

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Austria

I. Liability

1. Principles of liability

The main legal acts which govern liability of constructors in Austria are the Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) and the General Code of Construction (Baugesetzbuch-BauGB).

The Austrian Standards Institute makes available standard contract forms to the construction market parties (General Conditions for Construction Contracts). The model contract form for the construction market is defined by the norm ON B 2110.

The access to the profession of architects and engineering consultants is regulated by a federal law called Ziviltechnikergesetz (ZTG), which sets out conditions necessary for exercising professional practice in this field. Architects and civil engineers are by law members of the provincial chambers for civil engineers.

2. Starting point and duration of liability

There are two main liability durations stipulated in the Civil Code (ABGB), which may apply in the context of construction:

- Firstly, a specific legal warranty applies to real estate and construction works (art. 922 and following of the Civil Code), under which, the supplier “warrants” that the good provided is free from defects and complies with the contract.

The warranty period runs for 3 years starting from the handover or completion of works. Any defects identified by the client within the first 6 months of this period are presumed to have existed at the moment of handover.

During the remaining time of the warranty period, the client may enforce the warranty under condition that the builder admits his liability for defects. Otherwise the client must undertake a legal action to enforce the warranty.

Such guarantee is also stipulated in the standard construction contract form defined by the norm OB B 2110, which is the main reference for the industry.

- Alternatively, instead of enforcing his rights under the warranty, the client may choose to claim damages and interests under the general liability regime, defined by the art. 1295 and following. However, in such case, in order to obtain compensation the client must be able to demonstrate that a fault has been committed by the builder.

The limitation period for damages and interests claims is 3 years from the day when the client had knowledge of the damage and of the responsible person but with a maximum of 30 years from handover of the works.

3. Sharing of liability between different parties to a project

The parties contributing to the construction project can be jointly and severally liable for damages under the art. 1301 ABGB.

II. Insurance

1. Mandatory Insurance

Architects and consulting engineers are legally obliged to carry professional indemnity insurance. As of 01/08/2013, the insurance must cover not only persons and property, but also financial losses. The minimum coverage per accident depends on the annual turnover under §221 paragraph 2 and 4 of the Austrian Enterprise Code.

2. Widespread insurance

The parties from the construction sector are generally covered by insurance.

Main insurance products available in the market are third party liability insurance for construction firms, Contractor's All Risk insurance, insurance of civil liability of the building owner, combined insurance packages for property developers and insurance of damage to building machinery and equipment.

3. Schemes and good practices

Austrian Standards Institute (ÖN)

The Austrian Standards Institute (ÖN) is a platform for the preparation of Austrian Standards (ÖNORMs). The Institute hosts around 180 Committees and 400 working groups in which around 5500 experts from various economy sectors, consumer organisations, administration and research fields participate in the preparation of Austrian Standards.

Sources of information:

Previous studies:

- « Rapport particulier sur les régimes d'assurance construction dans une vingtaine de pays étrangers », Inspection Générale des Finances Conseil Général des Ponts et Chaussée, October 2006
https://www.igf.minefi.gouv.fr/IGF/sections/rapports/assurance_construction/downloadedFile/file/01-Rapport.pdf
- « Etude européenne sur la responsabilité des architectes », Centre d'Etudes d'Assurances (CEA), October 2004, http://www.groupe-cea.com/upload/doc_doc/Document_fr/155/SYNTHESE.pdf



Websites:

- a) Austrian Standards Institute (ÖN) <http://www.on-norm.at/>
- b) Access to the profession in Austria –Architects- Chartered Engineering Consultants
http://www.arching.at/baik/upload/pdf/access%20to%20profession/access_eea.pdf
- c) European Chartered Engineers access to the profession in Austria (2008)
<http://www.ecec.net/assets/ecec/download/members/european-chartered-engineers-access-to-the-profession-in-austria.PDF>
- d) “Changes in the Austrian Industrial Code of 1994 - Part 2”
<http://www.gtai.de/GTAI/Navigation/DE/Trade/Recht-Zoll/wirtschafts-und-steuerrecht,did=853020.html>
- e) “Industrial code of 1994 - §99”
http://www.jusline.at/99_Baumeister_GewO.html

Questionnaires:

- a) Austrian Insurance Association (VVO), Schwarzenbergplatz 7, Vienna 1030, Austria



Liability and insurance schemes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Belgium

I. Liability

1. Principles of liability

The liability regime of participants to construction process is mainly governed by provisions of the Civil Code (articles 1147, 1165, 1382 and following, 2262 bis, 1792 et 2270 C.C.) and by court interpretations of the above. The liability of the parties can be contractually modified with the exception of some legally binding provisions.

The main rule is that of fault liability. Proof of a negligent act, of damage and of causal relation between the act and the damage is required to hold architects, engineers and building contractors liable towards their clients or third parties. There is no strict liability or presumption of liability, therefore the claimant bears the burden of proof in order to be entitled to receive compensation.

There is a specific legal regime imposed by the law of 9 July 1971 called “loi Breyne”, governing off-plan sales of dwellings or of dwellings in the course of construction, which modifies the Civil Code rules in order to reinforce consumer protection.

The Breyne law applies to transactions in which a seller, a building contractor or a property developer undertakes to provide a completed dwelling against payments made in advance, before completion of a house or of a flat dedicated at least partially for habitation use.

According to this law the property developer is under a strict duty of performance i.e. he is due to deliver the dwelling free of defects. The client does not need to prove his fault, the developer is strictly liable in case of failure to deliver the result required.

2. Starting point and duration of liability

Liability of the participants to a construction operation may be contractual or extra-contractual.

Contractual liability

Where a contractual link exists between the principal and a construction participant, the latter is subject to various contractual obligations and assumes liabilities arising out of the contract. This liability is governed by the art. 1147, 1165, 1792 et 2270 of the Civil Code.

The construction phase is ended with acceptance of works by the principal assisted by the architect. This is in fact an act of acknowledgement through which the principal admits that the works comply with the contract specifications and that the apparent defects are repaired.

Starting from the handover, which may be confirmed by a formal certificate of completion or tacit, the liability of the participants to construction operation is as follows:

- 10 years liability for defects which are important enough to put in danger the solidity of the constructed structure or of an important part of it (articles 1792 and 2270 CC). This decennial liability is legally binding i.e. the parties cannot contractually restrict it;
- maximum 10 years liability for defects called “venial” or ordinary, which affect the building but are out of the scope of decennial liability. The parties are free to modify contractually this liability.

Although the art. 1792 CC, which concerns the decennial liability, refers only to building contractors and architects, its scope of application has been extended by the courts for many years to other construction professionals such as engineers.

The Breynne law extends the decennial liability on all construction professionals and even to non-professionals who are involved in sale or construction or who undertake to build or to deliver the property, to which the law applies (art 6). The persons above are under a duty to perform i.e. they are due to deliver the property free from defects. Therefore they have no possibility to exonerate themselves from such liability.

Extra-contractual liability

Extra-contractual liability, which covers both liability towards third parties and liability towards clients for so called « extra-contractual » faults, is governed by the art. 1382 and following of the Civil Code.

Any person who has suffered a damage arising from the activity of a construction party may claim on the grounds of his liability.

The claimant, who purports to have suffered a damage as a result of fault of the architect must initiate a legal action within the deadline of 5 years starting from the day when he had knowledge of the damage (or of its aggravation) and of identity of the liable person. The claim becomes statute-barred after 20 years following the day when the fault was committed (art. 2262bis §1er, paragraph 2 of the Civil Code).

3. Sharing of liability between different parties to a project

Joint and several liability may be acted upon on contractual or legal grounds.

Parties are jointly and severally liable when several persons are involved in fulfilling the same duty or where it is stipulated by law (art. 1200 to 1216 of the Civil Code).

Participants to the construction process may decide to form a temporary grouping without legal personality in order to perform a construction operation. In this case, participants of such an unincorporated grouping are jointly and severally liable towards third parties under law. The principal can sue all of them or those of his choice, who would be under a duty to compensate the totality of the damage resulting from non-respect of legal obligations.

Furthermore, joint and several liability may result from decisions of courts.

Where the architect and other participants to the construction operation, who are not linked together by a contractual relationship, have contributed through their faults to occurrence of a damage, the architect may be held jointly and severally liable (in solidum) by the court and he may be obliged to compensate the totality of the damage. The in solidum liability consists in the fact that each of the parties liable are under obligation to indemnify the totality of the damage. The parties may however contractually exclude such liability.

II. Insurance

1. Mandatory insurance

There is generally no legal obligation to carry insurance of construction risks with the exception of professional liability insurance, which must be taken out by architects, health and safety coordinators and expert land surveyors.

- Health and safety coordinator is obliged to insure his professional liability under the art. 65 of the royal ordinance concerning temporary or mobile building sites of 25 January 2001, included in the royal ordinance of 27 January 2005;
- Expert land surveyor has a duty to insure his liability under the art. 13 of the royal ordinance of 15 December 2005, implementing rules of professional practice. The royal ordinance of 25 April 2007 defines the terms of the compulsory insurance;
- The architect is obliged to carry insurance covering all his professional liabilities including decennial liability under the art. 5 of the law of 20 February 1939 on protection of title and of profession of architects. The royal ordinance of 25 April 2007 defines the terms of compulsory insurance.

The insurance contract must satisfy minimum legal requirements in terms of its content. These requirements are specified by royal ordinance and concern the persons legally obliged to carry insurance, minimum sums insured¹, exclusions allowed and duration of the insurance cover.

¹ The minimum sums insured applicable to professional indemnity insurance are as follows :

- 0 1.500.000 € for bodily injuries
- 0 500.000 € for property damages and consequential losses
- 0 10.000 € for property under custody of the insured

The insurer covers the architects or their agents against compensation claims formulated by third persons for damages arising in connection with performance of professional activities of the architect (design, supervision, surveys, urban planning...).

In most cases the architect will take out a yearly policy covering all his missions performed during the year but it is also possible to arrange a contract covering a particular construction project.

In the framework of the Breyne law, the building contractor, seller or property developer must provide the buyer with a guarantee granted by a financial institution. The guarantee in question should amount of 5% of the project value if the builder is qualified. If the builder is not qualified a completion guarantee covering 100% of the project value is required.

2. Widespread insurance

Engineers usually insure their contractual liability including decennial liability as well as their extra-contractual liability. They take out third party liability and professional liability insurance.

Most of building contractors cover only their third party liability. They systematically take out their third party liability insurance with the aim to cover their extra-contractual liability for damages caused to third parties in connection with performance of their activities.

The insurance market offers also specific insurances, in particular Contractor's All Risk (Tous Risques Chantier) and Decennial insurance or "control insurance", which requires an inspection of a technical controller. The insurances above are available on voluntary basis.

- Contractor's All Risk insurance is essentially a property damage cover arranged for the duration of construction works and possibly few more months following acceptance of the works. It provides indemnity to the principal if the works under construction are damaged regardless liability of the parties to the construction operation;
- Decennial insurance called « control insurance » in Belgium covers all participants to the construction operation against their decennial liability under the art. 1792 and 2270 of the Civil Code (architects, engineers, property developers, building contractors, health and safety coordinators...). Its principal purpose is to provide financial compensation for damages to the building works, for which the participants to the construction process are liable towards the principal on the basis of decennial liability. The insurance cover lasts for 10 years starting from handover. The insurer performs controls or appoints a technical controller (SECO, SOCOTEC, AIB VINCOTTE...) before granting the cover.

In the framework of public procurement contracts or private contracts the contractual terms may require the construction parties to arrange the insurances above.

3. Schemes and good practices

Taking into account duration of court procedures more and more construction parties propose alternative methods of dispute resolution such as mediation or arbitration. Insurers are in favor of these “out of the court” settlements for small and medium size claims.

Sources of information:

Previous studies:

- a) « Rapport particulier sur les régimes d’assurance construction dans une vingtaine de pays étrangers », Inspection Générale des Finances Conseil Général des Ponts et Chaussées, October 2006, https://www.igf.minefi.gouv.fr/IGF/sections/rapports/assurance_construction/downloadedFile/file/01 - Rapport.pdf
- b) « Etude européenne sur la responsabilité des architectes », Centre d’Etudes d’Assurances (CEA), October 2004, http://www.groupe-cea.com/upload/doc_doc/Document_fr/141/Belgique_20051.pdf

Legal acts:

- a) The Civil Code
- b) La loi du 20 février 1939 sur la protection du titre et de la profession d’architecte
- c) La loi du 9 JUILLET 1971 réglementant la construction d’habitations et la vente d’habitations à construire ou en voie de construction
- d) L’arrêté royal concernant les chantiers temporaires ou mobiles du 25 janvier 2001
- e) L’arrêté royal du 15 décembre 2005 fixant les règles de déontologie du géomètre expert.
- f) L’arrêté royal du 25 avril 2007 relatif à l’assurance obligatoire prévue par la loi du 20 février 1939 sur la protection du titre et de la profession d’architecte

Publications:

- a) Actes du Colloque organisé par la Conférence libre du jeune Barreau de Liège, Droit de la Construction, Editions du jeune Barreau de Liège, 2006.
- b) Jean-François Henrotte, Laurent-Olivier Henrotte, Bruno Devos, L’architecte. Contraintes actuelles et statut de la profession en droit belge, Larcier, 2008.
- c) J.M. CHANDELLE, « La loi Breyne », Rép. Not, Tome, VII, Livre VI, Larcier, 1996, p.83

Questionnaires:

- a) Scrl SECO cvba, rue d’Arlon 53, Etterbeek, Brussels, 1040 Belgium
- b) Bouwunie, Spastraat 8, 1000 Brussel, Belgium
- c) SPF Economie Service des Assurances, NG III Boulevard du Roi Albert II 16, Brussels, B-1000, Belgium
- d) CEA Belgium, Avenue Roger Vandendriessche 22 - 1150 Brussels, Belgium

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Bulgaria

I. Liability

1. Principles of liability

Under the general liability provisions of Bulgarian law, which apply also to the construction parties, every natural or legal person is due to remedy any damages caused to third parties as a result of their fault.

Moreover, if a physical or legal person agrees to perform a task for the benefit of another party, they are also liable for damages which arise with relation of the performance of this task. The party in question may avoid liability for non performance of their contractual obligations in the case of force majeure. In the context of construction works, occurrence of force majeure resulting in suspension of works gives the parties right to extended deadlines for completion of their contract. The above rule regarding force majeure applies even if it is not expressly included in the contract. Some construction contracts require notifying the other party of the force majeure event and may also stipulate that the suspension of works due to force majeure exceeding a specified period gives the parties involved a right to terminate the contract.

An important legal text relative to construction activity is the Territorial Development Act of 2001, further completed with Ordinances on its application. The Territorial Development Act deals among others with the territorial development rules, project designing and authorisation procedures, works controls and supervision, notices to be given to competent authorities at different stages of the works, the final inspection, requirements to be met by construction works and duties of the owners of completed buildings. Control of respect of the laws above is ensured by the National Construction Supervision Directorate (NCSD) – a specialised department of the Ministry of Regional Development.

The Act also refers to the following participants to the construction process: investor, designer, contractor, consultant, structural engineer, project manager and supplier of plant and equipment, specifies their respective duties and relations between them and, together with the Ordinance Establishing the Terms and Procedure for Compulsory Insurance In Design and Construction No 38 from 24.02.2004, introduces civil liability insurance obligation on some of the above parties.

Under the Act the relations between the participants to a construction project, including warranty periods for repair of defects must be regulated by a written contract. The Ordinance N° 2 of 31.07.2003 of the Minister of Regional Development and Public Works on the commissioning of works and the minimum warranty periods for construction and completed works, facilities and construction sites further specifies the procedures referring to authorisation of building construction, acceptance of buildings for use and defines the minimum warranty periods – contractual warranty periods cannot be fixed at a level lower than this minimum.

The duties of the parties above, specified in the Art. 160 of the Territorial Development Act are as follows:

- The investor is under obligation to “ensure everything necessary for the commencement of construction” such as effecting preliminary investigations or obtaining the necessary permits and approvals.
- In regards to designers the Act stipulates, that the precise terms of designer’s supervision should be detailed in the contract between the owner and the designer. The designer is in charge of preparation of the design and, if expressly agreed with investor, may be also responsible for preliminary investigations and research. Designers also control whether the works are executed in compliance with the design and have a right to issue instructions, which are mandatory for other parties to the project.
Designer’s supervision over structural parts of the construction is mandatory for all categories of works.
- The contractor/developer is an individual or a legal entity performing construction works under the agreement with the investor. The contractor is responsible for ensuring that the works are performed in accordance with the design, relevant permits and legal requirements applicable to construction works. Moreover the contractor is due to use in the execution of works “materials, manufactures, products and other such conforming to the essential requirements to construction works” as well as to prepare and keep relevant construction and technical documentation. Failure to respect the duties above exposes the developer to financial liability for resulting damages, including financial losses.
- The consultant is responsible for carrying independent supervision over construction works and for verification of compliance of plans. Further responsibilities such as preliminary investigations may be agreed contractually with the investor. Supervision by an independent consultant is mandatory for works of 1-4 category under the Territorial Development Act.
- The supervisor is a professional (usually consultant or project manager) appointed by the investor to ensure compliance with the administrative requirements relative to commencement of works, written notices and protocols. He is also responsible for compliance of works with the design and legal requirements, for respect of health and safety rules during the execution of works and for ensuring that the completed works are fit to be put into operation. Any breaches of technical norms and regulations identified during the works must be reported by the supervisor to the NCSO – the supervisor can also issue mandatory instructions to the contractor. The supervisor is jointly liable with the contractor for damage resulting from non compliance with approved plans or from breach of technical

norms and regulations. The same person cannot act in quality of a supervisor and of an independent consultant.

- Structural engineer is a professional responsible for control of structural parts of the project design.
- The project manager is a civil engineer in charge of managing the performance of construction works on behalf of the contractor. In the cases where the project is executed by the investor, he must also appoint a project manager. Project managers are also in charge of supervision of lower categories of works (5 and 6).
- The supplier is a person appointed by the investor to deliver and assembly the construction plant. He is responsible for due and timely delivery, assembling and tests of the plant commissioned.

Architects and consulting engineers need to be registered in a public register held by the Chamber of the Architects in Bulgaria or by the Chamber of the Engineers in Investment Development–Project Design, in order to be entitled to perform their practice. Exercising of architect’s and engineers profession is regulated by the Law on the Chamber of Architects and Engineers in the Investment Design.

Under the Bulgarian Chamber of Builders Act construction companies need to be registered in a public Central Professional Register of the Constructors (CPRC) before they can start to perform construction works. The register of building contractors indicates legally defined categories of works, which the registered companies are entitled to perform. Those who are enabled to perform higher categories may also undertake lower categories of works. In order to be authorised to perform works belonging to a given category, the building company needs to fulfill a number of criteria defined by law. Companies performing the lowest category of construction works (category six) are dispensed from the obligation of registration.

Under the Territorial Development Act the construction works are classified into six official categories depending on the level of difficulty and complexity of the project. The classification starts from category one, which comprises the most complicated works (airports, highways) and goes to category six, which concerns the smallest and less complex works (such as temporary structures or greenhouses).

The building cannot be handed over and permitted to exploitation before it is verified that the health and safety regulations were complied with. The construction process is supervised by the competent state and municipal bodies, who also issue approvals of the completed works.

The use of standard contracts is not a popular practice in Bulgaria. On the other hand, arbitration procedures proposed by institutions such as the Arbitration Court to the Bulgarian Industrial Association or the Arbitration Court to the Bulgarian Chamber of Commerce and Industry are regarded as the most efficient and cost effective way of dispute resolution. The decisions of an arbitration court sitting in Bulgaria have the same importance as decisions of ordinary courts under the Bulgarian law.

2. Starting point and duration of liability

As stated above minimum warranty periods referring to works execution and of repair of defects are defined in the Ordinance N° 2 of 31.07.2003 of the Minister of Regional Development and Public Works. Various warranty periods are defined for construction of buildings and for different types of civil engineering works. As far as buildings are concerned the main minimum warranty periods are as follows:

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- 10 years for structural construction works of buildings and equipments including ground base,
- 8 years for restored constructions of buildings,
- 5 years for waterproofing, heat insulation, acoustic insulation and corrosion of buildings and facilities in a non aggressive ambiance,
- 3 years for waterproofing, heat insulation, acoustic insulation and corrosion of buildings and facilities in an aggressive ambiance,
- 5 years for internal installations and finishing works,
- 5 years for industrial plants, complete installations of industrial machinery, control systems and automated systems.

Under the art 160 of the Territorial Development Act the contractual warranty periods cannot be lower than this minimum.

The minimum legal warranty periods run from the day when the construction project is introduced for operation.

3. Sharing of liability between different parties to a project

Under law, the supervisor is jointly liable with the contractor for damage resulting from non compliance of works with approved plans or from breach of technical norms and regulations, in particular with respect of bearing capacity, stability and durability of structures and foundations, fire safety, security of people and property on the construction site, environmental safety during the construction works and during operation of the completed building, energy conservation, building insulations and accessibility.

Usually the contractual provisions stipulate that the main contractor, who uses subcontractors in order to perform tasks within the construction project, is liable towards the employer for damages caused by the subcontractors even if he is not negligent himself.

II. Insurance

1. Mandatory insurance

There is no mandatory insurance of latent defects in buildings Bulgaria.

Under the Territorial Development Act (Article 171) and the Ordinance Establishing the Terms and Procedure for Compulsory Insurance in Design and Construction Nr. 38/24.02.2004 most of construction parties are subject to the mandatory professional liability insurance requirement.

The art.171 (1) of the Territorial Development Act and the art. 2 of the Ordinance Establishing the Terms and Procedure for Compulsory Insurance in Design and Construction define the participants to the construction project (architect, consultant, person exercising construction supervision, contractor/developer and technical controller) who are subject to an obligation to carry insurance covering their professional liability “for any detriment inflicted on other participants in construction and/or on third parties as a result of wrongful acts or omissions in the course of, or in connection with, the performance of their duties”.

The art. 2 of the Ordinance Establishing the Terms and Procedure for Compulsory Insurance in Design and Construction indicates the duties/functions of participants to the construction project, which should be covered with the compulsory professional liability insurance.

The compulsory insurance covers claims for property damage and for personal injuries including legal costs. The Ordinance defines the terms of minimum compulsory cover, which include “the liability for death or bodily injury of other participants in construction and/or of third parties, as well as for tangible damage to property of other participants in construction or of third parties, caused by the persons covered under the Article 171(1) of the Territorial Development Act”.

Art. 5 of the Ordinance defines minimum sums insured applicable. The amounts insured vary depending on professional category of the insured as defined above and on the category of construction project as defined by the Territorial Development Act.

The amounts of compulsory sums insured may vary from BGN 35 000 to BGN 300 000 for architects and between BGN 50 000 to BGN 300 000 for persons exercising construction supervision. For developers the amounts of sums insurance range from BGN 70 000 to BGN 600 000 depending of category of project performed. Nevertheless the Ordinance enables the construction parties to take out higher sums insured and longer periods of insurance if they wish so.

The Ordinance defines also a minimum insurance premium (1 per mille of the amount covered or BGN 50 whichever is greater) as well as the procedure of claim notification and of claim handling to be followed under the compulsory insurance policy.

The art 171 (2) of the Territorial Development Act specifies that the compulsory insurance is subscribed for the period of one year and covers claims presented during the period of validity of the insurance contract. The compulsory cover needs to be renewed without interruption as long as the construction party performs their activity. Moreover, the party who ceases their activity is obliged to arrange a runoff insurance cover for the period of five years from the date when the activity was discontinued.

The employer may require the professional to submit them a copy of a valid policy of insurance as well as proofs of the premiums paid within a deadline of 7 days from receipt of a written request by the construction party. They may also refuse payment to construction parties if they discover that the party did not respect their obligations relative to compulsory insurance.

2. Widespread insurance

Participants to the construction project may voluntarily agree additional insurance requirements in their contract such as insurance covering damage to the construction work, materials, mechanical equipment or the furnishings of the construction site.

During the phase of construction works “Insurance of construction and assembly works” covering the above risks, similar to “Contractor’s all Risks” insurance seems to be frequently used.

Sources of information:

Publications:

- a) Getting the Deal Through – Construction 2009 (Bulgaria report by Nikolay Nikolov and Iva Miteva, Borislav Boyanov & Co)
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<http://www.properties-guide.com/files/construction.pdf>

Websites:

- c) Chamber of Architects in Bulgaria
http://www.kab.bg/a.php?lang_id=2
- d) Ministry of Regional Development and Public Works
<http://www.mrrb.government.bg/index.php?lang=en>
- e) Solicitor Bulgaria
<http://solicitorbulgaria.com>
- f) Allianz Bulgaria
http://www.allianz.bg/site/index_en.php?page=prof

Legal acts:

- a) The Territorial Development Act
<http://solicitorbulgaria.com/index.php/legislation/construction-law:40>
- b) Bulgarian Chamber of Builders Act
<http://solicitorbulgaria.com/index.php/bulgarian-chamber-of-builders-act>
- c) Ordinance Establishing the Terms and Procedure for Compulsory Insurance In Design and Construction N 38 from 24.02.2004
- d) Ordinance N 2 of 31.07.2003 on the commissioning of works in Bulgaria and the minimum warranty periods for construction and completed works, facilities and construction sites
http://www.build.bg/bg/law/law_doc/480.pdf
- e) Law on the Chamber of Architects and Engineers in the Investment Design
<http://www.kab.bg/a/nav/docs/docs/3>
- f) Ordinance N°2 of 31.07.2003
<http://www.bg-surveyor.com/img/file/OrdinanceConstructionWarranties.pdf>

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Questionnaires:

- a) Bulgarian Construction Chamber, 1 Hristo Smirnenski Blvd., Sofia 1164, Bulgaria

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Croatia

I. Liability

1. Principles of liability

The main legal acts regulating liability framework for construction operation in Croatia are: the Civil Obligations Act (Zakon o obveznim odnosima), the Building Act (Zakon o gradnji), and the Act on Architectural and Engineering Activities in Physical Planning and Building (Zakon o arhitektonskim i inženjerskim poslovima i djelatnostima u prostornom uređenju i gradnji).

The Civil Obligations Act is regulating main principles of construction contracts including the contractual liability of contracting parties and the third party liability. .

The Building Act regulates the design, construction, operation and maintenance of buildings and the implementation of applicable administrative and other procedures regarding the essential requirements for the building and obligations of participants in construction (investor, designer, contractor, supervising engineer and project auditor).

Act on Architectural and Engineering Activities in Physical Planning and Building and Act on Geodetic Activity are prescribing requirements for performing professional construction activities such as compulsory liability insurance for participants in construction, competence and membership in the Chamber of Architects, the Croatian Chamber of Civil Engineers, the Croatian Chamber of Mechanical Engineers and the Croatian Chamber of Electrical Engineers and Croatian Chamber of Chartered Geodetic Engineers.

2. Contractual penalties as a formation of liability

Parties may agree upon a contractual penalty. Such a provision details the penalty to be paid or performed arising from a breach or failure to comply with the primary action to be undertaken by the parties. It is described in the aforementioned Civil Obligations Act.

3. Starting point and duration of liability

The Civil Obligation Act is stipulating joint and several liability of the contractor, project engineer (in case where the defect in the construction or land is attributable to a defect in the plan) and supervising engineer (where the defect in a construction or land is attributable to defective supervision) towards the investor but also towards any other acquirer of the building for:

- any defects in the construction which relate to the fulfilment of essential, legally prescribed, requirements for a construction where these defects are detected within a period of ten years from delivery and acceptance of works;

- any defects of the land where the construction was erected, detected within a period of ten years from the date of delivery and acceptance of works, except where the geotechnical examination or other appropriate document has shown the land to be suitable for construction and there was no indication in the course of construction that would cause the aforementioned documents to be questioned.

This liability cannot be contractually excluded or restricted.

Contractual liability towards the Contracting Authority would reside with the each contractor, in the capacity of employer, and not with the individual employee thereof. However, each contractor would have recourse claims towards its employees under the general employment law rules, to the extent the employees acted with intent or gross negligence.

As far as third party liability is concerned, Civil Obligation Act is stipulating "in solidum" liability of investor and contractor toward third parties for damage caused in relation with the performance of construction work. Third party liability is based on mandatory provisions of Croatian law. Liability for damage caused by wilful misconduct or gross negligence cannot be excluded under Croatian law.

Liability towards third parties would reside with the contractor (i.e., legal entity) and not with individual employee thereof. However, each contractor would have recourse claims towards its employees under general employment law rules, to the extent the employees acted with intent or gross negligence.

4. Sharing of liability between different parties to a project

Further to joint and several liability principles, Civil Obligation Act prescribes following:

- The project engineer, who has also been entrusted with the supervision of the planned work, shall also be liable for defects in the performed work in case the defects are caused by the contractor, if he could detect them through diligent supervision of the work. In this case the project engineer has the right to recourse from the contractor.
- The supervising engineer shall also be liable for any defects in the work performed by the contractor, if he could detect them through diligent supervision of the work, but he shall have the right to recourse from the contractor.
- The contractor, who paid indemnity due to defects in the work performed, shall have the right to recourse from the project engineer insofar as the defects in the work performed are attributable to defects in the project design composed by the project engineer.
- The contractor, who paid indemnity due to defects in the work performed, shall have the right to recourse from the supervising engineer insofar as the defects in the work performed are attributable to defective supervision.

5. Criminal liability

Criminal liability is based on law. As opposed to civil liability, criminal liability is individual and may reside both with the contractor (i.e., legal person) and/or its employees. The criminal liability of an individual exists if he or she, in the performance of his/her duties, acts contrary to the law or generally recognized professional standard of due care and thus endangers people's lives or health or causes significant damage to property.

The liability of companies exists if the liability of the company's responsible persons may be attributable to the company i.e., that the responsible person committed the crime acting in the capacity of a director or an employee of the company.

The penalty for the crime could potentially be imprisonment up to five years for individuals, and HRK 10,000,000 (approx. EUR 1,400,000) for the contractor (i.e., legal person), depending on the level of the intent or negligence of each of the individual and the contractor. Additionally, the contractor (i.e., legal person) could face other sanctions (such as prohibition of providing services in Croatia).

It is important to keep in mind that thresholds for breach of professional standard of due care with respect to the criminal liability are much higher than the ones applicable to the civil liability.

I. II. Insurance

1. Mandatory insurance

Current legislation does not impose any mandatory insurance regarding construction.

However compulsory liability insurance toward the investor or third parties is prescribed for licenced architects, licenced engineers, contractor and legal entities engaged in the management of construction projects. It is the responsibility of corresponding Chamber to contract liability insurance policy for their members.

Nevertheless this does not exclude the possibility for any engineer to stipulate additional individual liability insurance policy.

2. Widespread insurance

Construction insurance (Constructor's All Risks) is often contracted on Croatian market, most commonly for larger or infrastructural projects, or where the Government or state-owned companies act as Principals. For construction of smaller objects (private homes, ect.) often there is no insurance bought.

3. Schemes and good practices

Construction insurance based on Munich RE (CAR or CMI) or good local standard terms and conditions is widely taken out on Croatian market.

Good local standard presumes the following insurance covers:

- Material damages cover (building accident cover, Acts of God, theft) with sum insured in most cases up to the full contractual value of construction
- General third party liability cover with one limit for both material damages and bodily injuries (pure financial losses, guarantee cover, or contractual liability are not part of coverage) with common sums insured between 200.000 HRK and 1.000.000 HRK without policy aggregate considering liability coverage
- Employer's liability cover
- Additional limits for surrounding and existing property
- 12-24 months of extended maintenance (guarantee) coverage

Construction contracts often impose the use of performance guarantees as a security for timely completion of works. Such guarantees are provided in form of a bank guarantee.

4. Securities against contractor's insolvency

Contractor's insolvency can be mitigated by the following options:

i) Guarantees:

- Contractor can offer a third party guarantee in a form of personal guarantee or a bank guarantee on first demand, to the amount specified in that contract.
- Practice shows these amounts vary and should be contracted accordingly; up to the total value of construction, but no less than the value specified in the building contract plus provision to include extensions as appropriate.
- Personal guarantee is an option in which a third party alleviates contractor on insolvency based on a contract between the third party and the claimant.
- Bank guarantee on first demand is a contract in which a bank agrees to pay the claimant the contracted amount if the conditions from the contract are met (insolvency, breach of contract, etc.)

ii) Pledge agreements:

- Contractor may offer a pledge agreement as a means of security wherein the amount secured would allow the construction to be finished accordingly.
- Should the contractor then become insolvent, the claimant would have the position of a secured creditor and the right to settle its claims before any other creditors in a bankruptcy proceedings.

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Cyprus

I. Liability

1. Principles of liability

Until 1960 Cyprus was a British colony and its legal system was largely based on the principles of the English law. Although significant changes of its legal system took place since 1960, some of the legal aspects originating from the British system have been preserved in various domains and are still in force.

The British heritage in the Cypriote law comprises amongst others the importance of the case law and doctrines of law of contract and of law of torts. It is interesting to note that Cyprus has adopted the Common Law system. Most of English cases may be cited in the Cypriot courts, mostly as guidelines but, under certain conditions, some of British cases can be binding in Cyprus. In the areas where there is no specific Cypriot legislation the principles of English common law are applied.

Similarly to the English law the main domains of law which may be involved in the context of construction projects are law of contract and law of torts.

Law of torts provides general rules aiming in protecting several interests recognized by law and defines rules of compensation, which can be awarded to persons injured by a “wrongful act” such as personal injury, damage to property or financial damage. Liability to compensate a damage may arise as a consequence of an act or an omission of the “wrongdoer” or of a person for whom he is vicariously liable. Legislation which governs this area of law in Cyprus is Civil Wrongs Law, Cap. 148.

As far as contract law is concerned, until 1960 it was based on the English law. Subsequently Cyprus developed its own legal principles, which were widely inspired by English and Indian legal systems. The legal act, which governs the questions of contractual liability is the Contract Law, Cap. 149.

A breach of contract gives the injured party right to initiate a legal action and to claim damages suffered as a result of the breach. Total or partial failure to perform a contract enables the innocent party to regard it as discharged subject to certain conditions.

Similarly to the English law, the parties are generally free to form their contractual relationship, however a contractual agreement may be to some extent completed or modified by terms implied under the case law, statute or by custom. The implied terms may be of particular significance in protecting the parties whose bargaining power is weaker.

In Cyprus, similarly to the English law, the principle of privity of contract applies to contractual agreements. According to this principle only the original parties to a contract may have rights and obligations under it (which means that third parties are unable to enforce a contractual agreement if they are not a party to it).

The owner has the responsibility to obtain all licenses, appoint designers, appoint contractor, appoint health and safety manager and etc.

Builder or property developer is under the duty to perform the works according to the construction contract (if applicable), the building regulations, relevant construction permits and the art of good workmanship.

When defects in a building occur or when the builder fails to comply with his duties, the owner or buyer affected is entitled to claim compensation equivalent to the cost of repair of damage. The claim may be founded on breach of the construction agreement due to lack of attention and care during the construction of the building or upon civil wrong of negligence. Damages can be claimed only if they were reasonably foreseeable and if they can be attributed to negligence or to breach of contract by the contractor. Burden of proof of contractor's negligence remains on the claimant.

In the field of construction in Cyprus there is a practice of using standard construction contract forms issued by The Joint Committee of Architects, Engineers, Quantity Surveyors and Building Contractors of Cyprus (*ΜΕΔΣΚ - Μικτή Επιτροπή Δομικών Συμβολαίων Κύπρου*). These standard forms are based on Joint Contract Tribunal (JTC) contract forms published in the UK by the Royal Institute of British Architects and apply to the private sector.

In the public sector the conditions of contract are based on the Government's contract which vary to some extent from the private standard contract form – for example the engineer may not issue instructions and decisions without the prior approval of the employer.

The building contractors in Cyprus must be registered by the Council for the Registration and Control of Building and Civil Engineering Contractors. The Council operates an on-line register of licensed builders, which indicates the class of their licence and their experience. In order to have their licence application approved the builder must pass a number of examinations. There are different classes of builders' licences starting from A to E (with A being the highest class available for larger contractors and E the lowest, allowing to build houses up to 300 m² metres of surface). Licences are renewed every year and the building contractors are subject to ongoing checks. It is illegal to perform construction works without a licensed contractor and penalties apply to those who are in breach of this rule. Some works (e.g. minor works, some types of repairs etc) may not require the licence. There are currently two separate registers for Building Works and for Technical (civil engineering) Works.

Professional consultants must be registered by ETEK (Cyprus Scientific and Technical Chamber), which is a statutory regulatory body for all engineers in Cyprus established by Law 224/1990. ETEK also plays an advisory role to the Government. The Members must follow regulations of the Chamber which, among others, forbids them to accept work in the fields of engineering where their knowledge is not adequate. Currently, only natural persons can be registered with ETEK and they have unlimited personal liability. For professional appointments a specific standard document issued

by the Chamber is signed by both parties. This document contains description of work, initial budget, engineer's fees and special terms relative to the appointment. This document also contains a clause under which disputes concerning professional fees should be resolved by an arbitrator assigned by the ETEK. However, it is common for the parties to sign contract in addition to the ETEK form.

It seems that the large increase in foreign investment in real estate and the rapid increase in property prices during the years 2000-2007 have revealed certain concerns with respect to construction quality and protection of real property buyers in Cyprus. Proposals of reforms aiming in improving quality and protection of buyers are currently being discussed.

2. Starting point and duration of liability

Under the Civil Wrongs Act relative to tortuous liability, the article 68 of the Act provides the following limitation periods during which a legal action for damages can be initiated:

- 2 years from the date of the damage sustained,
- In case of civil wrongs fraudulently concealed by the defendant, 2 years from the date when the plaintiff discovered it or should have reasonably discovered it if he had exercised reasonable care and diligence.
- In case of fresh damage for a civil wrong that has already been ceased, 2 years after the ceding

In the framework of contractual agreements the parties can define the limitations periods by means of contract.

3. Sharing of liability between different parties to a project

Each party involved in construction operation bears responsibility for their own scope of work only. Joint and several liability does not seem to be a common practice in Cyprus.

II. Insurance

1. Insurance mandatory by law

There are no legal insurance obligations for construction parties in Cyprus. However, requirements relative to insurance may be imposed by standard construction contracts or by individual contractual arrangements with the client.

A project of law is currently being developed, aiming in allowing construction design services to be offered by limited liability companies. According to this draft law such companies would be required to be registered by ETEK (Cyprus Scientific and Technical Chamber).) and would be subject to compulsory professional indemnity insurance.

2. Widespread insurance

Insurances available in Cyprus cover damage to the works during construction operation (Contractor's All Risk) as well as third party liability. The risk of defects to the building after completion may be covered with the use of financial guarantees and bonds.

A widespread market practice consists in arranging guarantees of minimum 1 year covering construction defects resulting from negligence or from non compliance with the terms of the construction contract. Longer guarantee durations such as 2 or 5 years are also available.

Furthermore the market offers professional indemnity insurance for consultants, which is currently optional.



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- b) Andreas Neocleous & Co LLC, Neocleous House, 195 Makarios III Avenue, CY-3030 Limassol, Cyprus
- c) Dion Toumazis & Associates, 4 Romanos Street ,1070 Nicosia, Cyprus
- d) Cyprus Scientific And Technical Chamber (ETEK)

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Czech Republic

I. Liability

1. Principles of liability

Main legal acts applicable to construction in Czech Republic are the Civil Code, the Commercial Code, the Building Act 183/2006 Coll., the Act no 360/1992 Coll. on Pursuit of Activities of Authorised Architects and on Pursuit of Activities of Authorised Engineers and Technicians Involved/Practicing in Construction.

Construction parties are subject to general extra-contractual and contractual liability rules defined in the Civil Code. Further provisions relative to duties of parties acting as a business activity under various types of contracts are found in the Commercial Code. The Civil Code applies if at least one party of contractual agreement is not a “businessman” whereas the Commercial Code rules apply where both parties to the agreement act as a business activity.

Provisions of the Civil Code relative to contracts of “creating things” upon order stipulate that:

- “If a building is made for the customer upon an order, the maker is liable for damage to or destruction of the building until the moment when the finished building was taken over unless the damage occurs even otherwise” (art. 651);
- the provider is liable to ensure “that the thing has qualities stipulated for by the customer in the order” and that he is liable “for defects of the performed order caused by defects of the material delivered by the customer or by unsuitability of his instructions unless he reminded the customer of defects of the materials or of unsuitability of his instructions” (art. 645).
- Art 646 (3) defines statutory warranty periods applicable to construction of buildings and to building components, which will be discussed later in this document.

In case of defect, the claimant may require repair of it. If repair is impossible the claimant may withdraw from the contract or claim an appropriate price discount. He may also claim compensation of necessary costs which have arisen from the defects.

The art. 56 of the Civil Code introduces protection measures in case of so called “consumer contracts”. This article indicates several clauses which are inadmissible in consumer agreements. For example clauses excluding or restricting supplier’s liability for injury of death resulting from his acts or omissions and clauses restricting or excluding liability for defects and resulting damages are considered as inadmissible.

The Building Act 183/2006 Coll. deals with the matters related to territorial planning and to construction permissions, duties and responsibilities of persons involved in preparation and execution of construction activities and general rules for design activity and for realisation of construction works i.e. so called general requirements for construction as well as with protection of “public priorities” during the construction operation. The Act defines the following construction parties: owner, developer, contractor’s site manager, building supervision expert, designer and building entrepreneur.

- Owner is under a duty to maintain in a proper state the structure and its installations, to notify to relevant authorities building all defects which could cause danger to life or health, to enable inspection of the structure and to participate in it, to archive documentation relevant to performance of the building during the whole useful life of the structure and the site diary during 10 years from approval of the building for use.
- Developer is under a duty to take care of “a due preparation and realization of the structure” and “protection of lives and health of persons or animals, protection of the environment and property, and a considerate treatment of the neighborhood” during construction operation. Developer is also obliged to make sure that the required construction documentation is prepared and that, where necessary, the plans are drafted by persons with appropriate qualifications. Developer has also a duty to provide the relevant notifications to competent bodies. In case of public procurement projects developer ensures technical supervision and designer’s supervision over the works performed.
- Contractor’s site manager is under a duty to manage performance of works in compliance with plans, relevant permits and with respect of life and health safety, environmental safety and work security rules at the construction site. He is also obliged to ensure respect of general requirements for construction as defined by the Building Act and of relevant technical regulations and standards. The site manager is also responsible to ensure that the defects identified during construction works are removed, to notify them to relevant authorities and to cooperate with persons performing technical and designer’s supervision.
- The building supervision expert is liable together with the developer for conformity of the “spatial location” of the structure with relevant documentation, for respect of the general requirements for construction, other technical regulations and of relevant administrative decisions as well as for accessibility of the structure. Moreover, the building supervisor monitors performance of the works, safety of installations and devices operated on the building site, ensures that construction products and materials are installed or applied in an appropriate way and makes sure that the defects identified in the course of the works are removed and notified to competent authorities. He also keeps the site diary or construction records book.
- Building entrepreneur/contractor has a duty to ensure that the work’s performance is managed by an expert site manager and that all tasks requiring specific authorisations are performed by persons awarded with such authorisations. The contractor is obliged to execute the construction works in accordance with design documentation, relevant permits, the

general requirements for construction, technical regulations and standards and to ensure respect of life, health, environmental protection and work security duties defined in relevant regulations. The Act allows that some structures and installations may be realised by the developer himself under condition that he ensures appropriate building supervision over his works.

- Designer –activity of construction design is defined in the Building Act as a “specified activity” which may only be performed by physical persons awarded with an authorisation to perform design activity according to the Act no 360/1992 Coll. on Pursuit of Activities of Authorised Architects and on Pursuit of Activities of Authorised Engineers and Technicians Involved/Practicing in Construction. Liability of the designer comprises “correctness, wholeness and completeness of the planning documentation, planning study and the documentation for the issuance of a planning permission made by him/her”, observance of relevant legal regulations and acting in cooperation with the relevant authorities. Designer is also responsible for quality and safety of the structure erected according to his design, including stability and environmental safety aspects and for feasibility of his design. Further duties of designers are stipulated in the Act no 360/1992 Coll. on Pursuit of Activities of Authorised Architects and on Pursuit of Activities of Authorised Engineers and Technicians Involved/Practicing in Construction.

Under the Act no 360/1992 Coll. on Pursuit of Activities of Authorised Architects and on Pursuit of Activities of Authorised Engineers and Technicians Involved/Practicing in Construction professional consultants such as architects or engineers are subject to a compulsory “certification” i.e. an official authorization by a relevant professional body to perform their professional practice and a compulsory registration in an official register. They must also follow professional rules defined by their respective professional organisations. Professional consultants are due to meet a certain level of professional skill and care defined in the Act No. 360/1992 Coll.

2. Starting point and duration of liability

The Civil Code defines the following general statutory liability limitation periods:

“(1) Right to compensation of damage shall become statute-limited in two years from the day when the damaged person learnt of the damage and of the liable person.

(2) The right to compensation of damage shall become statute limited no later than in three years and, as for damages caused by intention, in ten years from the day when it came to the event from that the damage arose; this rule shall not apply to damages to health” (art. 106 of the Civil Code).

In addition to the above the art. 646 of the Civil Code defines a period of statutory warranty of 3 years applicable to building defects. Other regulations may stipulate shorter warranty periods for certain parts of the building, however these periods cannot be lower than 18 months. Further legal warranty period of 18 months apply on repaired or adjusted elements. The rights arising from liability for defects have to be acted upon within the warranty period, otherwise they become extinct.

Under the Commercial Code the limitation period is of 5 years from the day on which the injured party learned or could have learned of the damage, with a maximum of 10 years from the day when the damage occurred.

The parties are free to define contractually longer warranty periods. According to our interlocutors, the liability of building contractors for damages resulting from the work performed tends to be defined contractually for longer periods than the statutory provisions.

Similarly in case of architects and other professional consultants, the liability for defects in design is usually defined in the appointment contract for periods longer than the statutory limitations.

Producers of construction materials are subject to a compulsory legal warranty covering the goods sold during 2 years starting from the date of purchase and to liability for damages caused by defective materials (under the Act. No.59/1998 Coll).

3. Sharing of liability between different parties to a project

The general joint liability provisions are defined in the Civil Code. According to the art. 438 if a damage is caused jointly by several persons, they are liable for it jointly and severally. In justified cases the court may decide to apportion liability of each “wrongdoer” according to their individual contribution to the damage.

Moreover, in some cases provisions of the Commercial Code may apply. Section 293 of the Commercial Code stipulates that “If several persons are jointly bound to render the same performance, it is presumed, in case of doubt, that they are bound to perform it jointly and severally”. According to section 295 of the Commercial Code “If several persons assume an obligation and its nature implies that the obligation can only be fulfilled by collaboration of all the co-debtors, the co-debtors are obliged to fulfill the obligation jointly”.

II. Insurance

1. Mandatory Insurance

Under Section 16 of the Act no 360/1992 Coll. on Pursuit of Activities of Authorised Architects and on Pursuit of Activities of Authorised Engineers and Technicians Involved/Practicing in Construction architects, consulting engineers and technical surveyors are under obligation to carry “third party professional insurance policy”. The compulsory insurance is arranged for the period of one year and is subject to tacit renewal for most insurers. It must be maintained by the professional during the entire duration of their practice. A proof of a valid insurance must be produced upon request to the Czech Chamber of Architects and it is also one of conditions of registration with the Chamber.

There is no obligation to deliver the compulsory insurance by the insurers.

2. Widespread insurance

Contractor’s All Risk insurance (CAR) seems to be frequently used. This insurance may be required by the client, especially in the framework of public procurement contracts or projects financed by foreign investors. Moreover, performance bonds delivered usually by banks (and also by insurance companies) are available, but, according to our interlocutors, they tend to be less popular than the CAR insurance.

In 2006, following a proposition of TZUS (Technical and Test Institute for Construction) the Ministry of Industry and Trade discussed with the representatives of the insurance sector a possibility of implementing in the Czech Republic an insurance scheme covering construction defects. The solution

envisaged was inspired on the insurance model existing in France. Implementation of such an initiative either as a voluntary scheme or as a legal obligation was taken into consideration. The project was abandoned due to the lack of suitable reinsurance cover available for such new solutions reported by the insurers.

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- d) TZUS - Technical and Test Institute for Construction, Prosecka 811/76a, 190 00 Praha 9 – Prosek, Czech Republic
- e) Beiten Burkhardt, ul. Ks. Skorupki 5, 00-546 Warszawa, Poland

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Denmark

I. Liability

1. Principles of liability

The liability framework in Denmark is composed of technical regulatory acts setting out construction standards and of standard forms of construction contracts widely used in the industry.

The main acts are Building Act from 1977 (Byggeloven), which sets out basic principles relative to construction and Building Regulations applying to all buildings except of small dwellings, which in turn are ruled by a specific regulation called Building Regulations for Small Dwellings from 1998 and are subject to simplified building permission procedure. The Acts above have been constantly renewed in the recent years. A new project of amendment of the Building Act is currently being discussed. A new version of the Building Regulations for Small Dwellings in force since 2008 has extended the scope of these Regulations to larger buildings.

The above technical texts are further completed by memorandums or notes relative to specific aspects of construction and by guidelines or standards of good practice.

The purpose of the above body of written rules is to ensure that minimum technical requirements for buildings are met in terms of solidity, fire safety, energy performance and quality as well as to define the ways how new developments should be integrated with the existing buildings. The Building Regulations are based on functional criteria rather than on precise technical prescriptions, which facilitates implementation of innovation. Respect of the technical regulations is to some extent verified by the local authorities through verification of plans before the construction work commence and through final inspection and approval after the building is completed.

Liability of the parties participating in construction projects is defined by standard contract wordings issued by the former Danish Ministry of Housing and Urban Affairs.

Legal relations and obligations between the client and contractors are defined by the contract wording called AB 92 (General Conditions for Works and Supplies for Building and Civil Engineering Works).

Relations between the client and designers or professional consultants are defined by the standard wordings called ABR 89 (General Conditions for Consulting Services).

ABT 93 (Almindelige Betingelser for Totalentreprise) contract wordings correspond to design and build type of projects. The AB92, ABR89 and ABT93 are so called agreed documents which are

developed over years in cooperation between the Danish building authorities and the most important organizations in the building and construction industry. The contracts are widely used and are to a large degree considered to be representing the general rules of Danish construction law.

The liability of professional consultants is founded on necessary professional skill and care principle. They are liable for defects caused by their errors or negligence.

The contractor's liability for the works is alike, though he is acting under a rule of strict liability with regards to defects in the materials used (however, according to some opinions the contractor cannot be held strictly liable if he uses materials known at the time when the works are performed and when the materials are prescribed by the client unless it is obvious that they are not suitable for the intended purpose).

As indicated above, the duties relative of the mission of the above parties are detailed in the standard contract wordings.

In the case of designers or consultants the contract may specify a maximum amount to which they can be held liable.

According to AB 92 and ABR 89, the contractor and the technical consultant cannot be liable for consequential losses.

According to the standard contracts wordings, the disputes relative to the construction contracts are settled by an arbitration body called Building and Construction Arbitration Court.

It is worth to note that there is no monopole of the profession of architect in Denmark and no obligation to be a member of any professional body. Membership in the chamber of architects - Akademisk Arkitektforening - is voluntary.

2. Starting point and duration of liability

Standard contract forms stipulate duration of liability for building defects is 5 years starting from handover of the building. During this period the contractor is due to repair the defects notified by the owner. If the contractor refuses to rectify the defects, the owner may repair them at the contractor's expense or claim a reduction of payments specified in the construction contract.

After the expiry of this period the owner cannot claim any damages related to the building defects unless the parties have agreed to extend the liability period or the contractor has acted in gross recklessness.

Pursuant to the new Danish Limitation Act 2008 an owner's claim for damages in relation to construction defects is subject to a limitation period of three years from the time when the owner became or should have become aware of the defects, with an absolute period of limitation of 10 years from the due date of the claim.

This provision cannot be derogated from to the detriment of a consumer owner and the 5 years limitation period in AB92 can therefore not be applied in the context of consumer contracts to the extent that the application will involve a shorter limitation period than pursuant to the Limitation Act.

The requirement to maintain a performance bond during the period of liability in order to guarantee

the repair of defects is specified in AB 92 contract wordings.

Moreover, according to AB 92 conditions the completed building is subject to two compulsory inspections: first inspection takes place 1 year after the handover and the final inspection must be organised 5 years from the handover.

3. Sharing of liability between different parties to a project

Under the standard contracts wordings the construction parties are liable for defects resulting from their own errors or negligence, but according to practice they can be held jointly responsible where the defects are attributable to negligence by both parties.

II. Insurance

1. Mandatory Insurance

In April 2008 a legal requirement relative to building defects insurance was introduced for professional building owners' i.e. original owners (property developers, main contractors) who erect new private dwellings with a purpose of sale, rental and etc and cooperative housing associations which erect dwelling buildings for the benefit of their members.

The rules governing this requirement were defined in the Danish Building Regulations (Amendment) Act, Danish Public Housing Act and Danish Buildings and Dwellings (Registration) Act (Act No. 575, June 2007). Detailed rules relative to the scope of the building defects insurance, definition of building defect, inspection and publication of companies, which have contributed to defective building works, were laid down in Executive Order no. 1292 from October 2007.

The requirement to carry building defects insurance applies to new buildings used mainly for permanent occupation. Are excluded from this obligation: buildings used on temporary basis such as holiday premises and refurbishment works or extensions of existing buildings, public owners and buildings subject to the Danish Building Defects Fund and the Building Damage Fund for Urban Renewal schemes (described below) and individual dwelling owners (consumers) who arrange themselves the entire building process and who enter directly into agreements with different contractors.

The building defects insurance covers serious building defects resulting from errors in design, execution of works or from building materials. A defect is considered to be serious if it significantly affects the "useful life" and utility of the dwelling (such as defects which might cause safety or health problems or defects resulting from non-respect of building regulations or of professional standards). The duration of building defects insurance cover is 10 years. The insurance is contracted for the benefit of the original owner and is transferred to the subsequent owners of the building if the ownership of the dwelling changes. In case of defects identified the building owner can contact either the original owner or insurer. Insurer has a duty to arrange the repair of the building and it can claim compensation from the responsible party.

The respect of the insurance obligation is ensured by the local authorities' control within planning permission procedure. The authority must verify whether the insurance quotation is attached to the planning application for projects where the requirement applies. In case of a planning application submitted by a physical person for a single family dwelling, the local authority who issues the

permission must inform the applicant that the duty of building defects insurance may apply. Moreover, at the time when an application of the occupancy permit is made, the local authority verifies whether the building defects insurance has been taken out and whether the premium has been paid. The name of the insurer is registered in the Danish Central Register of Buildings and Dwellings.

The legislation relative to compulsory building defects insurance requires also that the building is inspected in year 1 and 5 from handover. Based on the inspection's results a report containing the identified defects is prepared by the surveyor and subsequently insurer prepares a list of defects covered by the compulsory insurance, which is forwarded together with the inspection report to the building's owner and to the parties who had contributed to performance of works, which have been found defective.

Another interesting initiative which has arisen in connection with the insurance requirement consists in Internet publication of a list of companies which contributed to works, in which defects covered by the compulsory policy have been found. The facility is operated by the Danish National Agency for Enterprise and Construction. The public list contains contact data of the companies concerned, description of defects identified and post code of the building, in which defects have been found.

Prior to the law from 2008 on building defects insurance, two compulsory insurance schemes were established in Denmark in the framework of implementation of a reform called "the Quality Assurance and Liability Reform" from 1986 (Kvalitetssikringsreforme): the Danish Building Defects Fund and The Building Damage Fund for Urban Renewal.

The Danish Building Defects Fund (Byggeskadefonden)

The Danish Building Defects fund has been created in 1986 with the view to address the problem of extensive damage level in the publicly subsidised housing buildings from nineteen sixties and seventies.

The Fund carries out the following measures dedicated to monitor and prevent construction defects:

- a database of construction defects. The relevant data is available from complaints of the clients and from the compulsory building inspections performed by the fund 1 and 5 years from completion of the building,
- diffusion of information and of feedback of experience relative to building damages.

It is estimated that the measures implemented have helped to significantly reduce the level of construction defects in the monitored buildings (from 30% at the beginning of nineteen nineties to 3-4%).

Moreover, the Fund provides a security against construction defects similar to latent defects insurance - it guarantees 95 % of the cost of repair of defects occurring in the public housing buildings up to 20 years from completion. In the case of occurrence of defects the Fund finances the repair cost and subsequently claims compensation from the construction parties liable for the damages.

The Fund is financed by contributions from the public housing development sector. 1% of the total value of each construction project financed by the public sector must be paid as a contribution into

the Fund.

The Building Damage Fund for Urban Renewal (Byggeskadefonden Vedrørende Bygningsfornyelse)

The Building Damage Fund for Urban Renewal was created in 1990 by the Danish government in order to cover publicly subsidised buildings subject to urban renovation works.

In the similar way as the Danish Building Defects Fund described above, the scheme may be regarded as a kind of insurance arrangement for which owners of buildings being subject to publicly subsidised renovation works pay a premium against which they are entitled to obtain compensation of costs of repair of building damages. The building owners must pay 1.5% of the total renewal cost as a contribution into the fund. Participation in the scheme is compulsory for all publicly subsidized buildings.

Moreover, the Fund's mission comprises measures in order to prevent building damages such as inspection of urban renewed buildings and diffusion of knowledge relative to prevention of building damages. Every year the Fund issues a report with recommendations relative to buildings quality. The Fund also organises information meetings for building owners and technical advisers in order to provide them information on the most common building damages and the ways how they can be avoided.

As indicated above, buildings covered by the Danish Building Defects Fund and the Building Damage Fund for Urban Renewal schemes are exempt from requirements relative to compulsory building defects insurance introduced in 2008.

2. Widespread insurance

The insurance is in principle voluntary in the sense that construction parties' obligations relative to insurance cover are defined in the standard construction contract forms.

The AB 92 wordings comprise a performance guarantee clause, according to which the contractor must submit to the owner a performance bond within 8 days following signature of the contract. This usually takes a form of a bank guarantee. Initially the amount of the bond is equivalent to 15% of the contract value during the construction and to 10% of the contract value after handover of the building. One year following the handover the value of the bond is reduced to 2% of the contract price and the bond expires within the deadline of five years following handover of the works.

Moreover, the AB 92 wordings impose a duty on the owner to take out an insurance covering damage to the building works caused by fire and natural perils for the duration of the construction process, until all works, including repair of defects are finished. The insurance must cover all building and engineering work specified in the contract. Only clients from the public sector can be exempted from this obligation.

The AB 92 wordings impose also a duty on all contractors and subcontractors involved in the project to take out liability insurance covering all injury or damage for which they may be held liable under the Danish law and the parties above must produce proofs of the valid cover upon client's request.

3. Schemes and good practices

The Quality Assurance and Liability Reform

A large number of construction defects occurring, in particular in public housing buildings from nineteen sixties and seventies has led the government to implement a reform called “ the Quality Assurance and Liability Reform”(Kvalitetsikringsreformen) in 1986 with the view to ensure an optimal balance between the total cost of construction projects, cost of management and cost of repair of defects.

The reform addressed mainly publicly subsidised buildings with the underlying idea that the implemented principles and practices would be followed by the private sector.

The main changes brought by the reform consisted in:

- new design and performance procedures, in particular procedures of formal quality reporting during the process of design and execution, which helped to integrate the quality reporting into the construction process. According to these procedures each party had to produce a formal record of compliance of its work to the originally specified level of quality and to submit the produced documentation to the client at the end of the works,
- unification of liability limitation periods and introduction of a common liability period of 5 years for all parties involved (instead of periods varying from 1 to 20 years existing previously) in order to simplify the juridical procedures and to reduce litigation costs,
- creation of the Danish Building Defects Fund (described below),
- introduction of building maintenance guidelines,
- introduction of compulsory building inspections 1 and 5 years after completion.

In cases concerning consumers, there is a modification to the 5 years liability period according to the Limitation Act as described above.

It is considered that as a result of this reform the Danish construction sector underwent major organisational and managerial changes, which profoundly affected the market practices and the ways, in which the value chain and the process of construction delivery were organised.

The Benchmark Centre for the Danish Construction Sector (Byggeriets Evaluerings Center)

Dissatisfaction from high level of construction defects and high construction costs has led the Danish government to implement further measures in order to improve quality and competitiveness of the sector. The main issues identified in the report from 2000 “The Danish Construction Sector in the Future- from Tradition to Innovation” were high overall costs of construction, high level of defects, difficulty to identify parties liable for defects leading to long and costly litigation procedures, lack of transparency in the industry and of lack of clear understanding of the price-quality relationship in the decision-making process leading to frustration of clients and construction services providers and to costly disputes, underperforming competition based mainly on price criteria with too few dominant market players, tradition-oriented approach to the construction business, lack of real competitive dynamic in the market discouraging market development, innovation and investment in increasing competency and skills.

The government highlighted an urgent need to boost the competitiveness and productivity of the market and to prepare the Danish construction sector to the challenges of international competition, new technological developments and requirements of modern IT driven society.

The Danish Ministry of Housing and Urban Affairs and the Danish Agency for Trade and Industry recommended in the report from 2000 creation of the Benchmark Centre for the Danish Construction

Sector with the view to enhance transparency in the market via a benchmarking system and productivity studies.

The BEC Centre was set up in 2002 as a joint initiative of all main players of the construction industry such as clients, contractors, architects, engineers, construction materials producers and the government. The BEC centre is a non profit organisation and it is dedicated to:

- enhance transparency in the construction industry by offering a set of comparable criteria helping the market parties in their decision-making process and in their choice of appropriate service providers,
- identify good practices thanks to a benchmarking system composed of a register and of a set of Key Performance Indicators (KPI).

The register - register of construction firms is maintained in the view to assess firm's capacity based on its previous performance. The database is created based on information included in the certificates of completion which are sent to the BEC centre. Based on this information each registered firm is assessed according to four main criteria: respect of deadlines, quality, respect of safety and security rules and client's satisfaction.

The records are kept in the register no longer than 3 years and then they are automatically deleted in order to make sure that the register is up to date and that the evaluation is based on the recent information.

Key Performance Indicators (KPI) - the BEC centre has developed and operates a benchmarking system based on 14 key performance indicators. The indicators concern four main fields: deadlines, quality, safety and security conditions and profitability. The evaluation based on KPI indicators is performed thanks to questionnaires sent to all parties involved in a project and to the certificate of completion provided by the client. The data extracted from the above documentation is used to calculate the firm's performance score.

Following Statutory Order from 2005 all contractors bidding for Danish public projects have to justify their capacities in the form of KPI indicators relative to their previous construction projects.

Although the construction benchmarking is not compulsory for private projects, it has shown itself popular in the private sector (in 2005, 800 from around 1000 construction projects were evaluated by the BEC on voluntary basis).

In addition to the missions above the BEC disseminates information about construction and construction research and animates network groups within the construction sector.

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- b) FRI - Danish Association of Consulting Engineers c) University of Copenhagen

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Estonia

I. Liability

1. Principles of liability

The liability may arise under contract in case of breach of contractual obligations, under delict in case if loss or injury is unlawfully (i.e. violating of statutory duties) caused to a third person (person who is not a contracting party nor protected by the construction contract).

Contractual liability covers the non-compliance of the work with the contract. In case the requirements to the work are not set worth in the contract, the law (the Law of Obligations Act from 26 September 2001, The Building Act) presumes that the work must be usable for the intended purpose and of the average quality. The Building Act stipulates that the work made under the construction contract shall retain its safety, usability and quality for two years at minimum (statutory warranty period). It is unclear if the obligation is owned only towards customer or also towards any owner or user of building work.

The building contractor shall at its own expense and within a reasonable period of time repair the construction faults which become evident during the warranty period.

The law presumes that deficiencies in the works which become evident during the warranty period existed at the moment of delivery of the works.

The contractual liability is not based on the culpability (if not otherwise agreed). The plaintiff must prove the breach of the contractual obligation, the loss and the causal connection. In case of breach the liability of the obligor is presumed.

The liability under delict (i.e. extra-contractual liability) is stipulated in the Law of Obligations Act. The liability under delict is applicable in cases when the aggrieved person has no contractual relationship with the person causing the damage and may be also if the occurred damage falls outside the scope of the contractual obligations of the defendant.

A person who has unlawfully caused damage to a third person must compensate for the damage if he is culpable of causing the damage or is liable for causing the damage pursuant to law. E.g. the construction expert, consultant or soil researcher can be liable if he has culpably provided incorrect information, incorrect opinion or fails to correct the information already provided.

The plaintiff must prove the violation of the statutory obligations, the loss and causal connection. The culpa of the defendant is presumed by the law.

In Estonia standard forms of construction contracts are widely used. Estonian standard forms are drafted by the Ministry of Economic Affairs and Communications as opposed to other Baltic countries, where standard contracts are based on FIDIC publications. The following main types of such contracts can be distinguished: General Terms of Construction Contracts, General Terms of Construction Subcontracts and Standard Terms of Design Work Contract. Although there is no obligation to use such standard forms it is regarded as best practice.

2. Starting point and duration of liability

The statutory warranty period for construction works is 2 years. The warranty period starts from the date of completion of the building works. If the date of completion of works is not determined in a contract, the warranty period is deemed to begin from the date of delivery of the building or a part of the building. Parties can agree a longer warranty.

Statutory limitation period for a claim arising from the deficiencies of the works performed under the construction contract is 5 years. The same applies to the claim arising from deficiencies in the building under the sales agreement.

The limitation period is 10 years if the obligated person intentionally breached their obligations.

The limitation period for a claim arising from unlawfully caused damage (delict) is 3 years.

The statutory liability limitation period commences from the moment when the plaintiff became aware of the damage and identified the person liable for the damage.

The parties can agree longer (but not exceeding ten years) limitation period for filing the claims with the court under the construction contract.

3. Sharing of liability between different parties to a project

If several persons are liable for the same damage on the same or different legal grounds they shall bear joint-and-several liability for payment of compensation. The court has the right to determine the compensation when an exact damage cannot be established. The court may either apportion or reduce the compensation according to the damage due in part to the aggrieved person or in case the compensation in full would be unfair with regard to the obligated person or not reasonably acceptable for any other reason (e.g. economic situations of persons involved, including insurance cover can be such reasons).

II. Insurance

1. Mandatory insurance

According to Building Act the notified body¹ (i.e. a certification body, an inspection body or a testing laboratory) which, within the limits of its competence, conducts procedures required for attestation

¹ Notified body - is a designated body which, within the limits of its competence, conducts the conformity assessment procedures required for attestation of the conformity of construction products.

of the conformity of construction products, must have mandatory liability insurance of the minimum

amount insured of EUR 31 955. The insurance covers damages caused to third persons in the framework of operations of the notified body.

2. Widespread insurance

It is common practice that medium and large construction companies take out a contractor all risk (CAR) insurance.

For designers, constructors, consultants, researchers, experts, supervisors, etc a professional civil liability insurance covers are offered and normally required by the customers.

Lenders require insuring of the mortgaged properties. All risks Property insurance covers usually excluded liability for the construction deficiencies.

In common practice the CAR insurance, the professional indemnity and third party liability insurances are required by the clients. Professional organisations in Estonia recommend to their members that they need to have CAR insurance or professional indemnity and third party liability insurance.

3. Schemes and good practices

For acting in a construction or construction-related field (i.e. building, designing, conducting site investigations, exercising owner supervision, performing expert assessments of building design documentation, evaluating construction works and engaging in project management) an entrepreneur must to register its activities in the Register of Economic Activities and to have a corresponding legal relationship with a person who has completed higher education in an appropriate field and has three years experience in work related to his or her profession.

Energy-performance label

On 27 September 2006 Estonian Parliament adopted Building Act amendment regarding energy performance label. The energy-performance label provides that from the beginning of 2009 the sellers of houses or parts of houses and lessors of apartments should present an energy-performance label before signing an agreement. From the same date all non-residential buildings with area exceeding 1000 m² should also have an energy label. The better the buildings energy efficiency is or the higher the energy efficiency class is, the higher is the assessed value of real estate. Energy-performance labels could be issued by especially accredited companies or by a company who is making construction examinations. The construction company is obligated to provide energy performance label to buildings built after 1 January 2009 except which have applied building permit before 1 January 2009.

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- b) Ministry of Economic Affairs and Communications website
<http://www.mkm.ee/>
- c) Estonian Association Of Architectural And Consulting Engineering Companies website

<http://epbl.ee/index.php>

d) Eesti Arhitektide Liit website

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10415 Tallinn, Estonia

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Finland

I. Liability

1. Principles of liability

The main legal acts relating to construction in Finland are the Land Use and Building Act 123/1999, Building decree 895/1999 and the National Building Code of Finland. This regulation is dedicated to controlling the land use, spatial planning and construction activities.

The Land Use and Building Act 123/1999 deals with the conditions of use of land and water and with building activities in the aim to achieve sustainable development in economical, ecological, social and cultural terms. The Act imposes some duties on certain construction project participants, for example the duty to have suitable qualifications and to use qualified personnel for the persons dealing with planning activities and with construction activities, duty to designate for each building site a person (i.e. site manager approved by the local building authority) responsible for carrying out the work and for the quality of the work.

Moreover the Act contains a number of dispositions relating to carrying out, supervision and approval of construction works (for example rules concerning supervision and inspections of construction works by building authorities and by the property developer or other private inspection, further specified by a decree - it is worth to notice that "private" inspections are not allowed for residential buildings). The Act also defines duties of care and maintenance of existing built environment.

The Building decree 895/1999 provides among others regulations and guidelines relating to construction design and management duties and to minimum qualifications required for activities of design and managing of building sites in accordance to the type of project concerned, essential technical requirements for buildings, carrying out of construction works as well as reviews and inspections of construction works.

The National Building Code of Finland complements dispositions of the Land Use and Building Act with technical regulations and instructions with regards to new building developments and, to a limited extent, to renovations and alterations of existing buildings.

The Finnish law does not specify any particular provisions relating to construction contracts. The general provisions of contract law are applicable to aspects, which are not expressly specified in the agreement between the parties.

It is important to note, that the Finnish legal practice is characterised by an approach consisting in a desire to achieve an equitable balance between the interests of parties to a contract, which in the case of a dispute will prevail over any existing contract wordings, applicable legal texts or relevant case law. In fact, in the Finnish legal system it is considered that the certainty of law in a wider sense is less important than an equitable relation in every particular case. For example the Finnish courts have a power of amending the content of a contract if they consider that it is “unfair” or creates inappropriate results (Finish Legal Transactions Act).

As a consequence of the above a common practice in the construction market is to use General Conditions for Building Contracts - a collection of standard contractual terms, called YSE, last version of which dates from 1998. The YSE terms have been drafted by RAKLI (the Finnish Association of Building Owners and Construction Clients). The use of the standards forms, generally regarded as equitable, provides the construction parties with some degree of certainty relative to “fairness” of the contract.

The generalised use of the YSE 98 terms makes them considered as a substitute of legislation relative to liability in the construction sector. The YSE 98 terms are widely used amongst professional builders, in particular for larger construction projects such as offices or large apartment buildings.

It is however worth to note that half of the newly built building stock in Finland is formed by one-family houses, which are built by the families themselves or by an individual builder hired by the family to do the works. In such cases the YSE 1998 terms are not frequently included in the construction contracts.

According to YSE 1998 the liability of the building contractor is based on “fitness for purpose” principle i.e. a duty to deliver a result such as defined in the construction contract.

In the case of architects’ and other professional consultants’ appointments, the market practice is to use a standard contractual terms called General Conditions for Consulting KSE 95 negotiated between the Finnish Association of Building Owners and Construction Clients (RAKLI), the Finnish Association of Consulting Firms (SKOL) and the Finnish Association of Architects (SAFA). The conditions define the liabilities and duties between the consultant and the client. KSE stipulate that the architect is liable for their own design and for compliance with the provisions of the Land Use and Building Act and with the good building practice. In the absence of other provisions in the contract, the liability of the architect is limited to the amount of “the total remuneration forthcoming to the other contracting party”.

2. Starting point and duration of liability

The YSE 98 terms stipulate 2 years guarantee period for buildings, during which the building contractor is obliged to repair defects unless he can prove that they result from circumstances out of his control.

After expiry of the 2 years guarantee period the contractor remains liable during 10 years following handover in case of defects resulting from gross negligence of the contractor, uncompleted work, unsatisfactory quality or in case of latent defects i.e. defects, which “the client could not reasonably be expected to have noticed (...) in the handover inspection or during the guarantee period”.

Moreover, the YSE terms introduce penalties for delays caused willfully or as a result of gross negligence of the contractor.

The duration of this liability may be extended if the injured party can prove that it was impossible to discover the defects within 10 years from completion (in particular defects related to waterproofing or insulation of the building).

Under the KSE 95 terms the limitations of the consultant's liability can be defined in the contract. In the absence of other provisions, the "guarantee period" expires in 1 year from completion; however the consultant may remain liable until 10 years from completion for damages arising from his gross negligence or incomplete performance where the client could not reasonably be expected to have noticed the damage prior to expiry of the "guarantee period".

3. Sharing of liability between different parties to a project

According to the market practice, in a large majority of projects there is a general contractor designed for a construction project, who assumes liability for running the construction project and for defects which may occur. He may in turn claim compensation from other parties for the damages caused or if the result defined in the contract is not achieved.

The share of liability between different parties to a project may be defined contractually.

II. Insurance

1. Mandatory insurance

The Housing Transactions Act 1994 relating to sale of housing shares in a housing company conferring the rights of possession of a residential apartment, sets out provisions in order to protect the interests of the housing company and of housing shares buyers. The Act imposes on the founding shareholders (a person, corporation or foundation who subscribes to or owns a housing share during construction stage) a duty to arrange two securities covering construction and post-completion stages.

Firstly, Section 17 of the Act imposes a duty to provide a security in a form of a bank deposit, a bank guarantee or insurance in order to ensure that the contract on construction or repair and the housing transaction contracts are fulfilled.

The security must be provided to cover the period during construction (minimum 5% of construction and repair contract price) and post-construction stage (minimum 2% of the total transaction price of the shares sold). The obligation to maintain this security lasts until 15 months following the approval of the building for use by the building authority.

Secondly, Section 19 of the Act introduces a form of an insurance scheme covering construction defects. The Section 19 requires the founding shareholders to ensure that insurance or bank guarantee (or an alternative appropriate guarantee) is arranged to protect the housing company and the share buyers in the event of their insolvency in case if the other security put up for the benefit of the housing company and the shares buyers is insufficient. This insurance or guarantee needs to be

issued before the housing shares are offered for sale and has to remain in force for 10 years starting from the approval of the building for use by the building authority. In case of insolvency of the founding shareholder the insurer or bank providing the cover has to compensate the housing company and the share buyers for “any necessary costs incurred in detecting a construction defect in the company’s residential, storage or utility building and in repairing any damage caused thereby, provided that the founding shareholder is liable for said costs”.

Under the Act, the apartment is considered as defective if it does not meet the agreed housing transaction terms or the requirements defined in legal and regulatory provisions in force at the time of the transaction, if the property does or can possibly cause detriment to health, if the construction or repair have not been carried out with care, adequate competence and in accordance to good building practice, if the materials used are of not of “normal” good quality and if the apartment does not meet the buyer’s reasonable expectations (which is assessed in comparison with transactions involving similar housing).

The apartment may also be considered as defective if the seller failed to provide the buyer before transaction with any specific information relative to the apartment, which could influence the buyer’s decisions relating to the transaction as well as if incorrect or misleading information had been provided concerning the surrounding of the apartment, services available in the area and any other important information affecting the value of the apartment.

The Act sets out the duty for the seller to perform an inspection between 12 and 15 month from approval of the building for use. During the inspection the seller has to draft minutes, which should be made available to the buyer. The buyer also should report during the inspection all defects identified by him. If the buyer fails to report the defect during the inspection he may not be able to notify it later. This rule does not apply to cases where the seller or other persons representing them have acted in gross negligence, if the apartment does not meet criteria of quality required in legal and regulatory provisions and if the defect is likely to bring about some risk to health or to property. The buyer has the right to claim repair of defect. He may also claim compensation for losses sustained as a result of the defect if the seller has acted negligently.

2. Widespread insurance

Even where there is no insurance obligation the participants to construction projects are systematically insured on a voluntary basis. It seems that examples of building contractors who take the risk of pursuing construction works without insurance cover are practically inexistent. It is also considered that the level of premiums in construction insurance in Finland is 10 times lower than in the UK due to a very small number of claims registered in this sector.

The YSE conditions impose an obligation on the general building contractor to carry insurance, which covers cost repair of defects in the building and in its equipments or indemnity to the owner in case if the defects cannot be repaired.

In the very rare cases where there is no general contractor, each building contractor contributing to the project is obliged to carry such insurance covering works performed by them.

The certificate of this insurance has to be submitted to the client before any payment for the contract works is made.

3. Schemes and good practices

Confederation of Finnish Construction Industries

Confederation of Finnish Construction Industries (RT) holds a public register of “quality” building contractors.

FISE

FISE organisation regrouping several associations representing construction and real estate sectors delivers professional training and professional qualifications and maintains a public register of qualified firms. The body has elaborated ethical conduct guidelines for professionals as well as a “competence charter”.

Moreover the body maintains a register of construction errors in the view to disseminate knowledge of safe and good construction and to prevent damage.

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Liability and insurance schemes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



France

I. Liability

1. Principles of liability

There are two separate bodies of rules applying to public and private sector. Positions of these two sets of rules may sometimes appear contradictory. Explanation of this situation consists in the fact the public sector legislation aims in defending public interests and is only inspired on the Civil Code whereas rules, which apply to the private sector safeguard private interests and follow strictly the Civil Code's provisions.

Liability in France is characterized by existence of two types of regimes: general civil liability regime and specific liability regime. The general regime of liability includes both contractual and extra-contractual liability. The specific liabilities: warranty of perfected completion (garantie de parfait achèvement), warranty of good running of dissociable elements of equipment (garantie de bon fonctionnement) and structural warranty called decennial liability (responsabilité décennale) are based on the Spinetta law of 4 January 1978 and on the case law.

In France there is no legal definition of construction works, nevertheless this concept is understood as referring to man-made structures, in most cases to works accomplished under a construction contract. The structure needs to be of immovable nature and the works should involve a construction operation including input of materials. This concept may concern both newly built structures and works on existing structures.

The concept of handover is of great importance because it is the starting point of duration of various legal warranties and of general post-completion liabilities relative to construction. The art. 1972-6 of the Civil Code defines the handover as an act through which the principal declares acceptance of the works with or without reserves.

Two categories of post completion disorders are distinguished:

- Hidden (latent) disorders, which require compulsory insurance cover and involve legal responsibilities; and
- Non-conformities which refer to the duty of provision of works and involve both general civil liability and perfect completion warranty;

Specific liabilities are:

- Warranty of perfected completion garantie de parfait achèvement (art. 1792-6 C.C. covers all shortcomings, non compliances as well as apparent and latent defects but only applies during a limited period of time (1 year) following handover. Only building contractors are subject to this duty of performance.
- Warranty of good running garantie de bon fonctionnement (art. 1792-3 C.C.) – lasts for minimum of 2 years; It is governed by the art. 1792-3 of the Civil Code and concerns defective functioning of dissociable elements of building's equipment.
- Decennial liability responsabilité décennale (art. 1792 et 1792-2 C.C.) – decennial liability of «constructors» is presumed and lasts for 10 years following acceptance with or without reserves. It concerns damages which:
 - o Compromise solidity of the structure;
 - o Affect solidity of inseparable elements of equipment i.e. elements incorporated into the structure in such way that removal, dismantle or replacement of these elements cannot be performed without deterioration or removal of material from the structure;
 - o Affect constituent elements of the works or of its equipment causing the works unsuitable for its purposes;

Decennial liability is involved when the following criteria are met:

- o Construction contract is signed directly between the party concerned and the principal;
- o There is construction of an immovable property;
- o A hidden damage occurs;
- o The damage in question is of certain gravity.

Who is subject of this liability? Constructor who has signed a construction contract with the principal; technical controller; seller of completed property built or commissioned by himself; seller of property to be erected or renovated, agent of the owner who performs functions similar to those of the principal; property developer as defined in the art. 1831-1 of the Civil Code; manufacturer of construction products called E.P.E.R.S. (Éléments Pouvant Entraîner la Responsabilité Solidaire du fabricant avec le metteur en œuvre); builder of individual houses.

Constructors may be exonerated from liabilities above in the following cases:

- o For perfected completion warranty – normal wear and tear;
- o For good running warranty and decennial liability – external cause (force majeure, fault of the principal, act of third person);
- o For decennial liability only – acceptance of risk by the principal;

Contractual liability is governed by art. 1134 and following of the Civil Code. In private law the contractual construction liability refers to disorders not covered by the warranty of good running or by decennial liability. In fact, the principal who initiates a legal action against the constructor on the grounds of specific warranties described above cannot at the same time claim on the basis of contractual liability.

Extra-contractual liability (art. 1382 and following of the Civil Code) concerns damages caused to third parties and damages which are not connected with performance of the contract. Lastly it needs to be noted that in French law there is a principle of non-overlapping between contractual and extra-contractual liability as well as between general and specific liability rules (with few exceptions only).

2. Starting point and duration of liability

Liability limitation periods run starting from handover of works.

Actions against both constructors and sub-contractors are now barred after 10 years following handover (art. 1792-4-2 and art. 1792-4-3). Handover is normally subject to decision of the principal but it may take place at the request of the most diligent party, by mutual agreement or in a form of court decision.

The handover needs to be unique (in for of a single act), it may concern a part of the works and all parties concerned should be given a possibility to participate in it.

Handover should preferably be express but it may also be tacit. In such a case, acceptance is implied from acts or from non ambiguous behaviour demonstrating the intention of the principal to accept the works.

3. Sharing of liability between different parties to a project

Joint and several liability between different parties to a construction project may result from:

- The law: in terms of decennial liability constructors and manufacturers of E.P.E.R.S. products are jointly and severally liable;
- A convention establishing joint and several liability between various actors to the construction operation (unincorporated grouping);
- A court decision consisting in in solidum conviction of some parties to a project.

II. Insurance

1. Mandatory insurance

The French compulsory construction insurance system implemented in 1978 is said to be of « double layer »:

- Insurance covering defects in the constructed property (dommage ouvrage) taken out by the principal for the benefit of subsequent owners is dedicated to “pre-finance” within deadlines and terms specified in the standard clauses repair of disorders falling within the scope of decennial liability which affect the works during 10 years from completion; subsequently the insurer providing dommage ouvrage cover exercises subrogation against the liable constructors and their decennial liability insurers;
- Decennial liability insurance taken out by the constructors in order to cover their decennial liability during 10 years following handover of construction works.

This system enables a prompt compensation of the owner and an efficient consumer protection.

The obligation of insurance applies:

In terms of construction works:

Compulsory insurance cover concerns all new structures except those listed in the art. L243-1-1 of the Insurance Code.

In terms of persons:

All principals (except, under certain conditions, the State, other public entities, moral persons acting as a principal under a partnership agreement with the State or with a State entity under the art. 1 of the ordinance no 2004-559 of 17 June 2004 on the partnership agreements as well as private legal persons executing activities exceeding the levels defined in the art. L.111-6 and art R.111-1 of the Insurance Code) are due to carry insurance of construction defects (dommage ouvrage) and all constructors and sellers of constructed property are under obligation to carry decennial liability insurance.

Simultaneously, the insurers are under obligation to insure. An independent administrative entity called Central Tarification Bureau (Bureau Central de Tarification -BCT) can be solicited by any person concerned who is refused the cover by insurers (just one refusal is sufficient), in order to fix the premium rates and possibly also the level of deductible.

Decennial liability insurance systematically includes a deductible. It is illegal to insure this portion of risk, which is intended to be borne by the insured.

Compulsory insurance contracts must award cover corresponding to standard clauses. The latter specify a minimum cover level, which cannot be restricted by any part of the insurance contract but which may be contractually extended. The compulsory clauses define scope of cover, sums insured, duration of cover, deductibles, exclusions and expiry date of decennial liability insurance as well as definitions, scope of cover, sums insured and limits, exclusions, starting point and duration of cover and mutual obligations of parties in dommage ouvrage insurance.

These compulsory insurances cover property damages of certain gravity (affecting solidity of the works or of one of its constitutive indivisible elements or causing the property unfit for its purpose) resulting from latent defects discovered up to 10 years from handover. Unsuitability for the purpose means that the property cannot fulfill functions for which it was intended.

In addition to insurance obligations above imposed by the law of 1978, architects and “sellers-renovators” (rénovateurs-vendeurs) are subject to compulsory professional indemnity insurance.

2. Widespread insurance

Firstly, principals and constructors often take out securities complementary to compulsory decennial liability insurance such as guarantee of good running of divisible elements of equipment and insurance of consequential losses.

Secondly, Contractor’s All Risk insurance (Tous Risques Chantier) and professional indemnity insurance are also frequently used insurance covers.

First one covers the erected structure against material damages which may occur during construction process as a result of fire, explosion, water damages, storms and natural perils, damages caused by construction works...This cover may benefit the principal and also all other construction parties including subcontractors, who operate on the construction site.

The second one covers liability of construction professionals arising from bodily injuries, material and immaterial damages caused to their clients or to third parties.

3. Schemes and good practices

Technical control

Technical control based on the law of 1978 plays an important role in the field of construction and is compulsory in some cases. The art. 8 of the law states that “the technical controller is due to contribute to prevention of various technical disorders likely to occur during performance of construction works. The expert’s opinion refers in particular to problems concerning solidity of the structure and to safety of persons”.

CSTB (Centre Scientifique et Technique du Bâtiment)

CSTB – Scientific and Technical Building Centre is a public organisation under control of the Ministry of Ecology, Energy, Sustainable Development and the Sea.

CSTB fulfils public service missions and is also involved in industrial and commercial activity in order to balance its financial standing. The missions of CSTB are focused in three following fields:

- Scientific research and technical expertises for construction and housing sector,
- Improvement of construction quality,
- Improvement of information accessible to construction professionals,

Amongst its actions CSTB proposes three main services dedicated to help professionals to launch innovative products and technologies in the market: Avis Technique (this procedure is defined by ordinance from 2/12/1969), Appréciation Technique d'Expérimentation and Pass' Innovation.

All three procedures above are voluntary and are intended to bring elements of evidence or of performance assessment face to requirements related to construction works. They are taken into consideration by insurers in different ways; they complement each other in the aim of risk standardisation.

AQC (Agence Qualité Construction)

In the framework of construction insurance reform in 1982 AQC – Agency for Construction Quality was created in order to prevent construction disorders and to improve quality in construction. As a platform of exchange between various categories of construction participants, it brings together all professional organisations from the construction sector, insurers, experts, certification bodies and public authorities.

The AQC provides their members with a unique and neutral working framework structured around three main fields:

- Monitoring – Observatory of Construction Quality is the basis of all AQC's work. It benefits from exclusive tools which enable to identify and to analyse construction pathology, to prevent serial disorders and to determine future actions.
- Prevention – there are two committees in charge of this subject: C2P (Committee of Prevention of Products installed) and CPC (Committee of Construction Prevention).
- Communication – relevant information is diffused in various forms: articles, books, letters, circulars, CD disks, press communicates... and through various media: printed and electronic letters, bi-monthly Construction Quality review, meetings and seminars, professional trade fairs.

Qualification procedures

Furthermore, independent qualification procedures are delivered by various organisations (Qualibat, Qualifelec, OPQIBI...). They are dedicated to building contractors and to engineering professionals with the aim to approve their competences and their internal quality management systems. Examples of such procedures include MPRO-Architecte for architects, QUALIMO for social housing organisations, QUALI-PROM for private property developers.

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Internet websites:

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- b) Euro-Info-Consommateurs, Rehfusplatz 11, Kehl, 77694, Allemagne
- c) Fédération Nationale des Travaux Publics, rue de Berri, 75008 France
- d) FFACB- Fédération Française des Artisans Coopérateurs du Bâtiment, France
- e) FFSA, 26 Boulevard Haussmann, Paris 75009, France
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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Germany

I. Liability

1. Principles of liability

The basic legal framework relative to construction in Germany is defined by legal and regulatory texts as well as by strongly developed system of norms. Contractual provisions also play a considerable role in this system.

The legal and regulatory rules are defined partly at the federal level and to a large degree by the Länder. In order to encourage some cohesion between the regions, ministries in charge of construction meet during conferences, where standard projects of norms are discussed.

The Civil Code (BGB – Bürgerliches Gesetzbuch) sets out the main provisions with regards to:

- liability in tort such as injuries inflicted to third parties as a result of construction operation (§ 823 I BGB), breach of statutory provisions that intend to ensure protection of other persons ex. safety regulations (§ 823 II BGB) and liability for damages caused by agents or subcontractors (§ 831 BGB),
- liability of construction parties (such as architects, engineers, building contractors) for construction defects (631 BGB and 634 BGB)

During construction operations the persons in charge of the supervision of works such as architect, engineer, building contractor as well as the client are legally liable to ensure that appropriate measures are in place, in order to make sure that the construction site does not constitute a danger to third parties.

The building contractors are liable for damages affecting solidity of the building due to error in design, hidden defects or non-compliance with the norms. The liability of the contractor is also involved in the case of important damages affecting the value or the fitness for intended use of the building.

Article 319 of the German Penal Code (Strafgesetzbuch, STGB), stipulates that architect, engineer and building contractor may be subject to penal liability if the structure is endangered, in particular if a failure to observe generally acknowledged rules during design, supervision or execution of works, results in putting in danger life or physical integrity of persons.

The provisions of art. 319 of the Penal Code together with art. 823 of the Civil Code concerning health and safety during the construction works form a set of “protective legislation”, which provides additional legal basis for financial compensation of persons, whose physical integrity or property have been harmed.

Federal contracting rules called VOB (Vergabe und Vertragsordnung für Bauleistungen) - Standard Rules of Contracting and Execution of Construction Works - govern awards of public works contracts in the framework of public procurement projects. They are compulsory for the public procurement procedures. These regulatory clauses concern relationship between constructor and principal. They complement the general rules established in the Civil Code.

The VOB clauses are periodically revised by DVA (Deutscher Vergabe und Vertragsausschuss). They provide a standardised basis of construction contracts and are composed of three main parts: rules of award of contract, general wording of construction contract covering all stages of the project from signature of the contract through execution, handover, payment settlements and guarantee period and general wording of technical terms of the contract works (ATV) which are composed of a set of DIN technical norms.

The VOB clauses, although they are not a legal disposition and are not compulsory for private construction contracts, are frequently used in the framework of private projects. It is estimated that the VOB clauses are used in a very large majority of construction projects in Germany.

In addition to the existing legal, regulatory and normative provisions with regards to construction, contract also plays an important role in formation of the liabilities between the parties to a construction project. The degree to which the parties may form contractually their mutual relationship is large, under condition not to pervert general rules defined in the Civil Code.

Finally, it is important to note that construction contracts in Germany describe with great precision the tasks to be performed, indicating for each part of the works the relevant applicable norms, which need to be strictly followed.

In addition to the general framework described above, a specific legal regime aiming in protecting the rights of consumers in case of property purchase from a property developer is worth being noticed: a legal disposition called Makler – und Bauträgerverordnung (MaBV) introduced in 1974 defines a number of principles, which must be respected by the property developers, relative, among others, to financial standing, the need to obtain a professional licence delivered by a competent authority and provisions, which must be contained in the purchase contract (such as description and plan of the property to be sold). This law defines also a maximum percentage of the purchase price, which may be paid by the client at each stage of the development and conditions to be met until the first payment can be made. If the contract differs from the above terms, the property developer may instead provide a complementary financial guarantee to the client.

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2. Starting point and duration of liability

A specific limitation period relevant to construction defects defined in the Civil Code (§ 634a I Nr. 2 BGB) is 5 years starting from handover in case of damages arising under contract of construction or contract of supervision of construction operation.

The parties, with the exception of architects, may contractually define a different liability limitation period. For example VOB clauses introduce a limitation period of 4 years, which may be extended for further 2 years in case of defects resulting from an incorrect execution of the construction contract. Architects cannot contractually modify the duration of their liability defined in the Civil Code.

There are cases, where the starting point of limitation period may be significantly postponed.

3. Sharing of liability between different parties to a project

The parties to a construction operation can be subject to joint and several liability under contractual provisions. Moreover, in case of liability in tort the persons responsible for the damage are jointly liable (§ 840 BGB).

II. Insurance

1. Mandatory insurance

Exercise of architectural and engineering profession is regulated at the level of Länder. As a general rule architects and engineers who sign plans and drawings to obtain building permission need to be members of a regional professional chamber, which imposes requirement to carry professional indemnity insurance as a part of their internal rules. As a result, all professional consultants have their professional liability insured.

All participants to construction projects are subject to compulsory third party liability insurance covering their civil liability for damages or injuries inflicted to third parties.

2. Widespread insurance

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In Germany, the participants to the construction market use a system of financial guarantees, frequently incorporated into the financing scheme of the project as a main security against construction defects. The market practice is based on a system of financial guarantees (Credit Insurance) combined with detailed contractual provisions and reliance on the professionalism of the construction parties. This is perhaps due to a general opinion in this market that building defects are necessarily a result of non compliance with the terms of the construction contract.

The main solution is a deposit guarantee submitted by a construction firm. Frequently a fraction of contractor's remuneration is retained by the client as a security against the post-completion defects. It may be replaced by a financial guarantee provided by an external guarantor such as a bank or an insurance company. The amounts of guarantees are usually of 10% of the project value until completion of project and up to 5% during the period between completion and expiry of the guarantee.

The guarantees are generally not compulsory, except for public procurement projects, however they are frequently imposed on construction firms by their clients.

Insurance solutions dedicated to construction firms as substitutes of bank guarantees covering construction operations and defects after completion (during the period of 5 years) are also available on the market.

There is no obligation to insure liability for construction defects after completion.

According to the opinion of some of our interlocutors, combination of widespread professional indemnity insurance for professional consultants and of joint and several liability may contribute to a disadvantageous situation for the consultants. We were informed that some building contractors might choose premeditated bankruptcy to evade liability. In such situations the remaining parties may have to face the responsibility for the damage without the possibility to claim compensation from the building contractor. In this context, some of our interlocutors representing consulting professionals declared themselves favourable to a more general insurance model including all actors of construction operation such as, for example, insurance covering all damages regardless individual liability of the actors involved. Such proposition was considered as unrealistic by our interlocutors representing insurance sector, who expressed a view that estimation of risk and premium could cause problems under such an insurance model.

3. Schemes and good practices

SVM GmbH

An organisation called SVM GmbH offers guarantees covering performance of the construction contract and repair of building defects for a period of 5 years after completion (in case of insolvency/failure of the building contractors and only for construction or sale of dwellings). This guarantee may be taken out by the construction firms for the benefit of the buyers of dwellings.

SVM GmbH was created by SWK (member of the GIW institute) from the Netherlands. It is not an insurance company. The guarantees delivered are offered through a cooperation with HDI Gerling Verzekeringen N.V. - insurance company, TÜV Rheinland - certification organism and KPMG – financial auditor. The insured building firms are certified and their financial standing is checked once a year. Moreover, the TÜV Rheinland performs on-site inspections and provides on its website general information relative to cost of repair of construction defects.

Deutsches Institut für Normung e.V. (DIN, German Institute for Standardisation)

The DIN constitutes an important initiative in the aim to support construction quality. As indicated above, the quality control system in Germany strongly relies on a detailed body of technical norms and on a strict compliance with the norms. The particularity of the institute consists in the fact that it constitutes a platform for “communication and decision” and all interested market stakeholders are involved in the process of drafting construction norms. It is considered that as a result of the above the construction norms in Germany are of a very good quality and that they are regularly updated

and improved in order to follow evolution in the technology, climate changes and other market requirements.

Fraunhofer-Informationszentrum Raum und Bau (IRB)

The IRB has created an online database (SHADIS®)¹ on full spectrum of damage in all parts of the building. The database contains technical books and publications concerning the origins, prevention and remedies of damage caused by construction works. Currently the database contains over 120 books and it is being constantly expanded and updated.

Institut für Erhaltung und Modernisierung von Bauwerken e.V. (IEMB, Institute for conservation and modernization of buildings)

The IEMB regroups various market stakeholders. The institute with the support of the government launched an initiative called “Dialogue Bauqualität” (Dialogue for construction quality) with the view to a common reflection on the national construction quality. The goal of the initiative was to develop a national platform of exchange between the Länder and the stakeholders of the construction market. The working groups created within this initiative have so far issued three reports on construction defects and the level of construction quality in Germany.

Although the methodology relating to collection of statistical data was sometimes criticized, the findings of the reports showed that the large majority of building defects resulted from physical performance of building works (and not from design errors or from defects in construction products). The majority of defects were discovered within 2 years following completion and the main causes of defects identified were problems of cooperation between different participants to the project, qualifications of the persons involved, and, in cases of installation of new construction products, lack of sufficient communication between producers and building contractors installing the products, resulting in installation errors.

The reports highlighted also the main types of defects occurring in various types of construction projects such as wooden houses, historic monuments, etc.

The institute became part of the “Bundesamt für Bauwesen und Raumordnung” since January 2009.

Deutscher Vergabe- und Vertragsausschuss für Bauleistungen (DVA)

In Germany a committee called DVA is in charge of improvement of public procurement procedures and of building sector regulations. This body is composed of different ministries, local authorities, main public contracting authorities and professional bodies of the construction sector.

There was a discussion within the DVA concerning a possible reform of German law proposed by local authorities, consisting in implementation of compulsory insurance system for building contractors. The proposal provoked criticism of organisations representing small and craft firms who considered that the cost of compulsory insurance might be too high for smaller firms.

¹ <http://www.irbdirekt.de/schadis/din.htm>

Verband Privater Bauherren (VPB)

VPB is an organisation of private property developers, which was created in 1976. This body enables individuals who wish to purchase, build or renovate a flat or a house to affiliate themselves to their system against a small fee. The affiliated persons are offered assistance in drawing up their construction contracts as well as services of independent experts in the fields such as control of building sites, insurance contracts or advice in case of a dispute with designers or builders.

Initiative “Kostengünstig qualitätsbewusst Bauen”

Kostengünstig qualitätsbewusst Bauen, which can be translated as “Quality-conscious building cost-efficiently” is an initiative of the Federal Ministry of Transport, Building and Urban Affairs (Bundesministerium für Verkehr, Bau und Wohnungswesen). This initiative has been created in order to provide help and advice to individual clients wishing to purchase an off-plan house from a property developer. The aim of this initiative is to increase public awareness, provide the clients with reliable information and to promote environmentally friendly, innovative and affordable construction.

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- b) German Institute for Standardisation
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- c) inHaus innovation center
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- a) German Construction Industry Federation, Kurfürtenstraße 129, Berlin 10785, Germany
- b) Beiten Burkhardt P. Daszkowski Sp.K., ul. Ks. Skorupki 5, Warszawa 00-547, Poland
- c) VBI – German Association of Consulting Engineers, Budapester Str. 31, Berlin 10787, Germany
- d) GDV - German Insurance Industry Association, Wilhelmstraße 43 / 43G, D-10117 Berlin, Germany
- e) EIFER - European Institute for Energy Research, Emmy-Noether-Strasse 11, 4th floor, D-76131 Karlsruhe, Germany
- f) BInGK - Federal Chamber of German Engineers, Germany
- g) BDB - Bund Deutcher Baumeister, Architekten und Ingenieure e.V.

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Greece

I. Liability

1. Principles of liability

General rules of liability are defined in the Civil Code. Furthermore the Civil Code defines specific liability duration in case of deficiencies in buildings. There are also other codified rules relative to construction in general (Law 3212/2003), to public construction works (Codified Law 3669/2008) and a number of legal provisions concerning safety measures (such as Presidential Degree 778/1980, Presidential Degree 1073/1981).

Contractor's liability is strict under both public and private projects according to art. 688 and 689 C.C. and only in exceptional circumstances the liability of contractor may depend on his fault (art. 687 and 690 C.C.).

The contractor is due to perform the construction project in compliance with the contract, the law and the relevant professional rules. He must deliver works free from defects and complying with all qualities agreed. In case of project's deficiencies, the contractor bears the burden to prove that he is not liable for non execution of the contract. The employer is entitled to claim restoration of deficiencies, proportionate reduction of the contractor's fee, unilateral termination of contract or compensation of losses sustained due to the deficiencies of the project. It is at the discretion of the employer to choose which type of reparation of the damage he wishes to claim. In addition to reparation of the defect he is also entitled to claim consequential damages (specific rules of redress apply to public contracts).

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Deficiencies, which may give rise to such claim include substantial defects as well as lack of agreed qualities. Defects are considered as substantial when they render the project totally unfit for its intended use in light of its contractually defined purpose or of the rules of professional "art and science". Agreed qualities mean particular characteristics of the project, which have been specifically agreed and described by the parties in their contract.

The provisions of the Civil Code, which govern liability described above are not mandatory, therefore the parties are allowed to limit or to extend this liability by means of contract. Customary rules seem to be in a widespread use in the definition of contractual construction liability in Greece.

2. Starting point and duration of liability

Following the handover of works the contractor remains liable for any hidden defects or for the defects intentionally concealed by him (art. 692 and 693 C.C.). Art. 692 C.C. defines hidden defects as defects “which were not possible to identify, by means of a regular examination of the project, when it was delivered”.

Duration of liability arising from deficiencies in buildings or in other immovable installations is of 10 years following handover otherwise of 6 months (art. 693 C.C.).

3. Sharing of liability between different parties to a project

Under art. 926 C.C., where several persons have contributed or are responsible for the same damage, their liability is joint and several. Similar position applies where several persons have acted together or in succession and it is impossible to establish whose action caused the damage.

II. Insurance

1. Mandatory insurance

There is no legal obligation relative to insurance in Greece.

Projects of legislative reform concerning construction insurance have been envisaged for several years.

2. Widespread insurance

It seems that voluntary insurances available in the Greek market cover mainly third party liability and professional indemnity risks as well as risks during construction operations (CAR insurance).

Insurance of latent defects is not currently available. Insurance solutions covering innovative construction practices seem to be available on the market.

Insurance seems to be principal risk transfer solution in this market and alternative securities such as financial guarantees tend to be rarely used.

Requirements regarding insurance are usually introduced by the client in the contract. In particular, such requirements are imposed by contracting authorities in case of public procurement procedures but they may also be included in private contracts, especially for larger projects.

3. Schemes and good practices

Greek government is involved in initiatives aiming in encouraging development of renewable energies. Examples of such projects are listed below.

Photovoltaics on the roofs programme

Greek Ministry of Development announced in May 2009 launching of a programme “PV on the roofs” aiming in promotion of use of photovoltaic energy amongst Greek households. The programme is intended to be supported with specific loans and public subsidies.

Centre for Renewable Energy Sources (CRES)

Centre for Renewable Energy Sources (CRES) created under art. 25 of Law 1514/1985 "Promotion of scientific and technological research" and Presidential Decree 375/1987 “Establishment of a legal entity under private law with the registered name Centre for Renewable Energy Sources”. The scope of activities of CRES covers promotion of renewable energy sources, energy conservation and rational use of energy. By virtue of article 11 of Law 2702/1999 “Regulation of matters falling under the jurisdiction of the Ministry of Development and other provisions” CRES operates as the national coordinating centre of the above activities. CRES operates laboratories for certification of renewable energy technologies, and carries out research on physical and economical potential of renewable energy sources and participates in the evaluation and monitoring of investments implemented in this sector.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Hungary

I. Liability

1. Principles of liability

In Hungary liability both for non respect of contractual obligations and extra-contractual is defined by law.

Provision of professional services, construction and installation services are governed by the chapter XXXV of the Civil Code.

Further provisions applicable to construction activities are stipulated in the Act LXXVIII of 1997 on the Formation and Protection of the Built Environment (the "Construction Act"), which was amended on January 1st, 2007. This act refers among others to issuance of construction permits, minimum requirements towards building structures materials and equipments as well as qualifications required to perform architectural and engineering professions in construction.

The liability of a construction party may be involved if the building works do not satisfy contractual requirements and compulsory legal dispositions.

Liability of the builder for construction defects is presumed. The builder bears the burden to demonstrate that he is not liable for defects.

1

Contractors shall be as responsible for the work of legitimately employed subcontractors as they are for their own work; in respect of any illegitimate employment of a subcontractor, contractors shall be liable for all damages that would not otherwise have occurred.

In the case of design services, the section 409 of the Civil Code allows the designer to stipulate contractually a limitation of his liability if he performs design of a solution, which is not known or used in Hungary.

2. Starting point and duration of liability

Liability of the building contractor for construction defects starts at the moment of handover.

The following limitations periods defined in the Civil Code apply:

- 6 months (with a possibility to extend up to 1 year) – general legal hidden defects warranty,
- Specific warranty duration of 3 years applies to the main elements of dwelling buildings. This warranty concerns new constructions and works on existing dwellings.

Furthermore, there are specific limitation periods applying to the following parts of the buildings:

- 3 years liability for construction products dedicated for “long term use”,
- 5 years liability for finishing of the buildings,
- 10 years liability for building structures.

3. Sharing of liability between different parties to a project

The Civil Code stipulates joint and several liability in the case of extra-contractual liability and in the case of contractual liability arising in the framework of so called “indivisible” services (Section 344 C.C.). The building contractor bears liability for all works performed by his subcontractors.

II. Insurance

1. Insurance mandatory by law

There are no legal obligations to carry construction insurance in Hungary.

2. Voluntary insurance

The insurance market offers to construction parties voluntary insurances, in particular Construction All Risk insurance.

3. Schemes and good practices

Tárki European Social Report

Hungarian Social Research Institute Tárki has issued a series of social reports since 1992. The latest report published in 2008 is a cross-national analysis of households’ conditions aiming in comparing the situation in Hungary with 23 EU Member States. The analysis criteria included sustainability of dwellings as well as quality of dwellings and construction defects reported in dwelling buildings.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Ireland

I. Liability

1. Principles of liability

The Irish legal system is based on common law i.e. a set of legal doctrines developed by courts, which may be subsequently modified by legislation. Judgments made in the UK, USA and other Commonwealth countries may have a persuasive significance for Irish courts but are not binding for them.

Similarly to English law the main bodies of law, which are likely to be concerned in the context of construction operations are law of contract and law of torts. Law of contract governs the principles of contractual liability whereas law of torts is concerned with so called “civil wrongs” and sets out remedies for damages and injuries arising from non-respect of extra-contractual obligations.

Mutual obligations between the parties to a construction project are mainly defined in a contractual way although similarly to English law, certain terms may be implied into the contract under common law doctrines, statutes and customs or market practice.

The main common law rules, which are implied in the context of construction works contracts impose a duty on the developer or builder to complete the building in accordance with the terms and conditions set out in the contract. Moreover, their primary responsibility is to complete the development in accordance with the terms and conditions of the Building Regulations in force and with the planning permission. On the other hand the implied liability of consultants and designers is based upon an obligation to exercise reasonable skill and care.

Various common law rules have been codified into statutes. Examples of such legal acts, which form a part of contractual relationship by implying contractual terms include in particular the Civil Liability Act 1961, the Statute of Limitations, 1957 as amended by the Statute of Limitations (Amendment) Acts 1991 and 2000 and Sale of Goods and Supply of Services Act 1980.

The Sale of Goods and Supply of Services Act 1980, which applies also in the context of construction governs contracts of sales of goods and contracts of supply of services. With respect to contracts of sale of goods by description, it implies that the goods should correspond to their description. Moreover, for sellers acting in the course of a business activity the Act implies:

- that the goods sold are of merchantable quality, which means that they are fit for the purpose for which goods of that kind are commonly bought and as durable as it could be reasonably expected in light of their description, price and any other relevant circumstances,
- that, where the buyer expressly or by implication communicates any particular purpose, for which the goods are being purchased, the goods supplied must be reasonably fit for this purpose.

The above duties cannot be overruled by a contractual statement.

With respect to supply of services the Act implies that the service provider must have the skills necessary to render the service, that the service needs to be supplied with necessary skill, care and diligence and that the materials used are “sound and reasonably fit for the purpose for which they are required”. The above implied terms may be varied by an express agreement between the parties. In case of contracts with consumers the seller must demonstrate that such modification is fair and reasonable and that it has been specifically brought to the attention of the consumer.

According to the rules above, liability of professional consultants such as architects or engineers are based on skill, care and diligence principle. The negligence of the professional consultant must be proven in order to hold him liable.

In the context of contractual relationship the principle of privity of contract applies, which means notably, that contractual obligations and duties can only be enforced by the original parties to the agreement. However this may be subject to reform following the recent changes in the English law. Currently, this principle can be overruled by use of collateral warranties or assignments. Assignments enable the seller to transfer their benefit under contract to the buyer. Collateral warranties are also instruments, which enable to confer benefit of a contract to a third person, who is not party to it. They are used frequently in practice in the framework of construction contracts, in particular in order to bind liability of architects, engineers or subcontractors.

The Building Regulations are set by the Ministry of the Environment, Heritage and Local Government. Its primary purpose is to ensure an adequate level of “the health, safety and welfare of people in and around buildings”. The Ministry also issues the Technical Guidance Documents, which provide guidelines on how the construction should be performed in order to meet with the Building Regulations requirements. Methods other than those set out in the Technical Guidance Documents are not prohibited as long as they comply with the Building Regulations. Qualified construction professionals certify compliance with the Building Regulations when the development is complete. The Building Control Authority can inspect buildings and enforce the standards required by the Building Regulations under the Building Control Act (2007).

Various standard forms of contracts developed by a number of professional and public bodies are available in the Irish market. The main forms governing residential and commercial building in Ireland are contracts published by the Royal Institute of the Architects of Ireland (RIAI). The basic form has been issued in agreement with the Construction Industry Federation and the Society of Chartered

Surveyors in the Republic of Ireland. The RIAI standard forms of contract are well known within the industry, and case law has developed to interpret many of the clauses.

2. Starting point and duration of liability

The Statute of Limitations 1957 governs the limitation periods for actions arising both under contract and under tort.

For claims based on tort the general limitation period is of 6 years.

For claims arising under contract the following limitation periods apply:

- 6 years for actions under simple contracts,
- 12 years for actions founded on contracts under seal.

Moreover the Act imposes a limitation period of 3 years for claims with respect to personal injuries founded on negligence, nuisance or breach of duty whether this duty is based on a contractual obligation, a statutory obligation or it exists independently of any contract.

All limitation periods above run starting from the date on which the cause of action accrued.

3. Sharing of liability between different parties to a project

Under the Civil Liability Act 1961, when several parties have contributed to a damage, they are jointly and severally liable - "concurrent wrongdoers are each liable for the whole of the damage in respect of which they are concurrent wrongdoers".

In such a situation an action may be brought against all of the parties who have contributed to damage or against any of them. The party who has paid damages may subsequently claim contribution from other parties who are liable with respect to the same damage accordingly to the degree in which they have contributed to the damage.

II. Insurance

1. Mandatory insurance

There is no compulsory construction insurance in Ireland.

The Building Control Act 2007 has introduced registration scheme with the aim of legal protection of titles of "architect", "building surveyor" and "quantity surveyor". The online register started operating in November 2009. Registration is not compulsory for those professionals who wish to exercise without title, provision of such services without a title not being restricted. The registration scheme is operated by the Royal Institute of Architects of Ireland and the Society of Chartered Surveyors (RIAI). Membership to RIAI is not compulsory, however most architects are members. The RIAI's code of conduct requires that "A member who is in practice as an independent consultant architect should maintain a level of professional indemnity insurance appropriate to the nature and scale of the practice."

Similarly to the UK, in spite of the absence of legal insurance obligations the market practice and, in particular, standard construction forms and requirements of lenders contribute to widespread use of insurance. The standard contracts impose on the builders a requirement to take out Contractors All Risk (CAR) insurance for the whole duration of construction works. Moreover, due to the requirements of the lenders it is in practice impossible to obtain a mortgage without a home warranty.

2. Widespread insurance

Standard market practice for the builders in the housing sector is to register newly build properties with structural guarantee schemes HomeBond or Premier Guarantee (details of these schemes are presented below). Although it is not compulsory, this practice is very common. In the absence of the insurance cover provided by the above schemes the client is usually offered builder's own structural defects indemnity, which is a guarantee personal to the builder and relies on his financial standing only.

HomeBond guarantees

The National House Building Guarantee Scheme operates housing guarantees scheme called "HomeBond" covering newly built houses. The scheme was created in 1978 as a joint initiative of Construction Industry Federation, Irish Home Builders Association and the Ministry of Environment, Heritage and Local Government. It is estimated that currently most of newly built homes in Ireland are registered under the scheme.

The guarantees are available through builders or developers registered in the scheme. The membership in the scheme is available for individuals or firms acting as builders i.e. building dwellings for sale or for a client or as property developers i.e. promotion of the building development for sale but without carrying out building works themselves. An on-site technical assessment of an applicant individual or firm carried by the scheme's housing adviser is necessary to become a member.

In order to be covered, the project must be registered before the building works commence. The works are subject to foundations and structure inspections.

The cover delivered includes 10 years guarantee of major structural defects defined as "any major defect in the foundations of a dwelling or the load bearing part of its floors, walls and roof or retaining walls necessary for its support which affects the structural stability of the dwelling" and 5 years remedial work cover in the event of water ingress or smoke penetration caused by major structural defects. Moreover, the scheme guarantees repayment of deposit or advance contract payments in the case of bankruptcy or liquidation of the registered builder.

The above insurance cover is underwritten by Allianz plc. insurance company.

Premier Guarantee Scheme

The Premier Guarantee is an alternative proposition of a structural insurance scheme managed by Willis Ireland and underwritten by Liberty Legal Indemnity (a Lloyd's of London syndicate). It has been developed with the aim to bring more competition into the Irish market, provide more protection to the builders themselves and to cover alternative construction methods or materials, for which it was difficult to find suitable insurance solutions.

The cover contains 10-year protection to the homeowner in the event of a serious structural problem extended to all parties with a financial interest in the property and assignable to future owners as well as cover of developer's insolvency during the course of construction.

The cover is available for new buildings, mixed developments and refurbishments.

Unlike in the case of HomeBond, the cover may be available after construction works have commenced.

HomeBond guarantee, Premier Guarantee or structural defects guarantee provided by the builder is necessary in Ireland to benefit from local authority construction loans schemes, which are available for the first time property buyers or for the self build projects. Another condition to benefit from the facilities above is that the construction must be supervised by a qualified supervisor who must hold professional indemnity insurance.

Mortgage providers such as banks or building societies also require structural defects warranty in their procedures of granting mortgage.

Besides housing guarantees solutions, other voluntary insurance products available to the construction market operators include public liability insurance, professional liability insurance, employer's liability insurance, Contractor's All Risk Insurance, personal accident insurance, plant and machinery insurance and contract bonds. It is worth noting that the Irish insurance practice is strongly influenced by the London market. Insurance is frequently available through the London insurance brokers.

3. Schemes and good practices

Irish Home Builders Association

IHBA is an association which operates a voluntary Code of Practice called the Home Purchase Protection Pledge. The code details the manner in which booking deposits, issuing of contracts and stage payments must be handled by member firms and purchasers.

Construction Quality Assurance Ireland (CQA Ireland)

Construction Quality Assurance Ireland was established by the Construction Industry Federation in the nineties in order to provide a sectoral approach to management systems certification. The scheme provides the construction industry with independent certification to international quality and environmental management systems standards.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Italy

I. Liability

1. Principles of liability

The liability framework relative to construction is mainly defined by the Civil Code (art. 1656 to art. 1677). The Civil Code defines the liabilities of different parties to the construction process. The dispositions of the Civil Code cannot be waived by a contractual arrangement between parties. Other important legal acts are the law from 1971 relative to buildings with metal or concrete structure and the law from 1974 applying to buildings located in seismic areas, which govern the responsibility of construction parties for stability of buildings.

The Civil Code defines liability rules of building contractors for building defects. Under the art.1662 of the Civil Code, the building contractor is obliged to perform the construction works up to professional standards and the building defects are regarded as non compliance with this legal obligation. In most cases the performance of the building works is entrusted by the client to a general contractor, who will assume the responsibility for all his sub-contractors. The art. 1669 C.C. defines the liability of the building contractor for defects causing destruction of the building and affecting stability of the building.

It is also important to notice that the Civil Code defines a number of legal warranties, which apply to the contract of property sale, under which the seller is liable towards the client for defects in the legal title of property, latent defects and quality which differs from contractual provisions i.e. title guarantee (art. 1483), guarantee that the property is free from defects which might undermine its “fitness for purpose” (art. 1490) and a “lack of quality” guarantee, dedicated to protect the buyer in the case where the property does not correspond to the quality level defined in the contract (art. 1497). The Civil Code allows only a limited possibility to waive the warranties above, in particular in the case of sales contracts concluded with “consumer” buyers.

In fact, the building contractor is the only party who assumes a civil liability towards the client. The responsibility of the remaining parties (i.e. professional consultants described below) is mainly of penal character.

The particularity of architect’s profession in Italy consists in the fact that he cannot exercise his profession as a company. The liability of the architect is relatively limited comparing to other EU Member states and it will vary depending on the role he performs within a construction project.

In many cases the role of the architect is limited to design (progettista). In such cases the architect is considered as an “artist” and he is not subject to civil liability defined in the art. 1669 C.C. In practice, he bears almost no responsibility for defects discovered after completion and he cannot be held jointly and severally liable in case of a building defect. The use of an architect is compulsory in Italy for all building presenting artistic merits such as historical monuments.

On the other hand, architects and engineers may also fulfil main independent technical functions such as project management and surveying.

In particular, in case of buildings with metal or concrete structure (law from 1971) or buildings located in seismic areas (law from 1974) – i.e. in almost all construction projects, the functions of design, project management and verification of building’s resistance and stability must be performed by an architect or an engineer registered by a competent professional body. The professionals in charge of the above functions are appointed by the client and they may face penal responsibility if a destruction of the building involving bodily injuries occurs. Their civil liability may also be engaged jointly with the building contractor.

In order to be registered the engineers and architects need to pass a professional examination in addition to their academic qualifications. Regional professional bodies are in charge of holding registers of persons entitled to exercise the above activities.

The project manager (direttore dei lavori) is a professional in charge of following the execution of works on behalf of the client. His role is to defend interests of the client towards the building contractor and he may, among others, dispose of payments due to the building contractor on behalf of the client. Often the same person who has designed the project is appointed to perform this function, although this is not compulsory. The project manager coordinates the works in the construction site and he must ensure that the performance of works is compliant to the project, in particular with respect of stability of the building. He has also the power to modify the project.

At the completion of the building the project manager certifies that there are no apparent defects in the building. Moreover, the municipal authorities verify the aspects of hygiene and security of the building. This final control is necessary for the municipal authorities to allow occupation of the building.

The surveyor in charge of verifying the stability of the building performs tests during or at the end of the construction works and certifies that the building has been completed according to the professional standards and with compliance to the project.

2. Starting point and duration of liability

As indicated above the liability of the building contractor is defined by the Civil Code. Three main phases may be distinguished with regards to the liability of the building contractor:

- From completion of works until the final handover – the building contractor is under contractual obligation to repair defects discovered by the project manager and during the handover verification procedure,

- During 2 years from completion the building contractor is liable for any non-compliance with the project as well as for all (including minor) defects of the building under art. 1667 of the Civil Code,
- Under the art. 1669 of the Civil Code the building contractor is liable towards the buyers and subsequent owners of the building for major defects during 10 years following completion of construction works (starting from the date of final control by project manager and municipal authorities).

Major defects, defined by the Civil Code and the relevant case law, consist in defects causing a total or partial destruction of the building, defects affecting stability of the building or other serious defects due to faulty construction or ground defects. The meaning of the major defect is further precised by the jurisprudence.

The defects must be notified by the client during one year from the moment when they become apparent. The period in which a legal action may be undertaken by the client is limited to one year from the client's notification. However the Civil Code does not specify the deadline in which the building contractor must repair the defects or indemnify the owner.

3. Sharing of liability between different parties to a project

According to the art. 2055 of the Civil Code, if several parties have contributed to a damage they are jointly and severally liable. The party who indemnified the totality of the damage may subsequently seek compensation from other parties responsible for the damage.

II. Insurance

1. Mandatory insurance

It is important to note that numerous bankruptcies occurring in the construction sector are at the origins of a legal act aiming in protecting individual property buyers in the cases of off-plan sales contracts – Law no 210 from 2 August 2004 (Delega al Governo per la tutela dei diritti patrimoniali degli acquirenti di immobili da costruire) followed by an application decree No 122 from 20 June 2005.

Under this act, the seller is obliged to submit financial guarantees dedicated to reimburse the amounts paid by the buyer in case of his insolvency.

The Law no 210 (2004) provided also an extension of an insurance obligation introduced initially by a legal act called “Merloni law” Legge Merloni from 11 February 1994. In fact, the Merloni Law provided an integrated body of rules relative to public procurement projects, under which the building contractor was under obligation to take out decennial insurance for public construction projects of value exceeding EUR 10 millions.

Subsequently, under the Law no 210 the decennial insurance obligation has been enlarged to the private sector.

Moreover, the act defines a number of compulsory clauses, which must be included in the off-plan property sales contracts such as a description of the building to be erected and its technical characteristics, deadline of delivery, applicable planning rules and details of the financial institution delivering the compulsory guarantees.

In addition to the above legal provisions a decree from 2 August 2004 introduced a Solidarity Fund (Fondo di Solidarietà per gli acquirenti di beni immobili da costruire) dedicated to indemnify the victims of insolvencies of construction firms, which took place in the years 1993-2005.

The decennial policy of insurance covering building defects defined in the art. 1669 of the Civil Code (described above) must be transferred to the buyer at the moment of the transfer of property of the building. The insurance incepts at the moment of completion of the construction works.

The compulsory insurance cover was designed in order to protect the buyers of the buildings. It is activated when major building defects occur, regardless liability of the building contractor and without the need to provide proof of contractor's fault by the buyer.

There is, however, no obligation for insurers to provide the compulsory insurance cover.

The system of compulsory insurance seems to encounter some difficulties in its application. A certain degree of resistance of the building contractors is due to the will to reduce costs and to the market tradition consisting in reliance on close relations of trust between contractor and buyer and on the contractor's reputation. As a result the obligations relative to compulsory insurance were not widely observed and that the application of these rules was particularly difficult in the south regions of the country.

2. Widespread insurance

The compulsory 10-years insurance covers only defects relative to stability of the building.

Additional covers, of for example waterproofing defects are available from insurers on optional basis. It seems however that the building contractors tend to limit their cover only to the compulsory scope and avoid taking out the optional insurance, with the view to reduce costs.

In addition to insurance a system of financial guarantees is used within the construction sector, in particular in case of public procurement procedures.

The guarantees are submitted by the building contractors to the contracting authority – for example 2% of the value of works during the call for tenders and 10% of the works value is submitted by the contractor selected through the tender procedure.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Latvia

I. Liability

1. Principles of liability

The liability may arise “under contract” in case of failure to fulfil contractual obligations or “under delict” in case injury or losses are caused as a result of a wrongful act or wrongful failure to act.

The liability “under contract” usually is stipulated in the contract by the contracting parties. In those cases when contracting parties have failed to agree on liability issues in the contract, the liability of the parties is determined according to the provisions of the law. Certain issues of liability, however, are regulated by the mandatory law.

For example, the mandatory provisions of the Latvian construction law (Construction Law, 1995) and related regulations stipulate such issues as minimum duration of term within which the main building contractor is obliged to eliminate deficiencies identified after putting the contraction into operation as well as the division of liability of the contracting parties against third parties for compensation of losses caused to third parties in cases when one of the contracting parties does not have the rights to perform the construction works provided for in the contract.

Furthermore, mandatory provisions of consumer protection law apply to the contractual relations of the parties, including liability issues, in case one contracting party is considered to be a consumer.

The liability “under delict” is stipulated in the law and may result in the obligation to compensate damages caused to third party as well as to compensate possible loss of profit and expenses for medical treatment and/or funeral expenses in case of bodily injury to or damage to the health or death of third party.

According to the general principle, the liability “under delict” arises in the result of wrongful intent or negligence. Nevertheless, in case of construction, the liability of the person, whose activity is related to construction, may arise irrespective of the fault of such person, since the construction is considered to be an activity related to increased risk for other persons.

2. Starting point and duration of liability

The liability arising from the contract starts from the day when the contacting party has failed to perform its contractual obligations.

In Latvia according to the general principle, the liability period for claim arising “under contract” or “under delict” is 10 years, unless the law stipulates shorter terms for raising respective claims.

Thus, for example, the minimum duration of the term within which the main building contractor is obliged to eliminate deficiencies identified after putting the contraction into operation is 2 years.

In cases of sale of the construction with defects a buyer is entitled to claim withdrawal from the purchase contract within 6 months after entering into contract or from the day of any special guarantee being given by the seller or to claim for price reduction within 1 year after entering into contract or from the day of any special guarantee being given by the seller.

The parties are free to agree in their contracts on longer terms for raising liability claims.

3. Sharing of liability between different parties to a project

Each party participating in construction and each manufacturer of construction products used in the structure are liable for the losses within the scope of their participation unless the contract stipulates otherwise.

As regards liability against third parties, if a party participating in construction has entered into contract with a building contractor that does not have the rights to perform the construction works provided for in the contract, and due to the incompetence of such building contractor losses have been caused to third parties, the first party participating in construction shall be financially liable for the losses caused to third parties.

II. Insurance

1. Mandatory insurance

Under the Latvian law builder¹ (in Latvian – būvētājs) and building contractor² (in Latvian - būvuzrādītājs) has a duty to obtain compulsory construction civil liability insurance (CCCLI). CCCLI agreement should be entered into prior to receipt of the construction permit. If there are several building contractors employed in the construction site, then the main building contractor is responsible for obtaining and maintaining of CCCLI. This insurance provides cover for harm caused to third party's life and health, as well as for damages to third party's property. In essence, any person who takes part in the construction process³ is not considered a third party under CCCLI and accordingly harm to interests of such person, for example, a subcontractor, will not be covered.

The law provides for two different CCCLI cover types:

1. on a yearly basis, i.e., a cover for all construction sites that is effective for one year and then subsequently should be renewed or a new CCCLI agreement should be entered into; or

¹ Builder is an owner, possessor or user of immovable property who himself or herself organises construction process, participates therein and is responsible for it.

² Building contractor is a natural or legal person who carries out construction work on the basis of a contract entered into with a client.

³ Third party under in compulsory construction insurance is any natural or legal person, save policy holder, insured, employee of insured or any person who on basis of another contract performs work for the benefit of the insured, insurer and other persons participating in construction, i.e., natural or legal persons who participate in the construction process with property, financial resources, work or services.

2. a cover for a particular construction site that is valid throughout the construction period.

Building contractor's CCCLI limit for a particular construction site should be equal or higher than 10 percent of the sum of the contract, but not less than ca. EUR 14,229 (LVL 10,000). If building contractor opts for insuring of his liability on yearly basis in respect of all construction sites, than the CCCLI limit should be equal or higher than 10 percent of a yearly turnover of the building contractor, but not less than ca. EUR 71,144 (LVL 50,000). The minimum CCCLI limit for builder is ca. EUR 7,114 (LVL 5,000).

2. Widespread insurance

Obtaining of a construction all risks policy has been a standard market practice for medium and large scale projects. However, the liability limit can vary depending on the particular agreement starting from 5 to 18 percent of the contract value.

In large scale projects clients usually retain 10-15 percent of the contract value upon completion of the building process for 2 years in order to be able to use these sums to fix defects of a building process. If no defects are discovered at the end of such time period, the sums are paid out to the builder. In practice, builders opt for purchasing of a guarantee period guarantee insurance, whereunder the insurer undertakes to cover all costs related to fixing of defects, in case the builder due to any reason is not able to fix such defects. Guarantee period guarantee insurance policy allows the building contractors to receive the contract value upon completion of the construction; however, it gives a lower level of protection for the interests of developer than retaining of a part of a contract value.

Unlike in other countries, in Latvia professional associations of persons involved in the construction process, i.e., the Latvian Builders Association (in Latvian - Latvijas būvnieku asociācija), the Latvian Construction Engineers Association (in Latvian – Latvijas būvzinieru asociācija) and the Latvian Architects Association (in Latvian – Latvijas arhitektu savienība), do not force or strongly advise their members to obtain and maintain insurance cover for their professional activities.

3. Schemes and good practices

Construction standards

Construction standards stipulate construction requirements that are mandatory applicable in the construction.

Energy efficiency of the buildings

The law and regulations on energy efficiency of the buildings (Law on the Energy Performance of Buildings, 2008) have been adopted with the aim to promote a rational use of the energy resources and to improve the energy efficiency of buildings. The aforementioned laws and regulations, among others, stipulate that energy efficiency certificate of a building is mandatory when selling, renting or leasing the relevant building (with certain exceptions).

Green construction

The Government in 2008 has approved recommendations for promoting of construction that is friendly to environment (green construction). The recommendations apply to the procurement of construction works and services related to construction works and refer to the stage of design, construction as well as operation and demolition of the constructions. The recommendations determine criteria that should be stipulated in procurement requirements. The criteria relate to energy consumption, use of renewable energy resources, materials used in construction, waste and water management as well as other aspects related to the impact of construction to environment.

Sources of information:

Beiten Burkhardt P. Daszkowski Sp.K., ul. Ks. Skorupki 5, Warszawa, 00-547 Poland

Websites:

- a) General information on construction policy and procedure available in the website of the Ministry of Economics of Republic of Latvia:
<http://www.em.gov.lv/em/2nd/?cat=56>
- b) A list of construction companies - members of the Latvian Builders Association available in the website of the Latvian Builders Association
http://www.building.lv/lba/eng/readnews.php?news_id=88792
- c) A list of natural persons – members and associated members of the Latvian Construction Engineers Association available in the website of the Latvian Construction Engineers Association (only in Latvian)
http://www.lbs.building.lv/readnews.php?news_id=89547
- d) The Latvian Architects Association <http://www.architektura.lv/>

Questionnaires:

- a) Building and Housing Department of Ministry of Economics, 55, Brīvības, Rīga, LV-1519, Latvia

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Lithuania

I. Liability

1. Principles of liability

The rules of liability relative to construction parties in Lithuania are mainly governed by the Civil Code, the Law on Construction, Technical Regulations for Construction, Building Codes approved by the Ministry of Environment, standards developed by the National Standardisation Bureau. Moreover methodical documents and guidelines created by research institutes and private companies are available and offer methodology guidelines on implementation of the Technical Regulations.

According to the Civil Code the liability of a party may arise either from non-performance of a duty established by law or by a contract, from actions that are prohibited by law or by a contract or from violation of the general duty to behave with care.

The Civil Code defines the respective duties of the parties to the construction contract and distribution of risks between the parties to the project. The Civil Code also indicates the necessary elements, which must be included in the construction contract.

Under the art. 6.681 of the Civil Code the contractor is under obligation to build the defined structure within the time specified in the contract and according to the specifications defined by the client. On the other hand the client is under obligation to ensure the conditions necessary for the contractor to perform the works.

Under the art. 6.695 the building contractor is liable to provide the works which comply with the contractual terms. In the cases where the works are “unfit for use in accordance with its designation as determined in the contract, diminish in its possibilities for use in accordance with its designation or where the designation is not specified in the contract, in accordance with its ordinary use” the client may require the contractor to repair the defects, reduce contractor’s remuneration or claim from the contractor compensation of costs incurred in order to remove the defects (if the contract awards the client the right to repair the defects himself). If the contractor fails to remove defects within reasonable time or if the defects are impossible to repair, the client can dissolve the contract and claim damages from the contractor.

The contractor may exculpate himself from the liability and claim compensation from the client if the damage arises before acceptance of works as a result of inferior quality materials, components or structures provided by the client or due to execution of client's instructions, under condition that the damage is immediately notified to the client and that the works are suspended until the client provides further instructions. Moreover, in case of reconstruction of structure or installations works the contractor is not liable for minor deviations from the Technical Construction Regulations made with the consent of the client if he is able to prove that they do not affect quality of the building and are unlikely to bring negative consequences.

Under art. 6.697 contractor, architect and technical supervisor are liable for building defects discovered during the periods of legal warranty defined in the art 6.698, which is discussed below, unless they are able to prove that the defects are due to normal wear and tear, inappropriate use or repair or other actions of the client and persons acting on his behalf.

Law on Construction refers to requirements for constructed objects as well as their inspection, planning, rehabilitation, repair, use and demolition. It also clarifies rights and responsibilities of all parties in the construction process, including state institutions and defines certification requirements for persons involved in planning, design, technical supervision and construction. The Law on Construction defines also requirements relative to building products certification procedures and imposes mandatory compliance with established normative standards and other requirements.

The Law on Construction was subject to several amendments relative among others to harmonisation of the aspects of structural design and issuance of construction permits with the EU legislation, introduction of compulsory civil liability insurance for designers and building contractors, minimal requirements for energy performance of buildings compulsory for new buildings or buildings under major refurbishment works as well as energy conservation and heat retention.

Use of FIDIC standard construction contracts tends to become popular in Lithuania, in particular for projects sponsored by international investors. The Ministry of Environment has officially recommended using these standard forms. The FIDIC forms are also recommended by construction planning regulations. The Lithuanian Institute of Construction Planning (JSC) is an official representative of FIDIC in Lithuania and is in charge of distribution of the FIDIC publications in this country.

2. Starting point duration of liability

The Civil Code (art.6.698) sets out the following legal guarantee periods in the case of collapse of the building or latent defects discovered:

- 10 years liability for "shell, core, structural elements and other hidden parts of the building",
- 5 years liability for all other parts of the building covering "materials, execution and completion of all construction works",
- 20 years liability in case of defects, which are intentionally concealed.

However the parties are free to define longer guarantee periods through contractual agreement.

3. Sharing of liability between different parties to a project

According to the art. 6.696 of the Civil Code, contractor, architect and technical supervisor are liable for the collapse of the structure and the consequential damages if the collapse has occurred as a result of defects in design, performance of construction work or ground defects. If it is impossible to determine which party is responsible for the collapse all of them are jointly liable.

The contractor can avoid liability for the collapse if he can demonstrate that the collapse occurred due to an error of the architect or of the technical supervisor chosen by the client or due to erroneous actions of the client.

II. Insurance

1. Mandatory insurance

Under the art 37 (1) of the Law on Construction designers and building contractors are subject to mandatory third party liability insurance.

The compulsory liability insurance for designers covers damage inflicted to third parties as a result of faulty design. The insurance may cover either individual designers or design companies. The designers are exempted from obligation to carry insurance in case of “uncomplicated” projects.

The compulsory insurance for building contractors covers damages inflicted to third parties as a result of defective construction works. The contractor is exempted from obligation to carry insurance in case of “simple building” or repair works.

2. Widespread insurance

The market offers voluntary insurance solutions such as professional indemnity insurance for professional consultants or third party liability insurance on voluntary basis for parties who are not legally required to carry it.

Contractor’s All Risk insurance solutions covering damage to building works under construction are also available - under a specific agreement with the insurer the solution may be extended to third party liability of the policyholder and for the duration of the guarantee period.

The Civil Code allows that the construction contract may impose a duty on the building contractor to carry insurance of property damage or liability insurance related to the construction process.

3. Schemes and good practices

Housing Strategy

In the past years, great attention of the legislators in Lithuania was granted to the question of energy efficiency in buildings as well as to specific questions related to the housing sector, in particular to privatisation of multi-apartment blocks built in 1961-1990 and the problems related to ensuring a proper management and maintenance of these buildings after privatization in order to avoid their deterioration (it is estimated that 66% of population was living in such buildings in 2004).

In order to cope with the above issues the Lithuanian Government announced a Housing Strategy in 2004, with the goals to expand housing choices for the population, increase a supply of social housing for low-income families and encourage development of rental market, increase the volume of new dwellings construction, to ensure proper management and maintenance of existing housing stock as well as efficient energy consumption. One of the provisions envisaged in the scope of the Housing Strategy consisted in stimulating the housing market through implementation of a credit information bureau providing information about available mortgage options to the population with the view to reduce the risks related to mortgage. Moreover, the strategy included financial support for the low-income families in order to facilitate acquisition of dwellings, development of state-subsidized credit insurance solutions dedicated to enable the banks to borrow to low-income families at affordable prices and tax deductions of interest amount paid on mortgage.

It is worth to notice that the above strategy relative to development of sustainable housing sector was supported by the Danish Ministry of Housing and Urban Affairs and the Netherlands Ministry of Housing, Spatial Planning and Environment.

Construction Sector Development Strategy

Construction Sector Development Strategy has been prepared for the period up to 2015 in the framework of Long Term Economic Development of Lithuania program. The strategy aims among others in promoting innovation in construction.

Sources of information:

Previous studies:

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- b) "Construction law: an overview of recent developments in the Baltics" by Dr. D. Foigt, J. Kirkilienė, S. Kravale, M. Mugu, The International Construction Law Review, April 2008

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- g) Lithuanian Housing Strategy
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- h) Short Background Material about Lithuanian Innovation System
http://209.85.129.132/search?q=cache:U_ggOFOuTOQJ:virtual.vtt.fi/virtual/constrinnet/material/final%2520report/policies/013%2520background%2520information%2520on%2520innovation%2520system%2520in%2520lithuan..pdf+construction+insurance+market+in+lithuania&cd=5&hl=en&ct=clnk&gl=uk&client=firefox-a
- i) ERGO Lithuania http://www.ergo.lt/business/construction_insurance
- j) Lieutvos Draudimas http://www.ld.lt/index.php/insurance/commercial_insurance/336
- k) PZU Lieutva <http://www.pzu.lt/en/index.php?pid=116>

Questionnaires:

- a) Lithuanian Builders Association, Lukiski4 st. 5-501, 502, LT-01108 Vilnius, Lithuania
- b) Balto Link, 59/27, Kestucio, Vilnius, LT-08124, Lithuania

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Luxembourg

I. Liability

1. Principles of liability

The general rules of liability of the construction parties are mainly governed by provisions of the Civil Code (art. 1147, 1382 and following, 1792 and 2270) and by interpretation of the above by the courts.

The articles 1147 and 1382 refer to the general liability rules whereas the articles 1792 and 2270 if the Civil Code apply exclusively to construction parties.

As a general rule, in order to hold a constructor liable the claiming party needs to provide a proof of fault, of a damage and of a causal link between the fault and the damage. However, the courts increasingly tend to apply duties of performance to the construction parties and have created more and more of presumptions of liability.

A project of law 5704 submitted on 15th March 2007 concerning a reform of construction liability regime and modification of the Civil Code is expected to bring important changes including introduction of a strict liability of constructors for disorders being subject to decennial and bi-annual guarantee.

A specific liability regime applies to property developers selling property off-plan (art 1646-1 and 1642-1 of the Civil Code). The above regime concerns all sales of real property, which is not entirely completed (sale at a specified future date or sale of property to be completed).

2. Starting point and duration of liability

Starting point and durations of liability vary depending whether the liability is contractual or extra-contractual.

Contractual liability

When a contract is concluded between the client and a party to construction operation, the latter is subject to various contractual obligations and responsibilities. The regime of contractual liability is governed by the articles 1147, 1792 and 2270 of the Civil Code.

Currently a distinction is made between two separate regimes depending on what type of disorder is in question i.e. conformity disorder or construction defect.

Conformity disorders exist when the good provided is different in nature, quality or quantity comparing to what was agreed in the contract. If a building corresponds to the contractual description but is not fit to its intended purpose it is considered as affected by construction defect.

The project of law 5704 intends to abandon this distinction, which provokes various difficulties in application.

Construction disorders

Liability of the participants in construction operation vary depending whether a damage occurs before or after handover.

The concept of handover is not defined by the Civil Code. In practice handover is done in two stages: a provisional acceptance and a definitive handover. Acceptance, which is taken into account as a starting point for liability limitation periods is an « actual » acceptance through which the client accepts the works.

Before completion

General liability rules apply to the damages occurring before completion. Under the art. 1147 of the Civil code, which governs breach of contractual duties, the parties involved can be held liable if the client claims to have suffered a damage and if he can prove that the damage was effectively caused by a fault of his contractor.

Limitation period applicable to the above liability is of 30 years except contractual relationship between business entities. In the later case the liability limitation period is of 10 years starting from handover of the building.

After completion

Following the completion specific regimes of liability will apply to the parties involved in construction operation under art. 1792 and 2270 of the Civil Code¹. Market actors concerned are architects, building contractors and other persons having a direct contractual link with the principal.²

The construction parties above are subject to decennial and biannual liability depending on the type of works involved (gros ouvrage - shell of the building or menu ouvrage - minor works) and on type of disorders (apparent or hidden) affecting the works.

a) Decennial liability

Participants to a construction operation can see their liabilities involved during 10 years for substantial hidden or apparent disorders affecting solidity of the building shell.

¹ Article 1792 CC : « If a building is totally or partly destroyed by a construction defect even resulting from ground defect, the architects, building contractors and other persons directly linked with the principal by a construction contract are liable during 10 years ».

Article 2270 CC : « Architects, building contractors and other persons linked with the principal by a construction contract are free from liability for the works performed or supervised after 10 years in case of shell of the building (gros ouvrage) and after 2 years in case of minor works (menus ouvrages) »

² The technical surveyor as well as consulting engineer are also subject to liabilities defined by the art 1792 and 2270 CC

In order to define the concept of gros ouvrage (shell of the building) it is useful to take into consideration not only stability and security function but also the intended use of the works, including disorders causing the building unfit for its intended use.³

The jurisprudence tends to follow the solutions of the French law in application of the regime of decennial liability in the cases where a construction disorder causes the building unfit for its intended purpose. Gravity of defects has increasingly become the main criterion.

It could be useful to underline that the concept of fitness for purpose was taken into consideration in the project of law from 2007 aiming in a reform of construction liability regimes by modifying the Civil Code.

According to the art 1792-1 of the above project of law « starting from the handover of works, the constructor is presumed liable during 10 years for disorders resulting from a conformity defect or from a hidden defect affecting the ground, which make the works unfit for their intended purpose ».

The legal action needs to be initiated within the deadline of 10 years starting from the handover of works.

Decennial liability cannot be excluded by a contractual agreement.⁴

b) Bi-annual liability

The participants to construction operation may be held liable during 5 years for substantial defects affecting stability of « menu ouvrages » (minor works).

« Menu ouvrages » signify connection or decoration works designed and performed, which are possible to be renewed by maintenance works or by a simple renewal without destruction⁵.

c) Liability for intermediary damages

Liability for intermediary damages (those affecting the shell of building but without affecting stability), which used to last in principle for 30 years, has been reduced to 10 years by the recent case law.

Liability for conformity defects

Conformity defect exists each time when the thing supplied is different in nature, quality or quantity comparing to what was promised in the contract.

If the conformity defect was apparent at the moment of handover, liability of the constructor cannot further be involved.

In terms of hidden defects, it is necessary to distinguish the contracts between business entities or between a business entity and an individual.

³ Cour d'appel du 29 juin 1984, P.26, 184

⁴ This guarantee intended to protect public safety and the owners is legally binding in the sense that all stipulation to the contrary is considered as void (Cour d'appel de Luxembourg, 5 novembre 1997, rôle n°17391)

⁵ définition de la Cour d'appel du 29 juin 1984

Within the contracts signed between commercial entities or between a business entity and an individual the limitation period is of 10 years starting from the date of discovery of the hidden non conformity.

However, in the framework of contracts with an individual (as may be the case of an architect or engineer in relation with a private client), the limitation period is of 30 years.

Extra-contractual liability

Liability of parties involved in construction operation towards third parties is founded on the art. 1382 and following of the Civil Code.

Limitation period last for 30 years starting from the occurrence of the damage or of its discovery by the victim.

Off-plan sales of real property

The regime of liability which applies to property developers is governed by the art 1646-1 and 1642-1 of the Civil Code.

The art 1646-1 introduces a liability of 10 years for hidden defects affecting gros ouvrage (shell of the building) and liability of 2 years for defects affecting menu ouvrage (minor works).

The same rules are applied by the art. 1792 and 2270 of the Civil Code.

The deadlines for initiating a legal action are similar with the duration of liability and are of 2 years starting from handover in case of disorders/defects affecting menus ouvrages (minor works) and of 10 years in case of disorders/ defects affecting gros ouvrage - the building shell and its stability.

3. Sharing of liability between different parties to a project

According to the legal rules, joint and several liability cannot be presumed. It arises when several persons are involved in fulfilling the same duties or when it is imposed by law (art. 1200 to 1216 of the Civil Code).

The actors involved in the construction process may decide to form a temporary consortium without legal personality in order to perform a construction project. In such a case the partners of the grouping are by law jointly and severally liable towards third parties. The client may claim from all of the co-debtors or may chose to claim from one of them, who will be liable to indemnify the totality for damages resulting from non respect of a duty.

The jurisprudence applies a concept of in solidum liability when the parties involved in a construction operation, even not linked by any contract, have contributed through their faults to a damage. In such cases the parties in question may be held liable in solidum - each of the parties may be obliged to indemnify the totality of the damages and subsequently claim compensation from the other co-debtors.

II. Insurance

1. Mandatory insurance

The only compulsory construction insurances are those of professional liability of architects and engineers, which arise out from legal obligation.

The law of 13 December 1989 concerning the exercise of architectural and engineering profession requires the above professionals to take out third party liability and professional indemnity insurance, which cover all professional liabilities including decennial liability.

The Chamber of Architects and Engineers (OAI) controls the respect of this obligation. The OAI has created guidelines for third party liability insurance and professional indemnity insurance which are, however, not compulsory.

The insurer covers the architect or engineer and the persons, for whom they are vicariously liable, against all claim of indenisation formulated by a party external to the insurance contract and based on a damage arising in connection with exercise of professional activities.

Generally the architects take out a policy covering all their missions during a given year. It is also possible to take out an insurance policy for a particular project covering an individual architect or engineer or alternatively all professional consultants involved in the project.

The insurance premiums may be based on professional fees, on value of the works or fixed.

2. Widespread insurance

Most of construction firms cover their third party liability only. The building contractors take out third party liability insurance in order to cover their extra-contractual civil liability for damages caused to third party in the framework of their activities.

The insurance market provides also specialist insurances, in particular Contractor's All Risk (CAR) insurance and Decennial Liability insurance.

- Contractor's All Risk insurance is essentially a property damage insurance taken out for the duration of works and possibly a few months following acceptance of works. It indemnifies the principal regardless liability of construction parties involved if the construction works are damaged. It may also contain an additional part covering liability of the participants to a construction project towards third parties, including nuisance.

- Decennial Liability insurance covers all parties involved in the construction operation who are likely to be subject to decennial liability under the acts 1792 and 2270 of the Civil Code. The goal of this insurance is to provide financial compensation of damages caused to the construction works for which the insured parties could be held liable towards the principal on the grounds of decennial liability. Duration of this insurance is of 10 years starting from the acceptance of works. The insurer performs an inspection or appoints a technical controller before granting the cover.

In the case of public procurement projects or of private contracts the contractual clauses may impose on the parties involved in the construction operation to take out one or several insurances.

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- a) Allen & Overy Luxembourg, 33 avenue J.F. Kennedy, L-1855 Luxembourg
- b) CEA Belgium, Avenue Roger Vandendriessche 22 - 1150 Brussels, Belgium

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Malta

I. Liability

1. Principles of liability

The rules referring to contractual obligations as well as to construction contracts are governed by the Civil Code.

The art. 1638 of the Civil Code defines the liability of the architect and of the builder for the defects in the construction: “If a building or other considerable stone work erected under a building contract shall, in the course of fifteen years from the day on which the construction of the same was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, the architect and the contractor shall be responsible therefore”.

The art. 1633 and following define the general duties and liabilities of persons undertaking to execute work. Under the general rules above, the liability of the person who provides the service consisting in exercising of his skill or labor only is based on fault. On the other hand, the person who bestows the thing to be delivered is strictly liable for it towards the owner until the delivery (except if the thing has perished due to defect in the materials). The Civil Code also imposes a duty on the employer to examine the thing delivered to him as “all the pieces of the work paid for are presumed to have been examined, if the employer pays the artificer in proportion to the work performed”.

The newly improved legislation and adoption of better construction practices are considered to have contributed to reducing the amount of onsite accidents and damages caused to third parties during construction. It is however considered that better education of stakeholders and better enforcement of new laws would further contribute to improving construction quality and safety.

Architects and engineers have to hold a title of „Warranted Architect and Civil Engineer“ in order to fulfill their mission in design and construction.

2. Starting point and duration of liability

Architects, engineers and building contractors are liable up to 15 years from the completion for construction defects affecting stability of the building under the art. 1638 of the Civil Code.

Moreover, according to this article “The relative action for damages must be brought within two years from the day on which any of the said cases shall have occurred”.

3. Sharing of liability between different parties to a project

Architects, engineers and building contractors are jointly and severally liable for construction defects and for stability of the erected building. As indicated above this liability lasts for 15 years from completion.

II. Insurance

1. Mandatory insurance

There are currently no insurance obligations for construction party in Malta. There is however a project under discussion to introduce a compulsory third party liability insurance in foreseeable future.

2. Widespread insurance

In Malta the parties may benefit from insurance of damage arising during the works of construction and third party liability insurance. Insurance of building defects after completion and of third party damage after completion is not available in this market.

3. Schemes and good practices

Several initiatives aiming in enhancing energy savings in buildings and to increase the share of renewable energy sources in the energy production are undertaken by Maltese authorities.

Energy Smart Authority – pilot project

The Housing Authority is actively involved in the effort of encouraging environment protection and promotion. The authority has developed a number of more environmentally friendly buildings through its housing projects since 2004. A recent example of such projects is Energy Smart Authority project, which consists in converting its offices into “eco-friendly” and “energy smart buildings”, which includes installation of a small scale photovoltaic system and of energy efficient measures in the lighting system. It is intended to monitor the results of the system installed with the view to use it for future social housing projects whilst promoting the use of renewable energy sources and energy efficiency in buildings. The projects of this type are supported by the structural funds provided through the European Regional Development Fund.

Planning guidelines for micro-wind turbines

The national agency responsible for land use planning and environmental regulation in Malta (MEPA) - Malta Environment and Planning Authority established under the mandate of the Environment Protection Act (2001) and the Development Planning Act (2001) is responsible for the implementation of around 200 Directives, Decisions and Regulations under the EU Environmental Acquis.

A public consultation draft on planning guidance of micro-wind turbines was issued by MEPA in July 2009 in the framework of implementation of the Directive on the promotion of the use of energy from renewable sources (2008/16 (COD)). Moreover, as a part of Environmental Technologies Action Plan a local draft was prepared by the Malta Council for Science and Technology which recommends pilot projects on wind power generation to better understand the benefits and possible impacts of this technology. The pilot projects suggested are for medium-scale and microscale wind energy technologies. Offshore wind facility is also taken into consideration.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Netherlands

I. Liability

1. Principles of liability

Since 1990 the rules relative to construction sector have been subject to a number of changes in the Netherlands. The role of the government in controlling the construction sector has been reduced as a part of the government's policy aiming in improving quality in construction and on limitation of legal constraints, which could hamper the development of the sector and discourage innovation.

The legal texts applicable to construction were modified and the prescriptive provisions were replaced with minimum requirements in terms of performance to be achieved. The choice of performance based approach was determined by the will to encourage innovation in the sector. The current system is therefore based on performance –driven approach with strong influence of certification.



The VROM (Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieu - Ministry of Housing, Spatial Planning and the Environment) is in charge of developing construction rules, while the respect of the rules is enforced by the local authorities through construction permit procedures and construction sites inspections.

The following legal acts applicable to the Dutch construction can be distinguished:

- Housing Act (Woningwet), which defines procedures relative to construction, in particular regarding issuing of construction permits,
- Building Decree or Building Code (Bouwbesluit) – a set of technical building regulations which defines minimal criteria to be satisfied by all buildings erected in the country. As noted before, the criteria defined by this act were previously expressed in a prescriptive way. They are now replaced by minimum criteria in terms of performance. The requirements set out in the regulations concern safety, health, usefulness and energy efficiency of buildings.
- Spatial Planning Act (Wet op de Ruimtelijke Ordening)
- Civil code (Burgerlijk Wetboek)

The Housing Act and the Building Decree have been revised and amended in 2003 and in 2012.

In addition to the legally binding quality levels, as determined in the Building Decree, the current

policy is to encourage involvement of the private sector in construction quality control as a response to a series of construction failures which occurred in early 2000s due to insufficient control and poor construction practices.

A large number of quality marks, certificates or labels for various housing related aspects exist in the Netherlands, and can be obtained voluntarily by buyers, tenants, owner-occupiers, construction firms and project developers. The marks concern the quality and lack of hidden or apparent defects in new or existing dwellings, burglar-resistance of dwellings (provided by the police), sanitary facilities, central heating installations, boilers, building materials and energy efficiency.

A project currently implemented by the VROM Ministry consists in implementing private building control as an alternative to the existing local authorities' building control performed in the framework of construction permits procedures. The principal would be free to choose the traditional local authority control or control by a certified private engineering firm. The scope of control would cover all stages of construction process from design to completion and would include control of respect of the legal performance requirements. The results of tests performed by the Ministry have demonstrated that the quality of control by private organisations was superior comparing to the traditional local authorities' service.

The general legal framework of liability rules relative to the construction parties is defined in the Civil Code (Nieuw Burgerlijk Wetboek). The articles of the Civil Code related to construction were reviewed in 2003. The new provisions introduced increased consumer protection measures in the case of purchase of a dwelling (relative to existing real estate, off-plan purchases or dwelling construction commissioned by a consumer). The dispositions introduced concerned among others:

- a compulsory deadline of three days, during which the buyer can cancel the contract (for contracts of purchase of dwellings or turn-key construction contracts relative to dwellings),
- publishing of all written real estate sales contracts in an official register as a mean of protection of buyer's interests during the period between the signature of the sale contract and the transfer or the right to property through a notarial deed (before the buyer was not protected against insolvency of the seller),
- prohibition of payment of the full price before the signature of notarial deed (for all dwelling sales to a consumer), a maximum 10% of the price was allowed to be placed by a buyer in an escrow account hold by a notary,
- for dwellings' construction contracts the instalment payments must correspond to the state of progress of the works performed. Moreover, a possibility to retain the last instalment payment (up to 5% of the total works price) in a notarial escrow has been allowed as a guarantee of repair of defects discovered during three months from completion.

A large majority of construction contracts in the Netherlands is governed by voluntary standard contracts. The wordings of these contracts are composed jointly by professional organisations representing various actors of construction sector and are regularly reviewed.

The standard forms of contracts constitute the main reference for formation of contractual relations between construction parties, and they play a crucial role in shaping the framework of liabilities in the construction sector.

The most popular wording used for construction works contracts is *Uniforme Administratieve Voowwaarden voor de unitvoering van werken (U.A.V.)*.

For professional consultant's appointments such as engineers or architects the most frequently used standard form is *De Nieuwe Regeling (DNR)*, drafted by professional organisation of architects *Bond Nederlandse Architecten (BNA)* or *CR 2006* wording *De Consumentenregeling* used for smaller projects.

Various standard contracts dedicated to use in more specific situations are also available (for example wordings elaborated by *Garantie-Instituut Woningbouw G.I.W.* for dwellings).

Under most of standard contracts conditions the liability of the building contractor is strict. He is obliged to deliver the result according to what was defined in his contract (although it has been recently argued, that there should be a difference in approach between situations where the contractor is liable both for design and physical performance, or when he is only due to execute the plans delivered by the principal). However, the building contractor cannot be held liable for building defects caused exclusively by faulty building materials provided by the principal or by materials imposed to be used by the principal.

The standard of liability of professional consultants such as architects is based on proven fault i.e. a proof of negligence is required to hold the professional liable.

The disputes relative to construction contracts are very rarely resolved by courts in the Netherlands. The privileged way of dispute resolution is by an arbitration organism.

Different arbitration bodies exist such as *Raad van Arbitrage voor de Bouwbedrijven in Nederland (R.v.A.)*, *Arbitrage Instituut vor GIV woningen (A.I.G.)* for contracts relative to construction of dwellings, *Arbitrage Instituut Bouwkunst (A.I.Bk)* for disputes relative to architect's appointment contracts or *Commissie van Geschillen van het Koninklijk Instituut van Ingenieurs (CvG – KIVI)* for appointments of engineering consultants.

The *R.v.A.* organisation issues also an annual review in which its arbitration decisions are published.

All standard contracts contain an arbitration clause indicating an arbitration organisation, to which an exclusive authority to resolve disputes related to the contract is attributed. *R.v.A.* tends to be chosen the most frequently.

It should be noted that the role of professional organisations in the Dutch construction market is important. Although the law does not impose any particular requirements relative to persons involved in design or construction, the professional bodies play the main role in developing rules of access to construction professions, conditions of performance as well as control of performance of the construction functions.

2. Starting point and duration of liability

According to the Civil Code the construction party is not liable for defects, which should have been reasonably discovered by the principal at the moment of handover. If latent defects resulting from a fault of a construction party are discovered after handover, the principal should allow the construction party a reasonable time to repair them.

Most standard contracts stipulate a maintenance period lasting from 3 months to 2 years after completion. During this period the building contractor is due to repair defects at his own expense. Once this period expires a “definitive” handover is declared by the principal.

In the UAV contracts, which are the most commonly used, the period of liability of the building contractor is limited to 5 years following completion. The duration of contractor’s liability for defects affecting stability or fitness for purpose of the building is of 10 years.

According to the standard policy wording for consultant’s appointments DNR 2005 the duration of liability of the consultant is of 5 years following the end of his mission. In case of defects discovered by the principal, the latter disposes of a deadline of two years to bring a legal action against the consultant. Moreover, the liability of the architect is limited to the amount of the fees with the maximum of Eur 1 million.

The Civil Code defines two limitations periods in the case of latent defects.

The first limitation deadline is of 2 years from the moment when the owner has notified the defect to the contractor (but the owner may lose his right to bring an action if he failed to notify the builder within the reasonable time from discovery of the defect). All actions based on latent defects are barred after 20 years following handover of the building. Moreover, during the period from 10 to 20 years following the completion, the claimant needs to prove the contractor’s fault.

3. Sharing of liability between different parties to a project

It is possible in the Netherlands that construction parties are held jointly and severally liable. However, this liability may only arise from contractual provisions and not by law.

In practice, most of liability issues are resolved through agreements between the principal and other participants to the project.

II. Insurance

1. Mandatory insurance

In the Netherlands there is no legal obligation for construction parties relative to insurance.

There is also no legal obligation to use a qualified professional for design or construction of a building. However, in 2007 Ministry of Housing, Spatial Planning and the Environment (VROM) announced that it intended to examine a possibility of implementing a compulsory insurance.

2. Widespread insurance

There is a number of warranties available for buyers of dwellings (which may cover new developments and/or refurbishments).

Examples of warranty schemes include:

- Warranty provider organisations Bouwfonds, SWK and Woningborg

The 3 warranty provider organisations Bouwfonds, SWK and Woningborg were until the 31th of December 2009 member of the well-known GIW Institute.

The GIW institute (Garantie Instituut Woningbouw) was founded in 1974. Its creation, inspired on the NHBC model from the UK, was supported by the Dutch government. The organism was composed of three consumers' organisations, three affiliated warranty provider organisations: Bouwfonds, SWK (Stichting Garantie Instituut) and Woningborg and of an association regrouping local authorities.

The affiliated warranty providers delivered warranties to owners of newly built houses covering the risk of insolvency of the builder and of building defects. A very large majority of newly built houses in the Netherlands were covered by the GIW warranty. Majority of Dutch local authorities had made GIW warranty compulsory for every newly built house.

In case of insolvency of the builder GIW warranty covered the cost of completing the dwelling in accordance to the original building contract. A compensation scheme may also be implemented. The owner was compensated on the basis of additional cost necessary to complete the building or on the basis of instalments already paid to the insolvent builder. The compensation for insolvency was limited to 17% of the agreed purchase or construction price including cost of land.

In case building defects occurred after completion and the builder no longer existed or was insolvent, the GIW warranty covered the cost of repair of defects. The defects guarantee was composed of a 6 years general warranty and of a warranty of 10 years covering serious structural defects which cause the dwelling unfit for habitation. Moreover some parts of building could be subject of specific cover periods applicable.

As from the 1st of January 2010, the GIW institute will cease his activities. The three member warranty provider organisations will continue the activities on an independent basis.

- reBuilding warranty delivered by BouwGarant (a quality scheme and home warranty provider organisation)

Members of BouwGarant (i.e. affiliated construction firms) can deliver warranties to their clients covering new buildings or conversion works. The reBuilding warranty covers apparent defects reported after completion, latent defects and builder's insolvency.

Moreover, in spite of lack of legal obligation other types of insurance are also systematically taken out such as Construction All Risk insurance and third party liability insurance.

Latent defects insurance covering defects in structural elements of the building is also provided to principals or main contractors by some insurance companies for larger projects (however it is not frequently used). For larger projects the construction parties (often the main contractor acting in a framework of a design and construct contract) may take out professional indemnity policy covering errors in design.

In practice, although no legal insurance obligation exists, a large majority of construction parties are insured. The reasons of the above are requirements of the principals, rules imposed by professional organisations and a general custom in the market. Moreover the standard forms of construction contracts provide a reference for the market in this field and impose requirements to carry insurance on market actors.

3. Schemes and good practices

As indicated above the Dutch dwellings owners may profit from warranties covering risks linked to purchase of a dwelling. The warranty schemes are based on voluntary membership of construction firms and include quality/labelling and technical control procedures in order to ensure that a service of satisfactory quality is delivered by the members.

The GIW institute (until the 31th of December 2009)

In addition to providing home-warranties the goals of the system consisted in improvement of construction quality, increase of customer confidence in construction firms and providing assistance to buyers in case of dispute with a member construction firm. Indemnity for construction defects was considered as a solution of last resort, when a construction firm failed to repair defects and all other means (such as mediation or arbitration procedure) proved to be inefficient.

The member construction firms could benefit from a “GIW label” providing that they met a number of conditions such as satisfactory results of audit of their technical competences and of their financial standing and use of standard GIW contract forms.

It is estimated that almost all larger construction firms and property developers in the Netherlands were affiliated to the GIW system. The affiliation was frequently imposed on property developers by local authorities. The buyers of dwellings were also encouraged by the government to require their builder to provide the GIW guarantee. The use of the standard GIW contract form may in some cases have been a condition to obtain subventions on dwelling purchase.

BouwGarant

BouwGarant is a quality mark organisation regrouping around 2000 construction companies. The members of the scheme have to comply with a number of requirements relative to quality standards, membership in the chamber of commerce and insurance. Moreover their quality management procedures are subject to periodical control (every three years). As indicated above, BouwGarant organisation delivers warranties to the clients of its member firms.

De erkende hoofdaannemer

De erkende hoofdaannemer is a quality label introduced by Bouwend Nederland (association of building contractor firms) . The companies wishing to benefit from De erkende hoofdaannemer label need to satisfy a large number of norms defined by Dutch Normalisation Institute (NEN) as well as ISO 9000 norms relevant to small and craft firms. The companies holding this label are controlled every year by an independent certified organism which verifies whether the company complies with the requirements and monitors the progress of the company in terms of quality.

Claims monitoring

There is no at present a central database of construction claims in the Netherlands. However, the VROM Ministry disposes of a department supervising local authorities' technical controllers from whom it can dispose of reliable information, in particular with respect to serial disorders.

The available information is used to perform more specific studies and to elaborate guidelines with the aim to prevent further disasters.

Bouwend Nederland described above operates also an insurance scheme covering construction risks during works execution and commissioning period. It has also launched an insurance solution covering latent defects. The association runs a database based on claims reported, which is used to provide feedback and guidelines to the members. The association is involved in creation of a national construction failures database, which would be composed of data available to Bouwend Nederland and of information from other sources such as architects, engineers, building contractors, insurers.

Furthermore, the consumers' organisations collect information on defects reported during handover inspection of dwellings.

It is considered that most of construction defects in the Netherlands result from lack of coordination on the construction site and insufficient communication between different participants to the project. Other factors contributing to the quality deficiencies are insufficient qualifications and training of the construction workers and professionals.

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Questionnaires:

- a) CEA Belgium, Avenue Roger Vandendriessche 22, 1150 Brussels, Belgium

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Poland

I. Liability

1. Principles of liability

The main legal acts relative to construction industry in Poland are the Civil Code and the Building Law Act from 7 July 1994 (Ustawa Prawo Budowlane).

The Civil Code provides a basic set of rules, which apply to construction works, whereas most of the aspects of the contractual relation between the parties to a construction project are defined by contractual agreement.

The Civil Code defines common liability rules including liability in contract and in tort, which apply also to construction professionals. The Building Law Act provides definition of the parties to construction projects and of their duties. It should be noted that the duties of different parties defined in this act may sometimes overlap. As a result of this, in case of a damage it is necessary in practice to analyse the cause of the damage and to determine case by case what liability regime should be applied to the parties concerned.

The main participants to the construction process defined by the Building Law Act are investor, building site inspector, designer and construction foreman. The art. 12 of Building Law Act provides also a definition of so called “independent technical functions in construction” (samodzielne funkcje techniczne w budownictwie).

The following general liability rules defined in the Polish Civil Code may be involved:

- Civil liability in contract (art 471 C.C.) in case of non respect of obligations defined by the contract signed between the parties,
- Civil liability in tort (art 415 C.C.) – the scope of this liability is not defined contractually but by general rules of law and consist in liability towards third parties for property damage or bodily injuries caused.
- The Civil Code rules (art 627 and 637 C.C.) relative to „contract of works” - according to the above article of the Civil Code in case of defects in the “works” being subject to the contract

investor may require repair within a defined deadline. If the other party fails to do so or if the defects are impossible to repair the investor may withdraw from the contract. In case of small defects investor may reduce the payment in proportion to the defect.

- an implied liability of a seller for physical or legal defects of a good sold (art.556 C.C.) called warranty - the term of “seller” may include for example a designer providing construction plans or a building contractor executing construction works. The liability of the seller on the basis of the warranty is strict (i.e. independent of fault). The warranty gives the buyer the right to require the seller to rectify the defects of the “good” or to withdraw himself from the contract (it may happen for example if as a results of defects to construction plans the performance of the project is impossible). In case of buildings the Civil Code (art. 568) defines warranty period of three years, which constitutes a minimum legal guarantee. Moreover, the parties may agree a supplementary guarantee period defined in the contract, which usually lasts for two or three years in addition to the minimum legal guarantee period. The clients may require such guarantees to be provided by building contractors.

Liability of the property developer towards the final client is defined by a “developers agreement” with the client. This type of agreement is not specifically defined by the Civil Code, therefore different parts of the agreement may be governed by the Civil Code rules relative to sales of goods contract or to building works contract. The rules of building works contract apply in case of building defects.

Liability of the property developer towards third parties is governed by general tort liability rules.

The Art. 12 of the Building Law Act provides a definition of “independent technical functions in construction”. Such functions refer to activities, which require professional assessment and independent solutions of architectural, technical and organisational problems during the construction process, in particular designing, verification of projects and supervising the designing process, coordinating and managing building works, supervising, managing or technical control of production of construction elements, investor’s supervision, technical control of building’s maintenance, activity of technical surveyors.

Professional consultants fulfilling independent technical functions in construction need to hold certified building qualifications awarded by their respective professional body in order to be entitled to perform their professional activity. This obligation is defined by statute (Law from 15.12.2000 on Professional Organisations of Architects, Engineers and Town Planners).

There are basically two categories of certified building qualifications relative to design and to supervising of construction works. The certified building qualifications can be awarded only to a physical person.

The liability of the consultant towards the client is mainly based on the terms of the contract. Moreover, the consultants are subject to public liability based on fault for damages suffered by third parties as a result of acts or omissions of the consultant in performance of their mission. Public liability of professional consultants is personal and unlimited.

In case of the construction catastrophe the fault of the consultant will be presumed – as a result the consultant would have to prove that they had complied with the professional standards in fulfillment of their mission and that the damage has been caused by external factors, which were independent from them.

The mutual duties and obligations arising between main contractor and investor are defined in part XVI of the Civil Code relative to the construction works contract.

Building contractors are subject to “fitness for purpose” liability standard - the building must be performed accordingly to the construction contract and to the rules of the relevant technical knowledge (art 647 C.C. defining building works contract). Therefore the contractors are liable for defective work execution including apparent building defects as well as latent defects. They also have to ensure that the materials and equipment used during the works are of satisfactory quality. However building materials producers are liable if the quality of the materials supplied does not correspond to the building norms.

Public liability of the building contractor is strict i.e. that in the same way as the investor, they have to establish that the damage was caused by force majeure, the injured himself or by a third party in order to avoid liability. Moreover, the building contractors are liable for the acts of their subcontractors. In order to exculpate themselves from the public liability towards a third party resulting from the acts of their subcontractors the contractor must demonstrate that they have employed “professional” subcontractors.

Usually the owner or the user of the building is in the first place obliged to repair the damages resulting from the construction defects. He may then claim compensation from the designer or from the building contractor, however he needs to prove the fault of the above parties to be able to hold them liable to compensate the claim.

Currently, according to our interlocutors, it seems to be little concern among the construction parties about serious financial consequences which may result from errors in design and execution of construction projects in the longer term. It is considered that the courts have not been very severe towards the liable parties in the framework of civil claims procedures following construction catastrophes or claims of persons injured. The amounts of indemnities awarded are generally far lower than in Western Europe. Moreover, the liability of each party is not often easy to determine, which results in sharing the liability between all the parties concerned and therefore in reduced financial consequences for the liable party.

The Polish law has not introduced standard construction contract forms. In practice however, the contractual forms are often inspired by the FIDIC publications, in particular if the employers are Western European firms. In particular, in case of larger construction projects sponsored by foreign investors, the FIDIC contract forms are used in order to determine the functions and liabilities of the parties involved. This may lead to difficulties in some cases as certain terms or names of professional functions used in the FIDIC forms are not recognized in the Polish law.

2. Starting point and duration of liability

As explained above the Civil Code defines the main liability limitation periods applicable in the context of construction.

Duration of the legal warranty for building defects according to the art. 568 of the C.C. is three years. The parties may contractually agree longer warranty periods.

The general claims limitation periods under art. 442 C.C. is three years from the date on which the injured party learned of the damage, but no longer than 10 years from the date when the damage occurred. In case of bodily injuries the limitation period is 3 years from the date on which the claimant learned of the damage. Damages caused as a result of a crime or a tort, are subject to an extended maximum limitation period of 20 years.

3. Sharing of liability between different parties to a project

There is no general statutory provision imposing joint liability between parties to a construction process. Such a liability may however arise on contractual basis or under specific regulatory provisions.

In case of damages resulting from torts (extra-contractual liability) of more than one party, they are jointly and severally liable under the art 441 C.C. This may apply in the case the non respect of duties defined in the Building Law Act. Each party may be held liable for their respective acts or omissions if it is possible to identify their individual contribution to the damage. However, it cannot be excluded that the parties are held jointly and severally liable, especially if the contribution of each party is difficult to determine.

II. Insurance

1. Mandatory insurance

All persons fulfilling independent technical functions in construction are subject to compulsory professional indemnity insurance and are obliged to be members of one of the following professional bodies: Polish Chamber of Civil Engineers (Polska Izba Inżynierów Budownictwa), Polish Chamber of Architects of Republic of Poland (Izba Architektów Rzeczypospolitej Polskiej) or National Chamber of Town Planners (Krajowa Izba Urbanistów) under the law of 15 December 2000.

The scope and guarantee limits of the compulsory PI insurance are defined in the Ordinance of Minister of Finance from 11 December 2003 (Rozporządzenie Ministra Finansów z dn. 11 grudnia 2003 roku (Dz. U. nr 220 z 2003 r. poz. 2174)).

Each independent consultant is obliged to indicate to his professional chamber a number of his PI policy. Failure to do so results in removing the consultant from the chamber's register, which means in practice that he is no more allowed to perform his professional activity.

The insurers are under obligation to offer compulsory insurance cover on request of the consultant. Statutory minimum guarantee limit of the compulsory PI insurance is 50 000 eur.

The professional chambers usually offer their members a possibility to take out their professional indemnity insurance through a “group scheme” negotiated with an insurance company.

Voluntary PI policies with amounts insured exceeding the statutory limits are offered by several insurance companies. In many cases the statutory minimum sums insured of the compulsory PI cover may be considered insufficient and the construction parties may decide to take out voluntary insurances with higher limits. Requirements of higher insurance limits may sometimes be imposed by the clients.

2. Widespread insurance

There are a large number of insurance companies offering various voluntary construction insurance policies, mainly Contractor’s All Risk (CAR) policies, Third Party Liability insurance or different types of guarantees such as guarantee covering repair of defects or performance bonds.

Main security solution against post-completion construction defects used in the Polish market consists in financial guarantees, which may be offered by banks or by insurance companies.

The guarantees are usually taken out for longer periods, although the durations may be restricted as a result of reinsurance terms available to insurers. The maximum durations of guarantees are usually of 72 months (the guarantees often combine performance of the contract as well as repair of defects). The guarantees covering repair of defects are activated only when the contractor fails to remove them in spite of being asked to do so. Moreover, the guarantees cover the cost of repair of defects only. Damages resulting from the defects such as bodily injuries, property damages or financial losses are not covered.

Although the use of insurance by construction firms in Poland is still relatively recent and may be less popular among small construction firms, the market awareness concerning the benefits of insurance seems to be growing. Larger construction firms are usually insured.

Property developers and clients may require their building contractors to carry insurance or to provide some types of guarantees.

Property developers and large commercial investors systematically take out a CAR policy to cover the whole construction operation.

3. Schemes and best practices

A public administration body called General Office of Building Control (G/6wny Urząd Nadzoru Budowlanego) supervises Architectural-Building Administration and Building Control Authorities, which are dedicated to control and to enforce among others:

- compliance with local property developments plans and environmental protection,

- respect of personal and property safety regulations in construction plans, in the course of construction works and in existing buildings,
- compliance of architectural projects with technical building regulations, industrial standards and the principles of technical knowledge,
- proper execution of independent technical functions in construction,
- proper use of construction materials and products.

The above authorities may among others order to scrap a construction built without a permit, prohibit to carry out construction works not compliant with the permit or with the building regulations, order to repair defects or to undertake actions in case of improper execution of works and order an evacuation of people and property from buildings in risk of collapse.

The General Office of Building Control holds a number of public registers such as register of major building damages (collapses) due to different causes such as natural catastrophes, improper maintenance of the building, defective construction or design and etc., a register of persons entitled to perform independent technical functions in construction, list of expert building surveyors and a list of persons who have been punished on the grounds of their professional responsibility in construction. It also maintains an official list of building materials and products, the quality of which is regarded as not satisfactory. The list indicates among others the kind of non-compliance of the product and dangers that may be caused by the use of this product.

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www.gunb.gov.pl
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www.izbaarchitektow.pl
- c) National Chamber of Town Planners
www.izbaurbanistow.pl
- d) Polish Chamber of Construction Engineers
www.piib.org.pl

Questionnaires:

- a) Beiten Burkhardt P. Daszkowski Sp.K., ul. Ks. Skorupki 5, Warszawa, 00-547 Poland

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Portugal

I. Liability

1. Principles of liability

The main legal acts relative to liability for construction defects are the Civil Code (art. 1225), Consumer law 24/96 as amended by Decree Law 84/2008 and Decree 67/2003 on sales of consumption goods and relevant guarantees as amended by Decree Law 84/2008 and an act called Regulamento Geral das Edificações Urbanas from 1951.

The General Building Regulations from 1951 provide general rules for buildings with respect to construction, health, safety and aesthetic aspects, covering new construction works, refurbishment, extensions and alterations.

Under the existing legislation building contractor or property developer is liable towards the client in case of defects in the building or in its inseparable parts, resulting from defective construction works or defects in the ground, which are likely to produce total or partial destruction of the building. This liability applies to new constructions as well as to alterations or refurbishment of existing buildings. However damages resulting from inappropriate use of the building or from insufficient maintenance are excluded from the scope of this guarantee.

The liability of the building contractors and property developers is presumed when the client proves the existence of defects and their seriousness; the law (art. 913 and 1208 C.C.) imposes on them a duty to deliver the building corresponding to the contract specifications and free from defects.

Under a legal act called Decreto Lei no 12/2004 of 9 January 2004 the construction firms need to obtain a certificate (alvara) in order to be allowed to perform construction activity. The certificate is granted by a governing body called Office of Construction and Real Estate (Instituto da Construção e do Imobiliário) and is valid during one year. The certificate specifies the type of works, which can be performed by the company. In order to obtain the certificate the company must prove that it has the necessary professional experience and qualifications, insurance covering work accidents and that it disposes of adequate technical and financial capacities in order to perform its activity. There are substantial penalties for those, who pursue construction activity without a valid certificate.

Small and craft firms may chose a simplified procedure enabling them to obtain a título de registo, which is valid during 5 years and allows the firm to perform works of a value not exceeding Eur 16,600. The Office of Construction and Real Estate holds a register of licensed builders, which is available to the public through its website.

On the other hand, the liability of professional consultants (architects, engineers) is based on fault. Recently issued law n ° 31/2009 from 3 July 2009 and in force since November 2009 has brought a precise description of roles, liabilities and mutual relations of participants to construction projects such as authors of the project, surveyors, coordinators, property developers and building contractors.

The Act refers among others to the following:

- it defines persons entitled to perform functions of design, supervision of works and project management and imposes on such persons a duty to hold adequate professional qualifications and to be affiliated to a competent professional organisation,
- it defines the scope of liability of professional consultants which covers “damage caused to third parties arising from the negligent violation, by action or omission within pursuit of duties that are required by contract or by law or regulation”,
- it imposes a duty to carry professional indemnity insurance by persons involved in the activities of design, supervision and project management.

It is considered that Portugal has a very strict planning law aimed at protecting sustainable development of land and buildings. Construction or renovation works are subject to tight control by the local authorities, who verify whether the works are done in accordance with the law. Non respect of the legal provisions may result in substantial fines from the local council and may affect the value of the property.

Until recently Portugal did not dispose of technical prescriptions or norms, which could serve as a reference in conformity assessment of the works performed, with the exception of technical specifications issued by Laboratório Nacional de Engenharia Civil which are due to be replaced by Eurocodes. A project of such technical norms called PRONIC (Protocolo Para Normalização da Informação Técnica na Construção) is currently supported by the General Direction of Buildings and National Monuments (Direcção General dos Edifícios e Monumentos Nacionais).

Several government initiatives were undertaken in order to regulate and improve functioning of the construction sector and further regulatory reforms seem to be in progress. Within an initiative called National Plan for Growth and Employment the government has announced a general review of regulatory framework relative to the construction and real estate sector with the aim to increase the level of professionalism and awareness of the firms in the sector, enhance transparency and reinforce consumer protection.

Proposals under discussion include extension of duration of the legal guarantee for building defects to 10 years, compulsory insurance covering legal guarantee for building defects and creation of an official register of property developers. The public contract code applicable to public works establishes already a 10 years guarantee for defects related to structural elements.

2. Starting point and duration of liability

In the absence of contractual provisions art. 1225 of the Civil Code, Consumer law 24/96 and decree 67/2003 stipulate a legal guarantee for construction, refurbishment or alteration works in buildings dedicated for long-term use lasting for 5 years from handover.

The guarantee applies if the building contains construction or ground defects, which are likely to cause its partial or total destruction. In the above circumstances the building contractor is liable towards the principal and subsequent owners. The same responsibility applies to a seller of a building, which has been subject to construction, modification or alteration works.

The guarantee covers defects in the building, ground, integral parts of the building and the elements permanently associated with the building. Other materials and equipments are subject to 2 years guarantee period. The parties are free to extend the duration of liability by contractual agreement.

The building contractor may be exonerated from liability for apparent defects if the client accepts to receive the building without reserves (art. 1219 of the Civil Code).

The client has the right to require repair of defects. If the defects cannot be removed, he may require a reconstruction of the property unless the cost of re-building is disproportional compared to potential benefits (art. 1221 of the Civil Code). If repair or reconstruction of the defective building is impossible the owner may require reduction of contractor's payments or avoid the contract and request restitution of the monies paid to the contractor.

Defects discovered by the client must be notified within a period of one year, following which the client disposes of further three years to initiate a legal action. After expiry of the above deadlines the claims against the contractor or property developer cannot be enforced.

Duration of liability of architects lasts for 5 years following completion of works. It is however considered that the liability of architects is rarely sought due to their limited role.

As mentioned above, in the case of public works, the public contract code sets out a 10 years guarantee for defects related to structural elements.

3. Sharing of liability between different parties to a project

A professional consultant such as an architect may be held jointly and severally liable with other participants to the construction process if, due to their negligence, they have contributed to the same damage.

The main contractor may claim compensation for defects from his subcontractors.

II. Insurance

1. Mandatory Insurance

In the nineties under Regulatory Decree 11/92 on Liability insurance for designers in building permit procedures of private construction works liability insurance for designers and contractors was made

mandatory. However implementation of this obligation was not successful and subsequently it has become voluntary.

As indicated above the Law 31/2009 from 3 July 2009 has imposed a duty to carry professional indemnity insurance on persons involved in design, supervision of works and in project management within public and private construction projects. The compulsory insurance is due to cover damages caused to buyers of design, building or property resulting from negligent acts or omissions within performance of professional duties by the persons above.

The Act allows a choice of alternative forms of security covering the liability above such as cash deposits, performance bonds or bank guarantees.

Detailed requirements regarding the compulsory insurance such as minimum sums insured, duration, scope of cover, claims procedures and exclusions are due to be published by the government following consultations with professional associations representing the architects, engineers and other professionals concerned. Such publication is expected at the beginning of 2010.

Construction firms must produce certificate of insurance of accidents at work in order to obtain an authorisation to perform construction activity.

As stated above a project of extending the duration of builder's liability for building defects and of implementing compulsory construction defects insurance is under discussion in the framework of the National Plan for Growth and Employment.

2. Widespread Insurance

Insurance of construction risks is available on voluntary basis. It seems however that the parties to construction contracts do not have the habit to carry insurance, unless it is required by the client.

Insurance or financial guarantees are more likely to be used in the framework of public procurement contracts.

Insurance covering building defects is available for the owners on a voluntary basis but it is not frequently used and it is considered as expensive. Before insurance cover is granted the insurers appoint an independent surveyor in charge of verification of plans and of surveying the construction works. At the completion the surveyor produces a conformity report, on the basis of which the insurers decide whether they accept to provide the cover. Duration of this insurance is of 5 or 10 years following completion of works.

3. Schemes and good practices

A number of initiatives relative to construction sector undertaken in Portugal in the recent years are worth noting:

[PRONIC - Protocol for the Standardization of Information Technology in Construction](#)

The ProNIC is a project dedicated to providing a technical reference tools for the construction sector. It has a transversal character and covers different phases of a construction process such as design, consultation, and performance of the works and use of materials. The project aims to integrate perspectives of the various entities involved in all phases of a project.

The scope of the projects includes general building construction, conservation and rehabilitation of existing buildings and the road infrastructure.

The main objective of this initiative is to create an information platform accessible to the general public containing, among others, standardised forms of basic documentation necessary in the construction projects such as budget estimates. The database will also contain information on methodologies, safety rules and performance indicators. It will also dispose of on-line tools enabling comparisons of estimates and selection of contractors.

Portuguese Construction Technology Platform

A technical/scientific discussion forum called Technology Platform was created with the objective of promoting growth, competitiveness and sustainability of the industry. The facility aims in involving public and private entities from the construction sector such as universities, research centres and private firms in the process of defining a Strategic Research Agenda focusing on the industry's needs in terms of research and technological development. The idea is that the entire sector should be involved in identifying opportunities and strategies for concerted development of the sector as well as best directions of research and innovation in the field of construction.

The goal of this common reflection is to define a strategy for growth and sustainable development of the construction sector via substantial investment in research and innovation, which will be supported by the 7th Framework Program of the European Union.

IcBench Project

The Faculty of Engineering of Porto (FEUP) with the support of INCI is currently working on development of the IcBench project. The aim of this initiative is to provide an internet platform for benchmarking for various businesses within the construction industry. The platform is intended to enable a self-assessment of the firm's activity in terms of overall yearly performance or of an individual operation including the possibility of comparison with aggregated results of competitors implementing best practices in the field.

This tool is intended to be very useful in assisting construction firms in their management policy with a view to promoting high management standards, achieving higher levels of performance and of optimising of resources. The tool should also help in identifying opportunities for improvement and provide guidance in decision making and in formulation of business strategies.

The Public Contract Code

The Public Contract Code, in force since 30 July 2008, establishes the regime applicable to public procurement. Within the scope of this initiative an internet portal called Observat6rio das Obras

Públicas has been created with the aim of centralising information on the formation and execution of contracts being subject of the Government Code of Procurement. The aims of the initiative are to achieve greater efficiency of public procurement processes, to reduce bureaucracy and to simplify procedures, reduce procedural delays and gain a better control over public spending.

Protocol of Accession to the Common Information Network – RTIC

Decree No 118/2009 of 19 May, which entered into force on 17 August 2009 established the network of Common Information (RTIC) for the registration and processing of consumer complaints and the exchange of statistical information on consumer complaints. A large number of regulatory bodies from various market sectors and the General Consumer Directorate (Direcção-Geral do Consumidor) have signed the protocol, including the Office of Construction and Real Estate (Instituto da Construção e do Imobiliário).

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Questionnaires and other information:

Portuguese Federation of Construction and Public Works Industry (FEPICOP)

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Romania

I. Liability

1. Principles of liability

The legal texts relative to construction activity in Romania are: the Civil Code, law no. 10/1995 amended by law no. 587/2002 on quality in construction, law no. 608/2001 on quality of the products, law no 50/1991 on authorization of constructions, law 350/2001 updated in 2006 on territorial and urban planning and law no. 137/1995 on environmental protection.

Law no. 10/1995 on quality in construction defines the framework of responsibilities of the construction parties. It covers all spectrum of activities related to construction and buildings starting from responsibilities of designers and investors, through responsibilities of building contractors for execution of works, government's responsibilities of control as well as responsibilities of owners, users or administrators for operation and maintenance of completed buildings.

Under the Civil Code the building contractor bears the responsibility for all risks related to the building works. The scope of building contractor's liability covers:

- execution of the works within time and under conditions agreed in the contract,
- all damage to the building works until they are delivered to the owner,
- hidden defects,
- quality of the building structure and incorporated materials.

As a general rule, the injured party may claim indemnity for damages as well as compensation of resulting financial losses. However, the liability of the contractor defined above can be contractually modified (i.e. limited or extended) and a cap value of contractor's liability can be negotiated unless the law provides otherwise. The areas where contractual limitation of the liability of contractor is legally prohibited are as follows:

- resistance of the building structure during the whole useful life of the building,
- structural hidden defects, which may result in destruction of the building,
- fraud.

Agreements entirely excluding builder's liability for the above are void under the Romanian law.

The Civil Code enables the building contractor to exculpate himself from the liability in cases of force majeure, although in order to benefit from this defense the builder must provide a proof of force majeure event and he must notify the employer about its occurrence.

The Civil Code also regulates the questions concerning appointments of subcontractors and enables the subcontractors to claim payments directly from the employer if the main contractor fails to pay them.

For each construction project the employer is under obligation to appoint an authorised designer's firm. During the construction works, the architect is liable for all occurring defects but he is free from liability for exceeding the forecasted budget or for delays in works' performance. Following the handover of works, the architect (similarly to the building contractor and other professionals) is liable for the building defects during 10 years and for resistance of the structure for the whole duration of the useful life of the building.

The title of architect is protected in Romania. In order to legally perform their profession the architects must be licensed and legally authorised. The compliance with this rule is verified by the local authorities. The act no. 184/2001 regulates the questions of organisation and of exercise of the architectural profession in Romania.

The register of authorised architects called National Architect's List is maintained by Ordinul Arhitecților din România - Architects' Order of Romania.

An important means to ensure quality in construction in Romania consists in compulsory inspection at the reception of the works. The final inspection is performed jointly by the investor, the designer, the main contractor and representatives of the local authority in order to verify whether the works have been performed in compliance with all terms of "technical manual of construction", which consists of all documents relative to execution of the construction project.

The art 17 of law 10/1995 imposes an obligation to create the technical manual of construction under supervision of the investor. The book is transferred to subsequent owners of the building, who are obliged to keep and to update it. The provisions of technical manual are mandatory for the owner and user of the construction.

Although the Romanian law does not impose standard construction contracts, it is quite frequent that for larger construction contracts the publications of FIDIC or, to a limited extent of RICS are used in an amended form to suit the requirements of Romanian law and construction practice.

It is considered that Romanian construction industry faces the problem of shortage of skilled construction labor due to reduced quality of professional education in construction and to low salaries in the sector, which amplifies the trend of migration of qualified personnel towards Western European countries, where the salary levels are higher.



2. Starting point duration of liability

Under the act 10/1995 on quality in construction, which replaced the art. 1483 of the Civil Code designer, manufacturers and providers of construction products, building contractor, consultants, building works supervisors, specialized inspector and certified technical expert are liable for hidden building defects discovered during the period of 10 years from handover of works as well as for the resulting damages.

Moreover, the parties indicated above are liable during the whole useful life of the building for structural and resistance defects of the building resulting from non respect of design and execution norms.

3. Sharing of liability between different parties to a project

The parties to a construction project, who, due to their fault have contributed to a damage may be held jointly and severally liable by the court. The joint and several liability cannot be excluded by contractual dispositions.

Under the Civil Code the main contractor bears full liability for all subcontractors appointed by him, unless otherwise is agreed with the employer. Some employers may wish to restrict the main contractor's right to appoint subcontractors and seek the right to approve the subcontractors before their appointment.

II. Insurance

1. Mandatory insurance

There is no mandatory construction insurance in Romania.

2. Widespread insurance

The following types of insurance are used in the framework of construction contracts. Requirements to carry insurance may be agreed in the construction contract:

- Insurance against risks of damage of construction works by catastrophes and natural perils,
- Civil liability insurance covering damage to third parties caused by construction plant or equipment,
- Civil liability insurance against damage to third parties due to contractor's fault or to accidents arising during performance of construction works,
- Professional indemnity insurance.

Construction contracts also usually impose the use of performance guarantees as a security for due completion of works. The guarantees are provided in the form of a bank guarantee or of a deposit consisting of a part of contractor's payments withheld by the employer.

3. Schemes and good practices

Standard terms and conditions for public works tendering

The idea behind this initiative is to adopt standard terms and conditions for public works tendering. It seems that the project is supported in particular by associations representing building contractors.

Romania Green Building Council

Romania Green Building Council is a non-profit association with the aim to encourage market, educational and legislative conditions necessary to develop high performance construction, which would meet the criteria of being both profitable and environmentally responsible.

The Council regroups various organisations and companies from real-estate and construction industry, wishing to demonstrate their commitment to promote sustainable development in construction and to "create an exemplary development model for the region by ensuring the built environment will not imperil future generations but rather be a source of safety, comfort, innovation, and opportunity". The activities of the Romania Green Building Council include increasing public awareness of the benefits provided by green buildings, providing training opportunities for construction sector on the principles of "green building", encouraging adoption of legislative measures in favour of sustainable development in construction, supporting and implementing pilot projects dedicated to demonstrate the benefits of "green technologies", in particular low energy buildings.

The Council supports joint effort of the public authorities and the private sector in promoting sustainable development in construction.

The National Construction Code

A proposal of National Construction Code published by a central public administration body called State Inspectorate for Constructions was until recently under discussion in Romania. The code was intended to integrate all existing provisions applicable to construction into a single legal act in order to remove the existing inconsistencies and to provide a unified legal framework covering territorial management, urbanism, authorization and execution of construction works, quality of construction and of building materials and state control over the construction activity.

It is worth to notice that the project proposed among others introduction of an insurance obligation for all construction participants. The compulsory insurance, although not yet precisely defined, was intended to refer to three following fields:

- civil liability insurance for damage resulting from professional errors – professional consultants and building contractors were intended to be subject to this obligation with the scope of cover adapted to suit each type activity concerned,
- damage to construction works in progress and during the entire life of the completed building – the duty to arrange this insurance was intended to be imposed on investors and owners with financial penalties in case of non respect of this obligation,
- employer's liability insurance to cover damage suffered by employees – this obligation was supposed to be imposed on building contractors.

Due to critiques on various grounds the project of the Construction Code has recently been abandoned.

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Questionnaires and other information:

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- b) Musat&Asociatii, 43 Aviatorilor Blvd., 1st District, Code 011853, Bucharest, Romania

Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Slovakia

I. Liability

1. Principles of liability

The liability of construction market actors may arise in case of:

- failure to meet contractual duties or
- failure to meet duties stated by law.

Under law, in particular, the Act No. 40/1964 Coll. as amended (“Civil Code”) and the Act No. 513/1991 Coll. as amended (“Commercial Code”), which apply in the construction sector as well, the construction market actors may be liable for:

- a) damage, caused by breach of a legal obligation (e.g. to deliver/handover a construction in time, to construct a building in compliance with technical regulations, etc.) or by breach of a contractual obligation; and
- b) defects of goods (for the purpose of this questionnaire the goods mean construction components)/work (for the purpose of this questionnaire the work means construction). The defects liability covers (i) defects existing upon a handover of goods/work and (ii) defects occurring in the course of a warranty period.

The Civil Code applies, if at least one party in the liability relationship is not a businessman, whereas the Commercial Code applies, if both parties of the liability relationship are businessmen and act within the scope of their business activity.

2. Starting point duration of liability

Liability for damage under both Codes may arise when:

- damage occurs as a result of failure to meet a general prevention duty, i.e. each person must act in a manner, so that no damage occurs,
- damage occurs as a result of breach of a legal/contractual obligation.

Liability for defects of goods/work under the Civil Code may arise when:

- defects occur upon a handover of goods/work,
- defects occur in the course of a warranty period.

Liability for defects of goods/work under the Commercial Code may arise when:

defects of goods occur at the time when the risk of damage to the goods passes to the acquiring party, even if such defects become apparent only afterwards, defects in work occur at the time the work is being handed over; however; if the risk of damage to the constructed work passes from a contractor to an employer/sponsor later, the time of this passage to the employer/sponsor is decisive. The contractor is liable for defects of work which arise after the time specified above, if such defects are caused by breach of its obligations.

Liability for damage under the Civil Code:

Indemnification entitlement lapses within 2 years as of the date when the claiming party learned of damage and identity of liable person (subjective period). The objective period is 3 years (or 10 years in case of wilful conduct) as of the date when a breach of an obligation occurred.

Liability for damage under the Commercial Code:

The subjective lapse period for damage indemnification is 4 years. The objective period is 10 years as of the date a breach of an obligation occurred.

Liability for defects of goods/work under the Civil Code:

Generally, the warranty period is 24 months, if not set out by virtue of law/contractually agreed otherwise. In respect of buildings, the warranty period is 3 years, if not set out by virtue of law/contractually agreed otherwise. Claims from warranty cease to exist after lapse of a warranty period.

If the claims arising from liability for defects of goods/works are not settled by the seller/contractor, such claims may be additionally filed with a court within 3 years as of the defect of goods has been notified to the seller/contractor.

Liability for defects of goods/work under the Commercial Code:

Claims arising from liability for defects can be filed with a court only if such defects had been notified to the seller/contractor without undue delay after the claiming party learned of defects, but no later than 2 years from handover of goods (if defects could not be identified at the time of handover) or 5 years from handover of building (if defects could not be identified at the time of handover),

2 and 5 years periods do not apply if warranty periods are agreed. Claims from warranty cease to exist after lapse of a warranty period.

3. Sharing of liability between different parties to a project

Where more than one market actor is deemed liable for damage, all participating market actors shall be liable jointly and severally and damages can be claimed towards any of the liable market actors.

Contractually, it may be agreed that different market actors shall be liable proportionally.

Insurance

1. Mandatory insurance

In the construction sector, architects and authorized engineers are obliged to maintain professional liability insurance. This obligation arises from the Act No. 138/1992 Coll. on Authorised Architects and Authorised Engineers as amended.

2. Widespread insurance

Although it is not an obligation, it has become a common practice for construction professionals to carry professional indemnity insurance and third party liability insurance.

Furthermore, it is usual that the property developers protect themselves against failure of their building contractors by use of (i) securities provided under the Slovak law, e.g. bank guarantee, promissory note/bill of exchange, retention right or (ii) foreign law instruments, e.g. performance bonds.

An agreement of the parties may stipulate an obligation of insurance.

Sources of information

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Slovenia

I. Liability

1. Principles of liability

The main legal acts defining liability framework for construction operators in Slovenia are: Civil Code (Obligacijski zakonik), Construction Act (Zakon o graditvi objektov ZGO) and Environmental Act (Zakon o varstvu okolja).

The Construction Act defines essential requirements relative to design, construction and maintenance of buildings and identifies the following parties to the construction process: investor, designer, contractor, building control supervisor and project auditor and describes their respective duties.

According to the Act:

- Designer, who can be a natural or legal person, is responsible for preparation of plans in compliance with territorial development rules, building regulations and decisions of competent bodies,
- Contractor acting as a natural or legal person is responsible for compliance of the works performed with design, planning permission, building regulations and for respect of health and safety rules on the building site. The main contractor is due to appoint a qualified work's manager who is in charge of coordinating the works and of maintaining adequate records of the works performed,
- Building control supervisor is a natural person due to ensure that the works comply with the building permit and that the quality of works meets the requirements of the building regulations,
- Project auditor is a natural person who verifies that the plans are drafted in compliance with statutory duties and building regulations.

The Act forbids performance of two or more missions above by the same person and imposes financial penalties for non respect of this rule. Furthermore, there are also restrictions relative to performance of the missions above by persons having mutual business or personal relationships.

Under the art. 32 of the Act all the parties above are liable towards third parties for damages directly caused by their work and by non respect of their contractual obligations.

Rules governing liabilities under construction contract are set out in the section XII of the Civil Code.



The Environment Act covers liability in terms of environmental damage (according to EU legislation - ELD), and also deals with construction license requirements.

2. Starting point and duration of liability

Duration of liability for building defects is stipulated by the art. 662 of the Civil Code.

According to this article the building contractor is liable for any defects relative to the solidity of the building up to 10 years starting from delivery and acceptance of works. The builder's liability includes also defects of the ground (except if suitability of the ground has been confirmed by an expert organisation before the works started and no circumstances have arisen during construction works, which would put into question correctness of the expertise).

The liability above applies also to the designer if the defects result from errors in design.

The parties above are liable for defects towards the principal and subsequent owners of the building. The principal or subsequent purchaser of the building is required to notify the designer or the contractor within six months from the date when the defect was discovered, otherwise they lose their rights to act upon it.

3. Sharing of liability between different parties to a project

Under the Civil Code contractor and designer are jointly and severally liable for errors. Joint and several liability cannot be excluded nor limited in a contractual way (art.662 C.C.).

Several parties operating in the framework of a turn-key project are jointly and severally liable towards the principal.

II. Insurance

1. Mandatory Insurance

Construction Act imposes an obligation to carry liability insurance on all main participants to construction projects: building contractors, designers (including architects and engineers), project auditors, controllers and supervisors. The insurance must be arranged before any works can start. The Act imposes a minimum sum insured of Eur 41 000 per occurrence.

The scope of compulsory insurance of the parties above covers "liability for damage which might arise to investors and third parties in connection with the performance of their activities", although the wording is not precisely defined by the law.

The market practice has developed a minimum cover, which does not include liability for building defects. Typical minimum cover available on the market is as follows:

- general public liability insurance covering property damage and bodily injuries to third persons (pure financial losses, guarantee and contractual liability are excluded from the scope of this cover),
- employer's liability insurance, and
- liability for damage to the works under construction as well as to property in care, in custody and under control of the insured.



2. Widespread Insurance

In addition to the compulsory insurance, it seems that Construction All Risk insurance is widely taken out in this market.

3. Schemes and good practices

The Energy Advisory Network for households

Slovenian Ministry of Economy launched a national programme called the Energy Advisory Network for households with the aim to promote energy awareness in general public and an effective use of energy in households. Through 35 energy advisory offices, the network provides free of charge advice to customers interested in energy savings methods.

Slovenian Construction Technology Platform

The Slovenian Construction Technology Platform, existing since 2005 is a part of the European Construction Technology Platform network. It aims in bringing together all stakeholders of construction industry, in enhancing technological development and competitiveness of Slovenian construction and in promoting sustainable development in construction. The organisation is also involved in SME's problematic and in cross-border activities of Slovenian construction firms.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Spain

I. Liability

1. Principles of liability

Main legal acts relative to construction in Spain are: law 38/1999 of 5 November 1999 “Ley de Ordenación de la Edificación” (LOE), the CTE - Technical Code for Construction (RD 314/2006) “Código Técnico de la Edificación” introduced in 2006 and the Civil Code.

Until introduction of the LOE act in 2000 liability of construction parties in Spain was governed by provisions of the Civil Code. The art.1951 of the Civil Code defined decennial liability of building contractors and of architects for “ruin” of building works. Jurisprudence has further specify the extent of this liability by applying the concept of “works” to all types of constructions, by considering that the concept of “ruin” referred to problems affecting structural stability and by extending liability on all participants to construction projects including property developers.

The LOE act has introduced a specific liability regime applicable to the participants of construction projects as well as requirements regarding compulsory construction insurance inspired by the French system. The main purpose of the LOE was to protect the “construction consumers” against lengthy settlement of claims and consequences of insolvency of construction parties following bankruptcies of important property developers.

The Act applies to all new construction works as well as to alterations and refurbishments of permanent structures.

The LOE has defined the roles, responsibilities and conditions of practice of different parties to construction process: property developer, designer, building contractor, project manager, construction site manager, building controllers, building materials providers.

The LOE act has also contributed to regulating the process of construction and the minimum requirements in terms of safety, habitability and solidity.

Moreover, the act has introduced formal requirements relative to project coordination and documentation which must be submitted to the users of the building for the purpose to ensure correct use and maintenance of the building. Under the act the client has become due to appoint a qualified project manager and a qualified construction site manager for each construction project

with the purpose to ensure coordination between different firms involved in the building works as well as ongoing quality control of the works performed and of materials used during the course of the project.

Public Administration Regulations, in particular Law 30/2007 of 30th October concerning public contracts regulates procedures and liabilities arising from works commissioned by public bodies. This law establishes constructor's liability for construction defects up to 15 years (art. 219) and liability of consultants during 10 years following handover (art. 288).

The Technical Code for Construction (RD 314/2006) is another major act introduced in 2006, which defines basic technical requirements of quality, security, energy efficiency and "habitability" of buildings. The code was drafted by Technical Construction Quality Committee (CTCE) composed of representatives of national government administration and local administration.

The legal acts above are completed by instructions or regulations relative to specific aspects of construction such as lifts, electrical or gas installations, structures and etc.

Moreover the LOE act is completed by a large number of additional dispositions.

Planning, building norms, building control and construction permits are the competence of regional authorities. Administrative control procedures and requirements may vary from one region to another.

Until recently there were no specific criteria for the access to profession of building contractors in the private sector. New law relative to subcontracting in the construction industry (Law 32/2006) has introduced a number of provisions aiming in ensuring proper health and safety conditions and suitable control of work in the building sites. The changes implemented by this law include compulsory registration of subcontractors in the Register of Accredited Companies, limitation to three of the number of links in the subcontracting chain and joint liability of the contractor and subcontractor with respect to labor law social security if the two first requirements are not respected. The joint liability provision is dedicated to ensure that a proper organisation is observed in the building site and that the workers have a suitable level of training.

As far as professional consultants are concerned - designer of the project has to hold a title of architect or of engineer. Supervision and works coordination is performed exclusively by architects. Design and works coordination cannot be performed by the same person therefore in practice the client needs to appoint two professionals – first one in quality of a designer and second one acting as a project manager in charge of coordination of works execution. The laws governing the architect's profession are: law no 2/1974, law 2515/1977 and the LOE. The architect's title is protected and the profession is regulated. The architects need to be registered in one of professional chambers. There are two separate organisations regrouping architects acting as designers and those acting as project managers.

2. Starting point and duration of liability

The LOE act has introduced three legal guarantees relative to construction defects, under which the actors of construction process are presumed legally liable during the following periods:

- one year – for all material disorders resulting from defective execution of works (applicable to building contractors only),
- three years – for material damages affecting suitability of the building for human habitation “ruina funcional” (applicable to all participants to construction process),
- ten years - for material damages affecting structure or viability of the work “ruina material” (applicable to all participants to construction process)

The above guarantee periods run starting from the date of the handover of the building work.

Legal actions for material damages resulting from disorders indicated above must be initiated within the deadline of 2 years from the date when the damage occurs.

Furthermore the law 30/2007 establishes the following limitations periods, which apply to public sector contracts:

- 15 years from handover- liability of building contractor for ruin of the construction works resulting from breach of contract,
- 10 years from handover – liability of professional consultant for damages caused to the contracting authority or to third parties arising from defective design. This liability is limited to 50% of the damage and up to 5 times the price agreed for the project.

3. Sharing of liability between different parties to a project

Under the law 38/1999 (LOE), the roles of each party to the construction project are clearly defined and the liability of each party for building defects is personal and individual.

However, if the cause of damage cannot be identified or if it is proven that several parties have contributed to the damage but their individual contribution cannot be established, they can be jointly and severally liable.

The property developer is jointly liable with all other parties to the project towards subsequent buyers of the building. In practice, in case of damage the claim is usually addressed to the developer.

II. Insurance

1. Mandatory insurance

Together with the new provisions relative to liability for construction defects the LOE has also defined security instruments i.e. insurance or financial guarantees which could be used to cover this liability.

For construction of dwellings the LOE has imposed a legal obligation on property developers to take out a security for the benefit of subsequent buyers. This security was intended to cover the ten years liability defined above (ruina material) and could be arranged in a form of insurance or of financial guarantee covering 100% of works value.

Prior to offering the cover the insurers require technical control of the structures by technical controllers appointed by the insurance company.

Initially the compulsory security requirements were intended to apply to the whole construction sector, however currently they are compulsory for dwelling buildings only. Since 2003 the above requirement does not apply to refurbishment works and to individual houses build for own use, but it is possible that it may be extended on other types of constructions in the future.

Enforcement of the insurance obligation is achieved by the fact that no official document relative to the property can be established without certificate of insurance. As a consequence, a building without compulsory insurance cannot be sold by the initial owner.

Architects are subject to compulsory professional indemnity insurance in some regions only but in practice all architects carry professional indemnity insurance. It is however considered that limits of covers available for architects are relatively low.

The insurers have no obligation to provide compulsory insurances to construction parties. In case of a refusal to deliver the cover by the insurers the party has to assume the risk itself.

2. Widespread insurance

As indicated above the new liability reform introduced by the LOE has defined three liability periods applicable to construction professionals lasting for 1, 3 and of 10 years. The LOE also defines the ways, in which these liabilities can be covered and the parties, who should take out the relevant security.

According to LOE the liability of construction parties can be covered by the following securities arranged for the benefit of subsequent owners of the building:

- 1-year liability – insurance or financial guarantee should be taken out by the building contractor. Alternatively a guarantee deposit may be retained by the principal amounting of minimum 5% of the building works value,
- 3-years liability – insurance or financial guarantee covering minimum 30% of the total works value should be arranged by the property developer,
- 10- years liability of decennial liability – insurance or financial guarantee corresponding to 100% of construction works value should be taken out by the property developer.

As previously stated, the use of security instruments above is currently not compulsory, except for 10-years liability security for new dwellings.

Although the law allows the choice between insurance or financial guarantees insurance seems to be the preferred means of security to cover the liabilities above and that the use of financial guarantees is marginal. Three-annual and decennial liability insurances are often delivered in a form of a single policy. The insurance is frequently subscribed via professional organisations where the parties belong.

3. Schemes and good practices

La Asociación Española para la Calidad (AEC)

Construction department of the Spanish Quality Association produces guideline documents, which may be helpful to different actors in construction process in increasing construction excellence. Moreover, some professional bodies animate discussion groups within the sector, dedicated to deliberate on the questions of quality in construction. However the influence of these groups is limited.

The Technical Code for Construction

The CTE standards, mandatory from October 2006 have established a series of energy efficiency requirements relative to residential and public buildings with the aim to reduce energy consumption in each building by 30-40% and CO₂ production associated with energy consumption by 40 -55%. The requirements included compulsory implementation of solar thermal energy in new or refurbished buildings and installation of photovoltaic panels in shopping centres, industrial buildings, hospitals, governmental buildings and hotels of an area exceeding 3,000 m².

Institute for Diversification and Saving of Energy (IDAE)

The Instituto para la Diversificación y Ahorro de la Energía is a state-owned entity that reports to the Ministry of Industry, Tourism and Trade through the State Secretary for Energy.

Institute's activity is focused in two major goals: achieving the targets set by the 2007-2012 the Spanish Energy Saving and Efficiency Strategy Action Plan and the goals of the Renewable Energy Plan for 2005-2010.

The Institute coordinates and manages measures and funds available for the above plans in cooperation with the autonomous regions. The IDAE also runs activities to increase public knowledge and awareness about renewable energy, provides technical advice, and runs and finances example technology innovation projects with potential for replication. The Institute is also involved in various European and international cooperation programs.

The institute's actions include maintaining online databases of renewable energy firms as well as energy efficient products, installations and appliances.

Claims monitoring

There is no mechanism or organisation in Spain at present in charge of collecting and analysing data regarding construction defects. Some publications of individual authors may be available, but in general, information about construction claims is dispersed and not necessarily reliable face to the

absence of systematic approach of data collection. Currently the only relatively reliable source of information about claims defects in Spain are insurance companies. However private initiatives are in progress in the aim of establishing a means of collecting main data regarding the most common failures in construction.

It is estimated that most of construction defects tend to result from faulty execution.

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- a) Confederación Nacional de la Construcción, Calle Diego de León N.º 50 - 2ª planta, 28006 Madrid, Spain
- b) TYPESA Spain, Gomera 9, 28703 S.S. de los Reye, Madrid, Spain

Liability and insurance schemes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



Sweden

I. Liability

1. The principles of liability

The main legal acts in Sweden, which apply to construction are: The Planning and Building Act (Law 1987:10) containing provisions related to planning of land, water and buildings as well as principles and general interests that must be observed within planning activities, The Act on Technical Requirements for Construction Works (Law 1994:847) relative to technical requirements for construction works and products as well as The Environmental Code (Law 1998:808) dedicated to promote sustainable development and measures necessary to assure sound and healthy environment.

The Planning and Building Act (Law 1987:10) requires, among others, that for each building site a certified quality site manager should be appointed by the building contractor before the works start. The quality manager defines with the municipal authorities a quality control plan for the project and subsequently helps the principal to control that the contractor complies with the construction requirements and the defined plan. At the end of the works the quality manager issues a certificate that the works have been performed in accordance with the established plan.

The liability of different parties involved in a construction project is principally defined in a contractual way, via standard forms of contracts being an integral part of the established professional practice. It is worth to notice that general forms of contracts are also widely used in other Nordic countries: Finland (YSE 1998), Norway (NS 8405) and Denmark (AB 92).

The Swedish standard forms of contracts are drafted by the Construction Contracts Committee BKK Byggbandets Kontraktsskommitté. BKK is a non-profit association composed of authorities, associations and organisations representing different categories of construction parties such as building owners, consultants and contractors.

BKK also chairs a Legal Matter Board, dedicated to produce at the request of interested parties, legal opinions on the matters related to application of the standard contracts, mainly in the purpose to ensure prompt and cost-effective resolution of disputes.

Some of the BKK statements of opinion are published (without disclosing names of the parties interested) as guidelines on application of law related to construction. BKK may also act in some cases as a mediator or as a “dispute settlement board”.

At present, a large majority of contracts in Sweden are based on “General Conditions of Contract for Building, Civil Engineering and Installation Work” contract (called AB04) introduced in 2004 or “General Conditions of Contract for Building, Civil Engineering and Installation Work performed on a package deal basis” contract (called ABT06) from 2006.

For agreements between client and a consultant a standard contract called ABK 96 “General Rules for Consulting Works in Architectural and Engineering Activities” from 1996 was usually applied until very recently. A new standard contract ABK 09 was implemented on 18th of December 2009.

Furthermore, a standard contract ABI 09, designed exclusively for technical consultants was also implemented, which regulates a liability period of 2 years for the consultants.

AB04 contract “General Conditions of Contract for Building, Civil Engineering and Installation Work” governs relationship between the principal and the building contractor.

Under AB04 contract the investor is responsible for design, plans and specifications of the project. The contractor is in charge of providing workforce and building materials in accordance to project specifications.

ABT06 is a form of contract employed in turn-key projects, where the main contractor is liable for design and plans. The scope of contractor’s liability defined by this contract is larger than that in AB04. There are also specific contract models available for the use of sub-contractors.

According to standard contracts the building contractor’s liability is strict during the execution of the project. After the completion of works, during a “guarantee period” (duration may vary depending on the type of contract used) the liability of the building contractor for defects and for the resulting damages caused to the owner is presumed. When the “guarantee period” expires the building contractor is liable for important defects up to 10 years from completion of works, providing that he was negligent. However, at this stage a proof of contractor’s fault must be produced by the claimant.

In case of turn-key projects usually governed by the standard contract ABT06, the main contractor is subject to a larger liability, taking into account that according to this contract he is liable for design and development of plans (i.e. his liability includes professional consultancy services).

The title of architect is not protected and no diplome is needed to exercise the architect’s profession. However the position of the architect’s syndicate (Sveriges Arkitekter) is very powerful in Sweden. The liability of architects and engineers is mainly defined contractually, with the use of ABK 96 standard contract and it is based on fault.

In the case of private houses and residential buildings liability of construction parties is governed by Law on Consumer Protection (Law 1985:716) Konsumenttjänstlagen, which guarantees protection of individuals who contract performance of building works.

Under this law individual construction consumers benefit from legal guarantee of building defects up to 10 years from completion of the project.

2. Starting point and duration of liability

The starting point and duration of liability is generally fixed by standard contracts.

For example the AB04 contract provides for a “defects warranty” of 5 years for work after completion of the project. During this period, the builder is strictly liable for defects (i.e. nonconformity to the contract) and damages caused to the principal as a result of these defects. Furthermore, the building contractor is liable for important defects up to 10 years following completion of the work if he was negligent.

In AB04 contract limitations periods run from the final inspection of the accomplished work, i.e. the moment when an independent inspector verifies that the work was performed in compliance with the contract.

For private houses and residential buildings the Law on Consumer Protection (Law 1985:716) imposes a legal guarantee of building defects lasting for 10 years from completion.

3. Sharing of liability between different parties to a project

Standard contracts determine the share of liability between different parties to a project.

The main contractor is liable towards principal for the defects caused by the sub-contractors. The sub-contractors are liable towards the main contractor.

In the case of a construction failure the building contractor is the first party to whom liability would be imputed and he would need to prove that other participants such as architect are responsible for the damage.

Parties not linked by a contract who contributed to the same damage may be held jointly liable by the court. Such an eventuality may be however excluded by a contractual provision.

II. Insurance

1. Mandatory Insurance

According to the Law on Construction Defects Insurance (Law 1993:320) Lag om byggfelsförsäkring all premises intended for permanent habitation must carry a Building Defects Insurance. The compulsory insurance covers material damage caused by faulty materials, design or works execution, discovered and reported within ten years from the date when the certificate of

completion was issued. The building defects insurance covers costs of repair of defects. The cover applies regardless liability of the constructor.

It is available for houses or residential buildings and it may be subscribed either by the client or by the contractor. The compulsory insurance benefits new buyers in case of change in ownership of the premises.

Main providers of building defects insurance are AB Bostadsgaranti and its subsidiary Försäkrings AB GAR-BO AB, and its subsidiary GAR-BO Försäkring AB, Nordisk Garanti and Gerling.

2. Widespread insurance

In addition to the building defects insurance described above, the market offers the following securities on voluntary basis:

- Completion Warranty Insurance during the contract period – this insurance covers extra expenditures occasioned by the building contractor, who fails to fulfil his contractual obligations and cost of repair of defects reported in the certificate of completion if the builder fails to repair them,
- Completion Warranty Insurance during the Defects Liability period – covering cost of remedying defects and of repair of resulting damage discovered during “defects liability period” as defined in the construction contract.

The above cover is mainly available for new works, refurbishment and conversions in residential buildings but it may also be subscribed for some other types of building works. In case if the builder fails to comply with their duty, the security provider takes over the builder’s responsibility to ensure completion of the building.

Furthermore, the following securities may be taken out by the building contractor in the framework of so-called “tenant-owner societies” projects:

- Deposit guarantees – this is a security for the benefit of the tenant-owner society and its members covering deposits and occupancy fees paid to the tenant-owner society,
- Advance Payments guarantees – these securities are dedicated for the benefit of future tenant-owners, who make advance payments under so-called preliminary agreement with the tenant-owner society for the enjoyment of an apartment in the society.

In addition to the warranties above, there are other insurance solutions available.

Professional indemnity insurance and third party liability insurance are systematically taken out.

Requirements relative to construction insurance may be included in the standard contracts. For example the AB04 contract imposes an obligation on the building contractor to take out at least two types of insurance:

- Insurance “all risks” Allriskforsakring, which covers the risks of material damages during performance of the project and two years after completion.
- Third party liability insurance Ansvarsforsakringen, which covers liability of building contractor for damages occurring during performance of the project and during the guarantee period.

3. Schemes and good practices

Boverket Institute

The National Board of Housing, Building and Planning - Boverket collects statistics and develops methods of measuring of construction defects. Boverket is the central government authority for town and country planning, management of land and water resources, building and housing. Boverket monitors the functioning of the legislative system under the Planning and Building Act and the related legislation and proposes regulatory changes if necessary. To ensure effective implementation Boverket also provides information to parties involved in spatial planning, housing, construction and building inspection activities.

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Liability and insurance regimes in the construction sector; national schemes and guidelines to stimulate innovation and sustainability



United Kingdom

I. Liability

1. English Legal System

Unlike the countries of continental Europe (but like Ireland), the United Kingdom has no Civil Code: unlike all other EU member-states, the UK has no single text of special legal status forming its Constitution. The main principles of the law of obligations in England & Wales are derived from case law: rules and principles found in the reported decisions of the higher courts (in particular the highest court, the House of Lords – replaced in 2009 by the new Supreme Court).¹

An advantage of this ‘common law’ system is that legal rules evolve through consideration of their application to real-life factual situations, coupled with prevailing policy considerations.² The proliferation of case law might be expected to create problems of accessibility, particularly for people from other jurisdictions; in practice, there is widespread international familiarity with English common law principles.³ There is also a significant degree of similarity with the law of obligations in Civil Codes, due to the influence of French writings during the formative years of the English law of contract.

These formative years occurred during the Industrial Revolution, a period of great innovation but with little regard for sustainability – features reflected in the law of obligations of that era. Innovation was also supported by a tradition of sharing experience and participating in research and development, without expectation of specific reward, through professional institutions, academic establishments, research bodies and standards institutes. The stimulation of innovation involves encouragement to innovate (and to accept innovation) on individual projects, but also stimulation of continued development and evolution of innovatory ideas, which may involve materials, products, devices, equipment, systems, applications or techniques. One-off innovation which is not followed up is of little interest. The ethos of sharing ideas was particularly significant for innovation in the UK construction sector. Unlike, say, the pharmaceutical or process industry sectors, which have powerful R&D departments within massively capitalised corporations, the construction sector is fragmented and poorly capitalised, so many innovatory ideas in construction come from small players who are

¹ Scots law has its own uncodified law of obligations, strongly influenced by continental ‘civil law’ ideas through its ‘institutional writers’ (doctrine) and illustrated by case law; it is not considered in this report, nor is the impact of limited ‘devolution’ of legislative and regulatory power from the UK Parliament in Westminster to Scotland, Wales and Northern Ireland under recent legislation. ‘English law’ in this report refers to the law of England & Wales.

² Compared to Civil Code systems, which formulate the legal rule first, based on policy, then test the rule against hypothetical factual situations.

³ There are examples, such as the Arbitration Act 1996, where statutes have been enacted to make English law more accessible to the international community.

ill-placed to ensure that their ideas are developed and carried forward independently.

English law also involves legislation. Parliament's position and its theoretically unlimited legislative powers mean that primary legislation (statutes), like secondary legislation adopted by Ministers or other public bodies under powers delegated by Parliament, has a status higher than case law. Legislation can therefore intervene to modify any aspect of the law, including the law of obligations.⁴ In this area of law, the role of statutes (Acts of Parliament) has historically been only at the margin: to complement, clarify and organise existing case law, or to modify aspects of its principles or effect. However, as will be seen below, some statutory changes (or refusals to change) have been particularly significant in the field of liability, and certain changes, e.g. imposition of an obligation to insure against latent defects, could only be achieved by statute. Changes in legislation, unless they emanate from the EU, often involve the Law Commission, a statutory body which has the function of reviewing the law and making recommendations to Parliament, or follow specific reports or inquiries commissioned by the Government.

History suggests that innovation is stimulated or encouraged by a legal regime which allows those who innovate to control the duration and extent of their exposure to liability or protects them from crushing liability. This is a matter of the nature of the obligation and what constitutes an actionable breach of the obligation, and the duration and extent of liability for such breach. On the other hand, as technology has advanced, consumers and clients have become less inclined to be tolerant or restrained in their expectations. There have been significant shifts in the English law of obligations since about 1970, in both statute and case law, which may be regarded as making the law less supportive of innovation. The ethos of sharing experience in England has also been lost, partly because of financial pressures which have led people to seek more immediate reward, partly because internationalisation has interfered with the established community for sharing ideas. Consumers and clients now also expect design risk to be covered by insurance, but the present basis of funding such insurance is unsatisfactory and insecure, thereby creating uncertainty for potential innovators and users of innovation.

The law of obligations subdivides, in English law, into three branches: the law of contract, the law of torts and the law of restitution. All three are relevant to construction projects. The law of contract governs the duties and responsibilities of parties to a contract, including during the process of construction itself; the law of torts deals with 'legal wrongs' arising out of breaches of duties imposed by law independently of contract (but sometimes also arising out of a contract, if consistent with the contractual framework). The law of restitution, which may impose obligations to compensate for work done or benefits received where there is no relevant contract (using ideas of 'unjust enrichment') is of little or no relevance to 'liability' and is not considered further here. In different ways, and under different conditions, these branches of law protect parties against a range of categories of 'harm': unfulfilled expectations, physical injury, damage to or loss of property, financial loss or time expended. They thus enable (in many cases require) the transfer of categories of risk from one party to another.

⁴ Parliament's powers may in practice be subject to limitations deriving from the UK's membership of the EU and from the European Human Rights Convention.

2. Risk and Liability in Contract

A construction project involves a large network of contracts, which not only define the obligations undertaken by the parties but also serve as a means of transferring risk. English law retains a principle of 'freedom of contract', under which parties are allowed to agree any terms they wish (and thereby transfer risk), provided these do not contravene a limited set of legal principles or statutory requirements (discussed below). The courts give themselves no general power to interfere with contractual provisions freely entered into, even if particularly disadvantageous for one of the parties. English law is similarly very flexible about the formalities needed for a contract; only exceptionally is there any requirement for writing, a signature or anything more than objective evidence of agreement in fact. Nonetheless, considering their importance, construction contracts are usually conclude in writing.



Until completion of construction, the general law of contract – which has no special principles applicable to contracts for work and materials – is likely to be less important than the parties' own agreed provisions, though these are of course underpinned by the general law. The spine of the network of contracts on a construction project is usually the contract linking the construction employer ('the client') with the main contractor, with further links between the main contractor and its sub-contractors, themselves in separate contracts with sub-sub-contractors and suppliers, and so on. This produces 'chains' of individual contracts. Rights and obligations pass up and down each chain without a break, even though there is no direct contractual link between parties at one or more removes in the chain. Typically a party will either offset a risk by insurance (through an insurance contract) or seek to pass it down by contract to the next party in the chain or to pass it elsewhere by a collateral warranty. If the risk is passed down completely the contracts are said to be 'back to back'. Passing the risk by contract does not absolve the first party from liability, it merely enables that party to seek an indemnity from the party to whom the risk is passed in the event of a loss occurring; the value of the indemnity depends on the continuing solvency and/or insurance cover of the second party. In the event of a loss which results in an insurance claim, the insurers of a party will commonly rely on the rights of their insured⁵ to recover from those further down the contract chain.

There will also be contracts with professionals in a consulting role: architects, civil engineers, structural engineers, building services engineers and others providing design functions – as sustainability becomes significant, the range of consultants is ever increasing. Historically consultants were employed by the client and enjoyed special protection under English law. They were also regarded as unlikely to have resources to be worth suing. UK practice has shifted towards design and build procurement, so that consultants are now commonly employed (either originally or after novation⁶) by building contractors. English law has also shifted to the extent that consultants have not only lost their favoured protection, but are now especially vulnerable, partly due to the prevalence of professional indemnity (PI) insurance.

⁵ Under the doctrine of 'subrogation'.

⁶ English law allows a contract between two parties, A and B, to be replaced, through tripartite agreement, by an agreement between B and C. This is called 'novation' and may be used to transfer the employment of, and responsibility for consultants and their designs from the client to a contractor

The liability of a consultant in such a situation normally depends on the existence of a contractual link with the person who has suffered loss: such a link is normally required between a person who claims damages and the person whose alleged breach of contract is relied on as giving rise to liability and entitlement.⁷ This comes from the case law principle of privity of contract, which limits the rights and obligations arising out of a contract to those who are parties to it.⁸ This doctrine, combined with the absence of any statutory regime for construction defects and the narrow scope of the law of tort in this field (described below), has led to widespread English reliance on 'collateral warranties'.

A collateral warranty will be made between Party A, whose primary contractual obligations are owed to Party X, to extend the benefit of some or all of these obligations via a separate contractual warranty to Party Y, who has an interest in acquiring effective remedies for defects. Party Y may be another participant in the same project, but with whom Party A is not otherwise in a direct contractual relationship; or Party Y may be a funding agency, the present or future owner of the building (if not also the client) or an intending tenant. Contractual rights (but not obligations) can also in principle be 'assigned' onwards to a 'stranger'; as a result, Party Y is potentially able to assign to Party Z (a new acquirer of the building) the benefit of the collateral warranty Party A has given. [The power to assign may be excluded entirely, or made subject to restrictive conditions, by the terms of the original contract.]

The doctrine of privity of contract has, in theory, been modified by the Contracts (Rights of Third Parties) Act 1999, which allows a 'stranger', under defined conditions, to enforce a term of a contract to which s/he is not a party. However, the 1999 Act permits the original parties to choose that the Act shall not apply to their contract. In practice, most contracts in construction exercise this 'opt-out';⁹ and even if a third party can enforce a term in a contract made by others, s/he does so subject to any conditions, valid exclusions or limitations of liability etc which would have applied between the original parties.

While the project is 'live', the contractual machinery put in place will normally be complete enough to provide (a) a method of defining the scope of the works (and the possibility of later changes, with consequential time and/or money implications); (b) the obligations on each side (which may include a duty to insure, and will normally require the main contractor to comply with all statutory requirements affecting the process of construction – building standards, safety on site etc); (c) procedures for identifying non-conformity with the specification and having them remedied, perhaps with part of the contract sum retained until they are corrected; and (d) payment obligations and mechanisms, often including certification under the contract and legally enforceable fixed amounts ('liquidated damages') payable by the contractor for culpable delay.

⁷ The theoretical alternative remedy in contract, an order for specific performance of a contract, is almost never available in a construction situation, as the remedy is discretionary and the courts will not take on responsibility for supervising construction work.

⁸ The linked concept of 'consideration' requires agreements to have a bilateral character (via each party's promises or acts) before their obligations are enforceable through the law of contract. However, there are exceptions, notably the principle that a promise in a deed (the modern equivalent of a document 'under seal') is enforceable by the promisee, even if purely unilateral: for the promise ('covenant') made by the other party to be binding in law, the party benefitting does not have to give anything in return. Promises in deeds also benefit from an extended time period for the starting of legal action.

⁹ There is some support for the view that parties should make greater use of the Contracts (Rights of Third Parties) Act 1999 to reduce the need for collateral warranties, which involve an enormous amount of negotiation and paperwork.

For construction in the UK, there exist a number of published standard forms,¹⁰ generally based on an equitable approach to risk-sharing. However, there is no legal obligation to use any of these forms. Until the 1980s, such forms were commonly adopted by clients with minimal amendment; but it has become increasingly common for clients to engage lawyers who draft either ad hoc amendments or complete bespoke contracts which shift the balance of risk. It may be observed that innovation is encouraged by client willingness to accept risk,¹¹ whereas contracts which transfer all risk generally deter innovation. Some clients see it as their function to champion innovation on a more strategic basis, rather than leave it to individual projects.¹²

Exposure to liability in contract depends, first, on the nature and obligation of the breach which will give rise to a liability; second, on the duration and potential extent of the liability for the consequences of the breach. Contractual obligations relating to the 'quality' of the product fall into three main legal categories: conformity with a detailed specification; satisfaction of fitness for purpose requirements or specifications; and due skill and care. One or more of these may appear as an express term of the contract, but they are also familiar as statutory and common law 'implied terms'. The express terms of contracts in construction generally reflect the same categories of obligation and the same standards as the common law and statutory implied terms. Fitness for purpose entails a design responsibility to achieve fitness for purpose, whereas conformance with a detailed specification excludes most design responsibility. Due skill and care is commonly applied to design-only obligations – this does not warrant that fitness for the purpose intended will be achieved, so liability depends on proof of breach of the duty of skill and care, also referred to as 'negligence'.

Historically, construction contracts were let on the basis of conformity with detailed specifications, with design provided by consultants employed by the client on a due skill and care basis. No fitness for purpose obligations were involved, except perhaps in relation to materials and products incorporated in the works. The shift towards design and build procurement brought decisions of the courts that a design and build contractor should have a fitness for purpose obligation for the works as a whole; and even that consultants who designed for design and build contractors should be subject to a fitness for purpose obligation. However the design risk involved remained covered exclusively by PI insurance (in the absence of latent defects or product liability insurance), and PI Insurers have consistently refused to countenance providing cover for fitness for purpose liability. Accordingly, contracts in construction commonly stipulate that design liability shall be limited to an obligation to exercise due skill and care.

The resistance of PI Insurers to providing long term fitness for purpose cover may be considered a negative influence on innovation. While it suits insurers (as structured) to limit liability to an annual claims-made basis, so that they can close their books at the end of each year, all claimants have to prove negligence rather than mere fitness for purpose. Failure to achieve fitness for purpose is easily

¹⁰ Examples include the Joint Contracts Tribunal (JCT) forms, the Institution of Civil Engineers (ICE) Conditions, the 1999 suite of FIDIC conditions, the New Engineering Contract (NEC3) and the Government Contracts (GC/Works/1).

¹¹ A good example is the approach of BAA procuring Heathrow Airport Terminal 5.

¹² For example, the Government Highways Agency and its predecessors have for many years published a Specification and funded a research laboratory whose work forms the basis of the Specification.

demonstrated, but proving negligence entails protracted and expensive litigation, which also results in the majority of PI insurance premiums being spent on legal costs, rather than compensation.

For consultants and contractors who carry design risk, this situation is unsatisfactory since they cannot be confident that they will be able to insure their exposure for the duration of the design risk – PI insurers have no obligation to renew the annual policy at all or on reasonable terms as regards premium, excess or sum insured. Contractors and consultants have no means of costing the insurance of the design risk for its full duration. This leads in practice to the real cost of design risk insurance being ignored and not included in the price. For clients, this appears beneficial in that they do not pay for the cost of the insurance, but they may then find that the design risk ceases to be covered if the consultant or contractor ceases to trade and/or the PI cover lapses.

The duration and extent of liability for a breach of contract depends on the terms of the contract, subject to various common law and statutory rules, which affect both the ability of a party to limit its exposure and the ability of the other party to extend the exposure. Innovators will be concerned by potential exposure to consequential costs if the innovation is unsuccessful, particularly if the extent of the liability might exceed insurance cover.

The starting point is the rule that damages for breach of contract are intended to put the innocent party in the position that it would have been in if the contract obligation had been fulfilled. The innocent party must prove that the loss claimed was caused by the breach, and there are some rules on causation which may need careful consideration. For example, the extent of recoverability of a loss suffered following negligent advice may depend on whether the advice was merely the provision of information for the advisee to make a decision, or advice on a course of action. In the former situation, the person giving the advice is not liable for events which do not flow necessarily from the information provided.

The extent of liability is subject to rules on ‘remoteness’, to the effect that the extent of damages recoverable is limited to heads of damage which were reasonably foreseeable at the time of contract as liable to result from a breach. Foreseeability is taken automatically to include what a reasonable person would be taken ordinarily to know. Foreseeability may be extended by special knowledge communicated at the time of contract, for example if the person liable is made aware of potential liabilities under a superior contract. In practice, contractors and consultants may find themselves subject to demands to sign up to contracts with provisions which open the door to substantial consequential liabilities, which may not be covered by insurance. Recognising such provisions in non-standard forms of contract is not easy, and contractors and consultants faced with non-standard forms may therefore need legal advice to ensure that they are aware of the ramifications of the proposed contract before entering into agreement.

The ability of a party to cap or limit its liability is subject to statute. The Unfair Contract Terms Act 1977 intervenes in a mandatory way in contractual relationships to make certain exclusion or limitation of liability clauses (and comparable devices) unenforceable. UCTA renders some of these devices invalid in all circumstances, like attempts to limit or exclude liability for death or personal injury; others put a duty on the person relying on an exclusion or limitation of liability clause to justify it as reasonable. This legislation specifically targets clauses within one party’s standard terms

of business and gives wider protection to consumers than to corporate parties to contracts. A key factor in deciding what is reasonable for the purposes of UCTA is the ability to cover the risk by insurance. Therefore limitation clauses which match reasonable insurance cover will normally be safe from challenge.

In addition, EU law protects individual consumers against any sort of unfair term (not individually negotiated) in their contracts with sellers or suppliers (implemented in English law by the Unfair Terms in Consumer Contracts Regulations 1999, as amended). These protections are specially relevant to provisions in standard form contracts between an individual residential client and a construction professional or building contractor. They do not depend entirely on an individual consumer taking action in court: the Office of Fair Trading (OFT) and other independent enforcement bodies can act as 'consumer champions', investigating a term which may be unfair, when alerted by a complaint. The OFT regularly 'encourages' parties to modify or withdraw doubtful terms, the outcome being on public record as a formal undertaking. Behind these powers of investigation lies the OFT's power to go to court for an enforcement order (in effect a statutory form of injunction) and to threaten to use its legislative powers to impose fair standards (the Consumer Code for Home Builders, discussed below, is an example).

As for statutory intervention specifically affecting construction contracts, Part II of the Housing Grants, Construction and Regeneration Act 1996 (as amended) was introduced particularly to safeguard contractors and consultants from unjustified withholding of payment. The Act requires all construction contracts (as defined, including contracts with consultants) to comply with a list of requirements for stage payments and for the availability of adjudication, in order to guarantee a speedy decision-making process for disputes between parties to construction contracts. The statute imposes its own default provisions, whatever the contract provides, if this fails to comply with the Act's minimum requirements. The HGCR has a 'residential occupier' exemption, so that most contracts between individuals and construction professionals or building contractors are outside its scope.

Duration of liability is considered below after consideration of tortious liability, but it should be noted that an 'indemnity clause' in a contract, whereby a party undertakes to indemnify the other party against claims, can have the effect of significantly extending the duration of exposure.

3. Risk and Liability in Tort

Persons involved in construction may also find themselves liable to claims in tort independently of their contract, including claims brought by people with whom they are in contract, or to bear liability for claims brought in tort because they have undertaken by their contract to indemnify the other party against such claims. Claims may be brought in tort either because there is no contractual link or because the claimant is seeking to overcome a limitation defence, as the statutory limitation period in tort will usually commence later in tort than in contract. Contractual provisions for indemnification of the other party against third party claims in tort are common in construction contracts as part of third party insurance arrangements. Both situations could be relevant to innovation.

When harm occurs for which the law of tort provides a remedy, the person claiming compensation needs to show that the harm complained of derives from the wrongful act or omission of the defendant in question. Although some specific torts impose 'strict liability' (no need for proof of fault, no defence of having taken reasonable care), the most widely applicable branch of the law of torts is the law of negligence, which rests centrally on the idea of fault. However, English case law has no generalised principle of liability for all negligent acts or omissions causing harm of any type: to establish liability in negligence involves first convincing the court that the person against whom the claim is made owed a 'duty of care' to the victim in relation to the type of harm which has now materialised (a question of law). In relation to construction defects becoming evident long after construction is complete, where the person wishing to make a claim usually has no contract with any relevant original party, a 'builder' (in a generic sense, including a designer or specifier) normally owes no duty of care towards an owner of a building in which defects come to light, if these defects merely require expenditure by way of repair or reduce the value of the property. The person or entity responsible for certifying the works' compliance with Building Regulations normally owes no such duty either. The cost of repair ('reinstatement') or loss of value of a building is classified in the law of negligence as (unrecoverable) 'pure economic loss'.

By contrast, a 'builder' (in the same wide sense) may owe a duty of care to the owner or occupier of a building where a defect, when it materialises, causes personal injury (happily, rare in the UK); or causes damage to, or the loss of, property other than the building which is defective. So a defect (including negligent design or supervision during construction) which damages or destroys movable property within the defective building may give rise to liability for that damage or loss, but not for the cost of repairing the building itself. This potential liability, already limited in scope, is for latent defects only: it will not apply if the existence of the defect was known by, or should reasonably have been known by, the present victim. Liability in the tort of negligence for construction defects, if it can be invoked, also requires proof of fault and of a causal link between the defect and the heads of damage claimed; but appears not to be affected by any limitation or exclusion of liability which the defendant could have relied on, if sued by a party with whom s/he had a contractual relationship in relation to this aspect of the construction project. There is a separate line of case law which can impose liability for 'pure economic loss', if caused by negligent advice or misrepresentation, where the person at fault knew or should have known that the claimant would rely and could suffer loss as a result; but it requires a closer relationship than usually exists between a party involved in construction and a later owner or occupier of a defective building.

In its rather narrow field, the Defective Premises Act 1972 (DPA) imposes a statutory regime of liability for certain fundamental construction defects, though only in relation to a dwelling (residential unit). Any 'person taking on work for or in connection with a dwelling' has a duty to see 'that the work is done in a workmanlike or professional manner with proper materials and that, as regards that work, it will be fit for habitation when completed'. Section 1(4) extends the meaning of 'takes on work' to include a professional developer, or installer of services in dwellings; but s 1(2) eliminates as a possible defendant a person who merely competently follows instructions given by someone else (except where s/he may have a duty to warn about the inadequacy of the instructions). Most importantly, the statute can be relied on by every person who has (or later acquires) an interest in the dwelling; and against the person responsible, even after they have parted with any

interest in the building. Another positive feature of the DPA is that it allows claims for ‘pure economic loss’: the cost of repairing defects, or the loss in value of the building or land caused by the defects. Further, under s 6 the duty the Act imposes cannot be contracted out of; and is additional to any other duties the relevant defendant may have taken on, in contract or otherwise.

There is therefore no general statutory regime specific to construction of liability for defects, nor is there any mandatory registration system for building contractors or for construction professionals, except those having statutory regulation (e.g. architects) in addition to their own professional codes of practice. Proposals from the Government-sponsored Latham Report of 1994 (Constructing the Team) to bring in compulsory insurance for latent defects in commercial, retail and industrial buildings (above a certain minimum value) in the UK were never implemented.

This is the limit of statutory intervention into construction as such, leaving aside the statute-derived public law which affects the sector: development control, environmental standards, building control, fire protection, health and safety at work etc. (Some statutes give persons affected by a breach of the statute a right to damages in tort for breach of statutory duty). These aspects of public law impact directly on innovation and sustainability, as do intellectual property law, taxation, and competition law; but they are beyond the scope of this study.

4. Starting point and duration of liability

In English law, the expiry of the relevant (statutory) limitation period does not bring to an end the obligation (or liability), but it does provide a complete procedural defence. The time-limits relevant to legal action in relation to construction defects come from the Limitation Act 1980 (as amended by the Latent Damage Act 1986) and the separate DPA 1972:

BASIS OF CLAIM	LIMITATION PERIOD	START DATE
CONTRACT	6 yrs [but parties can agree longer period] If contract in deed form: 12 yrs	When breach occurred (in a construction context, usually means ‘practical completion’ of the work)
DPA 1972	6 yrs	When dwelling completed (probably same date as for contract claim)
TORT (NEGLIGENCE)	Primary period: 6 yrs	When damage suffered (even if at that time undiscoverable)
	Secondary period (if facts giving rise to claim not known at normal start date): 3 yrs, if this expires later than the normal period Ultimate long-stop: 15 yrs from date damage suffered	When claimant had – or could reasonably have had – knowledge of the key facts making a claim possible
[Special periods for claims for damages for death or personal injury – not detailed here]		

As this shows, the start date for the limitation period in tort in negligence will often be later than for a claim in contract, so that in situations where the claimant has a choice (concurrent duties in contract and tort owed by the same defendant), claiming in tort may avoid a time bar in contract.

5. Sharing of liability between different parties

The damages payable by a defendant in the tort of negligence may be reduced if the claimant has failed to take reasonable care in the protection of his/her own interests. Under the Law Reform (Contributory Negligence) Act 1945, the court may reduce the damages recoverable 'to such an extent as the court thinks just and equitable having regard to the claimant's share in responsibility for the damage'. The same Act can also apply in a contract situation, but only if the liability in contract is the same as, and coextensive with, a similar liability in tort, independent of the existence of the contract. So there can be no reduction in the damages payable where liability in contract is strict (not fault-based).

Where more than one party may be liable in respect of the same loss or damage, the claimant can normally recover in full from any of the potential defendants (joint and several liability). As a result, where any of these is insolvent, no longer in existence or untraceable, one of the others may be held liable for the whole loss, even if their own contribution to it was marginal. This risk of liability bears specially heavily on the PI insurance premiums of construction professionals and has led to calls for reform of the law to limit one defendant's liability to a proportionate share of his/her responsibility for the loss or damage. These have not so far been acted on in the UK, in part because rejected by the Law Commission in 1996. Where joint and several liability could arise in a contractual context, the parties may agree a 'net contribution clause' limiting one party's liability to the share of the loss or damage for which it alone would be responsible, if all potential defendants were before the court and liable, the court then operating the 1978 Act (below) to apportion the liability between them. Such a clause is in principle valid and effective, like a contractual financial cap on liability, but both are potentially subject to challenge as unfair contract terms (above).

Under the Civil Liability (Contribution) Act 1978, the court may require one defendant to contribute to the damages owed by another, to the extent 'as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question' (which could be 100%). The 1978 Act applies whatever the legal basis of the defendants' liability (contract, tort or both), provided that all relevant defendants are liable 'in respect of the same damage'; under section 10 of the Limitation Act 1980, the time limit for requesting contribution is normally two years from the judgment or award in question.

II. Insurance

Although there is no external legal obligation on construction parties to carry insurance, some professional bodies require their members to have PI cover (e.g. the ARB for architects and the RICS for chartered surveyors). Insurance is common in practice, partly through the requirements of clients and lenders and the provisions in standard forms requiring insurance:

- 1 PI cover for consultants covers legal liability for negligence in performance of their professional duties. Even where not required, consultants and builders are encouraged by their professional organisations to take out insurance as a part of good business practice. Some professional bodies offer specific insurance schemes for their members and provide guidelines on insurance matters. They may also play a

mediator's role in case of a dispute. PI insurance operates on a 'claims made' basis in the UK.

- 2 Third party liability insurance.
- 3 Contractor's all risk insurance, covering damage to the building works during construction. This policy usually covers all parties to the project.

Performance and on-demand bonds, to guarantee completion of a construction project, are also common and can be seen as a form of insurance.

Latent defects insurance is available – but rarely used – for commercial buildings. It is more common in the residential construction sector, where a home warranty is usually required by a mortgage lender. The Buildmark scheme of the National House-Building Council (NHBC) dominates the UK home warranty market (Zurich Building Guarantee, the second-largest provider, withdrew from the market in 2009). As an insurer, the NHBC is regulated by the Financial Services Authority; the NHBC operates a registration system for developers and builders, as well as offering inspection and certification services (via a subsidiary) for compliance with its own Technical Standards and Building Regulations. Buildmark offers three main elements:

- 1 Where the builder (not developer, if a separate entity) is fraudulent or becomes insolvent, the warranty offers a financial contribution equal to the deposit paid and now lost, if the construction of the home has not started; or a contribution towards the costs of completing the home, if construction has already begun.
- 2 Until the end of year 2 from completion, the builder is required to rectify defects (and damage caused by a defect) himself. The NHBC offers a Resolution Service in case of a dispute and will itself do the repairs if the builder fails to do so.
- 3 From the start of year 3 until the end of year 10 following completion, the NHBC indemnifies claims resulting from defects.

However, what is meant by a 'defect' or 'damage' is narrowly defined. In the first two years, the cover is for a breach of any mandatory NHBC requirement, which means its own Technical Standards and all relevant Building Regulations, plus any damage to the home caused by such a breach. In years 3 to 10 the same definitions of the scope of cover apply, but only in relation to defects in specified parts of the home and resulting damage. So the cost of repairing a defective part of the structure (unless the defect is on the NHBC list), replacing inadequate materials or rectifying faulty workmanship is not covered. These limitations in part mirror the narrow scope of a developer or builder's potential liability in negligence (discussed above). The scope of the warranty in years 3-10 is slightly wider, if the NHBC was responsible for building control compliance, adding cover for 'present or imminent danger to the physical health and safety of the occupants [caused by non-compliance with specific aspects of the Building Regulations]'. There is also a long list of general exclusions for all categories of claim: Buildmark offers no compensation in respect of any reduction in value or loss of value of the home, loss of enjoyment, use, income or business opportunity, inconvenience, distress or other consequential loss. And for post-completion claims there is both an excess (currently £1,000 per item of claim) and a maximum aggregate amount (currently £1m) per home (there are different limits for pre-completion claims); these figures are adjusted annually.

In 2008 the Office of Fair Trading published the results of an investigation into the homebuilding sector: this reported that eleven housebuilding and related organisations (including the NHBC) had agreed to adopt an industry-wide code of conduct and scheme of redress in relation to new homes. This would target the marketing and sales process, including the contractual terms involved. The OFT suggested that if this new scheme was not operational by April 2010, a statutory system, funded by an industry levy and to which all housebuilders would be required to belong, should be imposed instead. The new industry-adopted Consumer Code for Home Builders comes into effect just in time; but leaves the details of existing post-completion warranty schemes untouched.

1. Schemes and good practice

TrustMark – a Government initiative dedicated to increase quality of construction services for domestic alteration or refurbishment works. It aims to offer protection for consumers via a quality label for registered businesses, trade associations and independent certification bodies. Membership requires having a code of practice (covering certain minimum requirements, including insurance and a low-cost dispute resolution service) and offering the client an optional warranty to cover the member ceasing to trade.

The Microgeneration Certification Scheme (MCS) is a scheme which ensures an independent certification of microgeneration products and installers in accordance with defined standards in the view to provide greater protection for consumers.

The Department for Communities and Local Government published 'Building a Greener Future: Towards Zero Carbon Development', a policy statement in July 2007 which confirmed the Government's intention for all new homes to be zero-carbon by 2016 via progressively increasing the energy efficiency requirements contained in the Building Regulations.

Rating of new homes against the Code for Sustainable Homes, a new UK national standard for design and construction of sustainable homes, became mandatory in 2008; the Code defines nine aspects of sustainable design and construction; its standards will be raised to match the higher performance requirements of the Building Regulations, which since the Sustainable and Secure Buildings Act 2004 have had as one of their statutory aims 'facilitating sustainable development'.

Zero Carbon Hub

The Zero Carbon Hub is a non-profit public/private partnership launched in June 2008; it is in charge of co-ordinating delivery of low and zero carbon new homes according to the Government's strategy.

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- b) Supply of Goods and Services Act 1982
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1982/cukpga_19820029_en_1
- c) Defective Premises Act 1972
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1972/cukpga_19720035_en_1
- d) Contracts (Rights of Third Parties) Act 1999
http://www.opsi.gov.uk/ACTS/acts1999/ukpga_19990031_en_1
- e) Limitation Act 1980 (as amended)
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1980/cukpga_19800058_en_1
- f) Unfair Contract Terms Act 1977 (as amended)
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1977/cukpga_19770050_en_1
- g) Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)
<http://www.opsi.gov.uk/si/si1999/19992083.htm>
Modified by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001/1186)
<http://www.opsi.gov.uk/si/si2001/20011186.htm>
These powers have in turn been overtaken by Part 8 of the Enterprise Act 2002
http://www.opsi.gov.uk/acts/acts2002/ukpga_20020040_en_1
- h) Housing Grants, Construction and Regeneration Act 1996
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1996/cukpga_19960053_en_1
Now modified by part 8 of the Local Democracy, Economic Development and Construction Act 2009:
http://www.opsi.gov.uk/acts/acts2009/ukpga_20090020_en_1

English case law: post-completion liability for construction defects:

- a) *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) [scope of duty of care of 'builder' and Building Control Body in relation to 'pure economic loss']
- b) *Bole v Huntstfield Ltd* [2009] EWCA Civ 1146 [scope of liability under DPA 1972]
- c) *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] BLR 97 (CA) [liability of builder for damage to personal property, when defect in building materialises]

Websites:

- a) NHBC
www.nhbc.co.uk
- b) Microgeneration Certification Scheme
www.microgenerationcertification.org
- c) TrustMark
www.trustmark.org.uk
- d) Zero Carbon Hub
www.zerocarbonhub.org
- e) The Architects's Journal
<http://www.architectsjournal.co.uk/home/defective-premises-act-testing-architects-quality-thresholds/174000.article>
- f) Consumer Code for Home Builders
www.consumercodeforhomebuilders.com
- g) Office of Fair Trading
www.offt.gov.uk

Questionnaires:

- a) National House-Building Council, NHBC House, Davy Avenue, Milton Keynes MK5 8FP, UK
- b) Association for Specialist Fire Protection, Ganders Business Park, Kingsley Bardon, Hampshire GU35 9LU, UK
- c) Federation of Master Builders, Gordon Fisher House, 14-15 Great James Street, London, WC1N 3DP, UK