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OBLIGATIONS OF THE CONTRACTING PARTIES IN THE SERVICE CONTRACT

ABSTRACT: The subject of the paper are the obligations of the contracting parties, i.e. the contractor and client, arising from the conclusion of a service contract. A service contract is one of the oldest forms of contractual obligations, but it is also a contract constantly being changed and adapted to emerging life situations. A service contract is a consensual, nominate, onerous and bilaterally binding contract. Therefore, it is a contract in which the obligations of the contracting parties are determined. The contractor has the obligation to complete the work, and hand it over to the client, while the client is obliged to pay remuneration for the contractor`s work. Also, one of the distinguishing facts of a service contract is that it is often concluded with regard to the contractor's personality, so the fulfillment of the obligation is related to the personality of the contractor due to whose attributes the contract was concluded.

***Keywords*:** *Service Contract, Contractor, Client.*

1. Introduction

The service contract was known in Roman law as well (Maksimović & Despotović, 2016, p. 32). It originates from the Roman contract *locatio conducti*, as a common name for three similar forms of contract at the time, but

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today completely different contracts, namely: the service contract, the manpower supply service agreement (*locatio conductio operarum*) and the lease agreement (Ognjanović, 2010, p. 185). According to the contract, one party entrusted the other with a certain asset, and it was obliged to perform certain work on it for a certain remuneration.

In the Middle Ages, the contract had a reduced scope of application. It was mainly used in the relations between craftsmen and merchants, where craftsmen were not able to procure raw and other materials (Zindović, 2010, p. 163).

In the contemporary law, individual contracts (construction contract, copyright and publishing agreements, etc.) have been separated from the service contract, and they represent special nominate contracts, while the service contract is a special type of contract concluded for performing activities not covered by the aforementioned special contracts.

2. Obligations of the Contractor

Parties in obligatory relations are obliged to cooperate in order to achieve the legal effects of the concluded contract (Pavlović, 2014, p. 583). With the service contract, the contractoris obliged towards the client to fulfill the obligation assumed during the conclusion of the contract. The work the contractor takes on can be different, e.g. making new items, remodeling, or repairing existing items, creating paintings, sculptures, costumes, translation services, etc. Therefore, the work is performed through the use of the contractor's mental or physical abilities (Kalamatiev & Ristovski, 2015, p. 187). Also, the work of the contractor can be to complete a service (Maksimović, 2018, p. 60). Often, the contracting parties determine the obligation of the contractor to act in accordance with the professional practice and the nature of a particular work, as well as the professional activity and attention of a good businessman. During the fulfillment of contractual obligations, certain inconsistencies may appear between the contract and the professional practice rules for a given work, in which case the contractor is obliged to immediately inform the client about the aforementioned, and to act according to the requests and instructions received from the client. All of the above indicates the contractor must achieve the contracted result. This means it should achieve the contracted result, ie. the result expected by the nature of the work itself. In cases when the result cannot be expected with certainty due to the peculiarities of the relationship, then the contractor is responsible only for the correctness of the work in the aforementioned manner (Blagojević & Krulj, 1983, p. 1055).

If the work material is provided by the client, the contractor is obliged to examine the quality of the material and to warn the client of possible defects. The contractor is obliged to warn the client of deficiencies in his order as well as other circumstances he/she knew or should have known, which could be relevant to the ordered work, otherwise he/she will be liable for the damage (Judgment of the Supreme Court of Serbia No. 4374 / 97 of December 2, 1997, as cited in Krsmanović, 1999, p. 1514).

In order to be cleared of liability for the noticeddeficiencies, it is not enough just to notice them, but to immediately inform the client about them. The contractor is obliged, after the work is complete, to hand over the item to the client, and the latter is obliged to inspect the item and in case of defects, immediately inform the contractor (Ožegović, 2008, p. 35). The contractor is responsible for the shortcomings of the material even when he/she chooses it with the consent of the client (Judgment of the Supreme Court of BiH, No.1162/71 of March 9, 1972 - Bulletin of the BiH Supreme Court, No. 24/72, as cited in Tajić, 2009, p. 734). To exercise the right due to material shortcomings of the delivered material making it unsuitable for the contracted purpose, it is not enough for the contractor to invite the client to perform an inspection determining the defects, but it is obliged to invite the client to replace it, and if they decide to terminate the contract, the contractor is obliged to make the material available to the supplier, ensure its safekeeping, and make a sale for the account of the client (Judgment of the Supreme Court of Serbia Rev. 2379/97, as cited in Krsmanović, 1999, p. 227). It is possible the client insists on the use of defective material that is not disputable, in which case the contractor is not liable for any shortcomings in the execution of the work.

An exception to the rule exists if the use of unsuitable material would endanger the health of the client, other people or if the use of such material would be contrary to regulations, norms or standards, and entail certain liability to the contracting parties. If the client did not provide quality material to replace the unsuitable one, the contractor would have the right to unilaterally terminate the contract. If the contracting parties have agreed the contractor provides the material, it is necessary to be of medium quality, which is determined by the valid or adopted standards for the given type of material. The law stipulates the contractor is liable to the client for the quality of the material used, same as the seller (Ožegović, p. 135).

The defect of material is present: if the item does not have the properties for its regular use or trade; if the item does not have the necessary properties for the special use, for which the buyer procures it, and which was known

to the seller or must have been known to him/her; if the item does not have the properties and characteristics that are explicitly or tacitly agreed, ie. prescribed; when the seller has handed over an item that does not comply with the sample or model, unless the sample or model were shown for information only (Ibid., p. 111).

Therefore, these are the following obligations of the contractor: the obligation to perform work as agreed in the contract, the obligation to cooperate during the commission of the work, fulfillment of the contracted obligation within the agreed time, the obligation to hand over the work and in the agreed place. The cooperation of the contracting parties in the performance of certain tasks is necessary in order to fulfill the contractual obligation of the contractor, and the client to be satisfied with the result, the right of the client in line with Article 603 of the Law on Obligatory Relations is to supervise the work and provide instruction when the nature of work requires it. The deadline for the execution of the contractual obligation is agreed by the contracting parties, and if the parties have not done so, the deadline within which the contractor is obliged to fulfill the obligation represents a reasonable deadline for the contracted work. Reasonable time is a factual issue and depends on the nature of the contracted work and the circumstances of each individual case. If there is a disagreement regarding the reasonable deadline, the court shall determine the disputable issue by an expert opinion. The expertise is related to the time required for the execution of the work according to the customs in the place of execution, but also according to the standards related to the area of execution of the contracted work.

The contractor will not be liable to the client in case of delay in the execution of work if the client did not submit the material for production within the deadline specified in the contract, if the client requested changes in the execution of the contracted work, if the client did not pay the advance that was his obligation, and other cases caused by the fault of the client. If the fault of the delay in the execution of the contracted work falls on the contractor, the client has a right to compensation, and if a contractual penalty has been agreed, the client is entitled to compensation exceeding the amount of damage. However, the contractor can be released from the obligations if he/she proves the delay was due to a cause for which he/she is not responsible. However, the contractor will not be released from the obligation even if the impossibility of fulfillment was not his/her fault, if the impossibility occurred after the delay. In situations where the oversight of the client was present, but the delay was partially caused by the contractor itself, a case of shared responsibility arises (Blagojević & Krulj, 1983, p. 1505). After

concluding a contract, it may happen the contractor does not adhere to the agreed conditions and does not work according to the instructions of the client, which is why the work will have shortcomings and the result will not meet the needs of the client. When the client instructs the contractor to eliminate the identified deficiencies within the given deadline, and the contractor does not act on this, it is obliged to reimburse the client for the amount it paid to a third party to rectify the deficiencies (Judgment of the Supreme Court of Serbia No. 586/96, as cited in Ćosić, 1998, p. 243). When the client warns the contractor and sets an appropriate deadline for him/her to adjust the work to his/her obligations, and the contractor does not act upon the request of the client, the client in addition to terminating the contract, may request thecompensation for the damage occurred. In the case when the contractor did not perform all the foreseen work from the contract, and the client paid the foreseen amount for the contracted work in advance, there is an obligation of the contractor to compensate the client's damage due to less performed work (Judgment of the Supreme Court of Serbia No. 614/96, as cited in Ćosić, 1998, p. 243). When the completed work has such shortcomings making it unusable or it is performed contrary to the explicit conditions of the contract, the client may, without seeking prior elimination of defects, terminate the contract and claim damages (Judgment of the Supreme Court of Serbia No: 2222/97 of January 14, 1998, as cited in Krsmanović, 1999, p. 231). When the contracting parties set out a deadline as an important element of the contract, and the contractor is in such delay regarding the contracted work that he/she did not even start with it, which is why he/she will not complete the work within the agreed deadline, the client can unilaterally terminate the contract and claim damages. The right of the client does not refer only to the situation when the deadline is an important element of the contract, but also in the case when due to a significant delay of the contractor, the client would no longer have an interest in completing the contract. Therefore, the client has the aforementioned right even when the existence of a deadline as an essential element of the contract has not been agreed (Manojlović, 2020, pp. 150–152).

3. Transmission of the Order to the Client

Order transmission is a bilateral legal action, meaning it consists not only in the transmission of the order by the contractor as an obligor, but also the simultaneous taking of the order by the client as a trustee. The contractor is obliged to hand over the manufactured or repaired item to the client (Law on

Obligatory Relations, Article 613). The contractor is released from the obligation if the item he/she made or repaired fails for a reason for which he/she is not liable. The liability of the contractor is present in the case of failure of a made or repaired item when he/she is unable to hand over the made or repaired item because it is individuallymodeled. The contractor is released from the obligation if the item made fails for a reason which is not his/her responsibility, ie. in the case of force majeure or actions or oversights of a third party for which it was responsible (Dudaš, 2010, p. 156). The contractor has to hand over the items to the client as agreed, ie. witimethin the agreed deadline, in the agreed place, the agreed quality and quantity. If the contracting parties have not determined the place of order transmission by contract, it is determined by the purpose of the order, the nature of the obligation and other circumstances, and even if the place of order transmission cannot be determined, the order transmission must be performed according to the contractor's seat and residence at the time of the obligation.

The transmission of the order can be physical or symbolic and it has to be done within the deadline determined by the contract or within the deadline assumed by the nature of the work. If the contractor does not fulfill its contractual obligation within the agreed deadline, he/she falls late and bears the consequences arising from the delay.

4. Contractor's Liability for Subcontractors

The contractor is liable in all respects for the work of its subcontractors as well as other persons to whom the work was partially or completely assigned (Judgment of the Supreme Commercial Court - Sl. 124/68 of June 11, 1968, as cited in Krulj, 1983, p. 1507). The contracting parties, when the nature of the work allows it or when nothing else arises from the contract, may agree to entrust the work which is the subject of the contract to third parties. This does not release the contractor from the obligation towards the client and it is responsible to the client even when he/she does not perform the work personally. The contractor's hiring of subcontractors does not imply bringing the subcontractor in direct relation with the client, it does not release the contractor from his core obligations (Judgment of the Supreme Court of Serbia 624/95, as cited in Ćosić, 1998, p. 241). If during the work the subcontractor causes damage, the contractor that hired him is liable as well. The contractor may be released from liability to the client if he/she proves the damage is not the result of his/her direct guilt.

5. Direct Request of Subcontractors to the Client

According to provisions of the Law on Obligatory Relations, to collect their receivables from the contractor, subcontractors can contact the client directly demanding the payment of receivables at the expense of the amount the client owes to the contractor at the time if these receivables are recognized (Radovanov, 2011, pp. 250–252). In this way, the legislator improved the economic position of the subcontractors. The subcontractors are given the right to ask the client to pay their remuneration for the account of the recognized receivables of the contractor. Mutual claims of the contractor towards the client and the subcontractor towards the contractor must be indisputable and liquid. When the client pays a part of the amount of money that represents the undisputed work of the subcontractor, he/she is released from the obligation towards the contractor for the given amount. The subcontractorswould not have the right in case the client and the contractor agreed the obligation of the agreed remuneration is paid after the execution of the agreed work, ie. the order transmission. Nevertheless, the subcontractor would have a recognized capacity of the intervener in the event of a dispute between the contractor and the client, because he/she has a legal interest based on the engagement of the contractor and the work invested.

6. Contractor's Defect Liability

After the contractor submitted the order to the client, the client is obliged to inspect the work as soon as possible according to the normal course of things and to inform the contractor about the observed shortcomings without delay. If the client does not respond to the contractor's invitation to inspect and receive the work without a justified reason, it shall be considered the work has met the required criteria of the client and the client has achieved the required result. In this case, the risk of accidental ruin or damage to the work or thing passes to the client.

Although it is presumed the client received the order, the contractor is obliged to keep it or to hand it over to the court or a person designated by court, but in that case besides the right for reimbursement of safekeeping costs, the contractor has the right to remuneration. When the inspection and delivery of the items to the client has been performed, the contractor is no longer liable for the defects that could have been noticed by the ordinary inspection, unless he/she knew about them and did not show them to the client. This norm is not imperative, so the parties can agree on a deadline for complaints, depending

on the nature of the work and other circumstances. When the client refuses to inspect and receive the item without a justified reason, then he/she falls into delay in payment (Tišić, 2018, pp. 175–184). In the situation when the client takes over the work without objection, the legal presumption that the work was without defects is fulfilled. Hidden deficiencies may also occur during the service contract period. Hidden defects are deficienciesthat the customer could not notice with a simple inspection. If such deficiencies are noticed, the client may reasonably point out this objection, but no later than within one month from the day of its discovery.

The objection in question may be raised within two years of receipt of the completed work, after the expiration of theperiod, the client loses the right to invoke hidden defects. Pursuant to the Law on Obligatory Relations (Karanikić Mirič, 2020, pp. 27–29), the client that informed the contractor in time about the deficiencies of the work performed, cannot exercise its right in court after one yearfrom the notification, but even after the expiration of the period, the client may, if it notified the contractor in a timely manner, by an objection against the contractor's request for remuneration payment, to assert its right to a reduction of remuneration and compensation for damages. When the client has duly informed the contractor the item or work has a defect, he/she may request from him/her to eliminate the defect and set an approximate completion deadline.

However, if the costs of eliminating the defects are excessive, the contractor may refuse to eliminate the defects, in which case, the client has the right to request a reduction of remuneration in proportion to the extent of the defects, and may request termination of the contract (Art. 616, Law on Obligatory Relations). In the case when the contractor did not act in accordance with the agreed conditions due to which the item has such defects making it unusable, the client may terminate the contract without seeking prior elimination of deficiencies and demand compensation from the contractor. On the other hand, when the work has not been completed, contrary to the explicit conditions of the contract, and the item has such defects making it unusable, the client has the obligation to allow the contractor to eliminate the defects within a reasonable time. If the contractor does not eliminate the defects presented to him/her by the client within a certain period, the client has several options: to eliminate the shortcomings at the expense of the contractor, reduce the remuneration or terminate the contract, but if it is a minor defect, the client cannot unilaterally terminate the contract.

When the contracting parties have agreed the contractor makes the ordered items in parts, the client has the right to inspect each part individually,

and the contractor has the right to remuneration for each part separately that transfers the risk of loss or damage to the client. In any case, the client has the right to compensation, and the contractor cannot invoke the exclusion of his liabilityfor the shortcomings when theyare related to the facts known to the contractor that he/she did not communicate to the client (Obradović, 1999, p. 122).

7. Client's Obligation to Cooperate

Previously, it has been stated the client has the obligation to cooperate with the contractor in performing the work, other obligations relate to the payment of remuneration and the receipt of work. In order for the client to cooperate with the contractor, the contractor is obliged to enable the client to cooperate in the execution of work. Mutual cooperation is in mutual interest because the given instructions, suggestions and guidelines facilitate the execution of work, but also reduce the contractor's eventual liability if during the execution of work he/she moved within the client's given instructions.

Forms of cooperation can be differentdepending on the type of work, from the submission of appropriate material, control and supervision, successive receipt, but also the work as a whole. The greater the cooperation and participation of the client, the greater the chances of achieving the desired result. The rights of supervision of the client are not unlimited, but are limited by the needs of work refraining from interfering with the contractor's work.

8. Work Receipt Obligation

The provisions of the Law on Obligatory Relations solve the theoretical question, whether receiving - taking the ordered work performed in accordance with the contract is the right of the client or at the same time its obligation. In a situation when the client refuses to receive the completed work without a justified reason or prevents its receipt, the client is in delay. The client is obliged to receive the work in accordance with the contract, the purpose of the work, the nature of the obligation and other circumstances (Babić, 2001, pp. 410–411). The client may receive the work explicitly or tacitly, when the client leaves the item with the contractor after he/she has inspected and received it, a new obligatory legal relationship is established, ie. a storage contract. When the client, contrary to the provisions of the contract, refuses to receive the work, which in all respects corresponds to the contractor's obligation and the expected result, the client is in delay and from that moment bears

the risk of accidental loss or damage to property. In case of delay of the client, the contractor may be released from the obligation to hand over the item by handing over the item to the court deposit or to a person assigned by the court for safekeeping at the expense and risk of the client. By taking the item, all the risk of ruin or damage to it passes to the client. The contracting parties may stipulate in the contract the handover of the work is recorded in the minutes.

By compiling the minutes, it would be precisely determined the contractor handed over the item to the client, and that is of exceptional importance for the contractor, because from that moment he/she is released from all responsibilities specified in the service contract (Perović, 1980, p. 727). In the case where the contracting parties have determined the intellectual work as the subject of contract, the receipt of the work will be done by taking appropriate actions that enable the performance of such work.

9. Service Contract Remuneration Process

After the contractor fulfills its obligation and hands over the item, ie. completes the contracted work, the client is obliged to pay the remuneration on time, at the place, and in the manner determined by the contract. The obligation of the client in the service contract is due at the same time as the delivery of the item, unless otherwise agreed, for which the contractor is authorized to refuse delivery of the item if the client is unable or refuses to fulfill its obligation (Judgment of the Supreme Court of Montenegro No. 347/96 of September 12, 1996, as cited in Obradović, 1999, p. 126). When the client receives the item without objections, and the court determines the service was performed well and meets the conditions of the contract, the client is obliged to pay the agreed remuneration, even when the contractor fulfilled the obligation from the contract with delay (Decision of the Supreme Court of Bosnia and Herzegovina No. 512/86-87, as cited in Obradović, 1999, p. 126). The contracting parties may agree on different forms and modalities of remuneration, so in addition to payment in a fixed amount, payment may be determined in installments that would be due for payment with the execution of contractual parts of the work.

As a general rule, the parties determine the remuneration by contract, but the fee will be determined by established tariffs or price lists. When the price of services is not explicitly specified in the contract, it is considered the contracting parties have accepted the price the contractor (specialized company) regularly charges for that type of services (Decision of the Supreme Court of BiH, No. 44/70 of December 17, 1970, as cited in Tajić, 2009, p. 737).

Depending on the nature of the work and its complexity, the parties may agree on criteria for changing the agreed fee. Remuneration for work performed can also be paid in advance or as a deposit. This will most often be the case when the contracting parties have agreed the contractor will provide the material, and the payment will be made successively according to the execution, ie. the performance of the contracted work. In that case, the client has the right to inspect each part individually.

After the contractor has completed the work, and the parties have not determined remuneration in the contract, and in the case the parties cannot agree on the fee, the fee will be determined by the court based on the contractor's working hours, job complexity, other circumstances and usual fees for the given type of work. In the case when the remuneration for the work to be performed is agreed on the basis of a budget with an explicit guarantee of the contractor for its accuracy, the contractor cannot request an increase in remuneration, even if he/she has invested more hours and if the work required higher costs than foreseen. This does not exclude the application of the rules and procedures on termination and amendment of the contract due to changed circumstances (Art. 624, Law on Obligatory Relations). But, if the compensation is agreed on the basis of the budget without an explicit guarantee of the contractor for its accuracy, and during the work the budget overrun proves inevitable, the contractor must notify the client without delay, otherwise he/she loses any claim due to increased costs. If there is a significant increase in costs, and the client loses interest in performing the contracted work, it has the right to terminate the contract without the consent of the contractor (Karanikić Mirić, 2020, pp. 27–29).

10. Conclusion

With the service contract, the contractor is obliged to perform certain work for the client, and the client is obliged to pay remuneration for the service. The subject of a service contract is the performance of a service or work, provided it cannot be legal work. First of all, it implies the creation or repair of an item, or the execution of some physical or intellectual work.The service contract, as a bilaterally binding contract, creates obligations and rights for both parties.There are three basic obligations of the contractor: the obligation to complete the work, the obligation in case of work deficiencies and the obligation to submit the completed work. In addition to these obligations, the contracting parties may include other obligations.

The basic obligations of the client in the service contract are the obligation to payremuneration, the obligation of appropriate cooperation in the execution of the work, and the obligation to receive the work. The contracting parties may also agree on some other obligations.The service contract is also characterized by the possibility of its termination by the unilateral will of the client. Namely, until the ordered work is completed, the client can terminate the contract whenever he/she wants, because the work is the subject of his/her interest.

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OBAVEZE UGOVORNIH STRANA IZ UGOVORA O DJELU

REZIME: Predmet ovog rada jesu obaveze ugovornih strana, poslenika i naručioca, nastale zaključivanjem ugovora o djelu. Ugovor o djelu je jedan od najstarijih oblika obligacionih ugovora, ali je istovremeno i ugovor koji se konstantno mijenja i prilagođava novonastalim životnim situacijama. Ugovor o djelu je konsesualan, imenovani, teretan i dvostrano obavezni ugovor. Dakle, ugovor u kome su određene obaveze ugovornih strana. Poslenik ima obavezu izvršenja posla, predaje stvari naručiocu, dok naručilac posla ima obavezu da plati naknadu za ugovorni, izvršeni i priznati posao poslenika. Odlikuje ga i to što se često zaključuje s obzirom na ličnost poslenika, tako da je izvršenje obaveze vezano za ličnost poslenika zbog čijih svojstava je ugovor i zaključen.

Ključne riječi*: ugovor o djelu, poslenik, naručilac.*

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