. If the client requires the possibility of giving orders regarding the manner of execution of the work, he must also accept joint responsibility for the consequences of such interventions in the manner of execution of the work. The client has the right to control the execution of the work. On construction sites or in the case of mechanical engineering, this function is performed by the technical supervisor (technical supervisor). If he/she finds that the contractor is in breach of his/her duty, he/she can demand that the work be corrected and carried out in a proper manner (e.g. by making an appropriate entry in the construction or assembly log). If the contractor is in breach of his obligations and fails to remedy the situation even within a reasonable period of time and if the contractor's conduct has undoubtedly led to a material breach of the contract, the client may withdraw from the contract. The control should also cover the adherence to the schedule of the work; if the work is carried out in accordance with the agreed schedule, there is a good chance that it will be completed and handed over on the agreed date. If it is apparent that the contractor is behind the agreed schedule and the delay is not addressed by the parties, it is likely that

6 MAREK, K. *Smluvní obchodní právo, Kontrakty*, 4.vyd. Brno: MU,2008.

the work will not be completed on the agreed date. The proper completion of the construction (especially of a manufacturing facility but also, for example, of a shopping center) is then followed by the contractor's obligations to its partners (buyers, tenants, etc.), which are usually "also under penalty", so that the investor has an eminent interest in the timely completion of the work.

The agreed deadlines for the completion of the work are also significantly affected by the so-called extra works, i.e. construction or technological works that were not foreseen (anticipated) in the construction documentation, the need for which became apparent only during the implementation. This is typical in the case of reconstructions and modernizations, where it is only during the implementation of the construction, when the basic structures of the building are uncovered, that it becomes apparent what all will need to be addressed in the reconstruction or modernization.

Object of the work, ownership
Arrangements of things for the execution of the work, notice obligation

Another provision of § 2594 has essentially the same solution as Commerce Code. It specifies the **contractor's duty to give prompt notice** in the event that the nature of the items or orders given by the client to the contractor is improper. This applies with due care. This does not mean that the contractor must, for example, re-perform all attestations of quality, but he cannot accept 'inputs' from the client without taking the appropriate care required.

According to the case law, the building contractor is obliged, inter alia, to identify a material defect in the documentation provided by the client during the construction process and to draw the client's attention to that defect while exercising the minimum professional care.

Since reality is usually more colorful than the legislator's imagination, even in this case, not only black and white, only faultless and defective instructions apply, but there may be a whole series of instructions and documents from the client which will not be defective, but will only require a different solution, which may be more suitable in some aspects and disadvantageous in others. Such an instruction may cause an obstacle to the execution of the work but will not in itself be a reason for withdrawal from the contract. It may also entail the need for more work and have an impact on the time limit for performance, but these consequences should be borne consciously by the client who has given such an instruction.

If the improper item or instruction constitutes an impediment to the proper performance of the Work, the Contractor shall suspend performance of the Work until the Work is replaced or the Order is changed. The time for completion of the work shall be extended by the period of the interruption and the contractor shall be entitled to reimbursement of the associated costs for a specified period. Should the client insist on the handed over item or order, the contractor may request from the client to confirm this in writing. If the contractor complies with this provision of Section 2594, the client has no right to defects in the work arising from the unsuitability of the items or orders.

Section 2595 further provides for the contractor's option to withdraw from the contract if the client insists on carrying out the work in accordance with an obviously unsuitable order or using obviously unsuitable things even after the contractor has been notified.

If the contractor procures a thing processed during the execution of the work, the party to that thing, if it has become part of the work, has the status of a seller. The purchase price of the item shall be deemed to be included in the price of the work.

The client is obliged to hand over to the contractor the items to be procured under the contract for the execution of the work at the time specified in the contract, otherwise without undue delay after the conclusion of the contract. In case of doubt, the price for the performance of the work shall not be deemed to be reduced by the price of these items.

If the client fails to provide the items which the client has undertaken to provide in time, it is stipulated that the contractor may give the client a reasonable period of time to do so and, after the expiry of this period, may provide the items himself at the client's expense after prior notice. The client shall then be obliged to pay the price thereof and the reasonable costs thereof without undue delay after the contractor has asked him to do so. The contractor shall be obliged to provide the items which are necessary for the execution of the work and which the client is not contractually obliged to provide.

The contractual parties may therefore agree who shall provide the items for the execution of the work. If the contracting parties do so, the contractual arrangement shall apply. If the contract does not address the matter of the provision of the items, then the contractor shall provide the items.

If it has been agreed that the client shall provide the items for the execution of the work, the client shall bear the risk of damage to the items for as long as he is the owner of them.

In the case of items taken over from the client (e.g. to be taken into custody for the purpose of repair or modification or for processing in the course of the work), the contractor shall be liable as warehouseman.

Upon completion of the work or upon termination of the obligation to carry out the work, the contractor shall return to the client without undue delay the items taken over from the client that have not been processed during the execution of the work.

Ownership right

If the object of the work is a thing determined individually, the client acquires ownership of it. This does not apply if the contractor has processed the client's item at a location other than the client's or on the client's land or on land provided by the client, or if the value of the work is equal to or greater than the value of the client's processed item, in which case the contractor acquires ownership. This is expressly provided for in section 2599(1) and the workmanship of the thing made by the kind determines the ownership of the contractor by section 2599(2). This corresponds to the former regulation of the Commercial Code.

Subsequent provisions regulate situations of the thwarting of the work. If the contractor acquires ownership of a thing by processing and the work is thwarted for a reason for which the contractor is not liable, the client has no right to compensation for the thing he has handed over to the contractor for processing. (The right to unjust enrichment is not affected.) However, if in the same situation this occurs for a reason for which the contractor is liable, he shall compensate the client for the thing he has processed or return the same kind of thing to him.

The determination of who bears the risk of damage to the property and who has the right of ownership is of course of considerable importance. This can be documented, for example, in the case of construction work. If it is agreed in the contract that the contractor is the owner (then, of course, the contractor may be advised to insure the item and take the insurance premium into account when negotiating the price) and the client has, for example, fulfilled the conditions for initiating bankruptcy proceedings, the work will not be included in the estate. However, the consequence of this situation is precisely the fact that the contractor bears the risk of damage to the work (unless otherwise agreed).

If, on the contrary, the client is the owner of the work, then the work should be included in the estate and the contractor's claim for payment for the work should be asserted in the list of claims of all creditors. Depending on the specific situation, this claim may therefore be satisfied to a small extent, if at all. However, the contractor does not bear the risk of damage to the property. However, there is nothing to prevent one possible form of agreement that the risk of accidental damage to the supplies is borne by the client, but that the contractor is the owner until the work is paid for in full.

However, if the insolvency conditions are fulfilled by the contractor who would be the owner of the work, the work will be included in the estate and if the client has paid a significant part of the agreed price in the meantime, he may find himself in an unenviable situation.

It is therefore possible that one party to the contract will be the owner and the risk of accidental damage will be borne by the other party. It is also possible to contractually agree on some form of ownership and risk of damage for land, existing structures and vegetation handed over to the contractor for use or care (during construction) and otherwise for the work itself.

The specific contractual arrangements must be based on the particular conditions relating to the parties and the nature of the work. In particular, consideration must be given to the method and terms of payment, which party, if any, has been forced to take out a loan, whether the work is subject to a lien, whether it becomes part of another work, etc.

The most common is the regime where the client becomes the owner of the work performed and the contractor is gradually paid the price of the work according to the scope of the work performed, with the risk of damage to the item (work) being borne by the contractor until the handover and acceptance of the work.

Arrangements for timely insurance against damage and for insurance of the work during the construction period should not be omitted. It is also advisable to contractually address issues related to the possible termination of obligations to perform the work.

When dealing with ownership issues in practice, it is also encountered that compatible solutions are not chosen for the relations between the client and the contractor on the one hand and the relations between the contractor and its subcontractor on the other. For the same object of performance, the ownership right of the client is agreed (or implied by law) in one contract and the ownership right of the subcontractor is agreed in the subcontract. Such solutions should be avoided and the same ownership regime should be negotiated throughout the supply system).[7]

Thwarting of the work

The related provisions of § 2600 to 2603 address other issues of thwarting of the work. They distinguish who has the ownership right to the thing and whether this entity is liable for the frustration. Four solutions are thus distinguished.

According to § 2600, the client is not entitled to compensation for the item that the contractor has handed over for processing if the contractor has acquired ownership of the item through processing and if the work is thwarted for reasons for which the contractor is not liable. This need not be limited to cases in which the client is liable, but may also include other cases.

In contrast to the legal provisions in § 2600, § 2601 deal with situations where the work is thwarted for reasons for which the contractor is liable. In that case, the contractor must provide the client with a monetary compensation for the thing worked out by him or provide him with a thing of the same kind.

Obviously, the provision of a thing of the same kind will only be possible in exceptional circumstances. Monetary compensation will normally be the usual one.

Sections 2602 and 2603 deal with situations in which the owner is the customer. If the customer has acquired ownership through processing and the work is thwarted for a reason for which the contractor is liable, the client may either demand the return of the item resulting from the processing or reject the item and demand compensation for his items used in the processing. If the contractor delivers the item resulting from the processing to the client, this shall not affect the client's right to unjust enrichment. If, however, the client refuses the item resulting from the processing, he shall be entitled against the contractor to monetary compensation for the processed item or to the return of an item of the same kind.

If, in the same ownership situation, there has been a frustration for reasons for which the contractor is not liable, the client may only demand the return of the item resulting from the processing, but shall reimburse the contractor for the cost of his item used for the processing. In accordance with the provisions of § 2600, the cases in which the contractor is not liable for the thwarting of the work are

7 *ŠTANDERA, J. Smlouva o dílo v novém občanském zákoníku. Komentář. § 2586–2635. Praha: C. H. Beck, 2013.*

either case in which the client is liable, but not only those, also other situations).[8]

Execution of the work

Completion of the work

Under Section 2604, **the work is considered performed if it is completed and delivered.** Both of these conditions must be met. In this respect, the work is completed if it is presented to be fit for its purpose.

If the contractor fails to hand over the work to the client in the manner agreed in the contract, the price of the work does not become due and the client is not in default.

In the case of larger works and in the case of standard construction, the agreed price is payable in stages, as the contractor would not normally be able to credit the work carried out until handover, so that handover of the work entails only the obligation of the client to pay the remainder of the price of the work, less the amount of the agreed retainer, if any.

If the work is a building, the client is not entitled (under section 2628) to refuse to accept the building on the grounds of isolated minor defects which, in themselves or in conjunction with others, do not prevent the use of the building functionally or aesthetically or substantially restrict its use. This is a change from the Commercial Code regulation, apparently inspired by established practice or commercial custom.

Since the criterion for completion is the ability to serve its purpose, it is advisable to state the purpose of the work directly in the contract. The client accepts the work either with or without reservations. He should acquaint himself properly with the work. In particular, he or she must make a reservation(s) in respect of obvious defects. If the client accepts the work without reservation, the court will not grant him a right for obvious defects in the work if the contractor argues that the right was not exercised in time.

The agreement determines when the execution of the work is to be completed, including the agreed conditions for the type of tests and the conditions for drawing up the acceptance report (including its content). Of course, the performance may be agreed in parts, e.g. by building objects and operating sets, and at the same time appropriate bonuses and penalties (contractual penalties) may be agreed in

8 PRAŽÁK, Z., FIALA, J., HANDLÁR, J. a kol. *Závazky z právních jednání dle občanského zákoníku, komentář* k § 1721 - 2893 OZ. Leges Praha 2017.

relation to these periods.

The execution of the work, especially in construction, will be a very complex activity and the timely and proper performance will often depend on the cooperation (suitably agreed) of other persons, especially the customer (the aforementioned handover of the construction site, or the handover of documentation, etc.).

In many cases, the contractor cannot ensure the entire execution of the work with its own employees, but will subcontract (especially electrical installations, insulation, air conditioning, etc.). The law allows him to do this. The contractor may entrust the execution of the work to another person if nothing else follows from the contract or the nature of the work. When another person carries out the work, the contractor is liable as if he had carried out the work himself.

The contractor shall also conclude work contracts with subcontractors, as well as purchase and other contracts, including innominate contracts.

For these cases, the contractor may be advised to 'play traffic warden', i.e. to negotiate the terms of the subcontracts (including the warranty) in accordance with the terms of the contract with the client.

In the event that the client is provided with "better performance", i.e. more favorable conditions than those secured contractually with subcontractors, the client should try to address the risks arising therefrom (e.g. differences in warranties) when negotiating the price. Implementation of this recommendation may not be straightforward, as there tends to be a relatively long period between the negotiation of the contract between the investor and the contractor and the contractor and the subcontractors. On the other hand, senior contractors often work with the same range of subcontractors, so they may know their requirements. In addition, investors are also increasingly interested in which subcontractors the contractor will work with, forcing the contractor to communicate with them already during the contracting process between the investor and the contractor.

It is not uncommon for the investor (client) to explicitly request that the contractor engage a subcontractor of his choice.

The complexity in the performance of a works contract, for example in construction, arises, among other things, from the longer performance period than in other contracts, the high financial volumes and, as a rule, the larger number of persons involved in the construction. However, it may also arise from the fact that the items required for the execution of the work, or part thereof, are provided by the client.

If the subject of the work is the elaboration of individual "stages" (types) of project documentation, it is advisable to agree who will discuss the documentation and in what terms and with which public authorities. It is also advisable to agree on the dates on which the contractor and the client will discuss the documentation during its preparation (e.g. first the concept of the solution and then the final form). The contract should also stipulate what documents and within what time frames the parties will provide each other with during the project processing.

In the case of technological deliveries in particular, it is possible to agree on the delivery of the specification of spare parts and on the delivery of service work, of course not only for the period when the contractor is liable for defects after completion, or for the warranty period, but also for the "post-warranty" period.

In practice, the implementation of changes to the agreed work is particularly difficult in the case of reconstruction and modernization of buildings. In the course of the work, new facts may be discovered (including in the case of buildings that are decades old) which could not have been discovered (or could only have been discovered with difficulty and at considerable expense) even in the course of structural engineering surveys or passport surveys carried out prior to the preparation of the project documentation.

The legislation takes account of the complexity of the execution of the work and as is clear from the statutory text, allows, under the conditions of this provision, i.e. if the various stages of the work can be distinguished, handover and acceptance in stages.

The contract should not omit the provision for tests (see above). If, according to the contract, the proper execution of the work is to be demonstrated by the performance of the agreed tests, **the execution of the work is deemed to have been completed** only after these tests have been successfully carried out. The contractor must invite the client to attend the tests in good time. Failure of the client to attend the tests to which he has been invited in good time shall not prevent the tests from being carried out, unless the nature of the matter so precludes.

Testing will be typical in construction, but also in research and development, for example. If the tests and their outputs are specified by regulations or binding standards of the standardization system, this must be respected (e.g. prescribed measurements and initial inspection reports). Where the type of testing is not mandatorily prescribed, it is recommended that it be agreed in the contract or specified in an annex to the contract and accurately described.

For some tests, it is advisable to agree in the contract the preparation of special documentation (e.g. for comprehensive testing, test operation and warranty tests), the time for the preparation of the design and its approval. The proposal shall also include the method of verification of the tests and the determination of when they have been successful and the content of the test record(s).

The result of the test shall be recorded in the minutes. If the client is not present, the record shall be certified in his place by a credible, competent and impartial person who has taken part in the tests. The Civil Code further provides that, unless the nature of the obligation is to the contrary, the contractor is obliged to hand over the minutes to the client. In our opinion, the client should always have the right to receive the minutes if he co-signs them.

If the **object of the work** is a thing, the provisions on the contract of sale shall govern the delivery of the thing similarly under section 2608. Upon acceptance, the client acquires ownership of the thing and the risk of damage to the thing passes to him, unless this has already happened.

Section 2609 determines when the contractor may sell the work after notifying the client (paragraph 1) and when he may sell the work without notifying the client (paragraph 2).

According to paragraph 1, the following conditions must be met: the sale must be affected in an appropriate manner; the client has not taken over the work without undue delay after the work should have been completed. If the work was completed later, it may be sold in a suitable manner without undue delay after notification of completion. Unless the nature of the work prevents it, an alternative period of not less than one month shall first be allowed for taking possession of the work. At the same time, the contractor shall inform the client that the item will otherwise be sold.

According to Section 2609(2), the contractor may sell the item without notice if an unknown or not easily reachable client does not apply for the work for more than six months. A thing may be sold without notice even if the client does not apply for the thing for a period of time suitable for its nature).[9]

The right to payment of the price

The right to payment of the price of the work arises from the execution of the work. If the work is accepted in parts, the right to payment of the price for each part shall arise upon completion.

9 HORÁK, P. Smlouva o dílo v novém občanském zákoníku (Pohled soudce na vybrané otázky a použitelnost stávající judikatury), publikováno: 20.10.2014 , Bulletin advokacie-online.

The contractor and the client may agree on the payment of an advance. If they have not done so and the work is either of considerable cost or is carried out in stages, the contractor may demand a proportionate part of the remuneration during the execution of the work, taking into account the costs incurred. This may be done, inter alia, by drawing up monthly 'survey reports' or 'inventories' of the work carried out, on the basis of which part of the remuneration within the meaning of this provision is paid.

Contractual discretion can be used extensively in matters of payment. It is possible to agree on the payment of advances, the **issue of partial invoices** or whether invoices will be issued at all. If there is an agreement on invoicing, it is advisable to agree on the time limits for issuing the invoice(s), the details of the invoices, the due dates, the penalties (contractual penalties for non-compliance with any of the provisions) and the amount of interest in the event of late payment.

In case **the client thwarts the performance of the work** for a reason for which he is liable, the contractor is entitled to the price for the work under § 2613, reduced by what the contractor saved by not performing the work - a similar solution to that in the Commercial Code.

If the parties agree after the conclusion of the contract pursuant to § 2614 to limit the scope of the work and do not agree on the consequences for the amount of the price, the client shall pay the price adjusted to take into account the difference in the scope of the necessary work and the reasonable costs associated with the changed performance of the work.

Section 2614 provides a solution similar to that of Section 549 of the Commercial Code. It provides that if the parties agree after the conclusion of the contract to limit the work (section 549 provided not only for limitation but also for extension and modification of the work) and do not agree on the consequences for the amount of the price, the client shall pay the price adjusted to take account of the difference in the scope of the necessary work and in the reasonable costs associated with the modified execution of the work.

Even if only a limitation of the scope of the work is referred to, in our opinion it would be appropriate to choose a similar solution for an agreed extension or modification of the work. The same criteria will apply here. However, this should be agreed in the contract, since these situations are not provided for by law. In our view, however, the law should regulate this issue.

Since changes, especially in the case of building supplies, occur on a regular basis, arrangements for so-called multiple works are usually part of contracts. The more comprehensive these arrangements are, the more future misunderstandings are eliminated as a precaution. It is recommended that the contract should pay adequate attention to the following aspects in particular when dealing with multiple works:

- defining what the parties will consider to be extra work
- setting dates for their execution
- the methodology for determining the prices (or at least the methods of determining the prices) of the multiple works
- the due date for payment of the price of the multiple works.

It is often advisable to apply the principle that the contractor will only be entitled to payment for multiple works if the price has been agreed in advance. This is to avoid problems with additional price negotiations after the extra work has been carried out.

Similarly to the case of multiple works, it is advisable to proceed in the case of 'minor works', i.e. where the scope of the work is reduced.

Price of the work

The price may be fixed or determined according to a budget (guaranteed - complete, non-guaranteed - incomplete, non-binding) or by determining the method of determining the price (e.g. according to a calculation formula), but also by the parties agreeing that the contract is formed without agreement on the price and by estimation. Both a price and a currency clause may be agreed to the price.

Fixed price and method of price determination

If a "fixed price" is agreed, then it may happen that the contractor may not achieve the expected positive economic result (e.g. if the price of some input supplies increases above the expected price level). However, in some favorable circumstances (e.g. a quality subcontract is awarded at a lower-than-normal price), the opposite may be true. There is a wide range of pricing methods (e.g. references to price lists, costing formulas, etc.). It is also possible for budgets to be drawn up to determine the price. In the case of a works contract, the price is often determined according to a budget; this is particularly typical in construction, but also in research and development (e.g. in the development of new machinery).

The fact that the price has been determined on the basis of a budget which is part of the contract or has been communicated to the client by the contractor prior to the conclusion of the contract does not affect the price.

If the budget has not been marked as incomplete or non-binding, the contractor cannot rightfully request an increase in the price of the work. This applies both to cases where, for example, the prices of subcontracts are increased and to cases where, for example, a wider scope (larger meterage) is required for energy piping.

In the case of complex works, a budget is regularly drawn up to determine and justify the price. If the budget was only a tool for fixing the price in the contract, the price of the work as agreed between the parties shall apply and any changes to the budget (or errors in it) shall not affect the change in the fixed price.

However, exceptional circumstances may arise which justify a relaxation of the severity of this rule. For this reason, the solution to the situation where the execution of the work is made more difficult and expensive by an extraordinary circumstance approaching force majeure has been adopted from Swiss law. If the parties fail to agree on an increase in price in such a case, it is provided that the court shall decide on a reasonable increase in price on the contractor's application or that the court shall have the option of annulling the contract and deciding on a settlement between the parties.

The new provision of § 2620(2) is a regulation that has not been introduced in our legal system so far. It takes into account the following exceptional and unforeseeable circumstances. It therefore allows the court to decide on a fair increase in the price for the work under specified conditions.

Where the work has been awarded on a budget, the standard distinction between guaranteed and non-guaranteed budgets is adopted. In the case of a budget guaranteed as to bindingness and completeness, the price cannot be increased except by agreement of the parties, unless there is a budget error as set out above.

By contrast, a non-guaranteed budget allows the contractor to increase the price unilaterally if there is a need for higher costs or additional work, but he must notify the client of such a need without delay, otherwise he loses the right to increase the price.

Incomplete and non-binding budget

However, if the price has been determined on the **basis of a budget given subject to the proviso that its completeness is not guaranteed**, the contractor may claim a reasonable increase in price if, during the execution of the work, the need for activities not included in the budget arises, provided that these activities were not foreseeable at the time of conclusion of the contract.

In construction, the non-guaranteed completeness budget may be used, for example, in the case of renovations and modernizations, where the budget provides for a certain number of units of material, including work, on the basis of the results of surveys (carried out with due professional care) submitted by the client. During implementation, the increased need for these units can then be identified after dismantling the existing equipment. However, the condition that this could not have been foreseen when the contract was concluded must also be fulfilled.

In addition to the budget with non-guaranteed completeness, the Code also provides for **a non-binding budget**. If the price has been determined on the basis of a budget given with this reservation, the contractor may claim that the price be increased by the amount by which the costs necessarily exceed the costs reasonably incurred by the contractor in the original budget.

In particular, the non-binding designation of the budget will be used in a period in which it is realistic to anticipate movements in price levels. The contractor will not only have to prove that there has been a price increase, but will also have to prove that he had to use these inputs because it was unavoidable. However, in order to designate the budget as non-binding, further detailed provisions in the contract are appropriate, e.g. on which subcontractors the contractor will buy from and at what time.

In order not to complicate the issue of evidence and complicated calculation (budgets contain dozens, often hundreds of items), it is not excluded to agree that the budget is non-binding only for the critical items. If the client disagrees with the price increase, the court will determine the price increase at the contractor's request.

However, the Contractor shall be entitled to have the price increase determined in accordance with the non-guaranteed completeness provisions if it fails to notify the necessity to exceed the budgeted amount and the amount of the requested price increase without undue delay after its inevitability has become apparent (i.e. not when it occurred, but when its inevitability became apparent).

The provisions on the non-complete budget and the non-binding budget protect the contractor. In general, it could not be excluded that the increase could be an order of magnitude higher. That is why the Civil Code also contains text intended to benefit the client.

The client may withdraw from the contract without undue delay if the contractor requests a price increase in accordance with the relevant provisions of the Code that exceeds the budgeted price by more than 10%. In this case, the client is obliged to compensate the contractor for the part of the price corresponding to the extent of the partial execution of the work according to the budget.

Estimated price and agreement that the contract is formed without an agreement on price

As for the **estimated price**, if the contractor discovers after the conclusion of the contract that the estimated price will have to be substantially exceeded (an overrun of more than 10% may be considered), he shall notify the client without undue delay, giving reasons for the new price. If the contractor fails to do so without undue delay after he has discovered the need for the price increase or should have discovered it and could have done so, he shall not be entitled to payment of the price difference. If the contractor has notified the client of the price increase in accordance with the specified conditions, the client may withdraw from the contract. In this case, he shall pay the contractor a pro rata part of the original price if he benefits from the partial performance.

In the event of a non-substantial price increase, the prior consent of the purchaser is not required, who is obliged to pay the increased price to that extent.

The client must decide without undue delay how to respond to the notification of a **substantial price overrun.** If the client does not withdraw from the contract without undue delay after receipt of the notice of the price increase, the client is deemed to have accepted the price increase.

For more complex contracts in terms of content, a contractual construction of the total price including the solution of mutual compensations, changes to the work and price clauses is created in practice, distinguishing between so-called flat, measured and cost prices.

A special provision of § 2625 provides that if the price is determined with reference to the actual scope of the work and its value or the value of the items used and the amount of other costs, the contractor shall, at the request of the client, account for the progress of the work and the costs incurred to date. These are cases where neither a budget price nor a fixed price will be agreed, but in particular situations for which a 'Calculation Formula' is agreed.

Contract without price agreement

In our view, a **contract without price agreement** should be implemented only in very exceptional cases. In such a case, the price would be determined by reference to the prices of such or similar works, supplied on such or similar terms, and by reference to those prices at the time the contract was concluded. In fact, the number of such or similar works carried out under the specified conditions will be very limited.

In addition to the payment for the work, i.e. the determination of the price, the advance, the payment, various methods of payment may also be agreed: by transfer (on the order of the payer), by direct debit (on the order of the payee), by payment by bill(s) of exchange, by use of a documentary credit, etc.

Defects in the work

Defects in the work are regulated in Sections 2615 to 2619 (defects in the construction are also specifically dealt with in the section named Construction as the object of the work in Sections 2629 to 2630). It is determined that the work is defective if it does not conform to the contract and refers to the analogous application of the provisions on the contract of sale for rights arising from defective performance. However, even under this provision, the client is not entitled to demand the performance of replacement work if the subject matter of the work cannot be returned or handed over to the contractor due to its nature. The following applies, for example, to a supporting column or chimney which, although not made exactly according to the documentation, is of sufficient strength and height.

Under the Commercial Code, the contractor is liable for infringement of another person's industrial property or other intellectual property rights as a result of the use of the subject matter of the work if the infringement occurs under Czech law or the law of the country where the subject matter of the work is to be used and the contractor was aware of this at the time the contract was concluded. The relevant provisions of the Commercial Code on the contract of sale applied mutatis mutandis to legal defects in the work.

According to the provisions of § 2616, if, under Czech law or the law of the state where the subject matter of the work is to be used, the use of the subject matter of the work results in a threat to or **infringement of a third party's industrial property right**, the contractor shall be liable to the client if the contractor knew or should have known of this at the time of conclusion of the contract. The provisions on legal defects of the object of purchase shall apply mutatis mutandis to legal defects. This legislation is stricter than the previous legislation. It specifies that it is not only cases where the contractor knew this at the time of conclusion of the contract, but also cases where he should have known it. It does not have to be a violation of these rights, but only a threat to them.

Section 2617 provides in general for works that if the **work is defective** when handed over, this gives rise to an obligation on the part of the contractor for defective performance. If, however, the risk of damage passes to the client at a later date, the time of such passage is decisive. After that time, the client has rights related to defective performance if the defect was caused by a breach of duty.

The court shall not grant the client the right related to defective performance if - pursuant to Section 2618 - the client does not announce the defects in the work without undue delay after he has discovered them or should have discovered them with due care, but at the latest within two years after the handover of the work, and if the contractor argues that the right was exercised late.

If, however, the contractor has given a guarantee for the quality of the work pursuant to § 2619, the provisions of the contract of sale shall apply mutatis mutandis to the guarantee.

In the case of defects covered by a guarantee, the guarantee period applies instead of the general period of two years for notification of defects. Liability for defects under the statutory scheme is not nearly as advantageous for the client (see the wording on liability for breach of duty by the contractor) as if he had agreed on a guarantee (inter alia, the work must be fit for the agreed - otherwise usual - purpose for a certain period of time). The negotiation of a guarantee therefore appears to be in the interest of the client.

If a **guarantee period** is agreed, it begins to run when the work is handed over. The provisions of the contract of sale shall otherwise apply mutatis mutandis to the guarantee for the quality of the work.

It is generally advisable for the contract to provide or regulate conditions to ensure that the required quality of the work is assured as far as possible. In addition to the standard continuous inspection by the client, other conditions and procedures may be agreed to contribute to ensuring the required quality. For example, sampling is increasingly being promoted, where the contractor presents a sample to the client before carrying out a particular activity (e.g. lining, plastering, special painting) and, subject to his approval, carries out such delivery).[10]

Other provisions and arrangements

The set of special provisions regulates certain specifics of works carried out as construction works. Typical cases are the construction, repair or modification of a building, but other modifications to immovable property may also be considered. First of all, the contractor is to bear the risk of damage to the building until it is handed over (unless the damage occurs otherwise). Section 651 of the former Civil Code is adopted in this respect. The client has the right to inspect the construction work even in the case of construction work already according to the general regulation.

As far as rights arising from defective execution of the work - construction - are concerned, the former Civil Code No. 40/1964 Coll. defined the period within which they may be exercised as three years (Section 646(3)), the Commercial Code five years (Section 565(2)). Civil Code, Art. is in favor of the solution of the Commercial Code, which is more in line with international standards. However, given that a five-year lifetime cannot be regularly guaranteed for certain parts of a building, it is proposed, following the example of Section 646(3) of the existing Civil Code, to allow the implementing regulation to shorten this period in certain cases for certain parts of a building. It is proposed to allow the same for the parties' agreement; however, the position of the client cannot be worsened if he is the weaker party.

It is quite common for contractual practice to differentiate the time limits for exercising rights for defects according to the nature of the delivery. On the one hand, there are deliveries for which a period of, for example, ten years can be agreed and, on the other hand, deliveries for which a shorter period must be chosen.

Section 2623 expressly states that the provisions of the first section of the legal regulation of the works contract apply to construction. In our view, however, the provisions of the second section, i.e. sections 2620 to 2622, are also typical of construction and also apply.

10 Černohlávek, J.; Doubrava, P., Právní spory ve stavebnictví, vyd. Aleš Čenek, s.r.o. 2018.

Co-operation

Co-operation is typical for construction, i.e. the fulfilment of individual obligations on which the timely performance of the partner depends (e.g. when placing non-pressurised earth tanks, the client - if agreed - will ensure the supply of water to the relevant location for their leak test, will allow the contractor to draw electricity at the relevant locations for welding work on the pipeline distribution, etc.).

If a turnkey delivery is not carried out and the client has several contractors as contractors in the construction, the phased handover of the site must also be carried out precisely. Temporary use of individual client buildings as site facilities may also be agreed.

Site facility issues, i.e. the construction of new buildings and facilities or the use of existing buildings and facilities for the social, operational and production purposes of the contractor(s), should again be agreed in the contract.

It is necessary to agree on the transport layout and unloading of shipments. It can be said that the scope of the co-operation negotiations may grow in proportion to the scope of the work.

In the case of large-scale construction, a number of mutual partial performances (consideration) are agreed in the contract. Some of these may be essential to the overall result, while others may be of a marginal nature in a given case (examples of the former may be the failure to hand over construction readiness, examples of the latter may be the failure of the client to appear for the partial covering up of works that subsequently become inaccessible).

When negotiating issues of co-operation, it is therefore possible to agree which of the client's sub-obligations are those on the timely fulfilment of which the contractor's proper performance depends. Contractually, different solutions can be chosen for the co-operation of the client, ranging from a minimum scope to a very substantial scope. This will also be reflected in the price of the work, where the price is likely to be higher if there is a minimum of co-operation.

However, the agreed co-operation and the extent of co-operation should be an expression of the contractual will of both parties for a rational solution, not the result of an abuse of the factually stronger position of one of the contracting parties. would be if the contractor were to force the client to purchase special equipment from a third party that it would not otherwise use, in order to borrow it during construction, or if the client were to insist, for example, that the contractor must provide the water needed for the tests himself, while having a sufficient water source available.)

For the agreed co-operation in progressive works, the time of their execution does not have to be agreed in the contract (however, the type of works does), nor does it have to be specified in the eventual schedule of works, if it concerns very partial issues in a large-scale action, where their execution cannot be determined with daily precision, and it is a short-term co-operation (e.g. direct presence of firefighters from the client's department during the execution of some works). For such an agreed category of co-activity, it may be agreed that the request shall be made e.g. by making an entry in the construction (installation) log and agreeing how many days in advance the request shall be made.

In general, however, in the context of co-operation, the specific time limits for such performance should also be specified in the contract. However, the arrangements for remuneration (an arrangement for remuneration may lead to the rationality of their scope) or gratuitous provision (which may have a further beneficial effect on the price of the work) cannot remain outside the scope of the agreement. In doing so, both the client and the contractor must consider whether to rely on the statutory liability regime in the event of a breach of a party's obligation or whether contractual penalties are to be agreed, if appropriate.

The obligation to hand over the construction site, or the site equipment, or to hand over the installation site in good time is one of the client's decisive obligations. In particular, when handing over the site, it is advisable to define what the site is, how it is defined and what is its specified extent. It may be agreed how the site is demarked with reference to the relevant document.

In some cases, in connection with the agreed scope of the subject of performance, it will be necessary to arrange for the handover of a document listing all distribution networks, sewers and other facilities, or a declaration that there are none. If the construction is on sites requiring special fire, hygiene and environmental protection measures, it is necessary to agree, inter alia, on the marking of the premises. Depending on the nature of the performance, the contract should not forget to include any co-operation on the drainage of the building.

It will also often be appropriate to agree on the provision or use of access and access routes, as well as the provision of lighting, electricity and water supply, etc. Arrangements should also be made as to who will obtain permission to use the public areas and who will pay the associated fees. The agreement may also include arrangements for co-operation in the relocation of underground lines and the digging up of public roads.

The subject of the agreement will also include the so-called entrances to the construction site(s). It will be agreed which representatives of the client are authorized to enter and, if the construction site is located in a specially guarded area, how access will be provided for the contractor's employees.

Co-operation in the removal of waste and impurities resulting from the work may also be considered. The issue of guarding and possibly fencing of the construction site will not remain outside the interest of the parties to the contract. It is also advisable to agree on co-operation in the preparation and execution of tests, the acceptance of the work and the clearance of the construction site.

Co-operation may also be agreed (e.g. details of securing entrances) in the event of the contractor rectifying defects in the work after completion, e.g. within the guarantee period or when defects are notified after completion.

This may also include the provision of machinery, scaffolding, assembly platforms, assistance in transporting and storing materials, or other activities. When negotiating co-operation in construction contracts, the fact that the legislation is concise and essentially dispositive can be widely contracted, and the contract can be appropriately 'formed' according to the specific conditions).[11]

Carrying out checks and keeping logs

Inspection of the work may be continuous. However, particularly **in construction**, it may be practical to **negotiate the timing of some inspections** in the contract, especially for work that will be covered later in the progress. Unless specific arrangements are agreed in the contract, any failure to carry out an inspection will generally not affect the ability to claim liability for defects.

The client is entitled to inspect the execution of the work. In addition to inspection on an ongoing basis, inspection of the subject-matter of the work at a certain stage of its execution will also be considered.

If the contract stipulates that the client is entitled to inspect the subject-matter of the work at a certain stage of its execution, the contractor is obliged to invite the client to the inspection in good time. If the contractor fails to comply with this obligation, he is obliged to allow the client to carry out an additional inspection and to bear the costs associated with this.

If the client fails to appear for an inspection to which he was duly invited or which should have taken place according to the agreed schedule, the contractor may proceed with the work. However, if the client is prevented from attending

11 BÁNYAIOVÁ, A. Závazky v oblasti výstavby a nové civilní právo, vydavatel Wolters Kluwer 2016.

the inspection by force majeure, the client may request an additional inspection without undue delay, but must compensate the contractor for the costs caused by the delay.

During the execution of the work, there may be 'covering up' of the work in individual stages. 'Work-covering' is one of the cases where an inspection is required at a certain stage of the work. The invitation of the client (invitation to the client) and the obligation of the client to participate in the "work-covering" usually has a specific contractual arrangement.

Depending on the scope of the construction, it is in our opinion appropriate to agree in the contract the performance of technical supervision and the scope of authorization of specific representatives of the client and the contractor for activities taking place directly on the construction site.

We also consider it appropriate to specify the details of the maintenance of the construction (assembly) logbook, in accordance with the provisions of the Construction Act and its implementing regulations. It should be recalled that the logbook is to be kept in principle from the date of commencement of work on the site until the date of completion of the work and the removal of all defects.

The logbook is used to record all relevant (or other agreed) facts and circumstances relating to the construction and may serve, inter alia, as an important means of evidence. Entries are also made in the logbook by the state construction supervision authorities and by the public authorities in general. The diary also serves as a common means of communication in ensuring the cooperation of the parties to the construction.

The active exercise of the right of inspection by the client or its technical supervisor is preventive; it helps to prevent defects and problems and it is therefore in the client's interest to pay due attention to it. It will certainly be to the benefit of the execution of the work to anchor the rules for carrying out inspections and, in particular, the subsequent resolution of any deficiencies found by the contractor in the contract.

In justified cases, the client should also have the right to suspend the execution of works where it has identified major deficiencies, so as to avoid unnecessary escalation of the problem. While this goes against the principle that the contractor carries out the work independently, it is ultimately good for both the work and the contractor.

Hidden obstacles, handover of the construction

Hidden obstacles

If the contractor discovers, pursuant to § 2627, hidden obstacles in the course of the work relating to the place where the work is to be carried out, which make it impossible to carry out the work in the agreed manner, the contractor shall notify the client without undue delay and propose a change to the work. It may suspend the execution of the work pending agreement on the modification.

If the parties fail to agree on a change within a reasonable period of time, either party may withdraw from the contract. The contractor shall be entitled to the price for the part of the work carried out before the obstacle could have been discovered by the exercise of due diligence.

This legislation provides for hidden obstacles to the execution of the work. Unlike the previous regulation (in the Commercial Code), these may only be obstacles relating to the place where the work is to be carried out.

In parallel the conditions have to be fulfilled

- it is impossible to carry out the work in the agreed manner
- the notification has been made without undue delay and a change to the work has been proposed.

Pending agreement on the change, the Contractor may suspend implementation. If the parties fail to reach agreement within a reasonable time, the contractor or the client may withdraw from the contract.

The contractor would then be entitled to the price for the part of the work subject to the statutory condition (until it could have discovered the obstruction with due diligence).

It is clear that in the case of a works contract, the Civil Code was inspired primarily by the earlier regulation of Commercial Code.

Handover of construction, joint liability of designated persons

We very positively evaluate the modification of § 2628 on handover of construction. It stipulates **that the client is not entitled to refuse to take over the building for isolated minor defects which, either by themselves or in conjunction with others, do not hinder the use of the building either functionally or aesthetically or do not substantially limit its use.**

Isolated minor defects in buildings (e.g. in paintwork) cannot practically be avoided. Indeed, foreign regulations also take this into account (e.g. in the conditions for the execution of buildings in Germany); the regulations of the Commercial Code, which were broader and covered even isolated minor imperfections, were also based on reality. The Commercial Code, which - unless the parties had agreed - did not contain such a provision, appeared too strict. It should be emphasized, however, that only defects defined by § 2628 must be considered defects.

The question of any isolated minor imperfections can be dealt with by appropriate contractual arrangements.

Situations when other persons are jointly and severally liable with the contractor and when the contractor is released from the 'obligation for defects in the construction' are regulated by the provisions of § 2630.

Section 2630 **governs the joint and several liability of designated persons together with the contractor.**

These are

- subcontractors of the contractor
- whoever supplied the construction documents,
- whoever carried out the construction supervision.

However, the subcontractor is not liable if it proves that the defect was caused solely by the decision of the contractor or the person who supervised the construction.

The supplier of the construction documents shall not be liable if he proves that the defect was not caused by an error in the construction documents.

The person who carried out the supervision is not liable if he proves that the defect in the construction was not caused by a failure of supervision.

The contractor is then exempt from liability for defects in the construction if he proves

- that the defect was caused only by an error in the construction documentation supplied by a person chosen by the client,
- there was only a failure of the client's construction supervision.

We consider the modification of joint liability to be a beneficial step, reflecting the practical situation where the client was forced to exercise rights under liability for defects, out of caution, with all participants in the construction, taking into account the intermingling and influence of their deliveries.

Where the work consists of an activity other than the construction of a thing or the maintenance, repair or alteration of a thing, the contractor shall proceed with that activity as agreed and with professional care so as to achieve the result of the activity specified in the contract.

Thus, it is specified that the work may also be another result of the activity; it may be, for example, software, project documentation or other documentation.

Work with an intangible result

The result of the activity, i.e. the work with an intangible result, shall be handed over to the client; it shall be deemed to have been handed over:

- when completed,
- the contractor allows the client to use it.

The contractor may also provide the **result of the work**, which **is subject to industrial or other intellectual property rights,** to persons other than the client, if so agreed. If the contract does not contain an express prohibition against such provision, the contractor is entitled to do so, provided that the nature of the work does not conflict with the interests of the client.

The agreement of the parties shall be decisive for the provision of the result to others.

In view of the potential complexity of determining when disclosure to others is or is not contrary to the interests of the client, it can only be recommended that the conditions under which the contractor may disclose the result of the work to others be expressly agreed in the contract.

Contracts should also address the scope and conditions of use of the 'intangible work'. This is very appropriate in the case of contracts the subject matter of which is design work, in particular those which specify the architectural form of the building. While the architect's interest may be in the "inviolability" of his work, the investor's need and interest may be to change or modify it to meet operational or economic requirements. However, if the contract with the architect does not allow the possibility of altering the work in any way within the framework of its use, a rather complex problem would arise.

A very specific group of works with an intangible character consists of computer programs and their implementations. During the implementation of a computer program, it is usually adapted to the specific needs and conditions of the user. Figuratively speaking, "as if a prefabricated family house were being adapted to the needs of a family". This also requires a specific contractual arrangement, which can be based on the experience of contractual construction.

If the subject of the work is the **result of an activity** that is **protected by industrial or other intellectual property rights, the contractor is deemed to have provided it to the client for the purpose of the contract.**

As we can see, a rebuttable presumption is formulated here that the result of the activity specified herein has been provided by the contractor to the client for the purpose of the contract. In these cases, also, an appropriate agreement between the parties is advisable.

The work provisions in the Civil Code also provides that the provisions of the section on works with an intangible result shall apply mutatis mutandis to the result of an activity carried out under the provisions on a public promise (competition work).

Concluding remarks

In our paper, we have documented the arrangements for which the previous commercial law regulation has been reciprocated, the cases for which we propose a change in the legal regulation and, in particular, we have drawn attention to the issues on which the contractual arrangements need to be oriented.

As a final remark, we would like to point out that the favorable course of business cases, the implementation or application of legal provisions is, in our opinion, limited mainly by the level of legal regulations, the choice of the contractual partner, the quality of documentation, the level of the content of contracts and the quality of documentation of the course of contract performance, as well as the speed and quality of the resolution of any disputes.

The importance of an appropriate contractual provision (evident from our discussion) in a works contract stems from the wide contractual freedom allowed by the law and the fact that the Code does not address sub-areas of issues and leaves them to the contractual partners to choose (e.g. supply of spare parts, servicing, duration of warranties, penalties, invoicing, testing, acceptance, cooperation, details of keeping a construction or assembly logging, etc.).

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Case law

Supreme Court Decision 29 Cdo 2173/99

The validity of a work contract is not affected by the fact that it was concluded at a time when some of the work had already been carried out.

Supreme Court Decision 29 Odo 14/2001

If the written form of the contract is not prescribed or required by any of the parties (Section 272(1) of the Commercial Code), it is not excluded that the parties conclude it partly in writing and partly orally. The will of the parties at the time of conclusion of the contract is decisive for the assessment of the parties' conduct.

The fact that the parties to a written works contract do not expressly declare that the deed attached to the contract defining the subject-matter of the work forms part of the contract does not render the contract void if the parties orally agreed that the subject-matter of the contract is the work defined in that deed.

Note: The issue of section 272 of the Commercial Code currently governed by § 1756-1758 of the Civil Code.

Supreme Court Decision 29 Odo 50/2001

A culpable breach of an obligation entitling the client to payment of a contractual penalty (if the parties to a work contract concluded under the Commercial Code have agreed on a contractual penalty for culpable breach of an obligation) may also be attributed to the contractor for culpable breach of an obligation by its subcontractor.

Supreme Court Decision 32 Odo 835/2002

The price includes value added tax and customs duty, unless otherwise agreed by the parties. Unless otherwise agreed by the parties, the agreed price of the work cannot be increased by value added tax.

Supreme Court Judgment 29 Odo 846/2003

Pursuant to the provisions of Section 542(1) of the Commercial Code, the reservation of the contractor's right of ownership of the property being constructed for the client on the basis of a works contract (concluded within the meaning of Section 536 et seq. of the Commercial Code) may be agreed only before the client's right of ownership of the property being constructed has been established.

If the contractor's retention of title to the real estate constructed for the client on the basis of a work contract (concluded within the meaning of Section 536 et seq. of the Commercial Code) is linked only to the full payment of the agreed advance payments for the price of the work, it may not be invoked by the contractor without further delay after the contractor has become entitled to the price of the work in connection with the handover of the work.

Note: The issue of Sections 542 to 545 of the Commercial Code is currently governed by Sections 2599 to 2603 of the Civil Code.

Decision of the Supreme Court 32 Odo 253/2005

The contractor of the construction is obliged to recognize a substantial defect in the documentation submitted by the client during the construction process and to notify the client of this defect while performing the work with the minimum professional care.

Supreme Court Decision 32 Odo 296/2005

If the contractor fails to hand over the work to the client in the manner agreed in the work contract, the work price does not become due and the client is not in default of payment of the work price, and is therefore not obliged to pay the contractual penalty, because he has not breached the obligation to pay the price of the work within the due date

Supreme Court Judgment 32 Odo 576/2005, 32 Odo 760/2005

Unlike the execution of the work, which involves the proper completion and handing over of the subject matter of the work to the client at the place specified pursuant to Section 554 of the Commercial Code, the mere handing over of the work does not include its proper completion, i.e. it is essential for the entitlement to payment of the price in connection with the handing over of the work that the work was properly and without defects completed.

Note: The issue of Sections 554 and 555 of the Commercial Code are now regulated by Sections 2604 to 2608 of the Civil Code

Supreme Court Judgment 32 Odo 1387/2005

If the contractor deliberately delivered defective work (e.g. used material of different properties for the production of the work than specified in the contract, without changing the contract), i.e. he must have known or had knowledge of the defects, his liability is assessed more strictly, and he cannot claim that the buyer did not announce the defects in time.

Only defects whose existence is apparent to the buyer or the customer may be regarded as obvious defects or defects which can be detected by normal tests. Obvious defects cannot therefore be considered to be those defects whose existence would have to be ascertained by the purchaser or the client by means of an inspection involving the destruction of the goods or the work, or defects which may typically only become fully apparent when the goods or the object of the work are used.

Supreme Court Decision 32 Odo 4502/2007

The decision to permit the use of the work (construction) does not in itself replace the handover of the work to the client.

Supreme Court Decision 32 Odo 542/2008

If the client has not provided the building permit in time, it has not provided the necessary cooperation for the contractor to fulfil its obligation, i.e. to complete the work properly and on time.

Supreme Court Decision 23 Odo 1242/2008

A creditor may, inter alia, fall into default if it does not provide the debtor with the cooperation necessary for the debtor to be able to provide the agreed performance at all. The creditor's cooperation may be agreed in the contract, but this is not a necessary condition after assessing whether certain cooperation by the creditor prevented the debtor from fulfilling his obligation. It will always be a question of assessing whether certain cooperation by the creditor is objectively necessary to enable the debtor to fulfil his obligation.

Supreme Court Decision 33 Cdo 156/2018

The rule of interpretation according to which in doubts about the content of consumer contracts the interpretation more favorable to the consumer applies, cannot be used to interpret contractual provisions purposely contrary to the manifestly expressed will of the parties, or to transform them entirely in favor of the consumer.

Supreme Court Decision 33 Cdo 2869/2020

The price of the work may be agreed in such a way that part of it is determined by a fixed amount and part by an estimate, while preserving the work as a whole.

The invalidity of a legal act, for which a written form is agreed, made by e-mail, without the signature of the person acting, cannot be objected to by the contracting party who caused the invalidity by not observing the agreed written form (Art. 579(1) of the Civil Code).

Supreme Court Decision 26 Cdo 749/2023

"Uncertain or indefinite" within the meaning of Section 1987 Art. 2, is generally a claim that is illiquid, i.e. a claim which is disputable (uncertain) as to its basis or amount and whose assertion against the debtor (creditor of the passive claim) by way of a set-off objection will give rise (instead of an unequivocal, i.e. mutually accepted extinction of both claims to the extent that they cover each other) to disputes as to the existence or amount of the claim.

When interpreting which claims are related to the contract (to which the claim or defense asserted in the proceedings relates), i.e. which claims can be considered interconnected, it is necessary to respect the purpose of the regulation of Section 617(1) of the Civil Code, which is to significantly strengthen the protection of the interest in the resolution of interconnected claims. According to Section 617(1) of the Civil Code, interconnected claims may be considered as such, when part of the same legal relation, it is irrelevant whether the claim is a right to performance arising from a contract or a unilateral legal act or a claim for unjust enrichment.

Supreme Court Decision 23 Cdo 201/2024

A reasonable price in a contract of sale must correspond to an amount which, in the particular circumstances of the case, is appropriate to the extent of the distortion of the equivalence of performance and is capable of compensating for that distortion (by reducing the price). Determining a discount on the purchase price simply by determining the difference between the value of the non-defective item and the value of the defective item delivered or by determining an amount corresponding to the cost of repairing the defective item without further consideration (without taking into account the other specific circumstances of the item) does not meet such requirements.

Note: The conclusions of the Supreme Court also apply to the granting of a price discount in a works contract[*])

Štenglová, I. Na pomoc stavební praxi, Stavební právo, Bulletin, 4/2024, p. 72-79, ISSN 1211-6386.