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Architect Design Contract under Polish Law[1]

I. Introduction

An architect design contract is one of the most important contracts in the course of the construction process. Despite this, a design contract under Polish law is an innominate contract, governed by provisions of the work contract. Due to the specificity of architects' obligation to design, sometimes under the Polish doctrine a suggestion is formulated that an architect design contract requires specific normative regulation as nominate contract, or a specific kind of work contract, at least. The aim of this paper is to analyse the legal nature of the architect design contract and its linkage to the construction contract, identify provisions applicable to the design contract and some non-normative guidelines for contracting parties, as well as particular issues of the architect's obligation including designer liability, and finally find out arguments for or against implementing provisions devoted to the design contract into the Polish Civil Code.

II. Legal nature of architect's contracts

In Poland, designing a building is an exclusive domain of architects[2], and the core architect's activity. Design activities are covered by an architect design contract, which is the most significant contract with an architect in the construction process. Besides designing, contracts with architect's can include consultations or arrangements with respective public bodies or media providers, obtaining a permit for construction obligatory for buildings and constructions listed in Article 29 of the Polish Construction Law[3], architect's supervision over a construction process, which serves as a control mechanism over the execution of the project[4].

Under Polish law, the architect design contract and other architect's contracts are innominate contracts. The design contract is an empirical contract model, formed and recognized by business practice[5]. From the legal perspective, a design contract is a contract of result, qualified as a work contract, and governed by provisions of the work contract (umowa o dzieło)[6]. The work contract is a nominate contract governed by the Polish Civil Code (hereinafter referred to as CC)[7]. The qualification of the design contract as work contract is broadly accepted by the doctrine, and followed by the jurispru-

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[2] The construction project shall be made by an architect qualified in the field of architectural design (Article 20 sec. 1 point 1 of the Construction Law).

[3] The Act on the Construction Law dated 7 July 1994, consolidated text Dz. U. (Official Journal) of 2016, item 290, as amended.

[4] Article 20 sec. 1 point 4 of the Construction Law.

[5] *J. Strzępka*, Umowy w zakresie inwestycji budowlanych, in: *S. Włodyka* (eds.), System Prawa Handlowego, Prawo umów handlowych, Tom 5, p. 1137; *T. Dybowski/A. Pyrzyńska*, w: *E. Łętowska* (eds.) System Prawa Cywilnego, Prawo zobowiązań – część ogólna, Tom 5, p. 181 ff.

[6] See Supreme Court verdict of 13.10.2005, IV CSK 180/05; Supreme Court verdict of 19.01.2012, IV CSK 201/11.

[7] Civil Code dated 23 April 1964, consolidated text Dz. U. (Official Journal) of 2016, item 380, as amended.

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dence. According to Polish courts, a contract where an architect is obliged to design the project documentation, in accordance with technical knowledge, standards and legal norms shall be qualified as a work contract[8]. If the design is a manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and form of expression, in the meaning of Article 1 sec. 1 of the Law of Copyright and Related Rights[9], it subjects as well to respective provisions of the copyrights law[10].

An architect's supervision over a construction is separated from designing and considered as an autonomous function in the construction process[11]. The contract on architect's supervision does not oblige an architect to provide a predetermined and verifiable outcome (specific result) considered as a work in the meaning of Article 627 CC, but only to perform the obligation with care and skill[12]. Therefore in legal terms, the contract on architect's supervision should not be considered as a work contract, but as a service contract, to which, pursuant to Article 750 CC, provisions of a mandate (umowa zlecenie) apply[13].

The variety of architect's services in the construction process, the diversity of their legal nature, the absence of normative typological recognition and their mutual relation, cause some heterogeneity in the legal qualification of architect's contracts, which can be observed both in literature and in case law. A contract which combines various architect services, for example designing and other activities, can be qualified as a work contract or mixed contract, or even as a package-contract which consists of more than one legally separated contracts. The court's interpretation of a contract combining multiple architect's activities is usually guided by the rule that, if all contractual obligations despite their different legal nature are of equivalent significance, each of them shall be separately qualified to the appropriate type of contract and governed by the provisions of this particular type of contract. If there is one dominant obligation, the whole contract shall be qualified according to the legal nature of this main obligation[14]. On the other hand, some views presented in the literature recommend qualifying the contract combining architect's obligation to design and to supervise a construction entirely as a work contract since the term "design work" covers not only project design, but also supervision on the execution of the project[15]. This, however, seems to be a rather flawed and not convincing explanation due to the actual separation of those two kinds of architect's activities in a construction process. A more convincing example of the application of the absorption theory has been presented by the Supreme Court in its verdict of 20 March 2002, where the Court stated that the contract which involves an architect's obligation to perform a technical documentation of sports and recreation venues, along with obtaining a permit for construction, shall be qualified entirely as a work contract, if the architect's remuneration is precisely associated with delivery of "the complete documentation" composed of all technical and construction documents with the required permit for con-

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8 Court of Appeal in Krakow, verdict of 18.09.2012, I ACa 785/12.

9 The Law on Copyright and Related Rights dated 4 February 1994, Dz. U. (Official Journal) of 2006, No. 90, item 631, as amended.

10 Supreme Court verdict of 18.6.2003, II CKN 269/01.

11 See Article 12 sec. 1 point 1 of the Construction Law.

12 See Supreme Court judgment of 1.09.2012, IV CSK 201/2011.

13 Pursuant to Article 750 CC the provisions on mandate (Articles 734–751 CC) shall apply respectively to service contracts not regulated by other provisions.

14 See Supreme Court verdict of 9.07.2003, IV CKN 305/01; Supreme Court verdict of 14.01.2010, IV CSK 319/09; Supreme Court verdict of 9.12.2010, III CZP 104/10; Supreme Court verdict of 19.01.2012, IV CSK 201/11.

15 *Strzępka*, fn. 5, p. 1166.

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struction. The failure in obtaining the permit in a proper time shall be considered as breach of contract, even if the design documentation was complete[16]. A different mode of qualification was applied by the Supreme Court in its verdict of 23 February 2013. The architect's obligations, in the case at hand, covered the design and additional services, such as developing the architectural and urbanistic concept, submitting to the respective public bodies the complete application (with attachments, opinions, arrangements) to obtain a permit for construction, undertaking other factual and legal actions to obtain necessary decisions of public administrative bodies. The Court has not applied the absorption theory, but decided that this part of the contract which refers to designing shall be considered as a work contract, while other architect's services, which form a package of technical and legal activities and require acting with care and skill, shall be ruled by the provisions of the mandate[17].

The court considering the legal nature of the contract can classify a contract otherwise than the parties. The legal interpretation of a contract is not limited to the verbatim explanation of terms or provisions used by the parties. In the case of doubts, the court shall carry out an in-depth interpretation with regard to the general rule of Article 65 § 2 CC. Considering this provision, the Supreme Court in its verdict of 12 December 2012 emphasized the importance of the intent of the parties, which define the scope of contractual activities, and the context and circumstances of the conclusion of the contract, for the legal qualification of the contract[18]. Following these instructions, the Supreme Court decided in its verdict of 12 March 2013 that even if the parties willing to expose the nature of a contractual obligation named the contract as a work contract, the name is not the exclusive factor for the qualification of the type of contract. The process of qualification requires taking into account other circumstances of the case, including examination of the intention of the parties which might be emphasized under contractual terms as the achievement of a result, or only efforts to achieve it[19].

Due to the existing lack of heterogeneity in legal interpretation the outcome of the legal qualification of architect's contracts combining various services and architect's obligations will differ case by case. The importance of architect services in the course of the construction process provides arguments for minimizing the indicated uncertainty.

III. Scope and substance of the architect design contract

1. Civil law provisions

Legal frames of the architect design contract are defined by the general provisions of the specific work contract included in Articles 627–646 of the Polish Civil Code. Pursuant to the definition provided in Article 627 CC, under the specific work contract the person accepting the order (provider) commits to performing a specific work, and the orderer (customer) commits to paying the remuneration. The general provisions of the Civil Code determine the presumption of remuneration for the work (Articles 627 and 642 CC), general rules regarding cost-based or flat-rate remuneration (Articles 628–630 CC), and the orderer's rights in the case of substantial costs increase (Articles 631 CC), rights of service provider in the case of unexpected change of circumstances (Articles 632 CC),

[16] Supreme Court verdict of 20.3.2002, V CKN 945/00.

[17] Supreme Court verdict of 28.02.2013, III CSK 70/12.

[18] Supreme Court verdict of 12.12.2002, V CKN 1603/00.

[19] In its verdict of 21.3.2013, III CSK 216/12, the Supreme Court considered the contract on software services.

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rules on materials used to perform a work (Articles 633–634 and 641 CC), rights of customer in case of delay (Article 635 CC) or defective performance (Article 636 CC), warranty (Article 638 CC), consequences of non-performance (Article 639 CC) or lack of customer cooperation (Article 640 CC), as well as withdrawal (Article 644 CC) or termination in the case of death or incapacity of the service provider (Article 645 CC), and the specific provision granting the two-year long prescription period for claims resulting from the work contract (Article 646 CC).

According to the parties' intention, the design contract can cover an architectural concept, construction, or projects for execution of construction (which consist of constructional, architectural or installation projects). Each of the indicated phases of designing is separate and can constitute a subject of a separate design contract.

The architect design contract can be concluded in any form[20], except for the situation when the contract subjects to the public procurement law where the written form is obligatorily required.

2. Public law provisions

Some specific requirements for the construction design and project documentation or architect's duties relating to the performance of the design are included in the Act of 7 July 1994 – Construction Law[21], and in the regulations which implement this act. The detailed scope and content of the construction design is governed by the respective provisions of the public law[22].

Polish law does not provide any objective limitations or requirements with respect to the legal status of the contracting parties of the design contract. It should be noted, however, that the construction design can be performed only by a person with appropriate professional qualifications (architect, chief architect) corresponding with the character/type of a designed construction.

Contracts created for investments and governed by the public procurement provisions shall be adjusted to the requirements of the Public Procurement Act[23]. If the architect contract is governed by rules of public procurement, pursuant to Article 36 Section 1 point 16 of the Public Procurement Act, the specification of essential terms of the public procurement provided by the awarding entity shall include provisions essential to the contract, which are afterwards included in the public procurement agreement, or in the general terms of the contract, or in a standard form of the contract. In this case, the proposed contract terms usually do not subject to negotiations between parties.

[20] In its verdict of 19.1.2012, IV CSK 201/11 the Supreme Court determined the scope of the contract on design and architect's supervision concluded in the oral form. See also verdict of the Court of Appeal in Krakow of 18.9.2012, I ACa 785/12.

[21] According to Article 20 sec. 1 Construction Law, a construction design shall be prepared in accordance with the construction law, the administrative decisions on conditions for construction and land development, provisions of law and principles of technical knowledge. Article 34 sec. 2 Construction Law says that the scope and the contents of the construction design should be adjusted to the structure's specific characteristics and capacity and to the complexity of the construction works.

[22] More details are defined, in particular, in the Regulation of the former Minister of Transportation, Construction and Maritime Economy dated 25 April 2012 on the detailed scope and form of the construction design, Dz. U. (Official Journal) of 2012, item 462; or Regulation of the Minister of Infrastructure dated 2 September 2004 on the detailed scope of the design documentation, technical specification for execution and delivery of the construction work, and designation program, consolidated text Dz. U. (Official Journal) of 2013, item 1129.

[23] Public Procurement Act dated 29 January 2004, consolidated text Dz. U. (Official Journal) of 2015, item 2164.

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3. Standard contract terms

The scope of an architect contract can be based on standard contract terms. A complex example of a model contract for a contract between an entity ordering a design and an architect provides the Chamber of Architects of Poland (IARP)[24]. The model contract is licensed and protected by IARP copyrights, and available via district chambers of architects. The model contract consists of two parts: the first part provides a set of definitions used in a contract and the form to fill (sections A1 to C2)[25], and the second part covers general provisions of the contract (sections D1)[26]. The proposed provisions can be modified or supplemented by parties, with rules in compliance with the applicable law. This model contract is neither of normative nature nor obligatory for architects. However, recommended by IARP, its use is not common in a business practice.

The design contract can be constructed based on standard contract terms provided by FIDIC patterns[27]. The general applicability of FIDIC model clauses is an expression of the rule on freedom of contract (Article 3531 CC)[28]. The application of the FIDIC patterns for design is not obligatory itself, and FIDIC model rules are rather used in large scale investments contracts combining design and building, where the internal procedures of one or both parties require standardization of contract terms (or in particular application of FIDIC patterns).

It is worth to mention, that before the broad amendment of the Civil Code of 1990, the content and form of design contract in the construction process concluded between "entities of the socialized economy" was strictly governed by regulations adopted by the public executive bodies[29]. An interesting example of these acts were two ministerial ordinances of 1974 and of 1983 providing a set of standard contractual provisions of the design work in the construction[30]. The ordinances, however, repealed in 1990[31], formed some kind of customary practice as to the design contracts[32].

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[24] See http://www.izbaarchitektow.pl/pliki/uza_uniwersalny_red_xxi_www.pdf, 30.3.2016.

[25] The form covers details as to contracting parties and list of annexes (A1), a set of definitions of terms used in the contract (A2), the architect's remuneration (A3), rules on reimbursement of expenses incurred by the architect and mutual obligations of the contracting parties (A4), copyrights (A5), a detailed description of the designed work (C1), and a list of external specialists carrying out part of the work or consulting the work (C2).

[26] Section D1 includes provisions on general obligations of the contracting parties, the scope of architect liability and its limits, rules on liability of an ordering party, architect's copyrights, proceedings in case of defects of the design, architect's supervision and other architect activities, including alternative projects, the time for completion of design, general provisions on the architect's remuneration and reimbursement of architect's costs, sanctions for breach of contracts, and liquidated damages.

[27] See *I. Karasek-Wojciechowicz*, Czy wzorce umowne FIDIC mogą stanowić wzór dla polskiego ustawodawcy w zakresie regulacji świadczenia usług?, Transformacje Prawa Prywatnego 2014, No. 3, p. 35.

[28] *M. Behnke/B. Czajka-Marchlewicz/D. Dorska*, Umowy w procesie budowlanym, Warszawa 2011, p. 107.

[29] The repealed acts: Ordinance of the Minister of Construction and the Industry of Construction Fabrics dated 8 April 1974 on the general contract terms and conditions for the design, execution of the construction investments and construction and installation repairs, M. P. (Legal Monitor) No. 14 item 94; Resolution of 11 February 1983 of the Council of the Ministers on the general contract terms and conditions for design in construction and execution of investments, works and repair in construction, M. P. (Legal Monitor) No. 8 item 47.

[30] Attachment No. 1 to resolution No. 11 of 11 February 1983 on general terms of design contract in constructions provided: provisions defining the substance and scope of the design contract, conclusion of the contract, obligations of the parties, and warranty for physical defects, remuneration, amendments and renouncement.

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4. Professional standards of architects

Apart from provisions of legal acts and the standard contract terms, the scope of an architect design contract and the quality of architect services are defined by the Standards for Architectural Practice and Extent of Services (Standardy wykonywania zawodu i zakresu usług architekta)[33] of the National Council of the Chamber of Architects. The Standards set out rules on the best architectural practices, professional ethics and architects care and skill.

The Standards are the only formal document (act) which provides a definition of a design, which is "a complete part of any design works; an industry specific design – developed in relation to a specific industry; a conceptual, construction or executive design – developed with respect to a specific phase of design works".

Standards relating to the scope of the design contract are included in part C ("standards related to the agreement") and part D (standards related to services) of the Standards. According to Standard C.1.1., the architect contract shall indicate, in particular, the purpose and the scope of works to be performed, the division and limitation of responsibilities, regulations concerning the architect's subcontractors, budget/project costs, completion deadlines, remunerations and ways of calculation thereof, architect's copyrights, architect's insurance, requirements regarding confidentiality and keeping business and commercial secrets and contract termination provisions. Some recommendations as to the architect's remuneration for the transfer of copyrights associated with the design work are included in the guidelines on royalties developed by the Association of Polish Architects (SARP)[34]. The nature of the guidelines is neither normative nor mandatory. They serve, however, as a point of reference for calculating the architect's remuneration[35].

The standards are not a legally binding interpretation of Architects Professional Code of Ethics, but might be used as an interpretation guideline for them. They are not legally binding themselves, but they are recommended as a guideline for ensuring proper quality of architectural services.

IV. Architect's liability for the design

The designer under the design contract is obliged to deliver to the contracting authority a fixed and established result, being the intangible, intellectual work of an architect, saved in a form of design, drafted on a tangible medium, usually in a form of a project documentation, applicable for the execution of a construction[36], and the contracting party is obliged to remunerate the architect's work. The process of designing consists of a continuous exchange of ideas and directions between the architect and the customer[37], and

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[31] Repealed by virtue of Article 7 sec. 1 of the Act dated 28 July 1990 on amendment to the Act – Civil Code, Dz. U. (Official Journal) of 1990, No. 55, item 321.

[32] *Behnke/Czajka-Marchlewicz/Dorska*, fn. 28, p. 105.

[33] Appendix to Resolution number O-01-2006 of the National Council of the Chamber of Architect dated 13.01.2006, available at: http://www.izbaarchitektow.pl/pokaz.php?id=604, 8.3.2016.

[34] See http://www.sarp.org.pl/pliki/1_539ec5f989836-zwpp_sarp.pdf, 24.4.2016.

[35] See also *Strzępka*, fn. 5, p. 1166.

[36] See also *Strzępka*, fn. 5, p. 1153.

[37] *M. Barendrecht/M. Jansen/A.Pinna/R. Cascao/S. van Gulijk*, Principles of European Law. Service Contracts (PEL SC), Sellier 20006, p. 615; *Ch. von Bar/E. Clivie/H. Schulte-Noelke*, Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Sellier 2009, p. 1848.

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requires in-depth co-operation of both contracting parties. The general rule of Article 354 § 1 CC obliges an architect (debtor) to perform the obligation in accordance with its content, in a manner complying with its socio-economic purpose, and the principles of community life, and respecting the established customs. The customer shall co-operate in the discharge of the contract in the same way (Article 354 § 2 CC). The failure in customer's co-operation essential for performance of the design, which is an obstacle to its execution, will enable an architect to withdraw a contract due to creditor's delay (Article 640 CC)[38], and claim for damages resulting from non-performance of the obligation (Article 494 CC)[39].

On the other hand, the outcome of designer work will not be performed properly unless it will satisfy the customer's needs. Therefore, the content of the agreement and its intended purpose will determine the scope of the architect's services. The scope and substance of design project shall comply with the intended purpose of a design, known to an architect[40]. Under Polish law, there is no specific provision implying any particular obligation of care and skill in design[41]. An architect is obliged to act with due care and skill, which is assessed with consideration of the professional nature of an undertaken activity (Article 355 § 2 CC).

The proper performance of a design requires not only its comprehensiveness or compliance with investor expectations and architect's diligence, but also its "internal" correctness, which is defined as correctness of technical, constructional and technological solutions[42]. The architect is under the general duty to deliver the design prepared according to all relevant statutory regulations, including requirements of construction law, zoning law or public procurement law (if applicable)[43]. If the planned location of a designed building is determined at the moment of designing, the design shall comply with the local zoning policy. Where the subject of a design contract is a complete design, including project documentation, the design shall be prepared in a way enabling to obtain a building license (if applicable). Any inconsistency in legal, technical or formal requirements being an obstacle in receiving a required building license will constitute architect's liability.

The architect is liable for defects in project documentation, as well as inappropriate instructions given in the course of supervision. Defective performance of the design results in the architect's contractual liability, according to general rules of liability for non-performance or undue performance of the obligation (Article 471 CC)[44]. Pursuant to Article 471 CC, an architect is liable for any damage arising from non-performance or undue performance of the design, unless he is not liable for circumstances which caused the non-performance or undue performance. The liability for architect's design extends beyond the process of designing, and intersects with the construction in two ways. Firstly, there are defects of design which can be determined only in the course of the construction process, or even after completing the construction. Secondly, the defectiveness

[38] An analysis of the legal consequences in the case of lack of creditor co-operation is included in Supreme Court's verdict of 20.6.2013, IV CSK 704/12.

[39] See Supreme Court verdict of 13.5.1987, III CAP 82/86; Supreme Court verdict of 3.12.2004, IV CSK 340/04.

[40] See Supreme Court verdict of 5.12.2013, V CSK 2/13.

[41] The particular obligation of skill and care in architects design has been identified as Article IV.C-6.103 of the Draft Common Frame of Reference (DCFR)

[42] Por. *J. Strzępka*, Odpowiedzialność z tytułu rękojmi w umowach o prace projektowe, Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia, Sectio G, 1982, Vol. XXIX, 11 p. 193.

[43] See *Strzępka*, fn. 5, p. 1134.

[44] See Supreme Court verdict of 10.7.2008 r., III CSK 59/08.

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of design may cause defective construction. Therefore, liability for defective design cannot be limited in time to the contracting period of the design contract[45].

The architect's liability for defective design often crosses or overlaps the constructor's liability[46]. Under Polish law, there is no specific provision of the work contract which balances the overlapping liability of the architect and the constructor, or which limits the architect's liability. Determining whether the damage results from defects of the design or only undue performance of the construction usually requires professional expertise[47]. The rather restrictive, but separate view as to this issue expressed in the Polish doctrine assumes that since the design process serves the creation of a building and determines the outcomes of the construction, an architect becomes, in a certain sense, the creator of the building, and shall be liable for all defects of the building which result from the defective design[48].

The construction of the building according to a defective design does not exempt the architect from liability. The constructor is not obliged to examine in detail the project documentation or evaluate the architect's instructions or project changes (introduced in the course of construction process) in order to detect defects, because he does not have to have expertise in the field of design[49]. However, if a constructor determines that the project documentation or architects instructions are unsuitable for proper performance of the work, he is obliged to notify the investor (Article 651 CC), who is a party of the construction contract. A failure to notify the investor regarding defects of the design detected in the documentation or observed in the course of construction will additionally result in the constructor's liability, but still does not exclude liability of an architect[50]. The constructor, but not the designer, will be exempted from liability for defects of a building resulting from the defective design, if he properly warned the investor about prospective danger, but the investor ordered him to perform the construction according to the defective design. The architect is still not exempted from liability for defective design, even if the investor informed about defects and warned about the risk of damage ordered to execute the construction with exceptions from the defective design.

Besides the liability resulting from the non-performance or undue performance of the design, the architect is liable for defects of the completed design (completed project documentation) according to the provisions of warranty for defects. Article 638 § 1 CC provides that the general rules on warranty of sales provided in Articles 556–576 CC shall be applied accordingly to the liability for defects of the work (design). The general shape of warranty on sales does not correspond perfectly with the specificity of the design. An example could be the provision of Article 568 § 1 CC, which provides that the seller shall be liable under a warranty if the defect of the sold item is detected before the elapse of two years, and as far as defects in immovable properties are concerned, before the elapse of five years from the date of releasing the item. The strict application of this provision would deprive the investor of the effective protection in the case of defects of the design detectable only in the course of construction. The broadly accepted view

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[45] *J. A. Strzępka*, Rękojmia za wady i współodpowiedzialność w procesie budowlanym. Studium prawnoporównawcze, Katowice 1993, p. 13–14.

[46] *Strzępka*, fn. 5, p. 1165.

[47] Compare Supreme Court verdict of 10.7.2014, I CSK 560/13.

[48] *W. Buczkowski*, in: *S. Grzybowski* (eds.) System Prawa Cywilnego, t. III, Wrocław 1976, p. 479.

[49] Supreme Court verdict of 27.3.2000, IIII CKN 629/98; Court of Appeal in Białystok, verdict of 7.8.2013, I ACa 311/13; Court of Appeal in Katowice, verdict of 17.6.2015, V ACa 731/14; Court of Appeal in Warsaw, verdict of 23.6.2015, VI ACa 1145/14.

[50] Supreme Court verdict of 27.3.2000, III CKN 629/98.

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assumes that investor's rights resulting from the warranty for design expire not earlier than at the time of expiry of the warranty for construction[51].

Under Polish law, there is no specific provision limiting the liability for damage caused by defective design[52]. Some postulates in the doctrine emphasized the lack of rules governing the architect's liability similar to rules of the repealed ordinance of 1983[53]. The lack of a normative limitation of the architect's liability results in risks disproportionate to the value of the design contract. In the absence of statutory provisions any additional limitation of the liability are the issue of lex contractus. Pursuant to the provision of Article 473 § 2 CC, the contracting parties are allowed to limit the liability for non-performance up to the damage caused by the debtor intentionally.

The issue of limiting the architect's liability has been considered by the Acquis Group and expressed in Article IV.C.-6:107 (Limitation of liability) of the Draft Common Frame of Reference. The DCFR provision refers only to a specific type of limitation clauses in design contracts[54], and allows the contractual limitation of the architect's liability for non-performance up to the value of the structure, thing or service which is to be constructed or performed following the design, excluding cases where the damage was caused intentionally or by grossly negligent conduct of the designer. The DCFR restricts the applicability of the provision to B2B design contracts[55].

V. Architect design contract v. construction contract

Under Polish law, the work contract and the construction contract are separate nominate types of contracts[56]. Despite this, professional practice reveals that the construction contract is more frequently combined with the design under one contract agreement[57]. The traditional approach, however, adopted under Polish law, perceives the design and the construction as separate phases of the construction process. This separation is also expressed in Article 18 of the Construction Law[58]. This fact also influences the mode in which these two contractual areas are classified under the civil law[59].

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[51] The rule, in fact, refers to the provisions of § 16 of the repealed Resolution No. 11 of 1983, which provided that rights to the warranty for defects of the design expire with the expiry of the warranty of the constructor of the building.

[52] Compare *Behnke/Czajka-Marchlewicz/Dorska*, fn. 28, p. 107.

[53] The ordinance provided specific rules on warranty for physical defects of the design (§ 12–17), for damages arising from not achieving the assumed parameters of the investment (§ 18) and rules on liquidated damages (§ 19–20). Para 3 of the general contract terms stipulated that the ordinance provisions on the time period for warranty for physical defects is *lex specialis* to provisions of the civil code.

[54] v. *Bar/Clivie/Schulte-Noelke*, fn. 37, p. 1872.

[55] An extensive comparative analysis of the conditions of limiting the architect's liability is provided by: *S. van Gulijk*, European Architects Law. Towards a New Design, Maklu 2009, pp. 120–141.

[56] *P. Drapała*, in: *J. Gudowski* (ed.), Kodeks cywilny. Komentarz. Księga trzecia. Zobowiązania, electronic edition Lex 2013, commentary to Article 647 CC, Item 9 (accessed: 18.4.2016).

[57] See *W. Popiołek*, in: *W. Popiołek* (ed.), Miedzynarodowe prawo handlowe, System Prawa Handlowego Tom 9, C. H. Beck 2013, p. 1003–1005.

[58] Article 18 of the Construction Law provides that the investor's duty is to arrange the construction process and to deliver the construction design or other designs by persons having relevant professional qualifications.

[59] The Construction Contract (umowa o roboty budowlane) is a nominate contract, separate from the work contract and regulated in Articles 647–658 CC.

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Pursuant to Article 674 CC, the contractor in a construction contract commits to handing over the facility provided for in the contract performed in accordance with the design and technical know-how, and the investor commits to carrying out the actions required by the relevant regulations to prepare the works, in particular, to hand over the construction site, deliver the design, accept the facility and pay the agreed remuneration. The provision of Article 674 CC is the source of the view broadly presented under the Polish jurisprudence and doctrine, that the obligation to deliver the design by the investor creates one of the essentialia negotii of the construction contract[60]. This view has significant consequences in cases where the design and construction are composed in one agreement. If the designing is incorporated in the construction contract and creates a part of the constructor's contractual obligation, the contract does not meet the typological requirements of the construction contract, where the investor, and not the constructor, shall be the design provider. Such contract cannot be classified as a construction contract. The Polish jurisprudence emphasizes, that the result of the contractor's tasks under the construction contract shall be the construction work, but not any arbitrarily defined result, and the contract cannot be a construction contract if the contractor takes the responsibility for the complete design and construction process from the initial briefing to the completion of the building[61]. According to this view, if the contract does not include the investor's obligation to deliver the design, it shall not be considered as a construction contract, and the intention of the parties to conclude a construction contract is of secondary importance during its interpretation and legal qualification[62]. The incorporation of the design into the construction contract as the contractor's obligation results in a change of the typological classification of the entire contract. The combined design and construction contract, pursuant to the presented view, is entirely classified as a work contract, even if the obligation to design and to construct is of similar importance and scale[63].

The presented mode of a typological classification of design and build contracts results in very serious implications for contracting parties. The statutory provisions of the construction contract provide some particular instruments which protect the constructor, its subcontractors and the investor of the construction contract. The statutory model of the work contract provides the general freedom of subcontracting, while the construction contract obliges the constructor to determine the scope of subcontracting in the contract (Article 647[1] § 1 CC) and requires the investor's consent for subcontracting agreements (Article 647[1] § 2 CC). Article 649 CC introduces an interpretational rule, according to which in the case of doubts it shall be deemed that the constructor is obliged to undertake all works covered by the design. The rule is not applicable to the work contract. The construction contract provisions implement a particular model of guarantee of payment, which are not known under statutory provisions of the work contract. Article 640 CC, which governs the work contract, but is not applicable to the construction contract, enables the service provider (e. g. designer) to renounce the contract ex tunc due to lack of investors co-operation in the execution of the work. The remuneration for a construction is the constitutive element of a construction contract, but not of a work contract. Article 628 CC stipulates a specific presumption of the remuneration for work, which applies if

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[60] Supreme Court verdict of 25.3.1998, II CKN 653/97; Supreme Court resolution of 11.1.2002, III CZP 63/01; Supreme Court verdict of 18.5.2007, I CSK 51/07; Supreme Court verdict of 22.6.2007, V CSK 99/07; Court of Appeal in Krakow, verdict of 12.2.2015, I Aca 1628/14; Court of Appeal in Łódź, verdict of 22.7.2015, I Aca 123/15.

[61] Supreme Court verdict of 13.7.2005, I CK 77/05.

[62] Supreme Court verdict of 21.3.2013 r. III CSK 216/2012.

[63] Court of Appeal in Katowice, verdict of 30.3.2006, I ACa 1900/05.

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the parties of the work contract did not fix the remuneration[64]. The statutory regulation of prescription under the work contract and construction contract also differs. In the case of claims resulting from the work contract, the presumption extends to two years from the day of completion of the work, or if the work has not been completed, from the day it had to be completed (Article 646 CC). In the case of claims resulting from a construction contract, the general regulation of prescription expressed in Article 118 CC applies, what means that for claims resulting from B2B construction contracts the three year prescription period applies, but if the investor is an individual person and the claim does not result from their economic activity, the period of prescription shall be ten years[65]. These implications of the presented practice highlight the level of inhomogeneity, being a result of combining design and construction.

The qualification of the constructor's obligation to design included in a construction contract as the criterion for differentiating the work contract from the construction contract has been criticized among the legal doctrine[66]. The fact of including design activities into the construction contact does not change the purpose of the construction work and the economic importance of the legal guarantees granted to the parties of a construction contract by provisions of law. The linguistic interpretation of Article 674 CC adopted by jurisprudence ignores the specificity of the construction contract, which lies among reasons for regulating the construction contract as a nominate contract. Finally, it ignores prospective benefits of the investor resulting from entrusting to one contractor the subsequent activities of the construction process. Some of the advantages of contracts combining design and construction are in the following: increase of the co-operation in the course of the construction process, increase of flexibility and acceleration of the investment, placing of the responsibility for the design and construction in the hands of one contractor, mitigating risks at determining liability for defective design, as well as liability for defective construction resulting from design defects[67]. Under the design and build contract, the investor is also better protected against the risk of underestimating the costs of construction[68].

Arguments from the experience of business transactions support the view that contracts combining design and construction correspond with their functional linking and raise an additional legal bound. Despite this, design and construction remain technically separated and form the sequence of related, but separable obligations. Such separation was even noticed by the Supreme Court of Poland in its verdict of 20 November 2008, where it decided in favor of autonomy of design and construction despite the fact that they were included in one contract concluded between the investor and the consortium. The Court considered the contract as two separate contracts, i. e. a design contract which was governed by the provisions of a work contract, and a construction contract governed by the provisions of a construction contract[69]. The case at hand was, however, quite specific, and the main argument emphasized by the Court was the internal separation of

[64] Article 628 CC says that in the case of doubt it shall be deemed that the parties assume the ordinary remuneration for the work of this kind. See also Supreme Court verdict of 3.12.2004, IV CK 340/04; or Supreme Court verdict of 13.7.2005, I CK 77/05.

[65] Supreme Court resolution of 11.1.2002, III CZP 63/01; Supreme Court verdict of 28.4.2004, V CK 379/03.

[66] See *J. Strzępka/E. Zielińska*, Gloss on the judgment III CZP 63/01, OSP 2002, No. 10, item. 125.

[67] Benefits of the package contracts listed *A. Burns*, The Legal Obligation of the Architect, London/Dublin/Edinburgh 1994, p. 7–8. See also *J. Strzępka*, fn. 5, p. 1293; *K. Konieczny*, Umowa o roboty budowlane w obrocie międzynarodowym, Warszawa 2012, p. 125.

[68] Comp. Supreme Court verdict of 20.11.2008, III CSK 184/08.

[69] Supreme Court verdict of 20.11.2008, III CSK 184/08.

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the contract reflected in: separation of design and construction, separately determined remuneration of both activities, and entrusting each of the entrusted to a different consortium member. The question is: what would be the difference if the service provider was the same entity? In a common sense, the same service provider would change nothing. The design by its very nature has to precede the construction, and according to Polish law is itself a precondition to obtain the building permit[70]. A situation where the same entity provides services of design and construction based on two separate contracts is itself not contradictory to the provision of Article 647 CC. The economic purpose of the contract stays unchanged regardless of the entity delivering the design. Actually, the requirement to provide the design by the investor treated as essentialium negotii of the construction contract, however, rooted in judiciary interpretation, stays practically dysfunctional and detached from the essence of the construction process.

The principle of freedom of contract expressed in Article 353^1 CC allows the parties to combine services specifically associated with various nominate contracts under one contract agreement and create a mixed contract[71], if only the content and the purpose of that contract does not contradict the nature of the agreement, statutory law, and the principles of community life. If under the mixed contract obligations specific for one nominate contract clearly outweigh others, the entire contract, according to the absorption theory, shall be governed by provisions of the nominate contract the elements of which prevail (according to the main obligation)[72]. The contract which combines equivalent elements of various nominate contracts shall be qualified as a mixed contract[73]. Design and construction are separable, autonomous and equivalently significant elements of the design and construction contract. Contracts which combine the design and construction shall be classified as mixed contracts, where provisions of the work contract are applied to design, and provisions of the construction contract are applied to construction activities.

The questionable definition of the construction contract included in Article 647 CC requires interference of the Polish legislator. The essence of the investor's "obligation to deliver the design" is a de facto form of guarantee that the constructor will dispose of the tools mandatory to carry out the construction and to complete the construction contract in accordance with the design and technical know-how. The investor's obligation creates a particular form of the investor's collaboration under the construction contract[74], which will be satisfied if the investor ensures the design documentation required to perform the construction.

VI. Conclusions

An architect design contract is one of the most significant contracts in the construction process. Despite this fact, there is no normative regulation specifically dedicated to architect's contracts whatsoever, including design.

[70] See *H. Kisilowska* (ed.), Prawo budowlane z umowami w działalności inwestycyjnej. Komentarz, LexisNexis 2010, Preliminary remarks, www.lexis.pl, 3.4.2016.

[71] Supreme Court verdict of 6.11.2002, I CKN 1144/2000.

[72] Supreme Court resolution of 9.12.2010. III CZP 104/2010.

[73] Supreme Court verdict of 21.3.2013, III CSK 216/12; Supreme Court verdict of 9.1.2012, IV CSK 201/11.

[74] *P. Drapała*, in: *J. Gudowski* (ed.), Kodeks cywilny. Komentarz. Księga trzecia. Zobowiązania, electronic edition Lex 2013, commentary to Article 647 CC, Item 10 (accessed: 18.4.2016).

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The applicability of civil law provisions to architect's contracts in the course of the construction process causes various disputable issues.

Discrepancies and doubts relating to design contracts under Polish law refer repeatedly to the typological qualification of contracts combining various architect obligations (design and supervision) or design and construction. Since the indicated discrepancies refer to judicial practice, a rather coherent or consistent interpretation made by the courts would be recommended in the first line, instead of any normative interference.

The indicated uncertainty caused by the lack of normative regulation results in the question whether the design contract shall be regulated on the normative level or remain unchanged as an issue of lex contractus. The importance of the architect design contract for the construction process provides arguments for minimizing legal uncertainty, and supports the idea of specific normative regulation regarding design. The specificity of design contracts identified by the Acquis Group allowed indicating particular issues which could require specific normative regulation, among them the pre-contractual duty to warn, the obligation of skill and care, the conformity rule, the handing over of the design, the recording of design documentation, as well as the limitation of liability[75].

Taking into account the particular nature of the architect design contract and its close relation to the construction contract, it seems reasonable to add some specific provisions on architect design contract to Title XVI: Construction Contract. The brief observation of the legal practice shall convince the legislator to clarify the status of design and construction contracts, which shall be recognized as mixed contracts. Therefore, interference of the Polish legislator seems to be required with regard to Article 647 CC, where the obligation of the investor to deliver the design could be replaced with the obligation to carry out the construction in accordance with the design delivered by the investor or constructor. The serious problem under Polish law is the lack of specific provisions limiting the liability for damage caused by defective design. As to this issue, I would recommend to consider the provision of Article IV.C.-6:107 DCFR as a point of reference, which allows balancing the disproportionate risk of the design defects; however, the decision regarding the applicability of the allowed limitation is left to the contracting parties.

Architect contracts are far too significant to be left without any consideration by the Polish legislator.

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75 *von Bar/Clivie/Schulte-Noelke*, fn. 37, p. 1848 ff.

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