

Liability for Construction Quality in Belarus

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1. Introduction

In the modern society, more and more people get interested and try to learn and competently exercise their rights. People understand that without knowing their responsibilities and their rights, they wouldn't know what to do in a particular situation in their life, how to protect their rights, and in fact, they would become defenceless. People who are ignorant of their rights can be forced to do things they don't have to do, or be deprived of things for which they have the right; their demands can be ignored. They wouldn't know a civilized way to carry their point, without going beyond from the legal limits.

As in other countries of the former Soviet Union, energy efficiency in the housing sector is very low in Belarus. This is not only the case for older buildings, but often also for newly constructed ones. Besides lower technical standards one reason for this problem can be non-sufficient quality of the implemented works.

Homeowners in Belarus are often not aware on what they can do, in case they detect a defect in their new apartment. The construction of a new building involves several parties and it might not always be clear, who actually can be made liable for defects. Also, the procedures might seem difficult and not transparent to homeowners. Consequently, owners often decide to eliminate the defects themselves or – in case of minor problems – just live with the defect.

In the context of the ARCEE project, a research was conducted on the issue of liability in the construction sector. Besides the question, who are the involved actors and who is responsible for the building quality, it was tried to find out, what an owner can do if he notices defects and if defects in the building quality have been topic of court proceedings in the recent past. Finally, a summary of the current situation with regard to insurances against liability claims is provided.

The information compiled in this paper should help to develop awareness raising material on the rights and possibilities regarding construction defects targeted at homeowners. An increased awareness of homeowners on these issues and increased claiming of consumer rights might contribute to a higher building quality, including increased energy efficiency.

2. Involved actors and their responsibilities

Based on the definition of construction activities, the following stages of construction can be outlined:

- **Preliminary design (pre-investment) documentation**, which is developed and approved by the Customers and the Developers prior to the development of design documentation for construction, reconstruction and renovation projects.
- **Permission documentation** - Site Selection Statement, Architectural and Planning Assignment, public authority decision on provision of land, decisions of approving authorities on the possibility and the conditions for the construction, technical specifications for engineering and technical support of the construction etc.



- **Design documentation**, which is developed by a design organization by an order and at the expense of the Customer. The design organization has to ensure that the design documentation passes the expert evaluation procedure and gets an approval.
- **Developer's passport** – a document confirming the eligibility of the construction.
- **Construction contract**, contracts for performing certain types of construction works.
- **Co-investment agreement**, which is signed between the Developer and the Shared Construction Participants to create a shared construction unit.

During the construction of an apartment block, the following agreements are signed:

- **Construction contract** with the General Contractor for the construction of the house;
- **Co-investment agreement** with Shared Construction Participants to finance the construction. Each Shared Construction Participant finances the construction of his own apartment and, in proportion to the area of the apartment, the construction of auxiliary facilities (lobby, staircases and landings, elevator lobbies and other facilities), and utilities, i.e. systems of a dwelling house providing for the established sanitary and technical requirements for accommodation (gas, electricity, ventilation, garbage chute, elevator, etc.).

If the construction of housing is funded only by the Customer (individual housing construction), then only a construction contract is entered into by the Customer and the Developer (Contractor) conclude only a construction contract.

At each stage of construction activities (construction) there are certain actors of the construction process, but in general, the actors of construction activities can be divided into:

Public authorities:

- decision-making (permitting) - the local executive and administrative bodies (executive committee), the territorial divisions of architecture and urban planning, the main architects of the region, of the city of Minsk, of districts and cities, and authorities engaged in expert evaluation of design documentation.
- approving – state emergency response authorities, the police, public health surveillance, etc.
- expert – state authorities engaged in expert evaluation of design documentation.
- regulatory – state authorities exercising state control and (or) technical supervision in construction.

Organizations engaged in the development of the project, design and construction documentation and other documents necessary for the implementation of construction activities are following:

Customer (Заказчик) – an individual or legal entity, including individual entrepreneurs, as determined in accordance with the legislation, that finances the construction, reconstruction, restoration, repair and improvement of the construction unit, demolition, who performs construction activities with involvement of a specialized construction Contractor, with or without the involvement of an Engineer (engineering company) on the basis of a contract.



The Customer is obliged to prepare, develop and approve the project, permission and other documentation required for the construction and to transfer it to the Contractor before the construction, including provision of the construction site and the scope of work. During construction, the Customer provides financing in accordance with the terms of the contract, provides field (design) supervision and technical supervision. Upon completion of construction, the Customer ensures comprehensive testing of the equipment, pre-commissioning, and acceptance of the constructed unit for commissioning.

Developer (Застройщик) – an individual or legal entity, including individual entrepreneurs, as determined in accordance with the legislation, that finances the construction, reconstruction, restoration, repair and improvement of the construction unit, demolition, and performs construction activities on his own with the involvement of an Engineer (engineering company), with or without involvement of a specialized construction Contractor for performing of certain types of construction works on the basis of a contract.

Herewith, both the Customer and the Developer can carry out construction activities. Both, the Customer and the Developer, involve a Contractor for implementation of the construction project as a whole and (or) for fulfillment of certain types of construction works. **The Customer always involves a Contractor, the Developer involves a Contractor only if necessary.**

The Developer provides the preparation, development and approval of the design, permission and other documentation, provides funding for the construction, concludes co-investment agreements for a shared construction unit, carries out construction of the unit. Upon completion of construction, he provides the state registration of the apartment block, passes all the documents to the householders' association (condominium) or other organization, which carries out the management of the constructed house. **When involving a Contractor in the construction process, the Developer acts as the Customer in relation to the Contractor.**

A citizen who wants to build an apartment in an apartment block enters into a contract with the Developer. Each apartment in an apartment block is a share of an integral whole - the whole house. Therefore, the contract of construction of an apartment is called a co-investment agreement, and citizens building apartments are called Shared Construction Participants.

Shared Construction Participant (Дольщик) – an individual or legal entity, including individual entrepreneurs, participating in creation of a shared construction unit at his own expense on the basis of a concluded agreement.

During construction, a Shared Construction Participant pays the Developer the price of the shared construction unit; upon completion, the Shared Construction Participant must accept the commissioned shared construction unit transferred by the Developer in accordance with the acceptance and transfer certificate, and within three months after the transfer by the Developer of all the necessary documents, to register the right to put the shared construction unit into operation (register ownership of the constructed apartment).

Acceptance into operation of a constructed apartment house, as an integral whole, is performed by an acceptance committee, which consists of public authorities representatives.



After the approval of the certificate of acceptance of the house, the Developer transfers, and individual Shared Construction Participants, the citizens who built the apartment, accepts it from the Developer, the entity with whom the co-investment agreement was concluded, and also signs the certificate of acceptance of the individual apartment.

Engineer (engineering company) (Инженер (инженерная организация) – an individual or legal entity, including individual entrepreneurs, involved by the Customer, the Developer for the provision of engineering services in the construction on terms and conditions prescribed by the law and the contract of provision of engineering services.

Contractor (Подрядчик) – an individual or legal entity, including individual entrepreneurs, who has the right to fulfil architectural, urban planning and construction activities, and who has entered into a construction contract with the Customer, Developer, Engineer (engineering company) in order to carry out these activities. The Contractor is required to carry out the construction works in accordance with the design documentation and schedule of works.

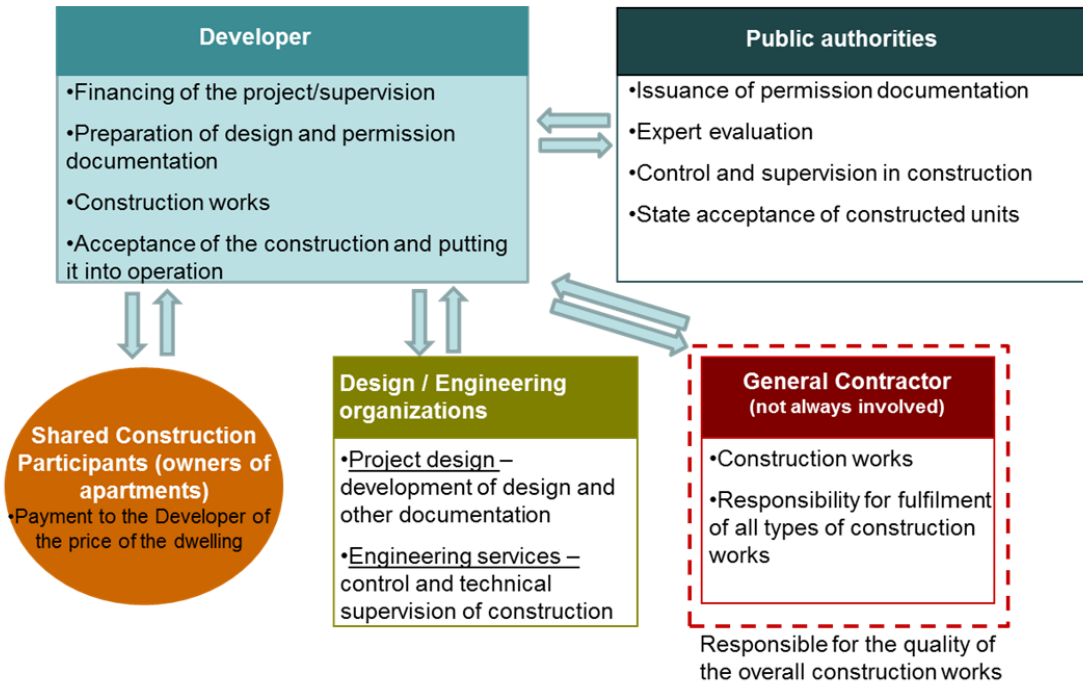
The Contractor may be the **General Contractor or Subcontractor**. In cases where, according to a construction contract, the Contractor is granted the right to involve Subcontractors to perform certain types of construction works, the Contractor is considered a General Contractor. The General Contractor organizes and coordinates the work of Subcontractors, accepts the construction works performed by Subcontractors with an acceptance certificate and pays for these works. The **General Contractor is responsible to the Customer for the quality of all types of construction works** performed by him and his Subcontractors, and to the Subcontractors for non-performance or improper performance of obligations under the contract by the Customer.

Eventually, the Customer and (or) the Shared Construction Participants act as the consumers of the constructed real estate property (the result of construction activities).

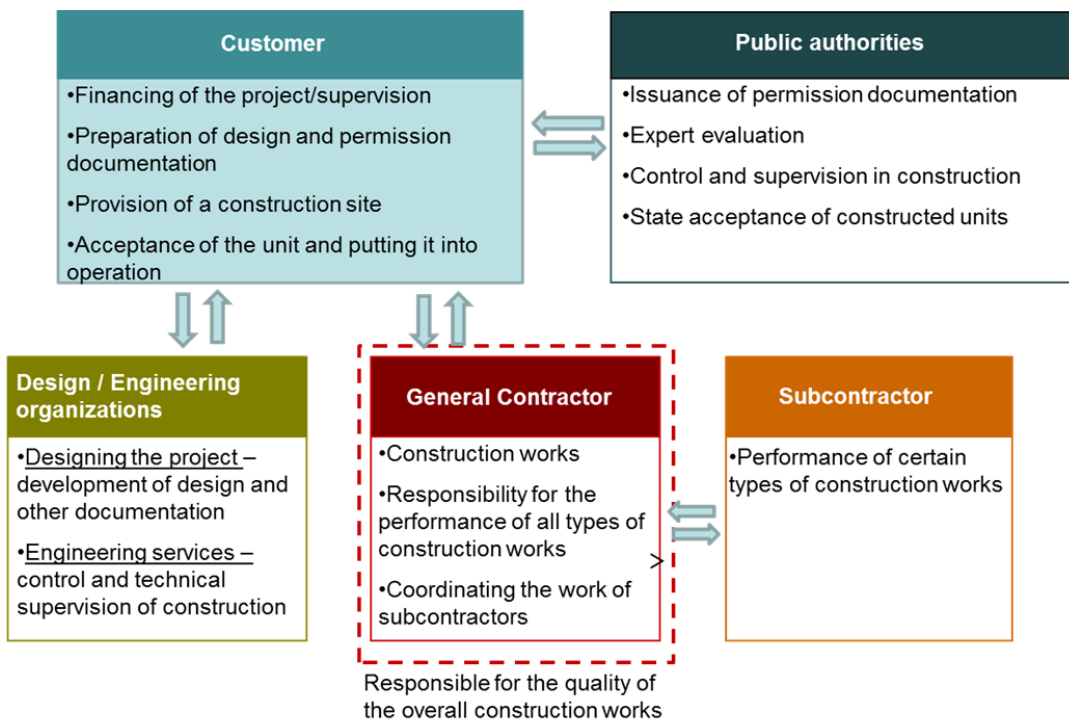
The basic rights and responsibilities of the actors of construction activities are defined in the legislative acts of the Republic of Belarus: Specific rights and responsibilities of the actors of the construction are defined in construction contracts, co-investment agreements, etc.

Relations between the actors of construction activities are reflected on the charts below:

Co-investment agreement



Construction Contract



3. Putting a newly constructed or reconstructed building into operation

The completed construction, reconstruction, restoration, repair, improvement of construction units prepared for the operation, including construction stages, start-up facilities, regardless of the sources of funding, are subject to acceptance into operation by acceptance committees. There are several organizations that issue decisions at acceptance of facilities into operation (see Annex1).

At acceptance into operation, the acceptance committees are appointed by the Customer, Developer or their authorized organization. The structure of the acceptance committees for acceptance into operation includes representatives of the Developer (Customer and Contractor - in case of a construction contract), the developer of the design documentation, operational organization, if available, local executive and administrative body, and public fire control. The structure of the acceptance committees may include representatives of other state authorities and other organizations in consultation with these authorities and organizations.

Acceptance into operation is made in form of a certificate of acceptance into operation (**acceptance certificate**). If the facility meets the quality criteria established by the law, the acceptance certificate is signed by all members of the acceptance committee and submitted by the Chairman to the person (authority), which appointed the acceptance committee, for its approval. Approval of the acceptance certificate determines the period of time from which the real estate property is placed on the record as a fixed asset. All documentation for acceptance into operation is archived by the Customer (Developer), and in the case of transfer of the facility to the balance of an operating organization - by the respective operating organization.

4. Legal background. What can an owner do in case of defects?

The Contractor, unless otherwise provided by the construction contract, guarantees the achievement by the construction unit of the criteria specified in the construction documentation and the possibility of operation of the unit in accordance with the construction contract during the warranty period.

Based on that, **the Contractor is responsible for the deficiencies (defects) identified within the warranty period**, unless it is proved that they occurred as a result of normal wear and tear of the unit or its parts, its incorrect operation or incorrect instructions for its operation developed by the Customer or by third parties involved by him, improper repair of the unit performed by the Customer or by third parties involved by him.

If defects are identified within the warranty period, the Customer (owner, operator, or user) has the right, prior to expiration of the specified period and in accordance with the legislation, to require from the Contractor to correct the defects.

The deadline for the identification of defects is five years. The statutory warranty period may be extended by agreement.



The Contractor may be relieved from the responsibility for the complete or partial failure to fulfil obligations under the contract, if he proves that the non-performance was caused by force majeure (extraordinary and unavoidable under the given conditions and other circumstances beyond the control of the parties, which directly affect the performance of the contract) .

When accepting the apartment, a citizen should carefully inspect the apartment to identify deficiencies and defects. If they are identified, it is necessary to document the identified defects and deficiencies in the presence of members of the acceptance committee and sign a statement of defects, or fix them in the acceptance certificate. Then he may require the Developer to correct the identified deficiencies and (or) defects at the expense of the Developer.

The certificate of acceptance of the apartment (statement of defects) is signed by the Developer and Shared Construction Participant in two copies, one of which is for the Developer, and the other one is kept by the citizen.

If defects in the construction are identified after the acceptance of the apartment and, possibly, after moving to it, but within the warranty period, a citizen also has the right to demand the restoration of his rights and the correction of defects.

In case of a shared construction of a residential building, on completion of construction and putting into operation, a homeowners' association or other management organization is established. A citizen, who identified defects in construction, may apply to the homeowners' association to fix the defects in the certificate or statement. As a rule, construction defects identified after the acceptance of the house into operation don't concern one single owner of the dwelling, but many of them, if not the whole house. Therefore, the homeowners' association will defend the rights of the owners of the apartment, demand the correction of defects and recovery of losses.

First, it is necessary to prepare and send to the address of the Developer (Contractor) a claim of the need of a pre-trial settlement of the dispute (correction of defects or refund the cost of their correction, recovery of losses). In case of absence of correction of identified defects and (or) response from the Developer (Contractor), it is necessary to prepare and submit a petition to the court in accordance with the civil procedural or economic procedural legislation of the Republic of Belarus.

Citizens, who built a house on their own, have the right to demand the correction of the identified defects in accordance with the construction contract, and the recovery of losses in court.

If the construction was carried out without the contractual arrangements with the Developer, the issue goes beyond the legal field. First, the citizen must prove who carried out the construction, and then demand the correction of identified defects. If the citizen can not prove it, then he loses the right to demand the correction of construction defects.

In both cases, shared and individual housing construction, **legislation of the Republic of Belarus on protection of consumer rights** is involved.

If construction defects are identified in auxiliary facilities and engineering systems of an apartment block, claims to the quality of construction are no longer imposed by the citizens, but by the homeowners' associations or any other organizations that manage the common property of an apartment block (legal entity).

Typically, such defects are clear, they affect the quality of living of all the occupants of the house, and the Developer (General Contractor, Contractor), i.e. the organization carrying out construction, corrects the defects voluntarily, without litigation.

5. Liability claims

Administrative liability is determined in accordance with the Code of Administrative Offences of the Republic of Belarus (Chapter 21 administrative offences against the order of architecture, urban planning activities, construction and landscaping). Administrative liability for administrative offences is foreseen in the form of a fine, which is imposed upon both, the guilty official and the legal entity.

Criminal liability is determined in accordance with the Criminal Code of the Republic of Belarus (Articles 303, 304, 305, 306). Criminal liability is incurred for violations of the rules of construction, fire safety, safety regulations, which caused particularly serious consequences. Punishment is foreseen in the form of a fine, or correctional labor, or imprisonment with deprivation of the right to occupy certain positions or engage in certain activities or without deprivation.

Civil liability for substandard housing construction is established by the Civil Code of the Republic of Belarus, the **Law of the Republic of Belarus "On Protection of Consumers' Rights"**, as well as determined in accordance with the terms of the construction contract or co-investment agreement.

In most cases, liability claims are submitted to courts in connection with collection of payments for performed construction works. As far as the court's consideration of cases on substandard construction is concerned, the author has no data on the court's consideration of such cases.

If construction defects are identified in auxiliary facilities and engineering systems of an apartment block, which are connected with the safety and health of residents, the Developer (Contractor) in most cases corrects the defects voluntarily. In such cases, the proceeding of the claim in court is not necessary. As experience shows, administrative and economic measures are more effective than the court's decision. The Developer (Contractor) understands that if all the inhabitants submit a collective complaint to a state authority (e.g., the executive committee) and an expert evaluation is organized to consider the complaint of the citizens, administrative measures would be more stringent than the court's decisions.

It is also necessary to note the economic aspect; if a construction company doesn't correct its construction defects, it may lose orders for construction works in the future, as the Customer wouldn't enter into contracts with such companies.

If construction defects are identified directly in the apartment, the citizen, the owner of this apartment, takes his own decision (the right of a citizen) whether to file any complaints about the quality of construction, demand the correction of the identified defects and deficiencies, submit a claim to court or just to correct the deficiencies and defects at his own expense and on his own.

In accordance with the civil procedural legislation, the claimant must provide evidence of the stated requirements, i.e. prove that the identified defects really exist, that they really are defects (a deviation from the permissive documents), as well as to prove a causal link between the actions of the

construction companies and the identified defects (deficiencies) in construction. To do this, a citizen may need an expert opinion. Expert evaluation is a time-consuming process. In addition, the expert evaluation must be paid by the citizen. A construction company as the defendant has the right to appeal against the conclusion of the expertize, the court may make an order for a new expert evaluation or an additional expertize.

Therefore, judicial proceedings may last not only a few months, but even several years. Citizens have the right to defend their interests in court in person or through a representative. Citizens may be represented in court by a lawyer, as well as by close relatives or spouses.

"Winning the case in court" is certainly possible, but what is the price of such a win? And how long will it take for the court's decision to be executed?

It is easier and cheaper to correct the identified defects and deficiencies independently during the repair of the apartment and live in it...

6. Insurances of companies against liability claims

In accordance with the Regulation on Insurance Activity in the Republic of Belarus approved by Presidential Decree of August 25, 2006 No. 530 "On Insurance Activity" (hereinafter - Regulation), insurance is divided into compulsory and voluntary insurance.

Insurance of construction and subsequent operation of apartment blocks is carried out within the framework of voluntary insurance of property and third party liability.

Voluntary insurance is carried out by a contract between the insured and the insurer. Every insurance company establishes its own rules of insurance, establishes a list of insured events, the terms of payment of insurance compensation, etc. The insurance rate is determined by insurance companies, depending on the value of the insured property and liability limits.

The Developer (Contractor) **is entitled, but not obliged** to insure civil liability on obligations arising as a result of substandard construction (causing damage to the property of third parties) in any insurance company at his sole discretion, under the rules of voluntary insurance being in force in this insurance company.

Construction is a complex and expensive process; unexpected things sometimes occur at a construction site, including fatal contingencies, which can ultimately influence the quality of construction. Insurance in construction not only allows to avoid the negative financial consequences of various unfavourable factors, restore the funding of the construction, but also brings further evidence of foresight and reliability of the Customer and the Contractor, and refinement of their economic relations.

The risk of fire, accidents and other emergencies is always the case in the operation of a whole apartment block and of each apartment individually. Insurance of the common property of an apartment block and of each apartment, liability for damages caused to third parties also helps to avoid a negative financial impact of various unfavourable factors, e.g. to restore, repair the common property of an apartment block, apartments of citizens and their property.

However, the author is not aware of the practice regarding the insurance contracts by Developers during construction activities, as well as of the insurance of the common property of an apartment block.

7. Conclusions

Problems with liability for the quality of construction in the Republic of Belarus are mainly not due to the absence or imperfection of legislative acts on liability, but are mostly financial. It is "cheaper" for citizens to correct everything on their own and live in their apartments than to demand the correction of the defects by the Developer or compensation for costs incurred.

The main problems of liability associated with the quality of construction in the Republic of Belarus are as follows:

1. Citizens (owners of constructed apartments) don't know their rights, according to the legislation.
2. Citizens know their rights, but don't know how to protect their violated rights in a competent way, in compliance with the current legislation. Without the properly made documents, without legal justification of the raised claims with reference to the norms of the legislation, it is practically impossible to carry a case in court.
3. Citizens seek professional legal advice. But this advice may not guarantee restoration of the violated rights, and those consultations with lawyers are rather expensive. In case of substandard (with low quality) constructed housing, there is a need for a significant amount of such consultations. In most cases, citizens cannot afford these costs financially, especially if they need it repeatedly during a long period of time. Of course, eventually, the law charges such costs from the losing party, but a citizen has to pay now, and these costs will be reimbursed later (in a year, two, three..., without any account of inflation).

It is possible to restore the rights that have been infringed, but it is very time-consuming; it is more often that citizens simply can't afford "walking the chain of command" and seeking justice instead of living ordinary life.

Newly constructed housing is often purchased using a bank loan; a citizen has to repay the loan and interest thereon for many years, and he simply doesn't have any additional money that he could spend on lawyers, expertize, etc.

As a rule, a citizen identifies deficiencies (defects) in construction after moving to the apartment and living in it for some time (within the warranty period). In such cases, a citizen must prove in court that the defects arose prior to his acceptance of the results of work (construction) or for reasons that have arisen before that. This requires an expertize; but if an apartment has already been renovated, it is almost impossible to establish that the defects arose as a result of construction of the house, rather than the apartment's restoration. One can't win in court without such evidence.



Moreover, in shared construction of apartments in apartment blocks, there is another big "but", which reduces the process of identifying defects in construction and their correction to "zero":

Apartments in apartment blocks are constructed according to standard designs with equally approved layouts, placement of plumbing, electrical, etc. equipment. Citizens participate in shared housing construction and pay for the construction, knowing that they will actually have to do major repairs (replanning and alterations, replacement of doors, window frames, electrical wiring, plumbing etc.). In such cases, a citizen is not entitled to claim from the Developer to correct the identified defects, and it is not necessary, as the citizen does everything himself anyway, the way he needs it. Of course, a citizen must coordinate such repairs with authorities, develop an appropriate project, conclude another construction contract, however this time - with the organization, which fulfils such repairs, but these issues are not directly related to the quality of construction of an apartment in a residential building.

It turns out that it is more cost-effective for a citizen, even if he is aware of his rights and of ways to protect them, not to seek restoration of his right, but to correct everything on his own (to make repairs, replacement of equipment, etc.).

As a result, many people prefer to correct all the errors of the builders and to live in their apartments instead of long-term litigation and "running to the courts," and then, eventually, anyway correcting the deficiencies and defects in construction on their own.

Annex 1: Organizations involved in putting a building into operation

К государственным организациям, выдающим заключения при приемке объектов в эксплуатацию, отнесены:

1. Территориальные органы Министерства природных ресурсов и охраны окружающей среды.
2. Уполномоченные государственные органы и учреждения, осуществляющие государственный санитарный надзор.
3. Инспекции Департамента контроля и надзора за строительством Государственного комитета по стандартизации по областям и г. Минску, специализированная инспекция Департамента контроля и надзора за строительством Государственного комитета по стандартизации (при приемке в эксплуатацию объектов, по которым требовалось получение разрешения на производство строительно-монтажных работ).
4. Департамент по надзору за безопасным ведением работ в промышленности Министерства по чрезвычайным ситуациям (Госпромнадзор) (при приемке в эксплуатацию объектов, ему подконтрольных).
5. Департамент по ядерной и радиационной безопасности Министерства по чрезвычайным ситуациям (Госатомнадзор) (при приемке в эксплуатацию объектов, ему подконтрольных).
6. Министерство культуры (при приемке в эксплуатацию объектов, включенных в Государственный список историко-культурных ценностей Республики Беларусь).
7. Органы государственного энергетического надзора (при приемке в эксплуатацию объектов, им подконтрольных).
8. Государственная автомобильная инспекция Министерства внутренних дел Республики Беларусь (при приемке в эксплуатацию дорог, технических средств организации дорожного движения, дорожных сооружений, железнодорожных переездов, подвесных контактных сетей городского электрического транспорта и трамвайных путей).
9. Органы государственного надзора и контроля за деятельностью по защите населения и территорий от чрезвычайных ситуаций Министерства по чрезвычайным ситуациям (при приемке в эксплуатацию объектов гражданской обороны).
10. Областные и Минское городское управления по надзору за рациональным использованием топливно-энергетических ресурсов Департамента по энергоэффективности Государственного комитета по стандартизации (при приемке в эксплуатацию энергоэффективных жилых домов и зданий после тепловой модернизации).
11. Органы государственного пожарного надзора.

Annex 2 : Construction sector related normative acts in Belarus

- ✓ Конституция Республики Беларусь
- ✓ Гражданский кодекс Республики Беларусь
- ✓ Жилищный кодекс Республики Беларусь
- ✓ Кодекс Республики Беларусь об административных правонарушениях
- ✓ Уголовный кодекс Республики Беларусь
- ✓ Закон Республики Беларусь «Об архитектурной, градостроительной и строительной деятельности»
 - ✓ Закон Республики Беларусь «О совместном домовладении»
 - ✓ Закон Республики Беларусь «О государственной регистрации недвижимого имущества»
 - ✓ Закон Республики Беларусь «О защите прав потребителей»
 - ✓ Закон Республики Беларусь «Об административном устройстве Республики Беларусь»
 - ✓ Закон Республики Беларусь «О местной управлению и самоуправлении в Республике Беларусь»
 - ✓ Указ Президента Республики Беларусь от 14 января 2014 г. № 26 «О мерах по совершенствованию строительной деятельности»
 - ✓ от 6 марта 2013 г. № 263 «О долевом строительстве объектов в Республике Беларусь»
 - ✓ Указ Президента Республики Беларусь 27 декабря 2007 г. № 667 «О порядке предоставления земельных участков»
 - ✓ Указ Президента Республики Беларусь 25 августа 2006 г. № 530 «О страховой деятельности»
 - ✓ Постановление Совета Министров Республики Беларусь от 15 сентября 1998 г. № 1450 «
 - ✓ Постановление Совета Министров Республики Беларусь от 22 февраля 2008 г. №262
 - ✓ Постановление Совета Министров Республики Беларусь от 20 февраля 2007 г. № 223 « О некоторых мерах по совершенствованию архитектурной и строительной деятельности»
 - ✓ Постановление Совета Министров Республики Беларусь от 6 июня 2011 № 716
 - ✓ Приказ Министерства архитектуры и строительства Республики Беларусь от 27.11.2008 № 433 -- Техническим кодекс установившейся практики 45-1.03-59-2008 (02250) «Приемка законченных строительством объектов. Порядок проведения».
 - ✓ Постановление Пленума Высшего Хозяйственного Суда Республики Беларусь от 19 сентября 2012 г. № 6 «О некоторых вопросах рассмотрения дел, возникающих из договоров строительного подряда»