

Liability for construction defects (FIDIC based and under national law) and damages

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Introduction

- Defective performance – defects in provided works (constructions) – constitutes breach of contract
 - Balance between parties incorporated in contract for work is hindered – purchaser (employer) did not obtain the anticipated performance for which he/she/it paid agreed consideration
- Legal means provided under various legal systems aimed at remedying such situation :
 - Liability for defects
 - Compensation of damages
- Both means have the same goal – repair (compensate) the shattered balance between parties. However
 - Procedures and conditions under which this goal is achieved differ
 - Each of the legal means stresses different aspects of the goal
- Therefore, it is necessary to deal with the relationship between these two legal means (institutes) and the conditions of their respective employment

Liability for defects v. compensation of damage

● Liability for defects

- Is a statutory liability of the seller/contractor for the quality/state of the subject matter of the contract at hand over
- It serves to reinstate the position of the purchaser/employer as if performance was perfect
- Offers various ways of remedying the situation from reinstatement (repair, exchange) to financial compensation (discount, rescission).
- It is tied to a notification obligation and often also to very short period for fulfillment of such notification obligation
- The defect must exist at hand-over

● Compensation of damage

- General and most common remedy for breaches in private law relations, including breaches in contractual relations
- Serves to compensate incurred harm – defective performance (lowered value) and its consequences
- Means of compensation – restitution (repair, exchange) as well as in money

● In both cases the liability is objective, i.e. regardless of fault

Liability for defects and damages under Czech law

- Principle – hierarchy of applicable legal means – defective performance can be remedied only under rules applicable for liability of defects: „*what can be achieved via claims under liability for defects cannot be claimed under different title* “ (§ 1925 Czech Civil Code)
 - Damages can be claimed for „follow on damage“, i.e. for damage caused by the defect (e.g. provided defective technology causes damage to other property of the purchaser/employer)
- When it comes to construction defects this means that the employer may :
 - 1. claim liability for defects under Civil Code. The scope of liability depends on the nature of the defects:
 - Defects constitute substantial breach of contract
 - Other defects
 - 2. claim rights agreed upon within quality warranty or based on FIDIC arrangement, provided FIDIC is agreed
- Employer may not claim damages in addition to or instead of liability for defects to compensate the defect of the performance (lowering of value of the performance)
 - Damages claim can be raised only in connection to the follow on damage, employer may claim only „additional“ damage caused by the defect

Different views on regulation of relationship between liability for defects and damages

- Different means of regulating the relationship between liability for defects and damages in case of defective performance are contained in a number of national legal systems as well as supranational private law concepts and conventions:
- Under UN Convention on Contracts for the International Sale of Good (CISG) – Art. 45
 - Buyer may
 - exercise rights provided to him to remedy defective performance (goods) and
 - claim damages
 - Buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies
- Similarly under Principles of European Contract Law (PECL), the aggrieved party is entitled to damages caused by the other party's non-performance which is not excused (Section 9:501)
 - Damages cover all forms of non-performance, i.e. including loss of value resulting from defects
- Similar concept in Draft of Common Frame of Reference (DCFR)

Issues and limitations caused by Czech regulation of liability for defects and damages

- Czech doctrine criticizes the current concept of interplay between liability for defects and for damages as contained in Czech Civil Code
- The criticism relates mainly to the following:
 - The current concept limits the main means of repairing breaches in contractual relationships – compensation of damage
 - As a result the scope of the term „damage“ is also limited since the current concept does not cover any (all) harm incurred by the purchaser (employer) as a result of breach of contractual obligations of the seller (contractor)
 - The purchaser (employer) is unduly limited as the means of available remedy are in a hierarchy
- Czech Civil Code has been amended several times since it came into effect in 2014. However, neither of the amendments has dealt with this matter.

THANK YOU

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