An Outline of French Decennial Property Insurance: A Legal Blueprint for Europe?

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ABSTRACT

Neither the Treaty of Rome (1957) nor the Single European Act (1986) (the SEA), provides a specific legal basis for Community action in the area of compulsory non-residential property insurance. In the absence of a Community-wide system, research and studies to date have tended to look at the advantages and disadvantages of the insurance provisions within the various member states. These reports generally recognise that the French system of statutory liability and the consequent obligation to obtain compulsory dual decennial insurance to cover that liability surpasses the somewhat ad hoc *measures prevalent in most of the other member state countries.*

This being the case, it is likely that measures ultimately adopted by the Community will be influenced by the French model. It is therefore imperative that lawyers practising in the area of commercial property development and finance, particularly cross-border property finance, familiarise themselves with the French system.

FRENCH DECENNIAL PROPERTY INSURANCE

The French system of statutory liability and insurance is referred to as a system of compulsory dual decennial insurance because it specifically provides for damage insurance (*assurance dommages-ouvrage*) (damage liability) and liability insurance (*assurance de responsibilité*) (fault liability) and is a statutory obligation which may not be contracted out of by the parties themselves.

Article 1792 of the *Code civil* imposes a statutory liability for damage in the following terms:

> *'Tout constructeur d'un ouvrage est responsable de plein droit, envers le maître ou l'acquéreur de l'ouvrage, des dommages, même résultant d'un vice du sol qui compromettent la solidité de l'ouvrage ou qui, l'affectant dans l'un de ses éléments constitutifs ou l'un de ses éléments d'équipement, le rendent impropre à sa destination.*
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> *'Une telle responsabilité n'a point lieu si le constructeur prouve que les dommages proviennent d'une cause étrangère.'*

Translated, the above may be read as follows:

> 'In the absence of proof of damage caused by a third party a works constructor is legally liable towards the owner or purchaser of the works in respect of damage, whether caused by adverse ground conditions which affect the solidity of the works or damage which, by affecting constituent elements of the works or their fixtures and fittings, render the works unfit for use.'

It can be seen that this statutory liability is extremely wide-ranging and places the onus of proof on the defendant works *constructeur*, should the aim be to avoid or reduce liability, to show that the cause of damage is due to *une cause étrangère* (a third party).

Article 2270 of the *Code civil* further provides that the liability period is to last for ten years from the date of the certificate of final completion in respect of the main structural works and fixtures and fittings, and two years in respect of minor non-structural plant and equipment not covered by the ten-year liability. As in the UK, a certificate of practical completion may be granted subject to qualification regarding certain imperfections which require to be carried out within the 'defects liability period' prior to the grant of a final certificate. In France a defects liability period of one year is written into the *code civil* (*garantie du parfait achèvement*) (see below) and normally the ten-year and two-year liability periods will take effect on the expiration of this one-year defects liability period.

French jurisprudence has clarified that the ten-year liability is in respect of defects not readily apparent on completion of the works and which only become evident after the grant of a certificate of final completion. Such defects are not necessarily *latent defects* in the English sense. Latent defects (whether relating to adverse ground conditions or the construction works) must be understood as meaning not only defects effectively hidden or latent on completion but also defects, the damaging consequences of which were not reasonably evident on certified final completion of the works.

The defects must be substantial. This is expressly clarified by the use of the expressions *solidité de l'ouvrage* (solidity of the works) (eg foundations, walls, structure, framework, water-tight elements etc) and *impropre à sa destination* (unfit for use).

The compulsory insurance obligation is stipulated by Article L.241.1 of the *Code des assurances*. This states that any person, corporate or non-corporate, who is, or performs the role of, owner, vendor or constructor of works and who in each case is deemed to be a *constructeur* under the terms of Article 1792-1 of the *code civil* (see below) shall obtain adequate insurance for himself or herself and any successors in title for the duration of the requisite liability period (ie ten years). Article L.241.1 provides as follows:

> *'Toute personne physique ou morale qui, agissant en qualité de propriétaire de l'ouvrage, de vendeur ou de mandataire du propriétaire de l'ouvrage, fait réaliser des travaux de bâtiment, doit souscrire avant l'ouverture du chantier, pour son compte ou pour celui des propriétaires successifs, une assurance garantissant, en dehors de toute recherche des responsabilités, le paiement des travaux de réparation des dommages de la nature de ceux dont sont responsables les constructeurs au sens de l'article 1792-1 du Code civil.'*

Article 1792-1 (translated) provides that the following are deemed to be *constructeurs*:

(1) any architect, works contractor, technician or other person connected to the

owner of the works by a works contract (*un contrat de louage d'ouvrage*);

(2) any person who sells a construction which that person has built or had built;

(3) any person who although acting as an agent of the owner carries out a task similar to that of a person under a works contract.

Article L.241.1 covers any person who *could* be deemed to be a *constructeur* under Article 1792 even if in fact the person's role in the development or works process is not necessarily that of a *constructeur* in the ordinary sense, eg the vendor of the property (including the private individual).

As a result, Article 1792, read in conjunction with Article L.241.1 of the *Code des assurance*, provides a system of fault and no-fault compulsory insurance. Certain categories of persons, in particular the vendor or persons who carry out tasks on behalf of the vendor (*mandataire*), must obtain adequate insurance (*une assurance garantissant, en dehors de toute recherche des responsabilités....*) not only in respect of actually being found to be at fault but also in respect of any damage which may occur and for which they may be held to be liable by virtue of being a deemed *constructeur* under Article 1792, even if they themselves are not at fault and the parties are unable to establish who is at fault.

Any person, corporate or non-corporate, who purchases land with a view to selling the land after carrying out works or having had works carried out on the land is obliged to obtain appropriate decennial insurance cover in respect of such works, regardless of that person's actual role in the works process. The decennial insurance policy, which runs with the land on which the works have been carried out, must be subscribed to before the building works commence, and may be relied upon, during the liability period (ie ten years), by subsequent proprietors of the land.

Experience has shown that under this system insurance claims are dealt with relatively speedily and effectively. The victim of damage can pursue a claim against a vendor or other *constructeur* confident in the knowledge that the defendant has been insured against damages on a no-fault basis. The defendant (in practice his or her insurers) can in turn pursue an indemnity claim against any other *constructeur* of the works. If the insurers are unable to agree on the extent of their clients' relative liability or on the proportion of damage compensation which they should bear, the matter will ultimately be decided by the courts according to the general law and in particular the relevant principles of tort *(la responsabilité délictuelle ou quasi-délictuelle)* and/or subrogation (Articles 1382/3 and 1251 of the *Code civil* respectively).

In 1983, in order to reduce the need to refer claims to the courts, simplify the litigation process and reduce costs, the insurance industry set up its own conciliation and arbitration service with the aim of effectively apportioning damage liability between insurers. In 1988, 76 insurers representing 98 per cent of the French insurance market used this service.

Two other compulsory interlinked provisions imposing statutory liability, the *garantie de parfait achèvement* and the *garantie de bon fonctionment*, also require attention.

Article 1792-6 of the *Code civil* provides for a *garantie de parfait achèvement*. During a period of one year, from the date of the grant of a certificate of practical completion the *entrepreneur* (the main works contractor) is obliged to repair any *désordres* of which written notice is given by the employer. *Désordres* includes both the concept of dam-

age in the ordinary English sense of the word as well as non-conformity with the contractual stipulations, ie any disparity (whether design or otherwise) between the works as carried out and the works as envisaged under the terms of the contract for the works. This liability only applies to the *entrepreneur* and does not concern other deemed *constructeurs,* ie architects, technicians or engineering consultants etc.

The two-year *garantie de bon fonctionment*, otherwise known as the *garantie biennale*, covers plant and equipment other than fixtures and fittings covered by the *garantie décennale*. Like the *garantie décennale*, the *garantie biennale* imposed by Article 1792-3, runs with the land on which the works have been carried out and during the two-year period may be relied upon by the proprietor of the land for the time being. Liability is imposed on all *constructeurs* linked to the owner of the works by a works contract (*un contrat de louage d'ouvrage*). This *garantie de bon fonctionment* should not be regarded as an extension of the *garantie de parfait achèvement*. It applies only in respect of malfunctioning (demountable) equipment and is not concerned with the wider matters of contractual non-conformity covered under the *garantie de parfait achèvement*. Insurance in respect of the *garantie de bon fonctionment* is not compulsory.

A BLUEPRINT FOR EUROPE?

Is the French system of statutory imposed liability and insurance likely to be used as a blueprint for Europe? As a draft European Directive has yet to be presented it would be foolhardy to provide a conclusive answer to this question. However, in his authoritative study,[1] Claude Mathurin, referring to the National Economic Development Office (NEDO) Report,[2] highlights several disadvantages of the UK's non-compulsory system of insurance and concludes that 'these disadvantages are probably felt to differing degrees in the other member states, except France.'

His study cites the following disadvantages of the UK system:

- uncertainty of the outcome of lawsuits, connected with proof of responsibility and the solvency of the accused, intolerably high costs of lawsuits for many plaintiffs, judgments handed down after many years and inadequate awards;
- complicated procedures, with several parties involved, claiming on many counts, the failure of English professional liability insurance which is poorly viewed by insurers, costly to manage and leaves only a pittance for the financing of repairs;
- clients who are uncertain about whether they will be compensated for the consequences of hidden defects, who are obliged to prove breach of contract or negligence in court, and to finance proceedings, and who are frequently forced to drop the case owing to lack of funds;
- builders confronted with too many uncertainties, potentially liable many years after completion of the works, having to bear multi-party lawsuits, and legal procedures possibly leading to a rough-and-ready sharing of responsibility;
- possible deterioration of the damaged buildings during the long period of litigation;
- quality of construction is not encouraged, and builders tend to adopt attitudes aimed at limiting their personal liability (defensive design).

Analysis of European legislation to date, particularly where an attempt has been made to harmonise or standardise legislation within the Community, indicates that the Commission has endeavoured to apply legal practices generally considered as being of the highest standard in order to counter any suggestion that Community harmonisation entails a fall in standards. Practice is supplemented in theory by Article 18 of the SEA which inserts into the Treaty of Rome the following new Article 100a: 'The Commission, in its proposals concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.'

In response to growing client demand, the larger insurance companies, by providing their client with European-wide insurance, have already, to a large extent, pre-empted the Commission by ensuring that their insurance policies satisfy the highest requirements throughout the Community.

Nonetheless, movement at the Community level is to be anticipated. The European Parliaments Resolution of 12th October, 1988, 'on the need for Community action in the construction industry' emphasises its view that a unified market requires that 'the Commission needs to take steps to ensure that documents relating to contracts and the monitoring of building operations are standardised and harmonisation introduced as regards the liabilities of house builders and developers'.

The transposition of compulsory European Community insurance provisions into English law should not prove unduly intractable. In support of this view, Claude Mathurin refers to Professor Bishop who, as Chairman of the Insurance Feasibility Steering Committee responsible for the NEDO report (*supra*), is quoted as saying:

> 'as a result of the balance between the good ten-year protection in the sector of new housing and the low take-up of damage insurance in other sectors, the adoption of harmonisation measures at Community level ought to be relatively easy.'

CONCLUSION

While it is clear that any Directive concerning compulsory commercial property insurance will need to take into account the different systems in existence throughout the member states and preserve wherever possible the positive aspects of these systems, it is likely, in view of Article 18 of the SEA and mounting pressure for European harmonisation that a European Directive, if eventually adopted, will owe much to the French system of compulsory insurance.

REFERENCES

1 Mathurin, C. 'Study of responsibilities, guarantees and insurance in the construction industries with a view to harmonisation at Community level', European Commission Report III/B/5.

2 National Economic Development Office (NEDO), (1988). 'Building users' insurance against latent defects' (BUILD).