THE UNDERTAKING CONTRACT AS REGULATED BY THE NEW CIVIL CODE

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Abstract
The present paper hopes to share a small but comprehensive analysis of the undertaking contract. This type of contract was scarcely regulated by the old Civil Code. Nowadays, the New Civil Code has dedicated a section especially for the undertaking contract.
The importance of this paper resides not only in the theoretical aspects but also in the practical perspective that it is hoped to be laid down. In the continuously developing world, despite the economic difficulties in the last years, enterprises and undertakings have continued to be a part of everyday life, and business still strive to maximize profits from this types of contracts.

Key words: *undertaking, subundertaking, agreement, work, New Civil Code.*

1. Preliminaries. The new civil code has comprehensively regulated the undertaking contract (articles 1851 - 1880).

The regulation includes new general rules of the undertaking contract, and special rules for the undertaking contract regarding construction works.

As conceived by the new civil code, the undertaking contract is a standalone agreement with its own features, and not a variant of the lease agreement as conceived by the regulation in the old civil code[1].

2. The general rules of the undertaking contract. Such rules regard the notion of the undertaking contract, and its delimitation from other agreements; the conditions regarding the capacity of the parties; the subundertaking contract; the workers' direct action; the ending of the agreement.

2.1. The civil code defines the undertaking contract as the agreement by which one party, the contractor, undertakes to, at their own risk, perform a certain work, either material or intellectual, or provide a service for the other party, the employer, in consideration of a price (article 1851 in the Civil Code).

Such legal definition includes the elements of essence of the undertaking contract.

The contractor binds itself to perform a certain work, or to provide a certain service for the employer.

The performance of the work, or the provision of the service, is done at the risk of the contractor. In performing the work, or providing the service, the contractor acts independently, and at their own risk; the employer is only interested in the result, the work or the service provided.

The new regulation expressly provides for that the work representing the object of the agreement may be a material work (constructions, manufactured items, etc.), or an intellectual one (expert examinations, advice, etc.).

For the performance of the work or the provision of the service certain materials are required. As the law conceives it, the same are to be procured by the contractor. The article 1857 in the Civil

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[1] As regards the contract agreement as regulated by the old civil code, please refer to Fr. Deak, *Tratat de drept civil. Contracte speciale* (*Civil Law Treaty. Special Agreements*), 6th Edition, updated by L. Mihai and R. Popescu, Ed. Universul juridic, Bucharest, 2006, p. 188 and the following.

Code provides for that, unless it results otherwise from the law or the agreement, the contractor is bound to perform the work with their own materials.

Working with their own materials the contractor is liable for the quality of the same according to the rules of the sale agreement.

The rule established by the article 1857 in the Civil Code regarding the procurement of the materials required for the performance of the work or the provision of the service by the contractor raises the issue of delimiting the undertaking contract from the sale agreement for a future asset.

The New Civil Code, inspired by the doctrinal solutions in the past, establishes the legal criterion for delimiting the undertaking contract from the sale agreement[2]. According to the article 1855 in the Civil Code the agreement is a sale agreement, and not a undertaking contract, when according to the intention of the parties the performance of the work is not the main purpose of the agreement, being also considered the value of the assets supplied.

Therefore, when qualifying the agreement the main purpose considered by the parties upon concluding the agreement takes precedence, as well as the value of the materials procured by the contractor.

The agreement shall be qualified as a undertaking contract when, in the intention of the parties, the performance of the work is the main purpose of the conclusion of the agreement, while the procurement of the materials is an accessory clause of the agreement.

The agreement shall be qualified as a sale agreement when, in the intention of the parties, the main purpose was not the performance of the works, but the material for the performances of the contractor.

Should the employer have procured the materials the contractor is bound to keep and use them according to their intended use, and under the applicable technical rules.

The performance of the work or the provision of the service by the contractor is done in consideration of a price, which consists of an amount of money, or of any other goods or performances (article 1854 in the Civil Code). The price may be an estimated (quotation) price, or a fixed price set depending on the value of the works or of the services.

2.2. The validity requirements for the undertaking contract are those provided for by the article 1179 in the Civil Code for the validity of any agreement: the capacity to contract; the consent of the parties; a determined and licit object; a licit and moral cause.

As regards the requirement for the parties to have the capacity to conclude the undertaking contract the general rules regarding the civil capacity of the individual and of the legal entity should be considered.

The contractor should in all cases have full exercise capacity.

The employer needs to meet the legal capacity requirements depending on the nature of the undertaking contract as a legal instrument, an administrative instrument, or a disposal instrument.

The New Civil Code also establishes certain special rules regarding the capacity of the parties to conclude the undertaking contract. According to the article 1853 in the Civil Code the provisions of the article 1655 paragraph 1 shall be accordingly applicable to the undertaking contract.

The law considers the incapacities to sell regarding the persons that are provided for by the article 1654 in the Civil Code: proxies, for the assets they are authorised to sell; the parents, the guardian, the trustee, the temporary administrator, for the assets of the persons they are representing; the public servants, the receiver judges, the insolvency practitioners, the bailiffs, who could influence upon the conditions of the sale being made by their intermediation, or having for objects the assets they are administering, or the administration of which they are supervising.

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[2] Please refer to C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *Tratat de drept civil roman* (*Romanian Civil Law Treaty*), tome II, Bucharest, 1929, p. 987, Fr. Deak, the quoted work, p. 192.

Such persons cannot sell their own assets for a price consisting of an amount of money originated in the sale and the operation of the asset or of the patrimony they are administering, or the administration of which they are supervising, as appropriate.

We consider that the applying accordingly to the undertaking contract means that the persons mentioned within the article 1854 in the Civil Code may not conclude the undertaking contract in capacity of contractor[3].

The subject matter of the undertaking contract is represented by the legal operation agreed upon by the parties, i.e. the performance of a work, or the provision of a service (article 1225 in the Civil Code).

Since the undertaking contract is a mutually binding agreement the object of the obligation of the contractor is the performance of the work or the provision of the service, and the object of the obligation of the employer is the payment of the price.

As we stated the new regulation expressly provides for that the work representing the object of the obligation of the contractor, and implicitly of the undertaking contract, may have a material or intellectual nature.

The object of the obligation of the contractor should be determined, or at least determinable and licit (article 1226 paragraph 2 in the Civil Code).

The price, as the object of the obligation of the employer, consists of an amount of money, or of any other goods or performances (article 1854 in the Civil Code). The price should be serious, and determined, or at least determinable.

According to the law the price may be a fixed price set on aggregate as a fixed amount of money, or an estimated (quotation) price considering the costs for the materials and for the performances of the contractor, or a price determined depending on the value of the works or of the services.

Should the agreement do not include clauses regarding the price of the contract the employer shall owe the price determined under the conditions of the article 1854 paragraph 3 in the Civil Code.

2.3. The New Civil Code includes a better regulation, as compared to the old regulation in the Civil Code, of the obligations of the contractor and of the employer.

2.3.1. According to the law the obligations of the contractor in the undertaking contract regard the performance of the work, the notifying of the employer on the issues arising while performing the work, and the warranty for the defects of the work and the absence of the agreed qualities of the same[4].

a) The contractor is bound to perform the work or provide the service that represents the object of the agreement.

Unless it results otherwise from the law or the agreement, the contractor is bound to perform the work with their own materials (article 1857 in the Civil Code). The contractor is liable for the quality of the materials procured by themselves under the conditions provided for by the Civil Code regarding the liability of the seller for the defects of the sold asset.

Under the conditions provided for by the law or agreed upon by the parties the materials required for the performance of the work may be made available for the contractor by the employer. In such event the contractor, in capacity of holder, is bound to keep the materials they received, and use them according to their intended use, under the applicable technical rules. They have to justify

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[3] As regards the applying of the provisions of the article 1655 paragraph 1 in the Civil Code to the contract agreement please also refer to T. Prescure, *Curs de contracte civile. Conform noului Cod civil* (*Course of Civil Agreements. According to the New Civil Code*)*, Ed. Hamangiu, Bucharest, 2012*.

[4] For certain accessory obligations of the contractor please refer to L. Stanciulescu, Curs de drept civil. Contracte. Conform noului Cod civil (*Course of Civil Law. Agreements. Accordng to the New Civil Code*), Ed. Hamangiu, Bucharest, 2012, pp. 344-345.

the way the materials were used, and return to the employer what was not used for the performance of the work (article 1857 paragraph in the Civil Code).

According to the new legal regulation, during the performance of the work, the employer is entitled to, at their own expense, check the works, but without unjustified hindrance to the fulfilment by the contractor of their obligation. The employer is also entitled to notify the contractor on their comments regarding the performance of the work (article 1861 in the Civil Code).

Should the contractor fail to fulfil their obligation regarding the performance of the work or the provision of the service the employer may use the remedies regulated by the article 1516 in the Civil Code.

b) The contractor is bound to notify the employer should the normal performance of the work, its durability, or the usage of the work according to its intended use would be endangered due to the materials procured, or to the other means that under the agreement the employer has made available for the contractor, as well as to the improper directions from the employer. The contractor also has the same obligation to notify the employer in the event of circumstances existing or arising for which the contractor is not held liable (article 1858 in the Civil Code).

The obligation of the contractor to notify should be fulfilled without delay so the employer takes the required action.

Should the employer, having been notified by the contractor on a cause that endangers the work, do not take the required actions within a term to fit the circumstances, the contractor may terminate the undertaking contract, or may continue performing under the agreement at the risk of the employer, after notifying the employer (article 1859 in the Civil Code).

In the event that the work would be of nature to threaten the persons' health or bodily integrity the contractor is bound to ask the agreement to be terminated. Otherwise the contractor shall take over the risk, and shall be liable for the damages caused, including for the damages caused to third parties.

c) The contractor is bound to deliver to the employer the work performed under the conditions set within the undertaking contract.

For the fulfilment of such obligation the contractor has to notify the employer about the completion of the work, requesting them to accept, and when appropriate to take the work.

The civil code regulates the consequences of the work perishing before the acceptance and the delivery of the work (article 1860 in the Civil Code). The law distinguishes as to whether the materials were procured by the contractor, or made available by the employer.

Should the work, before the acceptance, perish or be damaged by causes that cannot be imputed on the employer, the contractor that procured the materials is bound to remake it at their own expense, *(correction in handwriting with the mention 'see overleaf' – translator's note)* account the rules regarding the fortuitous suspension of the performance of the obligation of the contractor, under the conditions of the article 1634 in the Civil Code.

Should the materials have been procured by the employer the expenses for remaking the work shall only be borne by the employer if the *perishing (correction in handwriting – translator's note)* was due to defects of the materials. For the other cases the employer shall be bound to procure the materials again, but only if the perishing or the damaging of the work is not imputable on the contractor.

It must be stated that, should the perishing or the damaging of the work occur after the acceptance of the work, the mentioned consequences shall not be applicable. The contractor shall be liable, if appropriate, based on the obligation to provide warranty against the defects of the work, and for the agreed qualities of the same.

d) The contractor is bound to provide warranty against the defects of the work, and for the agreed qualities of the same (article 1863 in the Civil Code).

The obligation of the contractor to provide warranty against the defects of the work, and for the agreed qualities of the same operates according to the provisions of the Civil Code regarding the

defects of the sold asset, which are applicable accordingly. There are considered the provisions of the articles 1707-1715 in the Civil Code that regulate the obligation of the seller to provide warranty for the defects of the asset and for the absence of the agreed qualities of the sold asset.

2.3.2. According to the law, the obligations of the employer in the undertaking contract regard the acceptance and the receipt of the work, as well as the payment of the price for the work or the service.

a) The employer is obliged to accept and take over the work (article 1862 in the Civil Code).

According to the law, as soon as they received the notice from the contractor by which they are informed that the work was completed, the employer is bound to accept the work, as well as, when appropriate, to take it[5].

The acceptance of the work should be done by the employer within a reasonable term according to the nature of the work and to the usages within the area.

Should the employer, without any reasons, do not appear in order to accept the work, or do not immediately notify the contractor on the result of the checking, the work shall be deemed accepted without reservations. In such event the employer having accepted the work without reservation shall no longer be entitled to complain about the apparent defects of the work, or the absence of the agreed qualities.

As the law provides for, after accepting the work the employer is bound to take, i.e. take-over, the work.

The New Civil Code provides for that, should the contractor have undertaken to perform a work with the material of the employer, or to provide a service on an asset the employer has hand over to them for such purpose, and the employer fails to take the asset, the contractor shall be entitled to sell the asset.

For the exercising by the contractor of such right two requirements need to be met: a) that the employer did not take the asset within 6 months counting since the day agreed upon for the acceptance, or when the work or the service was completed later, since the completion date; b) that the contractor has first notified the employer on the sale of the asset.

In carrying on the operation of selling the asset the contractor acts in capacity of proxy of the employer and should use the diligence of a proxy free of charge.

From the price of the sale of the asset the contractor shall retain the price of the work and the expenses for the sale, and the balance shall be consigned available for the employer.

It has to be stated that, under the law, the contractor may not sell the asset not taken by the employer if the employer has taken action in justice against the contractor by means of a claim based on the failure to perform, or the improper performance of the work (article 1868 in the Civil Code).

As one can notice the law regulates the consequences of the employer failing to take a work that was made with the material of the employer.

For the case where the work not taken by the employer was made with the material procured by the contractor, in absence of a special regulation, there are applicable the provisions of the article 1516 in the Civil Code that regulate the remedies for a failure to observe the contract conditions. We also do not exclude the applying accordingly of the provisions of the article 1726 in the Civil Code regarding the direct enforcement.

b) The employer is bound to pay the price of the work and of the service (article 1864 in the Civil Code).

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[5] The article 1862 in the Civil Code provides for that the employer has "the obligation to... check it, and should the same meet the requirements set by the agreement, accept it"...

The wording of the text is pleonastic because by the acceptance of a work is understood the operation of taking over a work based on the quantity and quality checking of the same.

It is understood that such checking shall take into account the requirements set within the contract agreement concluded by the parties.

According to the law the employer has the obligation to pay the contractor the price of the work on the date and at the place of the acceptance of the whole work, unless otherwise provided for by the law or by the agreement.

The price to be paid by the employer to the contractor is the one agreed upon by the parties within the agreement.

Should a fixed (aggregate) price have been set within the agreement the employer should pay the price agreed upon (article 1867 in the Civil Code). In such event the employer may not ask the price to be reduced by reason that the work or the service required less working, or involved lower costs than those provided for within the agreement, and the contractor may not claim an increase of the price by reason that the work or the service required more working, or involved higher costs than those agreed upon by the agreement.

According to the law the fixed price set within the agreement remains unchanged even in the event that changes were made as regards the performance conditions originally provided for within the agreement, unless the parties have agreed otherwise.

If the price agreed upon within the agreement was an estimated (quotation) price, i.e. upon the conclusion of the agreement the price was subject to estimation, the contractor may justify any increase of the price (article 1865 in the Civil Code). In such event the employer is only bound to pay the price increase requested by the contractor if the same results from works or services that could not have been foreseen by the contractor upon concluding the undertaking contract.

Should a price set depending on the value of the performed works, of the provided services, or of the supplied goods have been agreed upon within the agreement the contractor is bound to, by request from the employer, account for the stage of the works, the services already provided, and the expenses already made (article 1866 in the Civil Code).

For the case where the undertaking contract does not include clauses regarding the price the employer shall owe the price provided for by the law, or calculated according to the law, or in absence of such legal provisions the price set in relation to the working done and the expenses required in order to perform the work or provide the service in considering the existing usages (article 1854 in the Civil Code).

The New Civil Code secures the right of the contractor to be paid the price of the work by the employer. The contractor enjoys a legal mortgage over the work, established and preserved under the conditions of the law (article 1869 in the Civil Code).

Related to the payment of the price the Civil Code regulates, as the old Civil Code also did, the workers' direct action (article 1856 in the Civil Code).

The law considers the cases where the performance of the work contracted by the contractor with the employer is done by certain persons, generally named workers, based on agreement concluded between such persons and the contractor.

Normally the price for such persons' working should be paid by the contractor, and in the event of a denied payment they have a contract action against the contractor.

In order to protect such persons, although they have no contract relations with the employer, the law acknowledges for such persons a direct action against the employer. According to the law they may claim the payment for their working, within the limits of the amount the employer owes to the contractor at the time the claim is submitted.

2.4. The Civil Code regulates the conditions for the ending of the undertaking contract. There are considered the death of one of the parties to the agreement, as well as the avoidance or the termination of the agreement.

In the event of the death of one of the parties the consequences are different.

The death of the employer only has for result the ending of the agreement if the fulfilment of the agreement becomes impossible or useless (article 1870 in the Civil Code).

In the vent of the death of the contractor, as well as in the case where the same becomes, without their fault, unable to complete the work or to provide the service, the agreement shall only

end if the same was concluded in considering the personal abilities of the contractor (article 1871 in the Civil Code).

Otherwise the employer is bound to accept the portion already performed, if they can use it, and they are bound to pay, in proportion to the price agreed upon, the value of the works performed and of the expenses made in order to complete the work, but only to the extent that such works and expenses are useful for them. Provided that they pay a proper compensation the employer is entitled to ask the materials prepared and the plans going to be acted upon to be handed over to them, in observing the intellectual property rights, under the conditions of the law.

As regards the ending of the undertaking contract by avoidance or termination the law distinguishes as to whether the same is imputable on the contractor, or on the employer.

The employer is entitled to obtain the termination, or as appropriate the avoidance of the agreement in the cases provided for by the article 1872 in the Civil Code (the observance of the term agreed upon for the acceptance of the work has become obviously impossible; the work or the service are not performed as agreed upon, and within a term set by the employer according to the circumstances; the contractor does not repair the shortcomings found, etc.).

The contractor is entitled to obtain the avoidance or the termination of the agreement if they cannot start or continue the fulfilment of the agreement due to an employer failing to fulfil, without justification, their own obligations (article 1873 in the Civil Code).

Apart from the avoidance or the termination of the agreement the contractor is also entitled to interest damages for the damage they suffered.

2.5. The Civil Code also regulates the subundertaking contract, which is sometimes used when performing complex works that represent the object of a undertaking contract (article 1852 in the Civil Code).

The subundertaking contract is the agreement by which the contractor entrusts to one or several subcontractors the performance of portions or elements of the work or of the services that represent the object of the undertaking contract concluded by the contractor with the employer.

The conclusion of the subundertaking contract is forbidden for the contractor in the case where the undertaking contract was concluded in considering the person of the contractor (*intuitu personae*).

By the conclusion of the subundertaking contract legal relations are established between the subcontractor and the contractor.

As a consequence, in relation to the employer, the contractor is liable for the deed of the subcontractor like for their own deed.

The subundertaking contract is subject to the stipulations provided for by the Civil Code for the undertaking contract.

3. Special rules regarding the undertaking contract for construction works. The New Civil Code, as well as the previous one, includes certain special rules regarding the undertaking contract for construction works.

The undertaking contract for construction works is the agreement by which the contractor undertakes to, at their own risk, perform works that according to the law require the issue of the construction authorization for the employer, in consideration of a price.

To the undertaking contract for construction works are accordingly applicable the provisions of the Civil Code regarding the undertaking contract, if compatible with the specific rules provided for in respect of such agreement (article 1851 paragraph 2 in the Civil Code).

As regards the undertaking contract for construction works there are also applicable the provisions of the Law no. 50/1991 regarding the authorizing of construction works[6], and those of the

[6] O.J. no. 163/07.08.1991. The law was modified, and then republished (O.J. no. 933/13.10.2004).

Law no. 10/1995 regarding the quality in constructions[7], the Regulation for the acceptance of construction works and of the installation works related to the same, approved by the G.D. no. 273/2004[8].

3.1. According to the Law no. 50/1991 the performance of civil, industrial, agricultural, or any other construction works is only allowed based on a construction authorization.

The construction authorizations are issued by the chairpersons of the county councils, by the General Mayor of the City of Bucharest, by the mayors of the cities, of the sectors of the City of Bucharest, of the towns and the communes[9].

3.2. In addition to the obligations that are usually on the side of the employer within the undertaking contract the employer within the undertaking contract for construction works also has certain specific obligation (article 1875 in the Civil Code).

Thus, the employer is bound to obtain all the authorizations required by the law for the performance of the work.

In order to meet such obligation the contractor has to cooperate with the employer by providing them with the required information they are holding, or should be holding considering their specialization.

Then, the employer is bound to allow the contractor, to the extent that the same are required for the performance of the work, to use the access ways, their own water supply installations, and other utilities servicing the building.

3.3. Considering the complexity and the specific features of the construction works representing the object of the undertaking contract for construction works the law regulates the right of the employer to check the performance of the work (article 1876 in the Civil Code).

During the fulfilment of the agreement, without hindering the normal activity of the contractor, the employer is entitled to check the performance stage, the quality and the aspect of the works performed and of the materials employed, as well as any other issues regarding the fulfilment by the contractor of the contract obligations.

The employer is entitled to notify the contractor in writing on their findings, as well as on the required directions.

In cases of "hidden works", i.e. of works to be covered by the subsequent performance of other works or by the mounting of construction elements, upon the completion of such works the contractor and the employer are bound to jointly ascertain the existence of the completed portion and the compliance of the same with the legal provisions and the clauses of the agreement.

Should the employer fail to appear for ascertainment on the term set according to the law the contractor may prepare the ascertaining document for the work to be covered by itself.

3.4. Should circumstances arise that would prevent the performance of the works the parties shall act according to the provisions of the article 1877 in the Civil Code.

Should the contractor, during the fulfilment of the agreement, find mistakes or shortcomings on the designing works based on which the undertaking contract was concluded they are bound to immediately notify the employer and the designer about their findings, along with the remediation proposals, of course to the extent that the same fall within the area of their professional education. The contractor should also ask the employer to take the required actions.

Should the employer, having also taken advice from the designer, do not immediately notify about the actions taken in order to remove the reported mistakes or shortcomings, or should the actions be improper, the contractor may suspend the performance of the works.

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[7] O.J. no. 12/24.01.1995.

[8] O.J. no. 193/28.07.2004.

[9] Please also refer to L. Stanciulescu, the quoted work, pp. 349-351.

3.5. Upon the completion of the work the parties should proceed with the acceptance of the construction under the conditions of the law.

According to the law the acceptance of construction works is done by two phases: provisional acceptance, and final acceptance.

The provisional acceptance is carried on upon the completion of the works. On the date of the acceptance minute the title over the work and the risk are transferred to the employer.

The final acceptance is carried on upon the expiry of the warranty period. According to the law the warranty periods against the defects of the work are those set by the special law.

3.6. The New Civil Code regulates the principles of the liability for the defects of the work (article 1879 in the Civil Code). According to the law the liability for the defects of the work is on the side of the contractor, the designer, and the engineer[10].

The architect or the engineer is exonerated from liability for the defects of the work if they prove that the same do not result from the deficiencies of the expert examinations or the plans they provided, and if appropriate from any lack of diligence in coordinating or supervising the works.

The contractor is exonerated from liability if they prove that the defects result from deficiencies of the expert examinations or of the plans of the architect or of the engineer chosen by the employer.

Should a subcontractor have also participated in the performance of the construction work the same shall be exonerated from liability if they prove that the defects result from the decisions of the contractor, or from the expert examinations or the plans of the architect or of the engineer.

The architect, the engineer or the subcontractor may also be exonerated from liability in the case where they prove that the defects of the work result from the decisions imposed by the employer in choosing the soil or the materials or in choosing the subcontractors, the experts, or the construction methods.

The exoneration from liability in such case does not operate when such defects, although they could have been foreseen during the performance of the work, were not notified to the employer. In such event the provisions of the article 1859 in the Civil Code regarding the consequences of the employer not taking the required actions shall remain applicable.

The term of the statute of limitation for the entailing of the liability for the defects of the work is the general term of the statute of limitation, of 3 years (article 2517 in the Civil Code).

The limitation term for the right to action for the apparent defects of the work starts elapsing since the date of the final acceptance or as appropriate since the date of the expiry of the term granted to the contractor under the final acceptance minute for the removing of the defects found (article 1880 in the Civil Code).

The limitation term for the right to action for the hidden defects of the work starts elapsing since the expiry of 3 years since the date of the final delivery or acceptance of the construction, except for the case where the defects were found before, when the limitation term shall start elapsing since the date of finding the defects (article 2531 paragraph 1 letter b in the Civil Code).

The limitation term for the right to action for the defects of the designing work starts elapsing at the same time as the limitation term of the right to action for the defects of the work performed by the contractor. There is excepted the case where the defects of the designing works were found before, in which event the limitation term shall start elapsing since the date of finding the same.

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[10] As regards the liability for the defects of the work please also refer to Fl. Motiu, *Contracte speciale in noul Cod civil* (*Special Agreements Within the New Civil Code*), Ed. Wolters Kluwer, Romania, 2010, pp. 212-213.

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