

**Wyrzykowski W.**

*PhD in Law, Department of Commercial Law Faculty of Law and  
Administration Silesian University in Katowice*

## **LIABILITY FOR THE DAMAGE HAPPENED ON THE CONSTRUCTION SITE UNDER THE POLISH CIVIL CODE**

### **1. Introduction**

The fulfillment of construction projects is a very complex process, which includes a number of factual and legal issues. There are a lot of different persons participating in this process, i.a. investor, building contractor, designer or subcontractors. According to that it is not difficult to imagine that the number of participating subjects (entities) and complex tasks fulfilled by them will increase the risk of damage, which can occur in a property of the investor or in a property of other parties participating in this process or even in a property of third party. The potential assertion of claims for damages in this cases may spawn a number of legal uncertainties, which concerns the problems to determine a liable subject and also the basis for civil liability. This article presents the most important issues concerning the civil liability for damage happened on the construction site.

### **2. Liability for damage happened on the construction site pursuant to Art. 652 of the Polish Civil Code**

It should be emphasized in the first instance that Poland as one of the few countries in Europe has the separated regulation of the construction works contract. This regulation was located in art. 647 - 658 of the Polish Civil Code [20]. The provision of Art. 647 of the Polish Civil Code includes the legal definition of the construction works contract. Pursuant to this Article a construction works contract is defined as a contract under which the contractor commits to hand over the facility provided for in the contract performed in accordance with the design and technical knowledge, and the investor commits to carry out the actions required by the relevant regulations to prepare the works, especially to hand over the construction site and to deliver the design and to accept the facility and pay the agreed remuneration. In the subsequent provisions were closely stipulated rights and obligations of the parties of this type of contract. Beyond that the different (in reference to general provisions) rule of liability for damage happened on the construction site was directly implemented into Art. 652 of the Polish Civil Code. According to this provision, if the contractor took over the construction site from the investor

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based on an acceptance certificate (preparation acceptance document), he is liable on general terms for any damage caused on the site until the facility is handed over. official.

In the case of analysis of this above mentioned provision these circumstances should be firstly marked which do not cast any doubts. The obligation to hand over a construction site has two legal bases: the definition of a construction works contract (Art. 647 of the Polish Civil Code) and also the provisions of the Construction Law Act [21]. In the provision of Art. 3 pt. 10 the Construction Law Act was included the legal definition of the construction site. Under this provision, the construction site is a space in which construction works are carried out and also the space occupied by the machine facilities construction.

Beyond that, it should be noted that in the legal literature [1, p. 455; 2, p. 155; 3, p. 348; 4, p. 94] and jurisprudence [5; 6] is undeniable that the cited provision of Art. 652 of Polish Civil Code does not constitute an independent basis for liability and the reference to the general principles of liability included in this provision is also a reference to the both rules of liability - contractual liability and tort liability. The contractual liability of the contractor may occur, when the damage was caused in the legal sphere of his counterparties (trade partners) and was a result of non-performance or improper performance of contractual duties of the contractor. The legal conditions of this liability shall be specified in accordance with the provisions of art. 471 et seq. of the Polish Civil Code. There are not serious objections to these issues and they will be omitted in the next part of this paper. It should be emphasized that the rules of contractual liability does not change under the content of Art. 652 of the Civil Code, because they may be applied if there was no site preparation acceptance document (acceptance certificate).

On the other hand, as has been mentioned previously, under Art. 652 of the Polish Civil Code contractor is liable not only to persons (entities) with whom he has a legal relationship, but he will be also liable to third parties. To all matters concerning liability to these persons (entities), Art. 652 of the Polish Civil Code refers to the tort liability (liability *ex delicto*). It should be kept in mind that the legal doctrine and judicature point out that the composite regime of tort liability, which is stipulated in 415 et seq. of the Polish Civil Code, will be lead to that the possibility to hold a responsibility by the contractor to third parties requires an adjudication, which of the tort liability rules should be applied in a particular case. The basic rule of tort liability was expressed in Art. 415 of the Polish Civil Code. According to that provision, anyone who by a fault on his part causes damage to another person is obliged to remedy it. Because of that the contractor will be liable for the damage caused

through his fault, unless he is not at fault. It should be indicated that the above mentioned interpretation of Art. 652 of the Polish Civil Code could cast some doubts. First of all, in the Polish legal literature was expressed the view that the essence of the legal principle resulting from Art. 652 of the Polish Civil Code cannot rely only on referral, or indication basis for liability contractor [4, p. 94 and next]. This view of that provision may lead ultimately to the pointlessness. If the provision of Art. 652 of the Polish Civil Code would have the meaning that this provision is only a reference to the general principles, which stipulate in the Civil Code conditions of this type of liability, and the contractor could be held to liability only after the fulfilling of these conditions, this regulation would be a *superfluum*. On the other hand, the principle of liability of the contractor will be the same, regardless of that if it was handover of the construction site from the investor based on an acceptance certificate or not. It should be noted that if there was not a handover of the construction site, the contractor is still liable for damages caused by his wrongful conduct in the construction area under Art. 415 of the Polish Civil Code. For greater clarity of the presented considerations can be instanced some law case. In a situation when the scaffold dropped off and fell to the ground causing damage to third parties as a result of the wrongful act or omission of the contractor works, the contractor will be liable for the harm, regardless of whether it was a handover of the construction site from the investor based on an acceptance certificate or not. Because of that the sense of Art. 652 of the Polish Civil Code cannot be reduced to a reference to general liability regimen. According to that it should be considered whether has the implementation of this provision by the Polish legislator a wider connotation. It should be emphasized that two possibilities can be raised as a *ratio legis* of this provision. The first possibility assumes that the reason for this provision is an attempt to strengthen the legal position of the aggrieved party which essentially is third party. The sense of the second possibility deem that the essence of the implementation of this regulation refers to the relations between the parties of the construction works contract, i.e. between the investor and contractor.

First of all, it should be noted that from the system point of view Art. 652 of the Polish Civil Code has been placed among the provisions regulating the construction works contract. In consequence of that it is more proper to search for the aim of the implementation of this provision in the relations between the parties of construction works contract. In addition, this is suggested also by the situation that is beyond the scope of the Art. 652 of the Polish Civil Code, i.e. when there was no an acceptance certificate (preparation acceptance document) of the construction site, the aggrieved party is also protected by

law. In such situations, there is a possibility to pursuing rights on a general principles. In connection to that *ratio legis* of Art. 652 of the Polish Civil Code should be determined by analysis of the relationship between parties of the construction works contract, especially when there was a handover of the construction site from the investor to contractor based on an acceptance certificate.

It is indicated in the Polish legal literature [7, p. 287, 8; p. 579; 9, p.1115 and next] that the obligation to hand over the construction site, which is the fundamental duty of the investor, does not have a unitary character. Depending on the system of performance construction works, the handover of the construction site may be achieved in a variety way. In the case of contracts of the partial performance of construction works and sub-contracts, it is to make available for contractor only a field of Works and the whole construction site is not transmitted to the possession of the contractor. In these situations the part of area or facility is only made available for the contractor. In the case of the general contractorship of construction works or general performance of construction works a general contractor transfers the whole construction site into possession of the contractor. From this moment the contractor is defined as the host of this area. Hence, we can assume that the rationale of the Art. 652 of the Civil Code is to protect the investor, who loses factual control over this area after taking over the construction site based on acceptance certificate. These deliberations do not explain all arising questions concerning the substance of the provision of Art. 652 of the Polish Civil Code. One of such question is the role of this provision in relation to tort liability of the investor and the contractor for damages caused on the construction site. This is all about answering the question: in which way does Art. 652 of the Polish Civil Code impact on this relation; does Art. 652 of the Polish Code exclude a tort liability of investor and can interpretation of this provision lead to the adoption of joint and several liability of these persons (entities) under Art. 441 of the Polish Civil Code.

### 3. Liability for the collapse of a structure

Taking above mentioned into consideration and remaining about the fact that the regime of tort liability is not created homogeneous, furthermore the liability of the contractor pursuant to other rules of liability than fault should be also deliberated. It should be noted that this issue was the subject of statements of representatives of the Polish doctrine. However, the analysis mainly relates to the relation between Art. 652 and Art. 434 of the Polish Civil Code. This last provision regulates the liability of an owner-like possessor of a structure for any damage caused by the collapse of this structure. The analysis of presented

in the legal literature opinions leads to the distinction of several basic stances. According to the first stance, since the moment when the contractor took over the construction site from investor based on an acceptance certificate, the contractor should be liable for damage caused in this site, because he becomes the owner-like possessor [10 , p. 60; 11,p. 134].

Subsequently, there is also a standpoint, according to which the contractor is not an owner-like possessor but only a holder since the moment, when he took over the construction site. The contractor is exercising sway in the interest and on behalf of the investor, but his liability for damages on the construction site arises from the Art. 652 of the Civil Code that modifies the personal scope of the provision of Art. 434 of the Civil Code, regardless of the contractor is the possessor or not [4, p. 92 and next; 12 ,p. 532; 2, p. 160]. This view refers to the opinion expressed earlier in the legal literature. Pursuant to that opinion the meaning of Art. 652 of the Polish Civil Code consists in waiving the passive legitimacy of the contractor and mandating the passive legitimacy of investor in these situations, when the Polish law links a liability for a damage caused on the construction area with possession of this area and the structure or links it with a fact that on the construction site were construction works [13, p. 113].

The third point of view assumes that both the investor and the contractor are jointly and severally liable for damages on the construction site. Under opinion of the representative of this view, the joint and several liability of the investor and the contractor is a result of the fact that the investor is still an owner-like possessor, unless the construction site was taken over from him based on an acceptance certificate. This liability do not exclude liability of the contractor under the provision of Art. 652 of the Polish Civil Code and an investor as owner-like possessor will be jointly and severally liable for a damage caused as a result of the collapse of the structure [1, p. 415; 3, p. 348 and next; Compare: 22].

It should be mentioned that in the literature was also expressed the fourth view which assumes that the liability for the damage on the construction is held only by the investor, because he is owner-like possessor of construction site for the whole period of construction, regardless if the contractor took over the construction site based on an acceptance certificate [7, p. 287; 15, p. 45 - 51; 16, p. 43 - 50; Compare: 17, p. 331 - 334]. Presenting the above mentioned opinion, it cannot be assumed that the contractor is liable under Art. 434 of the Civil Code of Poland due to the disposition of Art. 652 of the Civil Code that waives a passive legitimacy of the investor which is regarded as the owner-like possessor and put on this place a passive legitimacy of the contractor. The view that the Polish legislator changed by Art. 652 of the Civil Code a person

(entity) which hold a liability for the damage caused on the construction site, namely, that in Art. 652 of the Civil Code it is all about the statutory assumption of liability for every type of damage, raises serious objections. The similar opinion was already expressed in the Polish legal literature. The problem of determining the person which is liable for the construction or demolition of a structure must be resolved - pursuant to Art. 434 of the Civil Code - on the basis of analysis of the legal relationship that connects the investor and the contractor. As it was indicated it seems reasonable that the resolution of this issue has to be analyzed in accordance with the text of Art. 434 of the Civil Code CC in comparison with Art. 336 of the Polish Civil Code. According to that a contractor will not be covered by the above mentioned risk [18, p. 604].

Furthermore, it should be noted that the proper view is that view according to which the person (entity) liable for the damage caused as a result of the collapse of the structure is only an investor.

Due to the above mentioned circumstances, we cannot share the view that the liability of the contractor results from the fact that the contractor becomes owner-like possessor at the time of taking over the construction site based on an acceptance certificate and his liability does not derive directly from Art. 434 of Civil Code, because the contractor cannot be neither owner-like possessor nor dependent owner. His right can be classified only as right to hold (he is entitled only as a holder). The presented view can be also supported by the statement that if the contractor will be only the owner-like possessor, the disposition of Art. 652 of the Polish Civil Code would be completely pointless. If the contractor was an owner-like possessor since the moment of handover the construction site based on an acceptance certificate, his liability would result directly from Art. 434 of the Civil Code.

On the other hand, we can also defend the view that Art. 652 of Civil Code modifies a person (entity) specified in the wording of Art. 434 of the Polish Civil Code and implements construction contractor instead an owner-like possessor which is an investor. This statement would justify the pertinence of enforcement Art. 652 of the Polish Civil Code, which only in this case could show not only the basis of liability, but also could extend it to these situations, in which investor is exclusively liable. Unfortunately this point of view raises a lot of serious objections. First of all, the adoption of this standpoint has not unambiguous reflection in the Polish regulation. Approval of this standpoint requires an answer if through the application of Art. 652 of the Polish Civil Code CC was modified the tort liability specified, e.g. in Art. 435 or 436 of the Civil Code.

It should be noted that we cannot also share the view that the implementation of Art. 652 of Civil Code causes joint and several liability of the investor and

the contractor. Pursuant to the Art. 441 of the Polish Civil Code the joint and several liability for the damage caused by the tort can happen if several persons are liable for damage caused by tort. For this reason, the confirmation of joint and several liability in this case needs to determine the basis for this liability.

As it was stated many times, the provision of Art. 652 of Civil Code does not constitute this basis and or is not a separate basis at least. In other words, it cannot be considered that the contractor is liable in accordance with Art. 652 of the Polish Civil Code and the investor as owner-like possessor is liable pursuant to Art. 434 of the Civil Code, because the provision of Art. 652 does not constitute an independent basis for liability of the contractor and, as it was mentioned above, refers to the general principles. The adoption of opposite approach to this situation should base on the assumption that pursuant to Art. 434 of the Polish Civil Code the investor is liable as an owner-like possessor and the contractor is liable under this same provision of Art. 434 of the Polish Civil Code in accordance with Art. 652 of the Polish Civil Code. Other arguments support also rejecting this point of view.

On another note, it should be postulated as *de lege ferenda* remarks, that due to the multiplicity of interpretation of the Art. 652 of the Polish Civil Code, which is a result of its imprecision, it seems reasonable to make the correction by the Polish legislator. In this case, as a solution of this problem can be postulated that the legislator should clearly indicate in the wording of this provision that since the moment of taking over the construction site based on an acceptance certificate until handover of the facility the contractor is liable for damages caused on the site also on the basis of risk. It seems that this postulate is justified, for a reference to the comparative legal analysis. It should be emphasized that pursuant to the wording of Art. 837 BGB, the liability specified in Art. 836 BGB (Provision of Art. 836 stipulates the liability of owner-like possessor for the collapse of a structure) is held by person who has the right to administer someone's estate and is either an owner-like possessor of building constructed on the land or factory (*Eigenbesitzer des Gebäudes oder des anderes Werk*) instead by owner-like possessor. In German legal literature and judicature is highlighted that this provision modifies the liable person (entity) mentioned in Art. 836 BGB and specifies clearly that the only person (entity) which is liable for the damage caused by the collapse of the structure is the possessor of the building [19, p. 838 and next].

#### 4. Conclusion

To recapitulate the considerations, the following conclusions must be drawn. Firstly, it deserves approval the view that, from the moment when construction site was taken over based on an acceptance certificate, investor

is the only person liable for a damage caused by the collapse of structure. Although the investor loses factual control over the construction site since the moment of taking over this construction site based on an acceptance certificate, he is still an owner-like possessor of this area and that is a justification of the adoption of his liability. At the same time, taking this stand leads to the conclusion that Art. 652 CC is in the present matter irrelevant.

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**Wyrzykowski W. Liability for the damage happened on the construction site under the Polish Civil Code**

The article presents the most important issues concerning the civil liability for damage happened on the construction site. It should be emphasized in the first instance that Poland as one of the few countries in Europe has the separated regulation of the construction works contract. This regulation was located in art. 647 - 658 of the Polish Civil Code. Beyond that the different (in reference to general provisions) rule of liability for damage happened on the construction site was directly implemented into Art. 652 of the Polish Civil Code. According to this provision, if the contractor took over the construction site from the investor based on an acceptance certificate (preparation acceptance document), he is liable on general terms for any damage caused on the site until the facility is handed over. The cited norm does not constitute an independent basis for liability and the reference to the general principles of liability included in this provision is also a reference to the both rules of liability - contractual liability and tort liability. All the presented research has been focused on the legal analysis of provision art. 652 of the Civil Code and also try to explain the correct application of this provision in practice.

**Keywords:** liability, liability for the damage, Polish Civil Code