

# Contract for a completed piece of work

## 1. Consensual contract

- Where a party agrees to pay for a completed piece of work which is to be carried out by the other party (contractor).
- 94Da42976: If the contractor's own material is to be used and the completed item is 'generic' (not specifically catered for the principal), it is a contract of sale. If the completed item is specifically for the principal, then it is a contract for a completed piece of work. Contract to manufacture and supply waste water treatment facility (including evaporation tubes)
- 88Daka31866: Contract for the supply of axle housings which were to be manufactured with contractor's own material (steel shaft). Owner inspected but was unable to discover the defect. Owner sold it to a buyer, who discovered the defect and terminated the sale with a claim for damages. Owner now sues the contractor.
  - Art 667 applies. Art 580(1) does not apply (irrelevant whether the plaintiff should, or could not, have known the defect).
  - Owner has the 'right', not a 'duty' to inspect. Owner has the power to reject the work if the parties agreed that "the inspection of the owner is final."
  - But contributory negligence of the owner may be taken into account.
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## 2. Sub-contracting: allowed in principle

- The manner of carrying out the work is for the contractor to decide. The owner, however, may give instructions – without impairing the contractor's independence.
- Unless otherwise agreed or the nature of the contracted work does not allow, contractor may sub-contract the work, for which the contractor remains responsible. Contractor shall be liable for sub-contractor's fault (Art. 391)
- 2001Da82545: Sub-contracting itself is not a breach.

### **3. Ownership of the completed piece of work**

- Where the principal (project owner) provided the material, the completed item belongs to the principal. If, however, the value added by the contractor is "manifestly greater" than the cost of materials, then the contractor acquires the ownership (but has the contractual duty to hand over the completed item to the principal). Art. 259.
- 98Du16675: Building contractor who used his materials will acquire the ownership of the completed building – unless otherwise agreed between the parties.
- 97Da8601: Where the planning permission was prepared in the principal's name and it is agreed that the completed building was to be registered under the principal's name, then the ownership of the completed building vests with the principal even if the contractor used his own building materials. The case, however, dealt with a situation where the contractor purchased the land from the land owners. The building permission was submitted in the name of the land owners and it was also agreed that the completed building would be registered under the land owners' name. But the Court interpreted that these arrangements were merely to "secure the payment of land purchase price". The registration, therefore,

conveys the title of the building only to the extent necessary to secure the payment of land price. The contractor acquires the ownership of the building. As soon as the land price is paid, the contractor fully recovers the ownership.

#### **4. Contractor's warranty liability**

- Where the completed work (if the work is to be completed in stages, the completed stage) is defective, the principal may demand repair, and additionally, seek compensation for loss caused by the defect. Art. 667
- If the defect is not material AND if the cost for repair is excessive, damages only may be sought. Contractor shall not be compelled to repair in such a case (to avoid economic waste).
- Defence of simultaneous performance. Art. 667(3). In principle, the owner may withhold the entirety of payment until the defect is repaired or damage is paid. But 91Da33056 reduces the scope of defence so that the owner may withhold only the “portion” of the payment corresponding to the defect. 2001Da9304 provides a more detailed guidance for this rule: When the repair cost (or damage in lieu of repair) is relatively small compared to the owner's unpaid payment and when it is doubtful whether the owner would willingly pay even if the defect is repaired, then the contractor shall be entitled to receive the payment due minus the repair cost; the owner may not refuse payment of the entire amount due (even if the repair has not been done).
- 2001Da9304: Where payment was to be made in stages of completion, the principal may withhold payment regardless of whether the defect was in the stage of work corresponding to the payment obligation. Defect in a previous stage of work which was discovered after the payment for that stage was fully made, can be a ground

to withhold payment for the current stage of work.

- Measure of damage: (Where repair may not be compelled) the difference between the market value of the completed (stage of) work without the defect and the market value of the present work with defect. The pain and suffering caused by the defective work is special damage (contractor's foreseeability must be proven). 96Da45436
- 95Da30345: Where the repair may be compelled, the principal may elect to seek compensation instead of the repair. The actual cost of repair may be claimed. If there is other loss, that may also be claimed.
- Where the principal elects to seek compensation, can the contractor "insist" upon repair? Probably not. The contractor can limit the amount of damage award to the actual cost of repair.
- Termination: if the defect of the completed (stage of) work defeats the purpose of the contract, the principal may terminate the contract. Art. 668.
- 93Da25080: If the completed stage of work is beneficial to the principal and if it is wasteful to order restoration of the completed stage of work, the termination may not have retroactive effect. the principal must make payment *pro rata* (contract price x percentage of completion calculated in terms of the cost of carrying out the work). Also see 2000Da40995
- Where buildings and installations are "completed", the principal may not terminate the contract even if the defect is serious enough to defeat the purpose of the contract. Art. 668. While the buildings or installations are not yet completed, the termination shall be governed by the general principle of 'materiality' of the breach. Still, however, the completed stage may not be affected by the termination. 94Da18584 and 93Da25080
- Limitation period:
  - Ground work and installations: 5 years
  - Stone, Concrete, Brick, metal or other durable structures: 10 years

- Other works: 1 year.
- Limitation period begins to run from the date of actual delivery or completion of work (where delivery is not necessary).
- If the completed work is destroyed or damaged, claims must be brought within 1 year. (Art 671(2))
- Any manner of 'demand' (including extra-judicial demand) is sufficient.
  
- Exclusion of warranty or reduction of limitation period is possible. However, exclusion or shortening of limitation period is ineffective with regard to defect known to the contractor (and unknown to the principal). Art 672

## 5. Payment for the completed work

- In cash or in kind. Payable upon completion of work and delivery, where delivery is necessary.
- Where an advance payment was agreed in order to enable the contractor to purchase materials and hire workmen, the amount shall be set off against the completed stage of work corresponding to the percentage of the given stage's progress. The principal may not set off the entirety of the advance against any given stage of work. 2001Da1386. If, for example, 30% of the contract price was paid upfront as an advance and a stage of work representing 10% of the entire work is completed, then the principal needs to pay 7% of the contract price and the remaining 3% of the contract price can be set off against the advance payment (10% of the advance payment may be set off).
- Contractor's lien to secure payment for the completed work. Art. 320. If, however, the building was built with contractors' own materials and if there was no agreement to make it a property of the principal, then on

completion of the building the contractor becomes its owner. The contractor cannot have a lien over his own property. 91Da14116

- Contractor may 'demand' the owner of the completed building to set up a hypothec to secure payment due to the contractor. The hypothec will arise only when it is registered (and the contractor may compel the owner to register the hypothec). Art. 666.

## **6. Principal's duty to cooperate**

- Depending on the nature of work, the principal may have a contractual duty to cooperate.
- 96Da14364: Where the principal's refusal made it impossible for the contractor to complete the work, the contractor is entitled to full payment of the contract price.
- Principal does not have a duty to inspect unless explicitly agreed otherwise. Even when the parties agree that the principal must inspect, this is often interpreted to empower the principal to reject the work upon inspection.

## **7. Risk**

- As long as it is commercially reasonable to complete the work, the contractor must complete it even if completion is disrupted for any reason. The parties usually provide express terms to cope with force majeure and adopt a sensible solution for the contractor.
- Where the completed stage of work is preserved and only the future work is affected by unavoidable circumstances, the contractor would be entitled to the corresponding portion of the contract price.
- When the completed (stage of) work is destroyed before the delivery, or contractor's notification of completion

of, the completed stage of work, contractor bears the risk (the principal is relieved of the obligation to pay the contract price)

- 91Da14116: Once the contractor informed the principal to accept the completed stage of work, subsequent demolition by a third party will not relieve the principal of the obligation to make the payment corresponding to the completed stage of work.
- When the work is completed and delivered, then the risk passes to the principal. When payment is made in respect of the completed stage of work, the risk also passes to the principal to that extent.

## **8. Principal's Termination at will (Art. 673)**

- Principal may, at any time before the completion of the contracted work, may terminate the contract.
- Contractor's loss must be compensated. Contractor, however, must take reasonable steps to mitigate the loss.
- 2000Da37296: Upon termination by the principal, the contractor is entitled to damages (actual costs spent so far + the profit it would have enjoyed had the work been completed). If the contractor could reasonably use the resources (which were freed by the termination) to alternative contracts, or could have sold the materials (no longer needed because of the termination), the profit he could have enjoyed must be deducted from the damages payable by the principal.
- Art 832 of Commercial Code (Termination of voyage charter)

## **9. Bankruptcy and termination at will**

- In the event of the owner's bankruptcy, the contractor or the owner may terminate the contract and seek payment

for work done. (Art 674) Neither of the parties may seek damage.

- Debtor rehabilitation and bankruptcy act, Arts. 119, 121 apply only when the contractor is bankrupt. (2001Da13624) If the contract was not completed, the trustee of the bankrupt estate of the contractor may choose whether to terminate or to continue with the contract. If the bankrupt estate of the contractor terminates the contract, the owner may claim damage.