

The Contractor's Obligations in the Code of Egypt and the General Conditions of Contract in Iran

Mohammad Sadeghi

Department of Law,

Hazrat Masoumeh University (HMU), Qom, Iran.

Email: msadeghi4817@yahoo.com

Abstract

The contractor should construct the intended goods or object according to the contract and deliver it to the employer. The contractor's commitments include performing the action or the construction of the product, submitting the constructed product to the employer, and being responsible for it after submission. The main obligations of the contractor are the performance of the action and the construction of the intended object according to the content of the contract. In this article, the contractor's commitments in the Law of Egypt and some other Arabian countries along with the General Conditions of Contract in Iran will be investigated.

Keywords: Contractor, Contracting, Obligations, Code of Egypt, General Conditions of the Contract

التزامات المقاول في القانون المصري و الشروط

العامة للعقود في ايران

محمد صادقي

قسم القانون، جامعة حضرة معصومة (HMU)، قم - ايران

Email: msadeghi4817@yahoo.com

الملخص :

يتوجب على المقاول أن ينتج السلع أو الاشياء وفقا للعقد يسلمها الى رب العمل. تتضمن التزامات تنفيذ الفعل أو انشاء المنتج، وتقديم المنتج المنشأ الى رب العمل، وتحمل مسؤولية ذلك المنتج بعد التسليم. ومن أهم التزامات المقاول هي تنفيذ الفعل وإنشاء المنتج أو الشيء المطلوب وقا لمضمون العقد. وفي هذه الدراسة، سنبحث في التزامات المقاول في القانون المصري وبعض الدول العربية الأخرى، فضلا عن تفصي الشروط العامة للعقود في القانون الايراني.

الكلمات المفتاحية: المقاول، التعاقد، القانون المصري، الشروط العامة للعقود.

Introduction

The contractor should construct the intended goods or object according to the contract and after creating, he should deliver it to the employer. Also, the responsibility and the guarantee of the constructed good are committed to him. Thus, the contractor's commitments are discussed from three aspects:

1. The performance of action or construction of the product
2. The submission of the created product or object to the employer
3. The responsibility of the contractor with regard to the constructed object after the submission.

The Performance of Action

The main commitment of the contractor is the performance of the action and the construction of intended object according to the contract. This obligation includes the duties that the contractor should perform and compensate the created damages in the event of disturbing in this commitment.

The duties of the contractor in performing the action

To perform his obligation about performing the action and constructing the object, the contractor should use the accurate way and he should pay necessary and sufficient attention in performing his obligation, whether he or the employer has supplied the material. Therefore, he is responsible for his and his employees' negligence. The contractor should also perform the obligation during the agreed period.

Clause 1: The procedure of performing the task

The contractor should perform the task according to the agreed procedure and observe the inserted conditions in the contract. If the procedure for performing the task and its conditions are not determined in the contract, he should perform according to the custom especially the current industrial and technical principles and rules among the professional. For example, there are some principles and rules in building construction, carpentry, blacksmithing, moulding, weaving, and painting that should be observed, although the rules have not been mentioned in the contract (Al-Sanhoory, 1998, p. 65). This subject has been inserted in Article 637 of Code of obligations and contracts of Lebanon.

According to the Article 16 of the General Conditions of Contract, the contractor should indicate that he has studied the whole documents and is aware of their content. Also, he is assured of supplying the personal and preparation of materials and instruments and also has examined the place of performing the obligation, and generally he approve that there is no case that subsequently he can revoke his ignorance to it.

If the contractor disagrees with the agreed conditions and descriptions of work performance or violate the conditions that are the requirements of industrial

principles and custom of that profession and the employer prove this disagreement, the contractor could be recognized as intruder to the commitment of the contract and he should compensate the incoming damages and it is not required to prove the contractor's malpractice by the employer because disagreement with these conditions and descriptions is considered as malpractice (Shanb, 1961). The contractor cannot emancipate of this responsibility unless he proves the interference of an external cause i.e. he proves that any disagreement to conditions relates to force majeure or sudden event or employer's negligence or another person's act.

If the contractor, according to the conditions, needs any tools and instruments for performing the obligation, he should supply them at his own costs and it is not necessary to express this condition in the contract. Also, most of the time, the contractor needs some workers or persons who help him to perform the obligation and construct the object. Sometimes, he may entrust the whole act to them and he himself supervises their work unless the personal skill of the contractor is considered. In all these cases, the wages of these persons is upon the contractor unless there is an agreement on the contrary or the custom of the profession is on the contrary.

This subject has been inserted in the second part of Article 649 of Civil Law of Egypt: "It is up to the contractor to supply the necessary tools and instruments for performing the obligation and supply them with his own cost unless the contrary has been agreed or the custom calls for its contrary". Also, Article 659 of Code of obligations and contracts of Lebanon, Article 615/2 Civil Law of Syria, Article 642/2 Civil Law of Libya, and Article 867/2 Civil Law of Iraq states the same content. Article 17 of General Conditions of Contract provides that the supply of the required personnel is up to the contractor.

Clause 2: Necessary attention for performing the task

The contractor's obligation in contracts may be the obligation to achieve the results or obligation to means. If it is the obligation to achieve the result, such as the construction of building or instruments, making goods, preparing the design of a project, and so on, the contractor, in this cases, will not be released of liability unless the result has been achieved and the favorable work has been done. In these cases, necessary attention and care will not be sufficient. So, as far as the intended action has not been finished the contractor is responsible and his liability will not terminate unless he proves the interference of an external cause (Al-Sanhoory, 1998, p. 67). If the contractor has done the obligation according to the agreed conditions and descriptions or based on the technical and standard principles, he has done his obligation and consequently he will be clear from

obligation.

But if the contractor's obligation is an obligation to means, the contractor should consider the attention of the related person in performing the intended act. For example, the engineer who has undertaken the supervision of the building construction should have sufficient attention in supervising the performance of the task and achieving the result is not his duty. Under the title of contractor's liabilities, Article 42 of General Conditions of Contract states that contractor is bound to remove any defects and deficiencies at his own cost.

Clause (3): Supply of necessary materials

In many cases, performing the act needs materials that are used for the construction of goods. For example, the carpenter needs wood for making the table or other goods. The tailor needs cloth for sewing the dress. The dentist needs some materials for making the tooth and so on. In some cases, the contractor undertakes to supply the materials and in other cases, the employer himself provides the necessary materials. These items have been inserted in Article 671 of Civil Code of Egypt. The contract is considered as the construction order in some laws if the contractor provides the necessary materials in addition to performing the act. Article 865 of Civil Code of Iraq specified in this field: "it is permissible that the contractor only performs the act. In this case, the employer supplies the necessary materials. If the contractor supplies the materials, the contract will be called construction order contract".

But Article 652 of the Code of contracts and obligations of Lebanon has considered both cases as the construction order. "In construction order, it is allowable for the contractor to only perform the act. In this case, the employer supplies the necessary materials as well as it is permissible for the contractor to supply the materials in addition to performing the work. If the provided materials by the contractor are the main subject of the contract and the act is a subsidiary, the contract is called contract of sale, not construction order". In Code of Lebanon, this theory is based on Article 1787 of Civil Code of France in which there is no difference between the cases where the materials are supplied whether by contractor or employer.

According to the articles that are mentioned above, it is possible that the necessary materials for the construction of the object be supplied by the contractor or the employer. Therefore, it is necessary to explain each item separately in order to clarify the contractor's duty in each case.

The first phase: The supply of necessary materials for construction by the contractor. If the contractor supplies the necessary materials, he is responsible for the quality and accuracy of those materials. Article 642 of Civil Code of Egypt, in this case, has specified that: "if the contractor supplies the whole or

part of the materials, he is responsible for their accuracy and validity and also is responsible against the owner of the work. Also, Article 614 of Civil Code of Syria, Article 647 of Civil Code of Libya and article 866 of Civil Code of Iraq have stated this item. Article 663/1 of Code of contracts and obligations of Lebanon has also considered the contractor who supplies the materials as the guarantor of their types.

If the contractor supplies the materials and these materials involve a perceptible price, according to some jurists, the contract is a combination of sale and contract. And the sale is applied to materials and contracting is applied to the act. Therefore, the contractor is responsible for the accuracy of the material, because in this case he is deemed as the seller and is the guarantor for any latent defect of the materials that have been used for the construction of the goods (Al-Sanhoory, 1998).

According to this theory, the sale is based on the completion of the construction of the goods and after completing the construction, the sale is definite and involves its effects such as the transfer of ownership and the transfer of guaranty. It means that from the time that the wood changes into a table or the cloth changes into a dress the rules of sale are applied and the transfer of ownership is not suspended until the delivery and acceptance of the goods. But before completing the construction, the materials will remain under the ownership of the contractor. Therefore, before completing the construction, if the contractor goes bankrupt the employer cannot demand it because it has not been employer's property. Also, before the completion of the construction, the contractor can possess materials. It means he can sell it or pledge it or he can take any other possession on it.

Concerning contracting of building construction, some believes that if the contractor supplies the materials it does not imply the sale, but it is contracting agreement and with the installation of the materials in the land, it will transfer to the ownership of employer or owner of the land. Some believe that the transfer of ownership belongs to the employer from the time of goods submission and regarding the construction of similar goods, the transfer of ownership will be accepted from the time that the goods are especially determined and is discerned from the similar goods. Some also believe that the transfer of ownership is done from the time of employer's acceptance, although the delivery has not been done (Shanb, 1961).

Concerning the guarantee for latent defects, the rules that are consistent with the nature of the contract i.e. the latent defect rules should be applied to the sale of goods. If the work was done is not according to the agreed characteristics or the material used in goods have any defects that cause a deficiency in the price

or decreases the profit of the goods, the contractor is the guarantor although he is unaware of the defect.

The contractor is not guarantor regarding the defects that the employer is aware at the time of construction of the goods or those defects that he can become aware through searching unless the employer proves that the contractor has emphasized the lack of this defect, or proves that the contractor has intentionally hidden the defect. Also, the contractor is not guarantor regarding the defects that are ignorable based on the custom's viewpoint.

When the employer receives the goods, he must initially examine the goods. If he finds any defect that is attributable to the contractor, he should inform him in a reasonable time. If he fails to inform him, it is deemed as acceptance. But if the defect is among those defects that cannot be manifested through usual examining and the employer will subsequently discover it, as soon as the manifestation of the defect, he should inform the contractor and if he fails to inform him, it will be considered as its acceptance. If the employer informs the existence of the defect in due time, he can claim the guarantee and the claim of guarantee will remain, although the goods have been destroyed for any reason.

If it takes one year from the delivery time of goods to employer, the claim of guarantee is, although the defect is subsequently discovered, unless the contractor has been bound for a longer time. If it is proved that the contractor has intentionally hidden the defect, he cannot cite to this period of one year. Also, this matter has been stated in Article 420 of Civil Code of Syria, Article 441 of Civil Code of Libya, and Article 463 of Code of obligations and contracts of Lebanon.

To supply the necessary materials for construction, the contractor should observe the conditions and descriptions determined in the contract, and if the conditions and descriptions have not been expressed, he should supply the material that meets the intention and purpose of the contract based on the custom. If there is no agreement about the material as well as there is no standard, it will be required that the contractor supply the moderate kind of materials. This matter has been stated in Article 134 of Civil Code of Syria, Article 133 of Civil Code of Libya, Article 128 of Civil Code of Iraq and Article 190 of Code of obligations and contracts of Lebanon.

The second phase: The supply of material for construction by the employer. Regarding the contractor's duty, where employer supplies the material, Article 649 of Civil Code of Egypt has provided that: "If the employer supplies the material, the contractor should protect it, observe the technical principles for using it, pay to the employer regarding a number of the materials that he has used in construction, and return the rest of the materials to the employer. If some parts

of the materials are not usable because of the neglect or the lack of technical proficiency of the contractor, he should pay their prices to the employer". Also, this matter is stated in Article 639 of Code of obligations and contracts of Lebanon, Article 615/1 of Civil Code of Syria, Article 648/1 of Civil Code of Libya, and Article 867/1 of Civil Code of Iraq. Therefore, in the cases that the employer supplies the necessary materials, for example, he gives cloth to the tailor or wood to the carpenter, the contractor should protect these materials and in their protection, he should consider the intention of a reasonable person. If he does not pay sufficient attention, he is responsible for the destroying, defecting, or stealing of them. If the protection of these materials needs some costs, the contractor will be responsible for the costs of protection because the cost of material protection is part of the general costs that is determined at the time of the contract unless there is an agreement on the contrary (Shanb, 1961).

Regarding the contractor's responsibility for the protection of the materials, and also his responsibility for compensating the damages of destroying or spoiling the materials, there is no difference between fungible and non-fungible of the materials. The contractor should use the materials according to the technical principles and avoid any excess or negligence. It means that he uses the necessary number of materials without no wane, reports the number of materials he has used to the employer and returns the rest to him.

If the contractor, at the time of construction, realizes that the materials have some defects and do not have the competency for the intended work, for example, the cloth delivered is not useful for sewing the dress or the wood delivered is not suitable for making the table, he should immediately inform the employer. Otherwise, he should accept the result of his negligence. This rule also is applied where it is expected from the contractor's technical proficiency to discover the defect. But if it is not expected from the contractor to discover this defect, he will not be responsible for it.

If any circumstance arises that causes the delay in goods construction and performing the contract, the contractor should immediately inform the employer. Otherwise, he is responsible for the consequences of the lack of information. Article 869 from the suggested text of new Civil Code of Egypt had pointed out to this matter, but relying on the general rules, this article has been omitted from Civil Code of Egypt. However, Article 662 of Code of obligations and contracts of Lebanon has expressed this matter.

In this matter, the contractor's liability is a kind of contractual liability. Therefore, if the materials or the goods are destroyed, the burden of proving is up to the employer. He should prove that the contractor has not paid sufficient attention to the protection of the materials and his neglect causes the destruction

or defect of the goods. To be considered innocent from the liability, the contractor also should prove that he has paid sufficient attention and the destruction and defect of the materials occurred because of an external cause (Al-Sanhoory, 1998).

Concerning the necessary technical proficiency of contractor, the burden of proving is up to the employer to prove that the lack of contractor's technical proficiency has caused the destroying or non-usability of the materials, and the contractor should prove that he has observed the technical principles and regulations and destroying or non-usability of materials are not related to his technical neglect but it is related to an external cause.

According to the Article 20 of General Conditions of Contract, if, based on the content of the contract, the supply of the materials is up to the employer, the contractor will not be responsible for its deficiency, unless it is proved that the deficiency is related to the contractor's work.

Clause 4: The contractor's responsibility for his fault and the staff under his management:

As it was mentioned before, the contractor's responsibility for his neglect and faults is a kind of contractual liability. And the contractor will be responsible if he disagrees with the agreed conditions and descriptions of the contract, diverts from the technical and industrial principles, uses deficient materials, or does not pay sufficient attention and care, and his lack of proficiency and skill is proved.

If the contractor's fault is proved and he himself has supplied the necessary materials for construction, he should compensate the created damages and he cannot demand the price of destroyed materials or remuneration of the act from the employer, but he should compensate the created damages to the employer. If the employer has supplied the materials, the contractor should pay their prices to the employer and he cannot demand remuneration.

If the contractor informs the employer about the delivery of goods, and the employer does not accept and subsequently the materials are destroyed, the contractor will have no responsibility, unless the employer proves that the materials are destroyed because of the contractor's neglect. If the contractor seeks cooperation from another person for performing the act or employs someone else, he will be responsible for his actions and his responsibility will be a kind of contractual liability, but some believe that it is a non-contractual liability (Al-Sanhoory, 1998).

Also, if the contractor assigns the administration of the contract to another person, he will be responsible for the subcontractor's action, although the subcontractor acts independently. It is the same as Article 661/2 of Civil Code of

Egypt that expresses this matter. According to Article 24 of General Conditions of Contract, the contractor has no right to assign the contract to another person, but he can make an agreement with subcontractors for performing one part or some parts of the contract and, in this case, the contractor is responsible for the whole act of subcontractors and their employees.

Clause 5: performing the contraction in agreed period or proper term:

The contractor is committed to complete the object construction in agreed time, and if there is no agreement about the time, he should perform it in a reasonable time that is required according to the nature of the work and the care and custom of the profession (Shanb, 1961)

The Contractor's obligation to perform the task within the agreed period or in the reasonable time is in the scope of obligation upon the result. Therefore, if he proves that he has taken sufficient attention to performing the act, he will not be released of the responsibility for delay, but he should prove the effectiveness of the external cause in order to escape from the responsibility. If he proves the intervention of a sudden event or force majeure or another person's act, his responsibility will be canceled provided that the impression of the external cause will not accompany with the contractor's neglect or fault otherwise he is responsible for this neglect.

If the delay in performing the task arises of employer's fault, the contractor's responsibility will be canceled. For example, if the employer delays in supplying the necessary materials or delays in payment of the installment, and this leads to the delay in performing the contract, the contractor will not be responsible (Shanb, 1961).

Part (c) of the Article 23 of General Conditions of Contract states that if the employer causes the contractor's inability to perform the task according to the schedule, he will be responsible for compensating the additional costs created for the contractor. If the employer seeks a modification that has not been agreed on it previously and consequently causes a delay in performing the contract at the deadline, the contractor is not responsible provided that he has done the intended modification at a proper term (Shanb, 1961).

There are ten-item cases in Article 30 of General Conditions of Contract. If the occurrence of any of these items causes the extension of the period of the obligation performance, the contractor can request the adjustment and extension of the contract term.

The guaranty of the contractor's performing the obligation toward the task performance:

If the contractor does not practice his obligation, for example, he disagrees with the conditions of the contract or the technical principles, he is responsible against the employer. In this case, the employer can demand the objective performance of the contract or he can terminate the contract. And in both cases, if any damage has occurred, he can demand its compensation (Al-Sanhoory, 1998).

The employer can demand the objective performance of the contract provided that the performance of the contract has been possible. In the intended task, if the personality of the contractor has been considered, and the contractor avoids performing the contract, the employer can use the financial threat such as nonpayment of the remuneration, and if it is not useful, he can terminate the contract and request the occurred damages (Shanb, 1961). If the personality of contractor plays no role in the performance of the act and performing the contract is still possible, the employer can finish the act by another person but with contractor's cost.

Article 46 of General Conditions of Contract propounds 13-item cases based on which the employer can terminate the contract. One of these cases is the delay in completing the predicted works in the detailed program of the contract. If the disturbing in performing the contract justifies the termination for the employer, he can demand the court to terminate the contract. Based on the general rules, the judge can permit the employer to terminate as he is able to give respite to the contractor to perform the task. The contractor also can perform his obligation before the termination. And, in this case, the judge does not pass the termination order. But in the case of creating any damages, he judges the compensation for damages (Al-Sanhoory, 1961).

Article 47 of General Conditions of Contract has stated that if the employer recognizes that the contract is in the scope of the termination, he should notify his documentation to the contractor, and the contractor should send employer any objection and lack of authenticity of the employer's documentation in 10 days. If the contractor does respond it at this time, the employer will notify the termination of the contract to the contractor and will act according to the content of this article without observing the judicial procedures.

Sometimes the employer stipulates that in the case of delay in performing the task, he could have the right of termination. In this case, distinguishing the occurrence of delay is up to the employer, unless he violates the determination of the delay and proving the violations is up to the contractor. In any case, whether the employer demands the objective performance of the contract or terminates the contract he can demand the compensation for damages (Shanb, 1961).

If the goods do not match with the conditions and descriptions of the contract, the employer does not pay the remuneration and he can also demand

damages. It is possible that there will be recognizance payment in the contract, that in the case of nonperformance of the obligation it must be practiced and it is possible to diminish the recognizance payment or forgive it if there are no damages (Shanb, 1961).

It is not necessary for the employer to wait until the end of contract period in order to apply his right toward the objective performance demand of the contract or termination accompanied with the compensating damages. But he can apply his right from the beginning whenever he observes that the contractor is constructing the goods deficiently, or performing against the conditions and descriptions of the contract, or delaying in the starting and performing the contract. Therefore, this study reviews applying the employer's right in two states:

The first phase: The construction of goods deficiently or against the agreement

In this respect, Article 650 of Civil Code of Egypt provides that "during the performance, if it is proved that the contractor is constructing the goods deficiently or against the contract, the employer can notify him to come back from this method in a reasonable time. If the contractor does not come back to the correct method after the expiration of the time, the employer can terminate the contract or assign the work to another constructor with the contractor's cost. Moreover, if it is not possible to modify the defect, he can demand termination without timing". In Article 664/1, the Code of obligations and contracts of Lebanon states: "It is the responsibility of the constructor to guarantees any defects and deficiency arising from his construction. Also, this content is stated in Article 616 of Civil Code of Syria, Article 649 of Civil Code of Libya and Article 869 of Civil Code of Iraq.

It is understood from the content of this article that although the employer does not supervise on the contractor and the contractor acts independently, the employer has right to take care so that the work runs according to the agreed conditions and descriptions and the contractor acts based on the technical principles and the custom of the professionals. Therefore, the employer is not bound to wait until the end of the construction and then conform the constructed goods to the conditions and descriptions. Rather he can take care from the beginning and in this way, he can prevent any damages. For example, when the employer notices that the building contractor has not observed some of the agreed conditions and descriptions, he has right to interfere and prevent the contractor from performing deficiently and against the contract. For instance, he does not base the building or does not set the base of building into sufficient depth, or does not construct the wall properly or he notices that the carpenter

does not construct the intended instruments according to the agreed qualities, or does not use the agreed wood (Al-Sanhoory, 1998) In this case, two forms can be considered:

First: The improvement of the defected part is not possible. If the amendment of the defected part is not possible such as if the contractor has constructed the building but has built the first stairs against the agreed design and qualities. In this case, because the amendment requires destroying the whole building, the employer can demand the termination of the contract. The judge examines the matter and if he accepts the employer's claim, he passes the verdict of termination and compensation of damage. But if he distinguishes that the defect is amendable, he will bound the contractor to improve the defect with his costs.

Second: The improvement of the defected part is possible. In this case, the employer should inform the contractor to modify his method and he cannot initially request for termination. The contractor may neglect the existence of the defect, so he should be informed not to continue the deficient performance. If the employer neglects to inform the contractor about the defects or be intentionally silent in the way that the work continues deficiently, he does not perform his duties regarding to helping the contractor and he will not be entitled to compensate any damages that will be avoided if he informs the contractor.

There is no special form for the declaration of the defect to the contractor. Sometimes the danger is to the extent that the employer requires to notify through notary office, but if the danger is not to that extent, the oral notification is sufficient. The employer specifies a reasonable time for amendment; if the contractor accepts and modifies the defect, he will continue his work and the employer has no right in this case. But if the contractor rejects the employer's claim and does not consider it as a defect, or if the contractor accepts the defect, but does not amend the defect within the stated time, the employer can litigate in the court (Al-Sanhoory, 1998).

Sometimes the affair is urgent and there is no opportunity to refer it to the court such as repairing the building that is collapsing. In this case, the employer can perform the modification by another person with contractor's cost. Then, the judge will investigate it and clarify the authenticity or non-authenticity of his action.

The second phase: delay in starting the execution of the contract:

Article 780 of the introductory text of Civil Code of Egypt would provide that: "if the contractor delays in starting or continuing the contract so that it is not possible to perform the contract in the agreed period, the employer can terminate

the contract and it is not necessary to wait for the due time of the contract. This content has been omitted based on the General Rule (The series of Al-Aemal-o-Altaziriyeh, p. 14). But Article 868 of Civil Code of Iraq and Article 661 of Code of obligations and contracts of Lebanon has expressed this matter.

There are many examples of these regulations. For instance, a person contracts with a contractor in order to construct some goods for display in a famous showroom that the date of it has been determined. In this case, there is an implied agreement that the contractor should finish the task before the opening of the showroom. But the contractor starts performing its obligation with delay, or after starting the work, he delays in the continuation of the work, so that it is evident that he cannot finish the work in due time. Of course it is not necessary to exist a certain respite, rather there may be no agreement on the delivery time but the contractor delays in starting or performing the contract so that it is evident that he is not able to finish the work in a reasonable time considering the nature of the work, the costume of industry, and contractor's power.

Therefore, the employer is able not to wait for the due time or conventional time and when the permutation of the work becomes clear at the due time he can request the termination. This is in favor of both parties because if the employer waits for the due time, the work has not been finished and he should seek for compensating the damages from the contractor. Therefore, in this case, it is better to terminate the contract not only to prevent the contractor from paying for more damages but also to rescue himself from the future problems (Shanb, 1961)

Article 48 of General Conditions of the contract provides that "after finishing the contract if the work is incomplete or there are some defects, the contractor is required to remove any defect with his costs in the due time that is agreed with the employer. If the contractor does not remove the defects in the due time, the employer himself can modify the defected parts and diminish the related costs plus 15 percent from the contractor's demands.

The delivery of goods or the constructed object to the employer

In this section, the necessity of the delivery and its enforcement guarantee will be studied.

1. The necessity of delivery

The contractor should construct the goods according to the conditions and characteristics and deliver it to the employer. If the contractor supplies the materials, his obligation of the delivery is similar to the obligation of vender to the delivery of sales. If the employer supplies the materials, the contractors'

obligation toward the delivery is, in fact, returning the materials to its owner (Morcy, 1993)

Furthermore, the contractor should return the additional materials to the employer after finishing the work. Also, he should return anything that employer has provided for him such as the design, map, sample, license, documents of ownership, instruments, and tools. In this section, the quality of delivery, the time of delivery, and the place of delivery will be explained.

Clause 1. The quality of delivery. The delivery means that the goods will be under the command and disposal of the employer so that he possesses on it without any obstacle and can exploit it. The manner of the delivery depends on the nature of the goods and the intended act and it may involve different ways. For example, in sewing the clothes or constructing the commercial articles and so on, the delivery is achieved by putting the goods at the disposal of employer (Al-Sanhoory, 1998)

Clause 2. The time of delivery, the lien of the contractor. The delivery should happen on the due date. If the due time has not been determined, the delivery should happen in the standard and reasonable time based on the nature and custom of the profession. Sometimes the time of delivery is understood from the evidence, situations, and mood such as the object that is constructed for a race or showroom, its delivery time will be before the beginning of the race or showroom (Shanb, 1961).

At the time of delivery, if some parts of the price of goods or remuneration of the work have not been paid, the contractor has the right of lien and he can keep the goods instead of the payment of the price or remuneration. If the employer pays the remuneration or provides the sufficient supply, the right of the lien will disappear. The contractor's right of lien is not limited to the goods and materials, rather it also includes all of the instruments, tools, design, map, and documents (Shanb, 1961).

Clause 3. Place of the delivery: The delivery should be done at the agreed place. If the place has not been determined, the delivery will happen in the place where the custom of industry demands. If construction of the immovable properties is intended, the delivery will be in the place where the property is situated. If the act of the construction is regarding the immovable property that is under the authority of the employer, the delivery will be at the place where the property is situated. But if the movable property is not under the authority of the contractor for construction, and there is no agreement or custom about the place of delivery, it should be referred to General Rule. According to the General Rule,

the delivery will happen at of contractor' residence or workplace.

The guarantee of the delivery enforcement

If the contractor does not deliver the constructed goods in the due time and place, he, based on the general obligations, is able to request the enforcement of the contract or termination of it accompanied with the compensation of the damages. The employer should initially demand the delivery of the goods and force the contractor to deliver it.

If the delivery is based on the contractor's personal actions, the employer can use the method of financial threat (right of lien). If the delivery is achieved through supplying the equivalent goods, the employer can supply the equivalence with the contractor's cost and achieve the delivery.

If the construction of the goods includes a technical act and the contractor is not satisfied with his work as a technical act after the construction and he regards the delivery of the goods harmful to his technical reputation, he cannot be forced to delivery. In this case, the employer can only demand the compensation or he can demand termination accompanied by the compensation for damages.

If the employer demands the termination of the contract, especially where the completion of the work is not possible, he will be exempted from the payment of the price and he can also demand the damages. However, the judge will investigate the demand. If the contractor has performed most part of the work and the remained work is not so important, the judge does not justify the termination and he will give respite to the contractor in order to complete the obligation.

As it was mentioned before, the contractor's obligation to delivery is a kind of obligation on result, so non-delivery in the determined period is considered as disturbing the obligation and it is not necessary for the employer to prove the contractor's fault because non-delivery is considered as fault and the contractor's liability will not be cancelled, unless the contractor can prove the interference of an external cause.

If the non-delivery arises because of the destruction of the goods, the liability of destroying is different in various cases. In this case, Article 665 Civil Code of Egypt states that: "1. if the goods are destroyed because of a sudden event before the delivery to employer, the contractor cannot demand the price of the work as well as the occurred costs, and the compensation of the material is up to the one who has supplied it. 2. If the contractor avoids the delivery of the goods or the destruction of the goods before delivery is because of his fault, he should compensate the damages to the materials which the employer has

supplied. 3. If the employer has avoided accepting the goods or the destruction of the goods is because of his fault or is related to a defect on the supplied materials by the employer, the liability of the material destruction is up to the employer, and the contractor has right to demand the price and remuneration. Also, in the case of any damages, he can demand the compensation of damages”.

Also, Article 671 and 672 of Code of Obligations and Contracts of Lebanon has stated this matter. According to these regulations, there are three phases for the destructions of goods before delivery.

The first phase: The destruction of goods because of the force majeure

If the goods have not been delivered to the employer yet and are destroyed because of the force majeure or a sudden event, the contractor cannot demand the price of the goods or the remuneration and the occurred costs, and the damages related to the materials are up to the person who has supplied the materials. In this case, the burden of proving the force majeure or the sudden event is up to the contractor, because it is his duty to deliver the goods and he is not exempted from this responsibility unless he proves the interference of an external cause.

If the destruction occurs after the delivery or after the acceptance of the employer, the employer must incur the compensating of the damages, whether he himself has supplied the material or the contractor, and he should pay the price of the material to the contractor. Also, if the goods are under the disposal of the contractor because of his right of lien and it is destroyed because of force majeure, it is similar to the destruction before the delivery and the employer is responsible for compensating of damages (Shanb, 1961).

The contractor's liability can be expressed by the following examples: if the employer contracts with a carpenter for constructing instruments and before the carpenter's delivery, his workshop has been fired and the mentioned instruments are burnt or stolen and the firing or stealing is as the result of the force majeure and the contractor has no fault for its occurrence, in this case, if the contractor himself has supplied the materials, he cannot demand the remuneration and the incurred costs because the employer has not been profited by his action. Also, the contractor should take the responsibility for the destruction of the materials and he cannot demand the price of the wood from the employer because nothing has been delivered to the employer.

If the contractor is considered as the seller of the constructed materials and the ownership of the materials are transferred to the employer as soon as the materials are constructed, the contractor must undertake the destruction of the materials the same as the seller because according to the General Rule the liability of the destruction of goods before the delivery is up to the seller.

Also, if the employer has supplied the materials, the contractor cannot refer to the employer for the remuneration and costs because the employer has not been profited by his actions. But regarding the destroyed materials, the employer himself should bear the damages, because the employer is the owner of the materials and the destruction of the object is up to him.

The General Conditions of Contract have predicted two kinds of delivery: the temporary delivery and the definite delivery. In the temporary delivery, a committee including employer's agent, the agent of consultant engineer, and the contractor's agent will examine the performed task, and in the case of confirmation, declare the temporary delivery of the operation which is the subject of the contract. If they observe any defect or deficiency in the task, they will prepare a list of the defects and deficiencies and determine a respite for removing the defect and deficiency. There will be considered a time for the guarantee of the temporary delivery. At the end of the guarantee period, the employer will specify the members of the delivery committee on the request of the contractor and the confirmation of consultant engineer and in the case of confirmation by the committee, the definite delivery is achieved.

The second phase: destruction because of the contractor's fault

If the destruction is because of the contractor's fault or if the employer has requested the delivery of the goods but the contractor has refused, the responsibility is up to the contractor, because his fault has been the cause of the destruction. In this case, if the contractor has supplied the materials, he cannot refer to the employer due to the remuneration or the occurred costs. Also, he cannot demand the employer the price of destroyed materials, but he should compensate the employer's damages, too.

"If the employer has supplied the necessary material, the contractor cannot demand the remuneration and cost. In addition, he should pay the price of destroyed materials and compensate the occurred damages to the employer" (Shanb, 1961, p. 106).

The third Phase: destruction because of the employer's fault

If the destruction is because of the employer's fault or the employer has refused to accept the delivery of the goods, or the destruction is the result of defected materials which the employer has supplied, the employer must bear the damages of destruction because his fault has been the cause of destruction.

In this case, if the contractor has supplied the materials, the employer should pay the contractor's remuneration and costs and compensate the damages arising from the destruction of the materials. If the employer himself supplied the

materials, he must pay the contractor's remuneration and costs and he himself must bear the damages of material and he cannot refer to the contractor in terms of the price of destroyed materials (Shanb, 1961).

The contractor's liability after the delivery of the goods

After the delivery of constructed goods to the employer, there may appear some defects and deficiencies. That is why the contractor's liability will arise. In addition to the General Rules related to the liability after the delivery of goods, there has been enacted special regulations concerning the responsibility of the architect and building contractor. Therefore, in this section, we will initially review the General Rules regarding the contractor's liability after the delivery and then we will investigate the specific provisions related to the responsibility of the architect and building contractor.

General Rules concerning the contractor's liability after the delivery of the constructed goods:

The contractor's liability is explained in two cases: concerning the materials used for construction and regarding the way of construction and the actions performed on the materials.

Clause 1: The contractor's liability due to the materials

As it was mentioned before, according to the regulations, if the contractor himself has supplied the necessary materials, he is guarantor against the employer in terms of the health and safety of the materials. Indeed, the contractor, in these cases, has the role of the seller and is the guarantor of the latent defects of materials. Also, if the materials do not have the conditions and characteristics which the employer has determined, or they have the defect that causes the reduction of price or exploitation, the contractor is the guarantor. In these cases, the claim of guarantee, one year after the time of delivery to the employer, enter in the scope of the statute of limitations.

If the employer has supplied the materials, the contractor obviously is not responsible for the latent defects, because the contractor does not have the role of the seller. But if he discovers or considering his professional skill should discover, some defects during the construction and it is clarified that the materials supplied by the employer do not have the qualification for the intended purpose, he should immediately inform the employer. If he does not inform the employer, he will be responsible for the occurred damages.

Clause 2. The contractor's liability regarding the defects in construction

It is obvious that the contractor is responsible for the accuracy and soundness of his act and he has committed that he performs the task according to the agreed conditions and characteristics in the contract. Or if there is no agreement, he must

perform according to the custom and industrial principles. Therefore the contractor is responsible for any industrial defect for which the principles and the rules of professional consider him responsible.

Of course, this defect should be old. It means that the defect has existed at the time of delivery. If it created after the delivery, the contractor is not responsible. The task of proving the defects is up to the employer and when he proves the defects he is not bound to prove the contractor's fault.

If there is a defect in construction and the employer discovers the defect before accepting or taking delivery of the constructed object, he can request the objective performance of the contract i.e. he demands the modification of the defect or termination of the contract. In both cases, he can demand the compensation of the damage.

But if he takes delivery or accepts the constructed object and then discover the defect, how long is the contractor responsible? In this case, there is no explicit provision and we should refer to the General Rule. In this case, the General Rule differentiate three phases:

Phase 1: the defect in construction is clear so that an ordinary person investigate it he/she is able to discover it. In this case, if the employer accepts or takes delivery of the constructed object without any objection, it is supposed that he has accepted the goods defectively, and has waived his right of referring to the employer. Consequently, in such a case, the contractor's liability will finish by accepting the goods or taking delivery of it by the employer.

Phase 2: the contractor has intentionally hidden the defect of construction and the employer could discover the defect only at the time of accepting or taking delivery of the object. In this state, the contractor is responsible for his work and any time that the employer discovers the defect he can refer to the contractor or he can request for modifying the defect accompanied with compensating the damages or can request for termination and compensation of the damages.

This employer's power will continue for three years after discovering the defect because the contractor's liability in this phase is a kind of enforcement and fault liability and the claim of liability will abort after three years from the time that the fault is known.

Phase 3: the defect is not clear so that it cannot be discovered at the time of delivery or accepting. On the other hand, the contractor has not also hidden the defect i.e. he has not misrepresented it. In this case, the contractor is the guarantor for the fault during the time that the custom of profession requires. In this case, Article 875 of the Iraq Civil Code states that: "when the delivery is done, the contractor's liability regarding the patent defects or apparent opposition

to the contract will end. But if the defects are latent or the opposition to the contract are not apparent, and the employer discovers them after the delivery, he should inform the contractor as soon as he discovers them, otherwise, it is supposed that he has accepted them”.

Article 900 in the preliminary text of Civil Code of Egypt had differentiated between small and big contracting: “In small contracting, the employer should apply his right due to the existence of defect in performing the task during the period that the custom requires, and if there is no custom, he should propound the claim during the sixth month after the delivery. But in big contracting, the claim of liability and other claims that are based on the General Rule related to defects should be propounded during two years after discovering the defect. But this article has been omitted and it has been confined to General Rules (The Series of Al-Aemal-o-Altaziriyeh, pp. 30-31).

If the employer is silent after discovering the defect, his silence is considered as accepting the work and non-recourse to the contractor. Also, if the employer has given orders and instructions against the contractor’s opinion and applying his instruction has caused the defect, the contractor’s liability will be no longer. Article 666 and 667 of the Code of obligations and contracts of Lebanon has pointed out this matter. Of course, the mentioned regulations are not in the scope of public discipline regulations and agreement against it is permissible. Therefore it is possible to agree on the intensification of the contractor’s liability and even in the cases that the defect is apparent it is also possible to assign the lawsuit for three years (Talabeh, 2001)

It is also possible to agree on diminishing or lack of liability. For example, the contractor stipulates that he will not be responsible for the defects as soon as the delivery of goods even though the defect is latent. But we should pay attention to this matter that it is not possible to agree on the lack of liability concerning the defects arising from the contractor’s fault or misrepresentation. Article 899 of the preliminary text of Civil Code of Egypt has stated this matter.

References

- Al-Sanhouri, A. R. (1998). *Al-Wasit Fi Sharh-el Qanoun-el Madani-el Jadid* (Vol. 3). Beirut: Al-Halabieh Inc.
- Al-Ghanon-el Madani Series of Al-Amal-el Tahziriyeh*. Qahere, Egypt: Dar-el Ketab-el Arabi.
- Morci, M. K. (1993). *Al-Oghod-el Al-Mosama*. Qahere: Dar-el Nashr.
- Shanb, M. L. (1961). *Ahkam Aghd-el Moghvemat*. Egypt: Dar-el Nehzat-el Arabiye.
- Talabeh, A. (2001). *Al-wasit Fi Alghanoon-el Madani*. Almaktab-el Jamei-el Hadith, Egypt.

The Code of obligations and contracts of Lebanon (1932) (The law of Al-Movjabat & Oghood)

The Civil Law of Egypt

The Civil Law of Iraq

The Civil Law of Libya

The Civil Law of Syria

The General Conditions of Contract in Iran