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APPROACH TO THE EUROPEAN LEGAL SYSTEM OF THE BUILDER LIABILITY: IN PARTICULAR, THE CIVIL LIABILITY FOR DAMAGES CAUSED BY HIS AUXILIARIES

1. INTRODUCTION: THE SETTING OF THE RENTAL OF WORK

The building is in Spanish law the object of contract called *building lease (lease contract work)*, whose dominant feature is that the contractor agrees to obtain a result of the work and not just to work.

The Supreme Court gives a concept of the figure in a descriptive way, saying that "the lease contract work", as described in the art. 1544 of the Civil Code, following the nomenclature of the Roman law, is, in a part in obtaining a result that, with or without the supply of equipment, is heading the creative activity of the employer, who assumes the risk of their duties in accordance with the rule *res perit domino*, and in another setting a certain price, which the principal must meet at the time of receiving the entrusted order or the time and manner agreed. "

The Civil Code, regulating this contract, refers to those parts of the same one with terms as "contractor" and "owner" or "owner of the work". The owner is also called "principal".

Most of the rules that the Civil Code dedicates to the lease of work are written, thinking only works in building construction as an object of the contract. In addition, such legislation has become obsolete since it is not adapted to new forms of construction. Thus, the Code thinks about an owner that entrusts a building to the contractor, without considering the actors currently involved in the construction process: the technicians (architects, gear), whom the owner may contract directly with the draft of the project and/or, direction of the works, the developer and subcontractors with which the contractor agrees to the execution of some jobs. The economic development and the construction market has made appear in the building construction the figure of the "property developer" -seller, who generally occupies simultaneously the owner's position of the area, builder and owner of the building, and he sells the building to others who have the property in a condominium, flat or, apartment. The property developer is liable for the wrong building, and this liability does not disappear although he had contracted with other companies the material execution of the work The TS has outlined in diverse resolutions the protagonism of the property developer in the lease of works, it assimilating to the contractor to the effects of his

incorporation in the art. 1591 of the Civil Code. This way, the Judgment of the Supreme Court 1279/2007, of December 13, indicates that "it is an unanimous doctrine of the Room 1 ª of the Supreme Court to compare the figure of the property developer with that of the contractor, to effects of including it in the decennial responsibility of the art. 1591 CC when they give themselves in the person of the property developer the following circumstances: the work is realized in his own benefit; the building is going to be sold to other people; the third buyers have trusted in his commercial prestige; the property developer chose and contracted the contractor and the technical personnel; and, finally, to adopt opposite criterion would suppose that the futures ownerships would have only the warranty of the major or minor solvency of the rest of the interveners of the construction ".

2. SOME IDEAS ABOUT THE RESPONSIBILITY OF THE CONTRACTOR IN THE SPANISH CIVIL CODE

Regulation of the Civil Code:

The contractor takes as a fundamental obligation the accomplishment of the work under the contract. He has to work also also according to the rules of his profession and the uses (art. 1258), in such a way that the lack of skill is synonymous of negligence.

The Code has specific rules about the responsibility of the contractor in case of complete loss of the bulilding distinguishing as the above mentioned loss takes place before or after delivered.

A. - Case of loss previous to the delivery.

We must distinguish if the contractor gives material or puts only his work.

1. The art. 1589 establishes that " If the one that contracted the work bound to put the material, must suffer the loss in case of the work be destroying before being delivered, except if there had been delinquency in receiving it "

The rule of which " *the thing dies for its owner* " is applied and while there is no delivery the owner of the thing is the contractor; and the exception of default in the constituent is in harmony with the foreseen in the art. 1096, third paragraph, which displaces on the bad debt the risks of the complete loss in the acts of God. There is default in the constituent when passed the term for the delivery of the work and finalized this one for the contractor and putting at the disposal of the owner, the constituent does not accept it without any motive objects.

2. The art. 1590 says that " the one that has bound to make his work or industry alone, cannot claim any payment if the work would be destroyed before having being delivered, unless there has been delinquency to receive it, or that the destruction has come from the bad(wrong) quality of the materials, with such that has warned opportunely this circumstance to the owner".

The rule is, so, that the contractor loses his work (or what is equal, the price of the work). But the above mentioned rule has two exceptions that the same rule gathers: when delinquency has existed in the constituent to receive the work and when the owner gives the materials and the destruction has come from its bad quality, providing that the contractor has warned opportunely this circumstance to the constituent. It is necessary to bear in mind, nevertheless, that the warning and eventual continuation of the work serves the contractor not to lose the right to the consideration, if the destruction happens before the receipt; but he does not liberate him of responsibility for ruin of the building in the hypothesis of the art. 1591.

B. - Case of loss after the delivery.

The general rule in the contract of lease of work is that the contractor does not answer of the loss when happened after the acceptance of the work. Nevertheless, the Code introduces an exception to this doctrine when it is a question of buildings, since these works cannot be valued properly, but with the course of the time.

The art. 1591 regulates, in effect, the conditions of the responsibility for the ruin of the buildings, distinguishing the diverse reasons which this one can obey:

1. If it strikes for vices of the construction, the contractor answers of the damages provided that the ruin will take place in ten years, counted since he concluded the construction.

2. If it owes to vice of the soil or of the direction, the architect will have equal responsibility and in the same time.

3. If the reason was the contractor´s unfullfillment to the obligations of the contract, he is held liable for a fifteen years period.

The contractor is responsible, in addition, for the work executed by the persons that will occupy in the work (art. 1596). We will penetrate into this topic later on since is included in the Principle of European Law of the Civil Responsibility elaborated by the European Group on Tort Law.

About the article 1591 CC. we can examine diverse questions:

A) Concept of ruin. The concept of ruin does not fit with the purely semantic one of a total or partial collapse of the work, but it includes also those faults in the construction that for exceeding the common blemishes they suppose a breach to the terms of the contract, which make be afraid of the loss of the building or to make it useless for its own purpose. This concept includes the " physical ruin " and also the " functional ruin "

This way, the Judgment of the Supreme Court 522/2008, of June 5, indicates: " it differs, close to the hypotheses of total or partial collapse (physical ruin) and of danger of collapse or progressive deterioration (potential ruin), in that is outlined the physical value of the solidity, the functional ruin called, which takes place in those suppositions in that the constructive faults affect in the suitability of the thing for his nor-

mal destination(destiny), and, consequently, it concerns the practical value of the utility, as exigency, close to the safety, of a suitable construction. There is functional ruin when the faults have an importance or gravity that they exceed the current blemishes making the thing useless or improper for his purpose, as well as different those that, for the same reason, constitute a violation of the contract or affect in the habitability of the building; what means that, as it is described in the Judgment of December 15, 2000 (RJ 2000, 10445) - by appointment of previous others-, the functional ruin gets over the rigorous and strict meaning of total or partial ruin of the made work, since it is authentic violation of the contract. Moreover, according to the Judgments of June 22 of 20006 (RJ 2006, 3741) and March 26, 2007, the existence of ruin, to the effects of the mentioned rule-art. 1591 of the Civil Code-, a double appraisal is needed: one consisting of the facts and circumstances which the constructive fault consists of, including the entity or gravity of the same one, and different, of juridical nature, which consists of the qualification of ruin, in someone of the modalities that the jurisprudence admits as such: physics, potential or functional ".

B) Vices constituting ruin: Imputability. The art. 1591 distinguishes three classes of vices: of the construction, imputing the responsibility to the contractor; of the direction or of the soil, holding the director architect liable for the damages.

In case the ruin of the building has caused for the concurrence of several reasons, some attributable to the technical direction(address) and others to the execution, without possibility of discerning the proportion in which each of these factors have influenced the result, this originates a joint responsibility of the diverse elements (promoter, architect, rigger and contractor, according to the diverse hypotheses) that allows to the harmed one, owner of the work or buyer, to direct the action against any of them, for the totality of the claim, withouthis being forced to sue all of them.

Period of warranty- The art. 1591 of the Civil Code establishes a few period of warranty to demand responsibility for vices or faults derived from the construction. These period are ten years if it is a question of " vices of the construction " or " vices of the soil or of direction ", as it says the above mentioned rule, counted since the construction was finished and of 15 years " if the reason will be its failure to perform the obligations of the contract ".

Actions derived from the previous responsibilities has to be carried out on a 15 years deadline

The Supreme Court has declared that the subcontractor also answers in case of ruin if he has acted neglectfully for application of the art. 1902 of the Civil Code.

C) Joint liability of the persons in charge. In principle, the responsibilities of the contractors and technical personnel sued by ruin of the construction are individual. It means that the reason of the ruin must turn out to be specific to any of them.

3. REGULATION UNDER 4/1999 LAW (LOE)

The Construction bussiness is one of the most important economic activities in the Spanish Economy. The 4/1999 Law completes and partially revokes the Civil code rules.

The process of the building, for its direct incident in the configuration of the spaces, implies always a commitment of functionality, economy, harmony and environmental balance of evident relevancy from the point of view of the general interest; this way it is ruled in the Directive 85/384/CEE of the European Union, when it declares that " *Whereas architecture, the quality of buildings, the way they blend in with their surroundings, respect for the natural and urban environment and the collective and individual cultural heritage are matters of public concern; whereas, therefore, the mutual recognition of diplomas, certificates and other evidence of formal qualifications must be founded on qualitative and quantitative criteria ensuring that the holders of recognized diplomas, certificates and other evidence of formal qualifications are able to understand and give practical expression to the needs of individuals, social groups and communities as regards spatial planning, the design, organization and construction of buildings, the conservation and enhancement of the architectural heritage and preservation of the natural balance¨*

Therefore, this Law rules the construction process updating and completing the legal framework of its agents and professionals, stating their obligations in order to establish responsibilities and to cover the guarantees to the users and consumers defining the basic requirements that must satisfy the buildings.

This law defines the legal concept of the building and the essential principles ruling this activity. of the Law is delimited, needing specifying those works, so much of new construction as in existing buildings, which must be applied.

Due to the increasing social demand of quality, the Law establishes the basic requirements that must satisfy the buildings in such a way that to protect the users one agrees the guarantee not only in the technical requirements of the constructed but also in the establishment of a property insurance.

These requirements include both the aspects of functionality and of safety of the buildings and those modals to the habitability. The obligatory project concept is established, for the development of the works included in the area of the Law, ordering the necessary coordination between the partial projects that could be included, as well as the documentation to delivering the users for the correct use and maintenance of the buildings.

It is regulated, likewise, the act of receipt of work, given the importance that has in relation with the beginning of the period of responsibility and of prescription established in the Law.

Regarding builder´s obligations, the paragraph 2 of the same rule establishes the following ones:

Executing the work with subordination to the project, to the applicable legislation and to the instructions of the director of work and of the director of the execution of the work, in order to reach the quality demanded in the project.

Holding the qualifications or professional training that he(she) enables for the fulfillment of the conditions exigibles to act as builder.

Designating the architect in chief who will assume the technical representation of the builder in the work and who as his(her,your) qualifications or experience will have to have the suitable training of agreement with the characteristics and the complexity of the work.

Organising the work the human and material resources.

Coordinating the subcontractors of certain parts or facilities of the work inside the limits established in the contract.

Providing the guarantees ordered in the article 19 of the LOE.

As for the period of responsibility they are established in periods of one, three and ten years, depending on the diverse hurts(damages) that could appear in the buildings:

"Furthermore his contractual responsibilities, the natural or juridical persons who intervene in the process of the building will held responsibility to the owners and the third parties concerning property damages caused in the building inside the period indicated, counted from the date of receipt of the work, without objections.

a) For ten years, they will be liable for the property damages caused in the building by vices or faults concerning the foundation, the supports, the girders, the wrought ones, the walls of load or other structural elements, and that compromise directly the mechanical resistance and the stability of the building.

b) For three years, they will be liable for the property damages caused in the building by vices or faults of the constructive elements or of the facilities that cause the breach of the requirements of habitability of the paragraph 1, letter c), of the article 3 of the LOE.

c) The builder also will answer of the property damages for vices or faults of execution that should concern elements of completion or ended of the works in the term of one year (art. 17.1)

When the builder subcontracts with other natural or juridical persons the execution of certain parts or facilities of the work, it will be directly responsible for the property damages for vices or faults of his execution, without prejudice of the repetition to which there will be place.

Likewise, the builder will answer directly of the property damages caused in the building by the deficiencies(faults) of the products of construction acquired or accepted by him(it), without prejudice of the repetition to which there will be place (art. 17.6).

The responsibilities for damages will not be suitable to the agents who intervene in the process of the building, if there it is proved that those were caused by act of God, major force, act of third or by the damaged himself (art. 17.8)

The action to claim responsibilities expire in the space of two years, as those of repetition against the allegedly responsible agents. For what refers to the guarantees the Law establishes, for the buildings of housing, the obligatory subscription for the builder, during the term of one year, of an assurance

of property damages or of caution, or the retention for the promoter of 5 for 100 of the cost of the work to face to the property damages caused by a deficient execution.

The obligatory subscription is established equally for the buildings of housing by the promoter of an assurance who covers the property damages that cause in the building the breach of the conditions of habitability or that concern the structural safety in the space of three and ten years, respectively.

The Decree 314/2006, of March 17, approves the Technical Code of the Building (modified by RD 1371/2007, of October 19) that is formed as normative instrument that fixes the basic requirements of quality of the buildings and its facilities.

This Code gives fulfillment to the basic requirements of the building established in the Law 38/1999, of November 5, in order to guarantee the safety of the persons, the well-being of the society, the sustainability of the building and the protection of the environment, harmonizing the national legislation with the regulations of the European Union on the matter.

4. RESPONSIBILITY OF THE OWNER OF THE BUILDING FOR THE DAMAGES CAUSED BY HIMSELF

This concrete civil responsibility in conformity with right of the owner of the buildings is specifically ruled in the Articles 1.907, 1.908, 1.909 and 1.910 of the Civil Code, which they establish:

Article 1.907:

The owner of a building is responsible for the damages that ensue from the ruin from everything or part of it for the lack of the necessary repairs.

Article 1.908: Equally will be held responsible the owners of the damages caused by 1. º the explosion of machines that had not been taken care by the due diligence, and the inflammation of explosive substances that were not placed in sure and suitable place.

2. º the excessive smokes, which are harmful to the persons or to the properties.

3. º the fall of trees placed on public areas when it is not caused by major force.

[…]

5. PRINCIPLES OF EUROPEAN TORT LAW OF THE EUROPEAN GROUP ON TORT LAW: AN ACADEMIC PROPOSAL.

At present, there isn´t a single legal system throughout the EU regulating the builder liability. However, there are initiatives that have tried to propose to the law makers several theoretical solutions and future legal rules.

Thus, the European Group on Tort Law[1] or Tillburg Group is a group of scholars in the area of tort law which has been meeting since 1992 and has drafted a collection of Principles of European Tort Law.

In general, the Principles identify the main points of a legal system (the tort law system) on which there is agreement in the European legal systems (action or omission, damages, causal link, negligence). Thus, the main points of the builder´s civil liability will be those of the continental tradition with some elements of the tradition of Common Law (indeterminate legal concepts such as reasonable, the growing importance of tort).

However, a quite important subject in the field of insurance is the involvement in the building of several independent contractors or the involvement of a contractor with several assistants.

The builder liability for damage caused by his auxiliaries is one of the most important case of this civil liability and it´s regulated by one of these Principles. We are going to speak about this Principle the next twenty minutes.

Thus, for the case of large projects involving a main contractor and several assistants, the proposal of the European Group on Tort Law contributes to solving some of the difficulties that exist in the field of liability.

The article 6.102 of Principles of European Tort Law states[2]:

Art. 6:102. Liability for auxiliaries

A person is liable for damage caused by his auxiliaries acting within the scope of their functions provided that they violated the required standard of conduct.

An independent contractor is not regarded as an auxiliary for the purposes of this Article.

In this text there are two different cases about the contractor liability.

Independent contractor liability.

First, we must remember that the contractor will be liable to the owner of the work under a contract. In this case, the insurance coverage may be whether or not the same as covering his liability to third parties.

However, we are interested in differentiating it from assistants liability. The contractor is an independent agent of the building and participates in it in coordination with other participants (staff developers, engineers, architects, etc.). It is true that in some cases may be a relationship of subordination, but the contractor keeps always a very broad scope for action within the project implementation and technical instructions.

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[1] European Group on Tort Law, *Principios de Derecho Europeo de la Responsabilidad Civil*, Thomson-Aranzadi, Madrid 2008.

[2] European Group on Tort Law, *Principios de Derecho Europeo de la Responsabilidad Civil*, Thomson-Aranzadi, Madrid 2008.

As the academic group says, the art. 6:102 (2) refers to the case of truly independent contractor. In this case, the contractor supervises and conducts its activities with complete independence. He has a wide freedom of tools and people to carry out the work under contract.

As the European Group on Tort Law[3] said, in most legal systems, there isn´t "strict liability" in the case of damage caused by the independent contractor, *"it would seem unfair to impose liability on the defendant when he has no control over the person who behaves in an unlawful manner and he does not control his way to work"*[4].

Thus, this rule doesn´t allow to say that the others participants in the building are liable for the damages caused by the work of the independent contractor. That is exactly their specialty. Being independent, we can´t extend his liability to those persons who have not been able to avoid the action that caused the damage. This means, of course, that it is desirable that the independent contractor hired their own insurance coverage and, therefore, this situation opens the door to possible cases of concurrence with other insurance of the other people involved in the construction process.

Auxiliary liability.

The case of the liability for damages caused by the auxiliaries of the principal contractor is different.

The strict liability exists from the Napoleonic Code. This liability has different origins. In the opinion of the European Group on Tort Law, this liability is based on the risk created by the activity or on the benefit derived from such risk, being both -risk and benefit- on the same side.

The auxiliary liability may accumulate to principal contractor liability or it may disappear in cases of ordinary negligence.

Thus, the Group acknowledges the existence of the two options and chooses the latter[5]:

To exonerate from liability for damage to third parties in case of ordinary negligence, which is the solution choosen by the most of the legal system.

To declare the auxiliary liability, with the risk of an action in tort, but in combination with a reimbursement right against the employer in case of ordinary negligence.

For the purposes insurers, auxiliaries liability should be treated differently than the independent contractor liability. Indeed, the auxiliary is supervised by the principal contractor in a manner that falls within the area of risk that the principal contractor creates.

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[3] European Group on Tort Law, *Principios de Derecho Europeo de la Responsabilidad Civil*, Thomson-Aranzadi, Madrid 2008.

[4] S. GALAND-CARVAL, Comparative Report, PETL *Liability for Others*, nm. 64.

[5] European Group on Tort Law, *Principios de Derecho Europeo de la Responsabilidad Civil*, Thomson-Aranzadi, Madrid 2008.

It should be noted, therefore, that the insurance company shall be think, under subscription of the policy of the principal contractor, about the number of auxiliaries who can work with him. This will have consequences, for example, to define the risk covered and even to establish exclusions that must be accepted by the insured.

Some solutions of the Spanish market.

The Spanish insurance market offers several solutions and coverages for the construction industry demands. Therefore, risk managers tend to look for coverages including basic and optional solutions.

General liability policy: use to have some specific characteristics

- Protection for failure to detect the faulty workmanship of others

- Claims made coverage

- Coverage for your own liability from design services performed by:

In-house staff

Design firms as subcontractors

Joint ventures with design firms

Agency & at-risk construction management services

- Self-insured retention levels:

- Basic policy excess over project specific policies

Specific and optional coverages:

Employer´s liability

Cross liability In the event of claim by one insured for which another insured covered by the same policy may be held liable, this endorsement covers the insured against whom the claim is made in the same manner as if separate policies had been issued. However, it does not operate to increase the insurance company's overall limit of liability.

Legal fees and expenses beyond limit

However, according with the Spanish market solutions, the contractor will probably have the following exclusions among others:

- A damage to work exclusion
- A damage to the product exclusion
- An impaired property exclusion

- Absolute pollution exclusion

Therefore, the Spanish market covers actually the subcontractor´s liabilityu under a negligence *in eligendo* basis. Of course, the subcontractor hols fully liable regarding its negligence regarding the contractor´s insurance company.

6. SOME CONCLUSIONS

The proposal of the European Group on Tort Law allows to extract some consequences from what should be an uniform legal system of contractor liability.

First, the independent contractor has a direct liability from two points of view: liability under a contract to the others contractors; and tort. Therefore, his insurance coverage should be independent of the insurance of the others participants in the building.

The case of the contractor's auxiliaries case is different and more demanding for the insurance company. Because of the relationship of dependency and control exercised by the main contractor on his auxiliary, it is possible that the assistant liability disappear in the cases of ordinary negligence, or that auxiliary liability accumulate to the principal contractor liability.

The latter is the solution in the Spanish Civil Code, whose article 1596 provided that the contractor is responsible also for work performed by those who deal in the works. At present, this question is taken and developed in Article 17 of the Law on Management of Construction.

The Spanish insurance market covers the subcontractor´s liability under the general coverage. The insurance company is allowed to claim the reinboursement of the compensation it had to pay under such a coverage.

To sum up, we consider the Spanish market complies with the European proposal of common principles regarding the contractors and subcontractor´s liability.