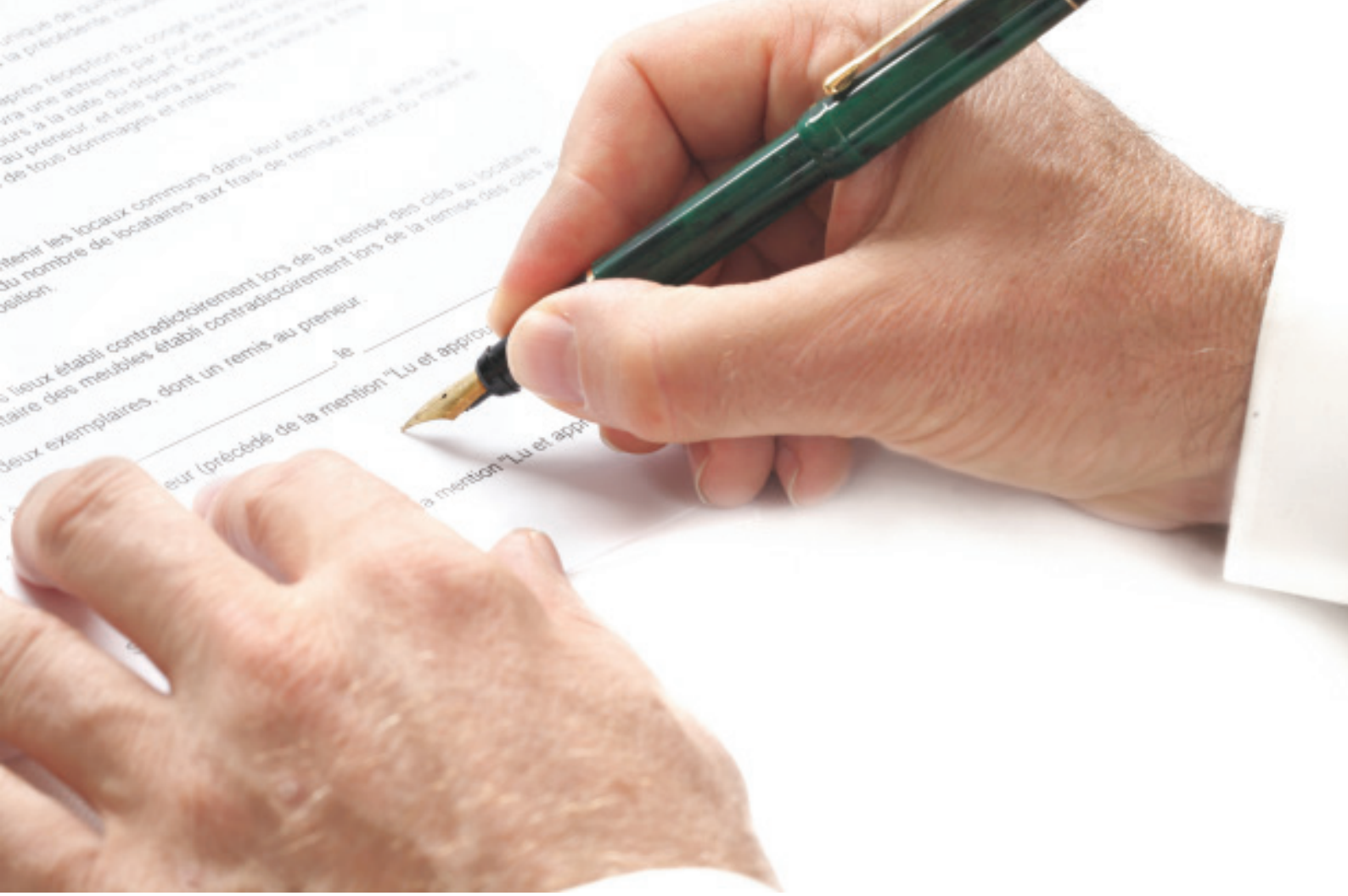

Contractors', engineers' and architects' duty to advise and decennial liability in civil law countries: highlights of some prevailing principles

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In France and countries influenced by French law, contractors and design professionals have more extensive duties to their employers than is typical in common law countries. These duties include the duty to advise the employer on potential risks and the contractor's liability to the employer and others for completed works.

France and many civil law countries influenced by the French legal tradition, which includes, to different degrees, southern Europe, francophone Africa and several countries in South America and the Middle East, share more or less the same provisions and related case law on key issues relating to the liability of contractors, engineers, architects and employers. Those principles, which have been embedded in codes, derive historically from the desire to protect the employer from the risk of abuse of professionals. This was apparently a significant issue at the time of the design of the French Civil Code more than two centuries ago.

As a result, the liability of the contractor, engineer and architect to the employer after acceptance is altogether much more extensive than in common law countries, and is also more 'integrated'. This is due to the fact that the building contract is considered a '*contrat d'entreprise*', that is, a contract where the duty of the contractor is to reach a result. If the works of the building are not in accordance with the contract conditions and fit for purpose, the employer may repudiate the contract and has no obligation to pay.

In addition to the above, the three lines of Civil Code provisions relating to good faith and four to five lines of the Code on the role of industry usages have given rise to an extensive case law providing for a far-reaching duty to advise.

We will limit this note to three elements: the duty to advise; the ten-year liability after acceptance of the works; and the mandatory insurance scheme. We refer chiefly to French law, which is often relied on in litigation and arbitration in other civil law countries. Those three elements, which are comprised of several regulatory provisions and leading case law, cannot be contracted out of (with marginal exceptions of course). They are of particular relevance to contractors, engineers and architects from common law countries who intend to conduct their activities in civil law countries since several contractual provisions with which they are familiar and may sometimes consider standard may be unenforceable and 'deemed to be non-written'.

A far-reaching duty to advise

The obligation of the contractor to inform and advise the employer on various risks that the contractor should be aware of in a building or works projects derives from a long tradition of case law widely accepted as a legal principle. This is, for instance, summarised in standard contract conditions for private works, which provide:

> 'Before the start of the work and during the work, the building contractor must draw the attention of the project manager to any disadvantages, defects or faults that could result from errors or omissions that he notices in the documents that were submitted to him and the orders that he received.'[1]

Even in the absence of contractual provisions, the contractor has the duty to advise and to inform the employer and his project manager as to the risks that they should reasonably be aware of after having reviewed the technical specifications.

This duty is a positive one and the contractor may be considered in default for not having advised the employer or the project manager of a situation that fails to comply with best practices and thereby risks material damage to the works. This derives from Article 1135 of the French Civil Code which states that 'agreements are binding not only as to what is expressed therein, but also as to all the consequences which equity, usage or statutes give to the obligation according to its nature'.

'... the contractor has the duty to advise and to inform the employer and his project manager as to the risks that they should reasonably be aware of after having reviewed the technical specifications.'

In order to better understand this duty to advise, which is regularly the cause of dispute and arbitration when common law and civil law cultures are both involved, we propose a brief review of the case law of the last decade.

For instance, the contractor may have a duty to advise the employer regarding:

- the choices made by the owner about a building product that did not comply with other parts of the works (CA Paris, 25th chamber A, 5 July 2002; JurisData No 2002-187625);
- difficulties that may arise with the materials or equipment provided by the owner (CA Dijon, 3 September 2002, JurisData No 2002-187288 (solution already established since Cass Civ 3, 1 July 1971, No 67-13789, Bull Civ 1971, III, No 439 and Civ 3,

20 June 1995, No 93-15801, Bull Civ 1995, III, No 276);
- renovation works that are bound to fail (Cass Civ 3, 8 June 2010, No 09-15276);
- works that would lead to a dangerous situation if put to their intended use (Cass Civ 3, 6 July 2010, No 09-66757); and
- sound isolation matters (Cass Civ 3, 15 February 2006, No 04-19757, Bull Civ 2006, III, No 37).

In the above situations the owner must, however, establish a causal link between any breach of the duty to advise and inform by the contractor and any resulting damage (Cass Civ 3, 16 June 2009, No 08-14046).

Contractors', engineers' and architects' strict liability for ten years and the practical consequences thereof

In accordance with Articles 1792 and 2270 of the French Civil Code, 'builders' are strictly liable for ten years for acceptance of the works if damage occurs, which relates to the strength of building of the works (or of one of their constituent parts) and renders them unfit for their intended purpose. This liability attaches even when the damage is due to subsoil defects. The benefit of such liability is transferred to any new owner during that period.

This far-reaching liability is, in addition, joint and several as between all participants of the building process, that is, contractors, architects, engineers of all kinds, etc, provided that they all have been involved in the performance of the portion of work in which the damage occurred.

It is important to note that, according to Article 1792-5 of the French Civil Code, the strict liability is of public order nature. As a result, under French law – and in other civil law countries having similar provisions – many traditional clauses in international common law and international contracts which limit, for instance, the liability of the engineer or architect to the amount of their fees or that exempt them from liability for immaterial damages are deemed to be void.

The case law has progressively defined the nature of the works subject to decennial liability as well as the nature of the defaults which affect the strength of the work and render the works unfit for their purpose. For instance, it has been decided that this could include, depending upon the situation, general corroding of the central heating system; the existence of pests such as capricorn beetles, coleoptera beetles, or other xylophagous insects; and fissures or cracks of a certain threshold.

The scope of liability of 'technical controllers' who do not participate in the design of the work itself has given rise to various developments in the law. In essence, they are only liable if it is demonstrated that damages are attributable to them. In addition, they can resist the obligation to pay on behalf of another party held jointly liable when that party is bankrupt.

'... many traditional clauses in international common law and international contracts which limit, for instance, the liability of the engineer or architect to the amount of their fees or that exempt them from liability for immaterial damages are deemed to be void'

Mandatory insurance for decennial liability

The consequences of decennial liability, which are extremely protective of the employer and the owner as a matter of principle and which represent a high level of risk to the contractor, the engineer and the architect, were not always realised in practice, *inter alia*, due to the risk of possible bankruptcy.

An insurance market progressively developed but the coverage was not always satisfactory and sometimes not even possible. As a result, in 1978, a new provision was introduced into the Insurance Code (Article L.241-1) providing that any person who may be subject to decennial liability must be insured. Failure to take mandatory insurance results in a criminal penalty of up to six months in jail and a €75,000 fine.

The Insurance Code also provides for the obligation of the 'builders' to prove to the employer upon commencement of the works, and at any time during the performance of the works, the validity of the mandatory insurance for the liability.

In order to guarantee full coverage for ten years, notwithstanding the termination of the insurance contract, the Code provides

that any contract subscribed for covering decennial liability is deemed to include a clause providing for the whole coverage of the ten-year period.

Since the insurance premium for decennial liability is generally considered reasonable (it ranges from about 0.8 to two per cent of the cost of the works depending on the nature of the works undertaken and their correlative risks), the ten-year liability regime is not seen in practice as an obstacle to the contractor, the engineer or the architect, while it is very advantageous to the employer. This system does not give rise to many disputes since, in practice, most of the claims are settled with the underwriter.

In sum, those principles and provisions which cannot be easily departed from by the contract conditions have an impact on quality and sustainability and consequently on the price of the works.

To conclude, it may be observed that the system described above has influenced the organisation of the contracting industry in France and in many civil law countries, which is more vertically integrated than in common law countries and which have long been familiar with design-build, turnkey and so-called Engineering, Procurement and Construction Management (EPCM) contracts (and which, due to the above framework, do not necessitate generally complex contractual provisions).

Notes

1 Article 7.7 of the Association Francaise de Normalisation (AFNOR) (French Association for Standardisation) standard form NF P 03-001 on private procurement for works.

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