Search News and Articles

Search

Legal Developments worldwide

Issues of Construction Guarantee Period Regulation under Kazakh Civil Legislation

May 2016 - Real Estate & Property. Legal Developments by **AEQUITAS**.

More articles by this firm.

Valikhan Shaikenov, Partner

Ardak Idayatova, Senior Associate

Construction work quality guarantee issues are going crucial, given the magnitude of projects, the amount of funds invested and the risks associated with the safety of built facilities for human life and health.

While the statutory regulation over goods quality guarantee looks fairly comprehensible, there are lots of questions regarding the guarantee periods in the field of construction. In particular, this is due to the vague wording of pertinent regulations and to contradictions between the provisions of the RK Civil Code**>[1]** and the Law on Architecture**[2]**

This article does not seek to resolve these issues, merely describing the practical difficulties faced by participants in civil turnover and by judicial practice.

Minimum Duration and the Possibility to Waive the Guarantee Period

If one goes by the provisions of the RK Civil Code, the issue of establishing the guarantee period as such is left to the discretion of the parties to a construction contract, i. e., it may either be stipulated or omitted in the contract.

The above stems from the contents of paragraph 1 of Article 665 of the RK Civil Code, which says that "*unless otherwise provided for by the construction contract* (emphasis added – *A. I. and V. Sh.*), *the contractor shall guarantee the attainment by the construction facility of the indices specified in the design-and-budget documentation and the possibility to operate the facility in accordance with the contract for the duration of the guarantee period.*"

At the same time, establishment of the guarantee periods for construction facilities operation is also governed by the Law on Architecture. Although paragraph 1 of Article 69 of the Law contains a back reference to the RK Civil Code, stating that "*the guarantee period for construction facilities operation shall be established in accordance with the Civil Code*" the same paragraph further reads that "*in all other cases the guarantee period shall be established depending on the constructed facility's statutory service life (normative term of operation) (according to the building's class of durability in general or the specific types of construction-and-assembly work performed) in case the customer and the contractor (general contractor) have entered into a construction contract, but cannot be less than two years of the facility commissioning date* (emphasis added – *A. I. and V. Sh.*)."

The following questions are arising:

- What should be understood as "*other cases*" taking into account that the construction is performed under the construction contract directly governed by the RK Civil Code?
- Can the quoted provision of the Law on Architecture mean that the two year minimum guarantee period is stipulated only for those cases where the parties have agreed to establish the guarantee period (taking into account that paragraph 1 of Article 665 of the RK Civil Code regulates the possibility of such choice optionally)? To put it otherwise, the contractor may either refuse to provide any guarantee at all, or, if the contractor assumes the guarantee period obligations, such period cannot be shorter than two years of the

facility commissioning date,

If the logics of peremptory regulation over guarantee periods in respect of particular construction facilities is associated with such facilities' statutory service life (normative term of operation), the permissibility of contractor's refusal to provide any guarantees whatsoever for the quality of work performed by him is questionable and looks inconsistent.

Subject to the above, paragraph 1 of Article 69 of the Law on Architecture needs to be made more specific as to which cases should fall within the requirement to establish the minimum two year guarantee period.

Correlation between the Guarantee Periods and Latent Defects Detection Periods

Unlike the Russian legislation, the RK Civil Code does not distinguish clearly enough between the guarantee periods and the defect detection periods, which causes practical difficulties.

On the one hand, paragraph 1 of Article 665 of the RK Civil Code leaves it to the parties' discretion to set the guarantee period in a construction contract. At the same time, paragraph 5 of Article 630 of the RK Civil Code provides for a three year latent defect detection period, which cannot be cancelled by agreement of the parties. If we interpret the said paragraph literally, it suggests that the period to notify the contractor of the latent defects detected by the customer is the guarantee period:

"*The maximum period for notifying the contractor of the latent defects detected by the customer shall be one year, and in respect of work relating to buildings and structures, and, regardless of the type of work, – in respect of defects knowingly concealed by the contractor – three years of the work commissioning date. Legislative acts or the contract may establish the periods (guarantee periods)* (emphasis added – *A. I. and V. Sh.*) *of longer duration.*"

However, literal interpretation gives rise to internal contradiction between the regulations of the RK Civil Code, which, on the one hand, does not require mandatory establishment of the guarantee period under a construction contract, and, on the other hand, mandates the three year guarantee period for latent defects.

The contradiction is removed if we make a distinction between the guarantee periods and latent defect detection periods. Still, the inadequate wording of paragraph 5 of Article 630 of the RK Civil Code confuses the two categories of periods under consideration, which gives rise to practical problems in the course of interpretation and law-application.

It should be mentioned that, unlike the Kazakh legislation, the legislation of the Russian Federation clearly distinguishes between the guarantee period and the defect detection period. The Russian legislation does not mandate establishment of the guarantee period for construction work:

"*Unless otherwise provided for by the construction contract* (emphasis added – *A. I. and V. Sh.*)*, the contractor shall guarantee the attainment by the construction facility of the indices specified in the technical documentation and the possibility to operate the facility in accordance with the construction contract for the duration of the guarantee period. The guarantee period established by the law may be increased by agreement of the parties.*" (paragraph 1 of Article 755 of the RF Civil Code).

In turn, the RF Civil Code dedicates several articles to the periods for detection of defects in contract work, which renders the pertinent legal regulation comprehensible and distinct from the guarantee periods regulation.

Article 724 of the RF Civil Code establishes a two year defect detection period for all types of contracting. For a construction contract, such period is five years (Article 756 of the RF Civil Code). This period applies regardless of whether or not the guarantee period is established for the work performed.

If the guarantee period stipulated by the parties has expired, but the statutory defect detection period is still in effect, the customer may, within the defect detection period, file a claim against the contractor in connection with the undue quality of contract work.

This specifically stems from the contents of paragraph 4 of Article 724 of the RF Civil Code setting forth that "*in case where the guarantee period provided for by the contract is less than two years and the defects in the work results have been detected by the customer after the guarantee period has expired, but within two years of the moment provided for in paragraph 5 of this Article, the contractor shall be liable, if the customer proves that the defects have arisen prior to the transfer of work results to the customer or for the reasons arising prior to that moment.*"

The key difference between the guarantee period and the defect detection period is in the fact that, as regards the guarantee period, the burden of proving the due quality of work performed lies with the contractor (presumption of contractor's guilt).

Paragraph 2 of Article 755 of the RF Civil Code says that "*the contractor shall be liable for the shortcomings (defects) detected within the guarantee period, unless he proves* (emphasis added – *A. I. and V. Sh.*) *that they have occurred due to the normal wear and tear of the facility or parts thereof, its incorrect operation or incorrect instructions for its operation developed by the customer himself or by third parties engaged by the customer, or improper repair of the facility performed by the customer himself or by third parties engaged by the customer.*"

As for the defect detection period, the burden of proving the undue quality of work performed lies with the customer (presumption of contractor's innocence). This is implied by paragraph 4 of Article 724 of the RF Civil Code:

"*In case where the guarantee period provided for by the contract is less than two years and the defects in the work results have been detected by the customer after the guarantee period has expired, but within two years of the moment provided for in paragraph 5 of this Article, the contractor shall be liable, if the customer proves that the defects have arisen prior to the transfer of the work results to the customer or for the reasons arising prior to that moment* (emphasis added – *A. I. and V. Sh.*)."

Taking into account the positive experience of the Russian legislator and the practical problems of interpreting Article 630 of the RK Civil Code, we deem it necessary to add clarity to the distinction between the guarantee period and the latent defect detection period, be it legislatively or via generalization of the Kazakh courts' judicial practice.

[1] The Civil Code of the Republic of Kazakhstan No. 409-I, dated 1 July 1999 (Special Part), as amended.

[2] Law No. 242-II of the Republic of Kazakhstan "On Architectural, Town-Planning and Construction Activities in the Republic of Kazakhstan" dated 16 July 2001, as amended.