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Distinction between Incomplete Work - Defective Work in the Context of Performance of Construction for Allotment Agreements

Authors: Gönenç Gürkaynak, Esq., Ceyda Karaoğlan and Tolga Uluay, ELIG, Attorneys-at-Law

I. Introduction to Construction for Allotment Agreements

A. Definition and Elements

In practice, especially in Turkey, there are numerous types of construction agreements relying on various terms and principles by virtue of the "*freedom of contract*" principle governing law of obligations. Construction for allotment agreement is the most common one among agreements that diverges from traditional construction agreements.[1] On that note, a traditional construction agreement can be specified as an agreement, pursuant to which the contractor undertakes to construct a specific structure whereas the client undertakes to pay a certain amount in consideration thereto.

In the light of the foregoing definition by which parties' duties in a traditional construction agreement are elaborated, two basic elements are revealed, construction of a specific structure and making a payment for it. When the parties mutually agree on those basic elements, which constitutes the fundamental aspects of a construction agreement, the agreement is founded and inures effect.

In a construction agreement, construction of a specific structure is the characteristic (main) performance and this is the contractor's responsibility, scope of which is elaborated through agreement. On the other hand, the client's responsibility is to make the agreed payment to the contractor, which is remuneration for the work undertaken by the contractor.

In a construction for allotment agreement, the client (land owner) promises to transfer a certain land share (allotment) to the contractor whereas the contractor undertakes to construct the agreed independent sections to the land owner.[2]

B. Legal Features of the Agreement

Prominent legal features of construction for allotment agreements are, put succinctly, as follows:

(i) Construction for allotment agreement is a synallagmatic agreement, since the client (land owner) and the contractor has reciprocal responsibilities and duties.

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[1] For detailed information, see. Hasan Erman, **Arsa Payı Karşılığı İnşaat Sözleşmesi (Construction for Allotment Agreement),** 3. Edition, İstanbul, DER, 2010.

[2] Erman, **İnşaat Sözleşmesi** (**Construction Agreement),** p. 4; Cevdet Yavuz, **Türk Borçlar Hukuku Özel Hükümler (Turkish Code of Obligations, Special Provisions)**, İstanbul, 2006, p. 352; Özgür Katip Kaya, **Arsa Payı Karşılığı Kat Yapımı Sözleşmesi (Construction for Allotment Agreement)**, İstanbul, 1993, p. 5.

(ii) Construction for allotment agreement creates a continuous and, at the same time, temporary relationship tangled up with each other. This is reiterated in High Court of Appeals' decision on unification of conflicting judgments.[3] Then again, this is a controversial issue in doctrine. Some scholars[4] argue that those agreements create a temporary relationship since the end result of the contractor's performance, which also represents the land owner's benefit out of this agreement, occurs at the same time when the structure subject to the agreement is handed over. An opposing argument[5] is made on the premise that construction period of the structure shall be construed as preliminary performance/work and thus, the contractor's performance is, in fact, continuous, which makes the relationship between parties continuous.

(iii) Construction for allotment agreement is of composite nature as this agreement encompasses property sales agreements along with agreement for work. This is so because land owner's responsibility is to transfer ownership of property to contractor, which is an element of property sales agreement; whereas the contractor's responsibility is to construct the structure and transfer the independent section, which is an element of an agreement for work.

II. DISTINCTION BETWEEN INCOMPLETE WORK AND DEFECTIVE WORK IN CONSTRUCTION FOR ALLOTMENT AGREEMENTS AND CONSEQUENCES THEREOF

A. Introduction

Identifying a breach of agreement as incomplete work or defective work has always been a controversial issue both in doctrine and practice. Settling theoretical debates on this issue has paramount importance considering the big difference between incomplete work and defective work in terms of legal consequences thereof.

Performing the undertaken work and constructing the building in accordance with the agreement and if the agreement has no stipulation, legislation, is contractor's main responsibility. [6] Failure to fulfill this responsibility constitutes a breach of agreement, making the contractor liable; regardless such failure being qualified as incomplete or defective work. Then again, incomplete

[3] High Court of Appeals' decision on unification of conflicting judgment, E. 983/3, K. 984/1,. 25.1.1984, For detailed examination on the decision, see Hasan Erman, "Kat Karşılığı İnşaat Sözleşmelerinde Müteahhidin Temerrüdü-Bir İçtihadı Birleştirme Kararının Düşündürdükleri" (Contractor's Default in Construction for Allotment Agreements, Thoughts on a Decision on Unification of Conflicting Judgment), **İBD,** Vol: 58, Year: 1984, Issue: 4-5-6 (Contractor's Default), p. 216.

[4] Yavuz, p. 355; Özer Seliçi, **İnşaat Sözleşmelerinde Müteahhidin Sorumluluğu (Contractor's Liability in Construction Agreements)**, İstanbul, 1978, p. 7; Fahrettin Aral, **Borçlar Hukuku Özel Borç İlişkileri (Code of Obligations, Special Liability Relations)**, Ankara, 2003, p. 326; Haluk Tandoğan, **Borçlar Hukuku Özel Borç İlişkileri (Code of Obligations, Special Liability Relations)**, Vol. 1, İstanbul, 2008, p. 147.

[5] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p.9; Rona Serozan, **Sözleşmeden Dönme (Reneging on an Agreement),** İstanbul, 1975, p. 174; İsmet Sungurbey, **Medeni Hukuk Sorunları (Civil Law Issues),** Vol. 4, İstanbul, 1980, p. 486; Zarife Şenocak, **Eser Sözleşmesinde Ayıbın Giderilmesini İsteme Hakkı (Right to Request for Removal of Defect)**, Ankara, 2002, p. 11-12.

[6] Efrail Aydemir, **Eser Sözleşmesi ve İnşaat Hukuku (Agreement for Work and Construction Law),** 2. Volume, Ankara, Seçkin, 2012, p. 227.

work and defective work are two different concepts in Turkish law and entail different legal consequences. Therefore, it is prominent to distinguish those two concepts. The following is to serve as a guideline to make such distinction.

B. Distinction between Incomplete Work and Defective Work in Construction for Allotment Agreements

1. In terms of occurrence;

When it comes to construction agreements, issues surrounding incomplete work and defective work come up quite frequently. Although those two concepts are different in nature, they may, under certain circumstances, intertwine since incomplete work is, in a way, defective too. That is why it can be tricky to tell incomplete work and defective work apart. Those concepts can be identified as such:

If the contractor fails to do a part of or the whole work, which is agreed upon by agreement (or technical specifications attached thereto) or deemed integral in a regular and ordinary construction, then this falls under the category of incomplete work. In other words, where there is an incomplete work, there is not even a work that can be made subject to an examination on whether it meets the agreed terms, since that specific part of construction is not complete at all. [7]

On the other hand, if the contractor does the work specified in the agreement but the work does not meet the agreed technical specification, this is defective work and provisions with regard to contractor's liability for defect become applicable.[8] In case of defective work, the work lacks the terms/specifications stipulated in the agreement or, if the terms are not pre-specified through agreement, fails to meet the utilization purpose of the construction that can be determined in consideration of good faith principle and commercial fairness.[9] In other words, in case of defective work, a quality which is integral for construction or agreed upon by agreement is missing. Since the integral or agreed qualities of construction is directly associated with the contractor's duty for performance, any defect in that regard is considered a breach of this duty, which ultimately means the agreement is not duly fulfilled by the contractor. If the handed over construction does not bear the required specifications, for instance, if the roof leaks or a swimming pool is not made long enough to be used for Olympic purposes, the work is considered defective.[10] In such cases, the contractor has warranty liability against defect.

[7] "In an incomplete work, there is no question on whether the work is done properly. As this is case, it is not possible to evaluate incomplete work under the concept of defective work.", Decision of High Court of Appeals for the 15th Circuit, 05.10.1987, K. 775/3419, Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 200 footnote. 28.
[8] Erman, **İnşaat Sözleşmesi (Construction Agreement), p**. 199.
[9] Turgut Öz, **İnşaat Sözleşmesi ve İlgili Mevzuat (Construction Agreement and Relevant Legislation),** İstanbul, Vedat, 2013, p. 190; Aydemir, p. 228.
[10] Ayhan Uçar, **İstisna Sözleşmelerinde Müteahhidin Ayıba Karşı Tekeffül Borcu (Contractor's Warranty Liability Against Defect in Agreement for Work)**, Ankara, 2003, p. 125; İzzet Karataş, **Eser Sözleşmeleri (Agreement for Work)**, Ankara, 2004, p. 147.

In doctrine, distinction between incomplete work and defective work is elaborated as such[11]: "*Lack in performance (incomplete work), if the performance pertains to something undividable/unitary such as construction, means that the client cannot benefit from this performance in a way that fits to purpose of the work. However, if it is possible to benefit from performance in such a way, but the benefit is not at the level that it is supposed to be and the value of performance accordingly diminishes, then this is a case of defect*." This distinction can be exemplified as such with a view to provide a clearer understanding on this:

If a construction lacks funnels, kitchen cabinets, bathroom tiles, one of the two elevators that were supposed to be installed or electric panels thereof even though the elevators are in place mechanically[12], this is incomplete work. On the other hand, if a regular funnel is installed whereas it was supposed to be suitable for natural gas use or the woodwork is made of ordinary material whereas it should have been made of first class material[13], this is defective work.

Despite theoretical explanations and examples on this issue, it can be challenging to decide whether a specific case attests to incomplete work or defective work. For instance, if the handed over construction or independent section is smaller than it is agreed upon by agreement, does this qualify as incomplete work or defective work? This is examined in detail in a decision of High Court of Appeals Assembly of Civil Chambers[14], which, put succinctly, says the following:

(i) The dominant view and well established precedents suggest that, in cases where surface area of a real estate is smaller than agreed upon, this has nothing to do with quality, hence no defective work. That is why provisions on warranty liability against defect, which applies in cases of defective work, are not applicable to such cases. Deficiency in surface area cannot be considered as defect.
(ii) Deficiency in surface area is incomplete work and shows that the contractor's performance is only partial.
(iii) In case of incomplete work, the client does not have the responsibilities that cases of defective work impose as a pre-requisite for exercising rights against defect, which are inspection of construction and giving notice for defect. Rights against incomplete work can be exercised pursuant to general provisions of Turkish Code of Obligations No. 6098 ("CoO"). (*Those provisions will be explained in the following chapter*.)

Recent decisions of High Court of Appeals[15] are also in line with the abovementioned decision and qualify deficiency in surface area as incomplete work. Then again, as pointed out before, separating incomplete work from defective work can be challenging and lead to erroneous

[11] Öz, s. 193.
[12] Aydemir, s. 228-229.
[13] Aydemir, s. 228.
[14] Decision of High Court of Appeals Assembly of Civil Chambers, 09.12.1992, K. 649/732, **Yargı Kararları Dergisi (Judicial Decisions Journal),** Year: 1993, Issue: 3, p. 331-334. Fort he same decision, see Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 199-200 footnote. 28; http://www.kazanci.com/kho2/ibb/giris.htm
[15] Decision of High Court of Appeals for the 15th Circuit, T. 01.04.2008, E. 2007/136, K. 2008/2056, http://www.kazanci.com/kho2/ibb/files/15hd-2007-136.htm.

conclusions, which we believe is the case in the High Court of Appeals' decision below[16]. Relevant part of the ruling goes as follows:

> "*The defendant is an architect who has undertaken to do the work subject to the lawsuit, and an expert on this work in every aspect. The defendant is well aware what circumstances hinder obtaining a resident permit. The appointed experts conclude that shelter walls, which are 20 cm thick, must have been 60 cm thick subsequent to environmental collocation. Unless the deficiency in that regard is made up, the work must be considered as incomplete. The client is entitled to sue for incomplete work within the statute of limitation*."

In the abovementioned case, the work in question, the wall, does not bear the quality that it is supposed to, but is sure completed. As mentioned above, where there is an incomplete work, there is not even a work, on which an inquiry for existence of agreed qualities can be conducted, since the relevant part of the work is not completed. However, if the agreed work is completed but not done in accordance with the agreed technical qualities, then this qualifies as defective work. In light of the following, deficiency in thickness of walls is a defective work, not an incomplete work, as there exists a wall in the construction and it is possible to run an examination on the wall to see if it bears the agreed qualifications, which would not be the case if the work (wall) is incomplete.

2. In terms of legal consequences;

Distinction between incomplete work and incomplete work is of essence since those two concepts bring different legal consequences to the table.

If an incomplete work is of question, the rule of thumb is that provisions on default (Article 117 of CoO and subsequent articles) apply.[17] The remedy granted by those provisions is compensation of the incomplete work, which is the required amount for finalizing the incomplete work plus the damage incurred due thereto.[18]

In construction for allotment agreements, incomplete work can manifest itself in common areas as well as independent sections that are agreed to belong to land owner. If the incomplete work is in the independent sections, the land owner can make a claim for the whole incomplete work; whereas if incomplete work is in common areas, then the land owner's claim shall be pro rata its land share (allotment).[19]

If a defective work is of question, provisions on contractor's liability against defect apply.[20] Accordingly, by virtue of Article 474 of CoO and subsequent articles, the client may request for

[16] Decision of High Court of Appeals for the 15th Circuit, T. 20.03.2002, E. 2001/5694, K. 2002/1253, http://www.kazanci.com/kho2/ibb/giris.htm.
[17] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 199.
[18] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 201-202.
[19] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 201.
[20] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 199.

reneging on agreement, deduction from the amount paid for the work or removal of defect, and also for compensation of damages should circumstances (*existence of damage, causal link between damage and defective work, contractor's fault*) are met. Those remedies are available to client only if the client inspects the work in a timely manner (the law does not provide any specific time period) and gives notice for defect, again in a timely manner. Unless those duties are fulfilled, the client is deemed to have accepted the work as it is and thus, loses the right to make any claim against the defects in the work.[21]

As provisions on default apply to incomplete works, contractor's liability for incomplete work remains until the statute of limitation, five years as per Article 147 of CoO, expires,[22] without any obligation for timely inspection or notice.[23] Then again, despite lack of any legal provision imposing duty for inspection and notice on the client, it would be best to reserve all rights against any defect or incomplete work by adding an annotation in that regard on the delivery receipt report pertaining to the construction in question. By doing so, any argument asserting that the client had tacitly accepted the construction, will be eliminated. On that note, the doctrine suggests that an overall reservation would work and there is no obligation to enumerate each and every incomplete work.[24]

On a final note, remedies available against incomplete work may vary depending on the severity and significance of the incompleteness in question. For instance, the client may resort to reneging on agreement only to the extent that the incompleteness can be considered to justify termination. Otherwise, the client can only request for deduction from the amount paid for the work or completion of work, and also for compensation of damages should circumstances (*existence of damage, causal link between damage and defective work, contractor's fault*) are met.

III. CONCLUSION

Distinction between incomplete work and incomplete work is of essence since those two concepts entail different legal consequences.

If the contractor fails to do a part of or the whole work, which is specified in the agreement (or in technical specifications attached thereto) or deemed integral in a regular and ordinary construction, then this falls under the category of incomplete work. On the other hand, if the contractor actually does the work specified in the agreement, but the work does not meet the agreed technical specification, then this is defective work.

Where there is an incomplete work, provisions on default shall apply and the client is entitled to exercise its rights without any obligation to inspect the work and give notice for incompleteness

[21] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 199.
[22] Aydemir, p. 228-229 ve 233; Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 199.
[23] "In case of incomplete work, client is not obliged to give notice for incompleteness to contractor. This is because whether the work is performed in accordance to the agreement is not an issue in cases of incomplete work, since there is no work that can be deemed to be done" Decision of High Court of Appeals for the 15th Circuit, 27.09.1988, K. 92/3020, Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 199, footnote. 28.
[24] Erman, **İnşaat Sözleşmesi (Construction Agreement),** p. 201.

thereof. However, defective work imposes inspection and notice duties on client as a pre-requisite to be entitled to exercise any right against defect, thus it has paramount importance to assess whether a breach of agreement qualify as incomplete work or defective work, with a view to determine availability of any remedy against this breach and safeguard future benefits.

Author Contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

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