



Research Article

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Reflection on the entrepreneurship contract in the current market conditions in Albania

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Abstract

The Entrepreneurship contract is one of the most widespread contracts in the domestic market. It is the most useful contract, for the investors or the entrepreneur which intend to develop their projects. It is a contract which has served for decades as a mechanism of economic development due to the characteristics it carries. In this contract, one party (entrepreneur) is obliged, with its own resources and assuming the risk, to perform an act (job), or to accomplish a work or service while the other party is obliged to accept it against the price specified in the contract. The professional practice of this contract has often been transformed, or modified, approaching its special nature. This paper aims to reveal practices and approaches to legislation through interventions by means of legal and by-laws, which distort the contract, the obligations that hinder the parties, the unavoidable risks that affect the project, and in general all situations that cause legal instability. This manuscript will try to make some proposals, in two aspects. The first aspect has to do with clauses which give more legal certainty to the existing system. Second, it will try to challenge legislators by exposing potential developments that could end standards confrontations or legal ambiguities.

Keywords: contract, form of the contract, the entrepreneur, the customer, the effects of registration, essential conditions, adjustments.

1. Introduction

Every contract has essential and incidental elements. The essential elements of the contract are subjects, object, and the content. The other elements are random. Their absence does not bring absolute invalidity of the contract. However, there are exceptional cases, where the form of the contract can be an essential element of the legal action. There are some situations, when the law requires the observance of a solemn

form for the conclusion of the contract.¹ Referring to the provision of Article 850 of the Albanian civil code, it is textually sanctioned that, "A party (entrepreneur) is obliged, with its own means and assuming the risk, to perform a work (job), or to provide a service or an independent implementation of works, while the other party is forced to accept it."² According to this provision, it is assumed that the entrepreneur and the customer are parties who are obligated to one each other. The civil code does not rule deeply with the qualities of the entrepreneur or the customer (Karati, 2023). The provision on obligations law and contract recognizes freedom of form in contractual relations. Generally, it concerns the obligations and the contracts serve the parties, to refer as a model in the drafting and editing of the rights and obligations of the parties in the contract. However, the parties to the contract are free to arrange in different ways. The Contract for work and service may be a simple contract with simple obligations where the entrepreneur is not required to have any special qualifications or licensing for assuming a certain obligation. For example, interested parties can deal with a natural person or a construction company for constructing the internal walls of a residential building. Surely, this job can be carried out by a self-employed natural person specialized in this job. On the other hand, we can have a small business related to the same object where the construction company undertakes the realization of the job. There may exist enterprises which exercise their activity specialized in different domains where contracts do not require binding in a certain form. For example, the contract concluded between the client and the atelier or tailor for the styling of a suit or clothing according to the client's desire, does not require a formal form. This is a simple contract for work and service contract. However, the analysis is different depending on the form of the contract. The object of the contract is fundamentally important to classify the type of contract for which the parties have seriously agreed to conclude. Building a real estate, the entrepreneur must be a licensed entity according to the regulation in force.³ Meanwhile, the civil code does not provide such a definition. Interest parties must register that contract in the public register. The registration procedure guarantees the identification of the immovable property. This clause stipulates the form of the contract.⁴

2. The entrepreneur in the quality of a builder

Any company organized as a commercial company must be licensed according to the terms and criteria set out in the regulations. Referring to the regulation: "*Professional license*" is the permit for the exercise of the activity in the field of implementation of construction works, with which it has to equip any legal/natural, private or public entity that wants to exercise activity in the field of implementation of construction works and meets the condi-

¹ For more see Article 83 of the Albanian civil code.

² For more see Article 850 of the Albanian civil code.

³ (Decision no.42 of the Council of Ministers "On the adoption of the Regulation and the criteria and procedures for issuing professional licenses for the implementation and disciplinary of legal subjektes exercising construction activities", 2008)".

⁴ See Article 50 (Law no.111/2018 "On Cadaster", 2018).

tions to be equipped with such.⁵ The license is a legal and professional document, which entitles its disposal to perform certain activities, according to the categories of implementation works based on the university degree profile of individuals employed in the role of technical director of the company. The classification of the beneficial categories is based on three elements: The value of similar works performed in the last 4 years as a company. The license contains some elements which are very important to be disclosed to third parties, regarding the categories of construction works.⁶ For example, if an entrepreneur defines an enterprise contract with a landlord in the quality of the commissioning subject, then it would be necessary that the entrepreneur, must be licensed in category N.P.2 “For civil and industrial constructions, to have the capacity necessary to meet the contract obligations shall be undertaken by the undertaking contract. The license must also contain tiered classification for each category, identification number, the date of registration in the Basic Register (same as the date of the decision taken by the Commission; the names of legal and technical directors, headquarters, the term of validity. Security elements defined by order of the Minister; full categories and classification data, on the back of the license.⁷ It can be concluded that the regulation in the enterprise contracts for construction of a new building sets certain conditions, in order for the constructing company to be able to execute the contract. The competent authorities require the license as stated in the above example. The parties are essential elements of the contract. If the entrepreneurial party in this type does not fulfil the conditions set out by law, it consequently results in absolute invalidity of the contract. The absolute invalidity of the acts in this case, comes as a result of Article 92 of the Civil Code. *Legal actions that come in contravention of an ordering provision of the law.*⁸ If the entrepreneur does not take the measures to meet the criteria that the law has set out, the contract goes against the rules provided by Article 92 of the Civil Code. Taking into consideration, these facts, we conclude that the parties have violated an ordering provision of the law regarding a substantial elimination of the legal action as the party.

3. The price of the entrepreneurship contract

The characteristic of an entrepreneurship contract is a contract with a counteraward. “When the parties have not set the price of the contract, or they haven’t decided the methodology for calculating that, then the price is calculated based on the existing tariffs or

⁵ Chapter 1 of the Regulations entered into force with the (Decision no.42 of the Council of Ministers “On the adoption of the Regulation and the criteria and procedures for issuing professional licenses for the implementation and disciplinary of legal subjektes exercising construction activities”, 2008).

⁶ This category includes excavation works in the land, civil and industrial constructions, reconstruction and maintenance of civilian buildings, highways, roads, railway overpasses etc. Dams, hydrotechnical tunnels, water, gas, oil, drainage works, irrational, works and river protection. All these categories have specifically their own codes, which are regulated by following with corresponding clarifications on the three-way link of the same instruction.

⁷ See Decision no.42 dated 16.01.2008 “On the adoption of the regulation on criteria and procedures for issuing professional licenses for the implementation, classification and disciplinary of legal entities that exercise construction activities.

⁸ For more see Article 92 of the Albanian civil code.

the basis of the unwritten rules of the country, or the precedent created by the parties". The Albanian Civil Code has provided when parties have not agreed on the price, the court can decide it.⁹ Parties should foresee how to make the payment of the contract. How would they realize the payment if they have forgotten to make such a provision? What components will be part of the contract price? Usually, the price of a contract is calculated according to the situations reflected in the service made by the investor, including the materials bought by the investor. The Albanian civil code rules none of this hypothesis. Parties are free to choose and regulate their contract according to their discretion. Practically, in many entrepreneurship contracts, parties agree that the contract price will be part of the contract's object. For example, we may have contract clauses formulated as follows: *"The parties agree that the owner shall make available to the entrepreneur the landholder owned in his or her according to the specifications set out in the account, to realize the fullness of this contract. The entrepreneur realizes the object of the contract in the owner's property and puts at the disposal of the land owner "X" % of the construction area, with economic destination, residential units and/or business, in the object to be realized by the latter" ...* We note that there is no connection between the legal provisions set out by the parties in the contract and the Civil Code in the provision named "contract price" which we think that is incomplete. Within an enterprise contract, there are also the elements of the exchange contract, as after the entrepreneur's work, the parties will exchange the land area for the construction (Hasneziri, 2024). From this consideration, we submit that it is necessary for this provision to re-feature current market changes. The contract price must be in the currency that the parties have agreed. If the parties have not mentioned the currency, then the currency shall be one of the countries where the deal is determined. Probably parties in the entrepreneurship contract (in the domain of building construction) receive compensation utilizing exchange clauses. Generally, parties set up percentages of new building surface and construction in the contracts for works and services. This methodology reflected in the contract serves as a payment method in nature. The application of legal provisions in the civil code of this practice spread widely in the internal market and plays an informative role for non-professional parties who seek to enter a legal relationship with the entrepreneurial parties.

4. The contract contents

The content is the main component of the contract. It provides the legal reasons for which the contract is determined. It also provides the rights and obligations of the parties to the engagement. Referring to article 853 of the Albanian civil code: *"The entrepreneur must give timely notice to the customer: a) when the material provided by the customer for the work does not have a good quality if it is discovered during work and damages the quality of the work; b) when instructions of the customer cannot be displayed, or when their implementation makes the work inadequate or unsuitable; c) when there are circumstances unrelated to the entrepreneur which influence the work and cause it to be inadequate*

⁹ For more see Article 851 of the Albanian civil code.

or unsuitable; *The entrepreneur is responsible for the damage caused to the customer if he fails to provide notice of the above.*¹⁰

The customer must pay the entrepreneur obligation for his work even if the material has poor quality. The parties of the contract are free to set their terms and demands according to their common purpose. A characteristic of the entrepreneurial account is risk. The risk stands at the entrepreneur. Based on the characteristics of this contract, it is understood that the content of the business contract varies depending on the parties' intention. The only limitation of their volunteers in the contract relates to essential elements of the contract and the form.

5. Material warranty

Generally, the entrepreneur responds in an unlimited way to accomplish the work. For this reason, as a rule, *the materials necessary for the performance of the work must be provided by the entrepreneur, if the agreement does not provide otherwise.*¹¹ If it is the ordering person who brings and guarantees the materials to the entrepreneur for the latter to build the work, then the issue of material guarantee is put up for discussion. The question consists of who will be responsible for the poor quality of materials. Referring to the Albanian civil code, a logical interpretation of the articles related to the contracts for works and services is required. The responsibility falls on the entrepreneur even, when the customer provides material. *The entrepreneur shall be liable for the loss or damage of materials is provided to him by the director, except when it is proved that his loss or damage occurred because the material was of inadequate quality, or because of the application of the instructions of the orderer for the performance of the work. The company had warned the ordering company in due course.*¹² This provision has in its composition also the exceptional case when the entrepreneur is dismissed from responsibility. Furthermore, *the entrepreneur has the right to waive the performance of the contract and to demand compensation for the damage he has suffered when the orderer does not replace the material of inadequate quality or when he does not change the instructions for the performance of the job even when he has been warned in due time by him.*¹³

The entrepreneur takes the chance to perform according to the criteria and technical determinations given by the commissioners. The third party is the supervisor or a commission established by parties to carry out the job before submission. The commission or the supervisor can control the performance of the job during the construction process. For the third parties in the contracts for works and services of construction of apartments or business units, the legislator has to implement articles which provide rights and obligations related to that contract. It is appropriate for the guarantors of delivery of the item and its members to be able to work in closer cooperation, even specifying the time and conditions of the payment of the price by the parties to the contract themselves. It is advisable to add a specific provision only

¹⁰ For more see article 853 of the Albanian civil code.

¹¹ For more see article 852 of the Albanian civil code.

¹² For more see article 855 of the Albanian civil code.

¹³ For more see article 854 of the Albanian civil code.

for the insurers of damage (contractor or non-contractor). These would offload the entrepreneur's margin of responsibility in the contract. There are too many entrepreneurship contracts that the entrepreneur in the quality of the interest parties controls for ensuring the good execution of the contract. For instance, lenders (natural or legal persons) who loan amounts of money to investors will be given them back on time. However, means to guarantee the execution of obligations are not the only means to ensure the contract. Third parties have to establish working groups to ensue that the work is processing. It is logical to submit that all competencies for the project management of construction of construction surfaces should be the exclusive competencies of the entrepreneur alone. This fact has to do with the conditions of being an entrepreneur. Generally, the parties to the contract do not anticipate or neglect to regulate the relationship between the entrepreneur and third parties. On the one hand, the entrepreneur will have difficulty in carrying out specialized work for which he does not have the capacity. On the other hand, the instructors will not be clear about who should be responsible in case of non-fulfilment of the obligation. However, such an intervention in the civil code is also necessary when subcontracting with third parties. It may bring convenience for the parties in drafting the contract in general rules. If the parties wish to provide detailed rules, they may set them freely in the contract. Professionals, workers, and other entrepreneurs who are not parties to the contract, have rights and respond solidly with the key entrepreneur (subcontractor) in carrying out specific jobs. The practice usually has shown that the neglect of subcontracted parties has failed to perform the work. The employee is legally alone facing the requests of the order or in fulfilment of the contractual obligation. On the other hand, the owner of the land/the buyer seeks the fulfilment of obligations from the entrepreneur. Therefore, it is urgent the intervention to the civil code to extend the rights of the entrepreneur to other contracting parties contracted by the entrepreneur. This intervention would give access to the interested parties, requiring the fulfilment of the contractual obligation.

6. The Form of contract under specific laws and legal acts

If we refer to the legal provisions sanctioned in the civil code, there is no specific form for enterprise contracts. However, the importance of the form is related to the object of the contract. The kind of jobs which intend to create or construct a movable thing do not oblige the parties to formalize the contract for works and services, utilizing the notarial act (Mehmeti - Ademi, 2023). Referring to the civil code, there is no specific form for entrepreneurship contracts. However, the importance of the form is related to the object of the contract. Regardless of the private rights, we must understand that the notaries' role in these acts has nothing to do with the will compliance of the parties. The notary does not guarantee the legacy of the parties' will. Also, he doesn't guarantee the will and the autonomy. Even though in many notary acts or contracts, we find passages where the notary states: *"The parties read the contract, understand it, and in the presence of one another, they sign it freely and unvestedly."* Despite this statement, the notary does not guarantee that there will never be any conflict between the

parties. The notary is not the mediator of the will of parties that comes as a consequence of expressing the will of the parties.

The notary is obliged to clarify the natural and legal persons when the latter performs notarial actions aimed at realizing the rights and protecting their legitimate interests for the rights and duties arising from them and warns of the legal consequences arising from the performance of notary actions, in order not to harm their interests by the disregard of the law; drafts notary acts clearly and purely, according to the rules provided for in law and in the regulations adopted by the National Notary Chamber.¹⁴

As noted above, the functions of the notarial act consist of two types. *Firstly*, the notary act proves the correct time when rights and obligations start. *Secondly*, the notarial act legalizes and makes known to public authorities contracts and private agreements concluded between private entities.

The non-existence of mechanisms to register the contracts for works and services in the public register has caused over the years problems regarding property rights. There are too many cases of violation of property rights. The phenomenon of non-registering real estate titles in the public register has been present in the long term. Even more, the law ordered the register of contracts/promises of sale or orders between entrepreneurs and interested entities, with the object of gaining ownership of construction surfaces. The obligation to protect the right of property under Article 1 of Protocol No.1 includes both positive and negative obligations. The main object of this provision is the protection of the person from unjustified interference of the state against the right to enjoy his or her assets (negative liability). Negative liabilities would include, for example, expectations or demolitions of property as well as restrictions imposed by planning, rent controls and temporary sequestrations of assets.¹⁵

7. Conclusion

This manuscript analyzed some practical problems of entrepreneurship contract regarding its elements. There are different elements which the civil code has not elaborated yet. The essential elements of these contracts are regulated by special laws or legal acts issued by the public authorities. Some legal provisions of special laws, regulations, Council of Ministers decisions or guidelines play a significant role in the classification of the entrepreneur. The Civil Code does not refer to these laws. That is the main reason why modifications and updates are necessary. It is crucial to make additions and adjustments concerning the entrepreneurial party to the enterprise contract. However, for the entrepreneur charged to build real estate, it must be underlined that the entrepreneur must dispense some criteria sanctioned by legal acts. Entrepreneurs have to register their companies according to the rules of commercial law. That is the first condition, "sine qua non", to exercise the activity. The contract price must be in the currency that the parties have agreed. If parties have not expressed the currency of the payment, then the currency shall be the currency of the

¹⁴ For more see article 63 of Law 110/2018 "On notary".

¹⁵ The Right to Property under the European Convention on Human Rights pp. 9 taken from (The Right of the Property under the European Convention of the Human Rights).

country where the parties deal to execute the contract.

As far as other contracting parties are concerned, it is clear that the third parties are under the umbrella of the entrepreneur. In all cases, even though the parties to the contract do not provide or neglect to regulate the relations between the entrepreneur and third parties. In my view, the conditionality of such relationships would make it hard to fulfil the contract. However, such interference with the civil code is also necessary for subcontracting situations with third parties.

In addition, all the problems and innovations outlined in this manuscript are estimable for the adjustments and changes in the civil legal framework. I believe that the remodeling of this contract is necessary to fit the market dynamics. This improvement of the civil legal framework will enhance the standards and strengthen the principle of legal security. Finally, all elements presented in this manuscript are considered necessary for the existence of the entrepreneurship contract and its correct utility.

References

Legislation, Acts and Regulations

Decision no.42 of the Council of Ministers "On the adoption of the Regulation and the criteria and procedures for issuing professional licenses for the implementation and disciplinary of legal subjekes exercising construction activities". (2008, January 16). https://www.infrastruktura.gov.al/wp-content/uploads/2019/04/Vendim-i-KM_42_16-01-2008.pdf

Instruction no.1 dt 13/04.2016 "On setting criteria and procedures registration of construction permits and related notarial acts of the object on the carabine phase and the finished object,. (2016, April 13). Recovered on www.drejtesia.gov.al

Law no.7850 "Civil Code of the Republic of Albania". (1994, July 29). Recovered on: <https://qbz.gov.al/preview/f010097e-d6c8-402f-8f10-d9b60af94744>

Law no.111/2018 "On Cadaster". O.J 28 (2019, March 6) (s.d.). Recovered on <https://www.ashk.gov.al/2021/05/26/28-2019-ligji-nr-111-2018-per-kadastren/>

Law no.110/2018 "On notary". (2018, December 20). Recovered on <https://euralius.eu/index.php/en/library/albanian-legislation?task=download.send&id=160&catid=25&m=0>

Law no.9901/2008 "On traders and Companies" updated O.J no.60 (2008 May 6) (<http://qbz.gov.al/eli/ligj/2008/04/14/9901> (2008)).

The Right of the Property unde the European Convention of the Human Rights . (s.d.). Recovered on: <https://rm.coe.int/handbook-10/16806fc136;>

Decision no.10/2008 of the Constitutional Court of the Republic of Albania . (2008 , March 19). Recovered on https://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php

Decision no 17/2005 of the Albanian Constitutional Court. (2005, July 18). Recovered on https://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php

Hasneziri, L. (2024). Terms of exclusion or limitation of contractual liability under English civil law. *Academic Journal of Business, Administration, Law and Social Sciences, Vol. 10. No. 1.*

DOI: <https://doi.org/10.2478/ajbals-2024-0003>

Mehmeti - Ademi, A. (2023). International norms and standards for juvenile justice. *Balkan Journal of Interdisciplinary Research, Vol. 9. No. 2.*

DOI: <https://doi.org/10.2478/bjir-2023-0005>

Karati, M. (2023). Law of Contracts: Their presence in corporate transactions learning. *European Journal of Economics, Law and Social Sciences, Vol. 7. No. 2.*

DOI: <https://doi.org/10.2478/ejels-2023-0003>