INTERNATIONAL BAR ASSOCIATION
SECTION ON BUSINESS LAW

Committee T
International Construction Contracts
Toronto Conference
October 3-8, 1983

THE ENGINEER'S LIABILITY TO THE CONTRACTOR: FRENCH LAW

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The Engineer's Liability to the Contractor: French Law

I. INTRODUCTION

For purposes of this discussion, I have assumed that the type of engineer we are talking about is one having generally the same responsibilities as the engineer under the FIDIC international construction contract conditions. This type of engineer is common enough, I believe, in the case of construction contracts in England and North America. He is an engineer who acts as the owner's consultant, designs the works and later supervises their execution. From the outline, I have assumed that we are less concerned with cases where an engineer is acting in more narrow, specialized roles, whether on behalf of the owner, the contractor or a subcontractor.

As this question and the outline appear to have been prepared principally with English and American building law and practice in mind, it is necessary to begin with some general comments in order better to place the problem presented in the context of French law and practice:

(1) If I may take the FIDIC engineer as a representative example of the type of engineer we are addressing, then the first thing to be said is that there are some basic differences between the role of the engineer under FIDIC and the role of his counterpart in France. As these differences undoubtedly affect the extent of the engineer's liability in France, as compared to common law countries, it is necessary to explain briefly who is the counterpart in France of the FIDIC engineer and the nature of his duties.

The position or role in construction projects in France which corresponds most closely to that of the FIDIC engineer is that of maître d'oeuvre. Like that of the FIDIC engineer, the role of maître d'oeuvre normally includes the design of works and the management and supervision of their execution. Traditionally, this

role has been occupied by an architect.* However, in recent years, with changes in the building industry and the advent of new technologies, the importance of engineers (ingénieurs-conseils and bureaux d'études techniques) in construction projects has increased while the importance of the architect has declined in relative terms. Engineering firms now frequently act as maîtres d'oeuvre, especially in the case of projects of an industrial or technical nature, e.g., factories, bridges and dams.**

Under a FIDIC-type contract, the engineer may be regarded as acting in three capacities: (1) as an independent contractor, with respect to the preparation of plans and specifications; (2) as an agent of the owner when supervising or inspecting construction work; and (3) as a quasi-arbitrator when called upon to settle disputes.

In French law, a maître d'oeuvre is not regarded as being either the agent of the owner nor as a quasi-arbitrator although he may, exceptionally, be granted specific powers to act as agent. The maître d'oeuvre, like the contractor and other professionals generally (doctors, lawyers, etc.), is considered to be an independent contractor, bound by a contract for the hire of work (contrat de louage d'ouvrage, Civil Code, Arts. 1710 and 1779).

The maître d'oeuvre's principal duty is to advise his client, not to act on his behalf. Consequently, his powers vis-à-vis the contractor under a construction contract are generally much more limited than those of a FIDIC engineer. A comparison of the standard form of contract for private works in France

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* As most of the cases in France to date concerning the role and liability of the maître d'oeuvre involve architects and as it ordinarily makes no difference to the decision whether the role of maître d'oeuvre was filled by an architect or engineer, I shall be referring hereafter to cases involving architects as well as engineers.

** The participation of an architect is generally required by law for works necessitating a building permit, Law no. 77-2 of January 3, 1977, Article 3.

(Norme Afnor - Marchés Privés - Cahiers Types - NF P03-001, April 1982) with the FIDIC international construction contract conditions brings this point out. Under the French form:

(a) Variations in the works are ordered by the owner (Art. 07.1.4.1) not the engineer. They are implemented by written orders signed by the engineer and countersigned by the owner.

(b) Completion of the works is established by minutes of completion drawn up by the engineer but signed by the owner (Art. 14.4).

(c) The engineer is accorded no power to approve or disapprove the contractor's work programme (Art. 01.4.1.5).

(d) The engineer has no power to stop the works, although the owner can do so for periods of up to six months without being deemed in breach of contract (Art. 19.1.3).

(e) The engineer has no formal role in the settlement of disputes between the owner and the contractor. Moreover, the provisions of FIDIC, which permit the engineer to render decisions that in certain circumstances may become "final and binding" on the contractor, may be unenforceable against the contractor under French law (Cass. Comm. March 9, 1965).

As indicated by these examples, the basic decisions under French private works contracts are taken by and in the name of the owner not the engineer, acting as maître d'oeuvre. While the owner will ordinarily rely heavily on advice and information from the maître d'oeuvre, the owner generally takes the decisions and has final responsibility for them. As the rights and powers of a French engineer, when acting as maître d'oeuvre, are much more limited vis-à-vis the contractor than those of the FIDIC engineer, he is almost certainly subject to substantially less exposure to legal liability to the contractor and third parties. It also means that some of the points in the outline are not relevant to France.

(2) There is no absolutely clear line of responsibility between the engineer, acting as maître d'oeuvre, and the contractor or other builders (architects, specialist engineers and other technicians) in France. In France,

builders on a project are perceived as having, in some degree, overlapping responsibilities to the owner and to each other for ensuring that the work is properly done. The contractor is not expected to carry out the engineer's orders and design decisions blindly. Rather it is his duty, as a professional man, to become aware of basic errors in design and construction and to call them to the engineer's attention. An illustration of this is a provision in the standard form for private construction contracts in France which formally requires the contractor, both before works begin and during construction, to bring to the attention of the maître d'oeuvre any defects or problems resulting from errors or omissions that he finds in documents or orders he receives (Art. 04.4.1). As a consequence of this type of obligation, the contractor in France may end up sharing with the engineer responsibility for problems of design and construction. This may render the problem of the engineer's liability to the contractor less acute in France than in common law countries.

(3) In France there are two separate legal regimes applicable to construction works: the execution of public works is subject to public (administrative) law and disputes connected with such works are generally settled in the administrative courts, whereas the execution of private works is subject to private (civil) law and disputes connected with such works are settled in the judicial courts.

In my discussion today, I shall generally refer primarily to the civil law applicable to private works contracts, as there is not time to discuss both regimes. However, the basic legal principles or theories to which I shall refer are also generally applied by the administrative courts in the case of public works, although they may not be applied in the same way nor lead to the same result.

(4) French judicial decisions are quite concise, especially those of the Cour de Cassation (the highest court in the private law system), each somewhat resembling the summary published at the head of a court's opinion in American court reporters. Consequently, it is often impossible to ascertain such matters as the exact terms of the contract in dispute, the precise nature of the building defect alleged, if any, or the amount of damages sought or awarded, and sometimes difficult to determine in any detail the exact legal basis of the decision. This makes it hard to respond precisely to some of the points in the outline.

II. BUILDERS' LIABILITY GENERALLY

A distinguishing feature of French construction law is its special concern with protecting the owner, who is presumed to be ignorant about construction matters, from the builders (contractors, architects, engineers and other technicians), who are, as skilled professionals, presumed to know generally of defects in the works which they have constructed. As an important object of the law is to protect the owner, who is perceived as the weaker party, the law makes little distinction between the individual skills or contributions to a project of engineers, architects, contractors and other specialists, as far as relations with the owner are concerned. Once the works are completed, all builders having a contract with the owner are treated on much the same basis and generally presumed to be responsible to the owner for substantial building defects that may appear in the works over a ten-year period. Only force majeure or proof that the defects were attributable to someone else will relieve a builder of this responsibility.

One consequence of this emphasis is that the general principles of legal liability are the same for all builders having a direct contract with the owner, whether it be the engineer, architect, contractor or another builder. Thus, the same general principles of contract, decennial and tort liability which apply to the engineer in his relations with the owner and third parties (that is, persons with whom he has no contractual relationship including other builders, such as the contractor) apply equally to every other builder having a contract with the owner, in its relations with the owner and third parties. For this reason, legal works in France rarely discuss in detail the liability of the engineer, taken alone, but rather builders' liability (les responsabilités des constructeurs) generally, as this is more appropriate in the French legal context. The liability of subcontractors, who are not subject to decennial liability, is an entirely separate matter which I will not get into.

It should therefore be borne in mind, in the discussion which follows of the engineer's liability to the owner, that the same basic legal principles apply to the contractor's liability to the owner. This is important, as most suits against the engineer by the contractor, as we shall see later, are claims for indemnification for amounts for which the contractor is, or may become, liable to the owner, often on grounds of decennial liability. As the strict liability of builders to the owner under French law has an important impact on the liability of builders to each other, the engineer's liability to the owner merits some discussion.

Accordingly, I propose first to deal with the question of the engineer's liability to the owner, with whom he has a contractual relationship. I shall then deal with the question of the engineer's liability to the contractor and to other third parties with whom he has no contractual relationship. The existence or not of a contractual relationship is, as we shall see, important to the nature of the engineer's liability.

III. THE ENGINEER'S LIABILITY TO THE OWNER

In discussing the engineer's liability to the owner, it is desirable, in French law, to distinguish between the engineer's liability to the owner before completion of the works and his liability to the owner after completion.

(1) Before Completion: Liability Under General Contract Principles

An engineer who is to act as maître d'oeuvre will ordinarily enter into a contract with the owner. This contract, which we have seen is characterized as a contract for the hire of work (contrat de louage d'ouvrage), will ordinarily govern the relations between the parties until the completion of the works. An act or omission by either party constituting a breach of contract will give rise to an action on the contract, determined under normal contract principles (Civil Code, Arts. 1146 to 1155), but cannot ordinarily serve, alternatively, as the basis for an action by a party in tort.* This is because of the general rule in French law that, where an action for breach of contract is available, a party is denied the right to sue on the same facts in tort. The statute of limitations applicable to contract actions is, with certain exceptions, thirty years from the date the cause of action arose and the victim was aware of the damage (Civil Code, Art. 2262). One exception is that, where at least one party is a merchant (commerçant), the statute of limitations is ten years from the date the contractual obligation should have been performed (Commercial Code, Art. 189 bis).

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* A suit in tort would be permitted as to matters "exterior" to the contract, e.g., in the case of dol, a form of fraud.

The precise scope of the engineer's obligations, and therefore of his liabilities, will depend on the terms of his contract. But there is a division of opinion among legal authorities in France as to the extent of the liability of an engineer who, as maître d'oeuvre, not merely designs works but supervises their execution.

The majority of legal authors appear to consider that an engineer who acts as maître d'oeuvre is in some sense a guarantor that the project will be free from defects (i.e., he is said in French law to owe the owner an obligation de résultat). Thus, if defects or problems arise in the project before completion, the engineer is presumed to be liable for them unless he can prove that they were the responsibility of another party or attributable to force majeure. This is consistent with the general tendency of French law in this field to impose a form of collective liability on builders* generally, including particularly the maître d'oeuvre.

The proponents of this view emphasize the expectation of the owner to receive a building free from defects and the global character of the engineer's functions to design, manage and supervise the execution of the works. They also point out that standardized methods of modern construction may significantly diminish the risk of error. Other legal authors (including most practitioners, it appears) take the view that the engineer is not a guarantor of the project in such cases and that he should owe the owner no more than an obligation of prudence and diligence (i.e., in French law, an obligation de moyens). His responsibilities in relation to other members of the contracting group have been likened, by one proponent of this position (M. Liet-Veaux), to that of an orchestra conductor to his orchestra; while a conductor must be familiar with the use of the instruments of his performers, he cannot be expected to equal the performance of each of his musicians, particularly his soloists, nor be held responsible if they strike a false note.

While the French courts do not take a clear position on the question, they tend to conclude that the maître d'oeuvre is a guarantor in some sense of the

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* See generally, Anne d'Hauteville, Responsabilité et Assurance des Ingénieurs Conseils et des Bureaux d'Etudes, thesis for doctorat d'état en droit, Université de Paris 1 (1977), pages 128-137.

project (i.e., owes an obligation de résultat). Thus, if a defect is found in the works, there is said to be a presumption of liability on the part of the maître d'oeuvre that can only be rebutted by proof of a foreign cause (cause étrangère), that is, by proof that it was another party's fault or that it was due to force majeure. Certain of the cases on this point are considered below (see Section IV(1)).

The presumption that the maître d'oeuvre has failed in his duty of supervision enables the courts to render judgments against the maître d'oeuvre and other builders in solidum, that is, judgments which make builders liable jointly and severally to the owner for damages arising from building defects (see Section V). This comports with the objectives of French law in this area which, as we have seen, are to assure that, to the extent possible, the owner is fully compensated.

The French cases are very clear on one aspect of the engineer's responsibility, namely, that when he (or an architect) acts as maître d'oeuvre, he is, absent force majeure (e.g., an unforeseeable natural movement of the earth), responsible for the condition of the soil and the subsoil even if this responsibility has not been allocated to him by contract (Cass. Civ. 1ère March 9, 1965; Cass. Civ. 3ème May 21, 1969; and Cass. Civ. 3ème July 1, 1975).

(2) After Completion : Decennial Liability

Once the works are completed and have been accepted by the owner without reservation, the contractual obligations of the builders come, in principle, to an end. However, the building or other finished works remain. To protect the interests of the owner at this point in time, France instituted a system of strict decennial liability on builders.

Architects and contractors have been subject to strict liability by statute in France at least since Napoleonic times. However, in recent years, as a result of reforms in 1967 and 1978, the scope of this legislation has been extended so that now engineers who contract with the owner for construction work are clearly also subject to this standard. Such an engineer is presently subject to strict liability to the same extent as an architect, a contractor or other builder.

The basic provisions of law on this matter are Articles 1792 and 2270 of the Civil Code which may briefly be summarized. Under Article 1792, any builder

of a work is presumed to be liable to the owner for damages which impair the security (solidité) of the work or which, by affecting one of the constituent elements of the work or an element of its equipment, make it unsuitable for its purpose. For purposes of this Article, a builder is defined to include, among other persons, an architect, a contractor, a technician or other person bound to the owner by a contract for the hire of work. Thus, if, after a building work is completed, it suffers damage which impairs the security of the work or makes it unsuitable for its purpose, both the contractor and the engineer could, under this Article, each be presumed to be liable to the owner for the whole damage. Subcontractors who may have worked on the project but who have no contract with the owner are not, by law, subject to this presumption of liability.

The defects giving rise to the damage must not have been visible at the time of completion of the works. Defects which, at the date of completion, would have been visible to a layman, do not give rise to a presumption of liability.

An engineer can only escape liability to the owner under Article 1792 if he can prove that the damages to the work resulted from a foreign cause, that is, were due to someone else (for example, faulty maintenance of the building by the owner or bad workmanship by the contractor) or due to force majeure (as defined in French law). If an engineer, subject to suit under this Article, is unable to prove that the damages were due to a foreign cause, he may be made liable to the owner for the full amount of the damages.

The provisions of Article 1792 are matters of public policy in France and, therefore, cannot be excluded or modified by contract (Civil Code, Art. 1792-5).

By virtue of Article 2270, builders are relieved of this presumption of liability ten years after completion of the works. Therefore, in order for an owner to be able to benefit from the presumption, the damage must have occurred, and the owner must bring legal action, within such ten-year period. The benefit of the presumption is attached to the building or work, not to the

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* Article 1792 also provides for a two year guarantee of "good functioning" in respect of building equipment not covered by the decennial guarantee (Art. 1792-3).

person of the original owner. Thus, subsequent owners of the work can, during the ten-year period, benefit from the presumption.

This form of strict liability is harsh for the engineer whose duties in respect of the works may be limited either to design or supervision or both. The engineer's role in the project, and his financial stake in its execution, will often be small compared to that of, for example, the general contractor. Furthermore, this form of liability takes no account of the existence today of a number of owners whose sophistication about building matters may equal or exceed that of those doing the work. All owners, regardless of their knowledge of building practice, are, by law, made equally entitled to the benefit of this presumption.

(3) Duty to Advise

The engineer's obligation to the owner is not confined, before completion, to the express terms of his contract and, thereafter, to the principles of decennial liability. Under French law (Civil Code, Art. 1135), a professional person, such as an engineer acting as maître d'oeuvre, is under an affirmative duty to advise his client and provide him with information about the difficulties or risks that may be encountered in the execution of the works, even if they relate to matters falling outside the terms of his contract. Thus, he may be expected to advise the owner about risks to neighbouring land or the possible disadvantages of the construction processes being used or difficulties with the soil, even though there may be no express contractual obligation to do so. However, where the owner is himself an expert in building matters, this duty to provide advice and information is reduced. Breach of the duty to advise is a frequent source of liability, not only for engineers, but also for other builders.

IV. THE ENGINEER'S LIABILITY TO THE CONTRACTOR AND OTHER THIRD PARTIES

For purposes of this paper, I have assumed that the engineer will have a contract with the owner only. Accordingly, his liability, if any, to the contractor, as well as to other third parties, will ordinarily be only in tort (délit ou quasi-délit). As the doctrine of decennial liability only operates in favor of the owner (and his successors in title), the contractor and other third parties have to prove "fault" (faute), that is, a negligent or intentional act or omission by the engineer, to be able to recover damages.

So far as I have been able to determine, neither the engineer nor the architect has had the protection from liability in negligence to third parties under French law which he has enjoyed (and, perhaps, still enjoys) under English and American law. Under French law, the basic article providing for suit in tort is phrased in the broadest terms:

> "Any act whatever of man, which causes damage to another, shall oblige the one by whose fault it occurred, to make it good." (Civil Code, Art. 1382)

and appears to leave no room for restriction by a doctrine, such as privity of contract, long applied by the English and American courts.

The general principles of French tort law are contained in Articles 1382 through 1386 of the Civil Code. These five Articles provide, generally, that to recover damages in tort, a plaintiff must show that he suffered damage and that the damage was caused by an act or omission for which the defendant was responsible. This responsibility may be engaged because the defendant was personally at fault, or because he was vicariously liable for another's fault, or because the damage was caused by a thing in his care. The statute of limitations applicable to tort actions is generally thirty years from the date the cause of action arose and the victim became aware of the damage (Civil Code, Art. 2262).

If the elements of a tort under the above Articles can be established, the action may proceed and the fact that there exists no contract between the engineer and the contractor is irrelevant.

(1) Liability to the Contractor

In France, the engineer is typically subject to suit by the contractor in two different situations: (1) either the contractor has suffered some direct damage as the result of a negligent act or omission of the engineer on the site; or (2) the owner has suffered damage for which it has obtained or is seeking to obtain indemnification from the contractor, who then seeks contribution from the engineer. Of these two situations, the second seems to be by far the most common and the only one I propose to consider here (one or two examples of the first are, however, given in the cases summarized below).

The standard of strict decennial liability naturally facilitates suits by owners for building defects. If the owner does not initiate suit immediately against most or all participants in the project, but sues only the contractor, then the contractor will often implead as third party defendants the other participants, including the engineer, if any. Alternatively, the contractor may wait until judgment is handed down and then bring a separate action against the engineer. It is in the context of these multi-party type proceedings that the issue of the engineer's liability to the contractor is generally raised and determined.

Whereas, in the original action instituted by the owner, the owner is generally relieved of having to prove negligence by virtue of builders' strict decennial liability, in the contractor's subsequent action against the engineer, he will have to prove negligence (faute) and a causal connection between such negligence and the damage suffered. For purposes of enabling negligence to be established in such cases, the French courts have developed a special theory which is commonly resorted to in construction cases.

Under this theory, the breach of a contractual obligation may be invoked by a third party to the contract as being a tort under Article 1382 of the Civil Code.* Thus, a breach of the engineer's obligation to design the works correctly or to supervise properly their execution, which is owed by contract only to the owner, may, nevertheless, be invoked by the contractor as being a tortious act towards him. If the contractor can establish that the specific act constituting the breach caused him damage, he may have a good cause of action against the engineer. To be able to recover, the contractor is not required to establish an intention on the part of the owner and the engineer, under their contract, to confer third party beneficiary rights on him.

The cases in this field generally concern design defects or faulty supervision, and the following selection is broken down in these two categories:

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* This theory constitutes an exception to the general principle in French law that agreements have effect only between the contracting parties and can neither damage nor benefit third parties, except third party beneficiaries (Civil Code, Art. 1165).

(a) Design Defects: Illustrative Cases

In one case, the owner had brought suit against the contractor after large cracks and splits appeared in a building constructed based on plans of an architect retained by the owner. After the contractor impleaded the architect as third party defendant, the architect challenged the impleader on the ground, among other things, that, as he had no contract with the contractor, he could only be liable to the contractor in tort and only for an act or omission independent of the contract binding him to his client, the owner, and that none had been alleged. The Cour de Cassation confirmed the lower court's decision, which had rejected this argument, in the following language which describes well the nature of the contractor's potential tort action against an architect or engineer (translation):

> "But whereas the (lower court) decision correctly declares that the architect and the contractor, third parties to one another, can, in the accomplishment of activities which are separate, but dependent in their final goal, commit torts one against the other; that equally a claim by the owner of breach of contract against the architect, or against the contractor, can, quite apart from any contractual viewpoint, be characterized as a tort in the relations between the architect and the contractor." (Emphasis added) (Cass. Civ. 1ère May 24, 1967)

As indicated by this decision, a breach by the architect of its obligation to the owner to design a building correctly may constitute an actionable tort against the architect if the contractor suffers damage as the result of the design defect. The basis for this theory is indicated to be the fact that the activities of both the architect and the contractor have a common objective (the achievement of the work) and, viewed in this light, are inter-dependent, the performance of one party's activities being dependent on the performance of the other's.

A subsequent case offers a further example of this theory in a design defects context. A contractor had been held liable in damages to the owner for having built a residential building without a basement or ventilated space under the floor and, as a result, the building was excessively humid. The contractor then commenced a proceeding for indemnification against the architect

upon the basis of whose plans the building had been built. The lower court held the architect liable in tort to the contractor for its damages. The architect challenged this decision, stating that the contractor could not base his action on negligence committed by the architect in the performance of his obligations to the owner as this negligence was not separable from his contract. The Cour de Cassation disagreed, holding that the fact that this design error could make the architect liable to the owner in contract did not preclude the contractor from alleging that this breach constituted a tort towards him. The court stated that the contractor was entitled to recover the damages he had suffered (i.e., representing the damages for which he was liable to the owner) from the architect as they were caused directly by the architect's defective design (Cass. Civ. 3ème March 7, 1968).

A theory that allows one builder to recover in tort for a breach of contract to the owner by another builder is consistent with a system which imposes strict liability, by law, on builders (contractors, architects, engineers and other technicians) for building defects. As this last case suggests, it offers a means of allowing one builder, who has previously been held liable to the owner for the negligence of another, to recover from the negligent builder. As there is doubt whether, in such a situation, a builder could validly claim to be subrogated to the owner's rights against the negligent builder under French law, a tort remedy, such as this one, offers a means of apportioning liability equitably.

(b) Faulty Supervision: Illustrative Cases

(i) Private Law

The scope of the engineer's potential liability will ordinarily depend on the extent of the responsibility he undertakes in his contract with the owner. If he is responsible simply for the preparation of the bill of quantities and execution drawings, he will not be liable in the event that the works are improperly executed by the contractor, assuming that he has given the contractor due warning of any special risks and precautions which the execution of the works entails (Cass. Civ. 3ème December 10, 1970). However, the situation is quite different if the engineer (or architect) is entrusted with the duty of supervising and managing the work and is specially remunerated for this task (Cass. Civ. 1ère July 13, 1961). In such a case, if, after the owner claims against the contractor for a building defect, the contractor seeks to implead

the engineer as a third party defendant for having negligently managed and supervised the works, the court will examine whether the contractor has a tort claim against the engineer on that account (Cass. Civ. 3ème June 4, 1973).

The courts regularly reject the argument that it is somehow improper for a contractor who has himself been guilty of faulty workmanship to seek contribution for some portion of the damage from the supervising architect or engineer. Thus, in one case, upon finding that the woodwork of the buildings which the contractor had built was infested with capricorn beetles, the owner sued the contractor, who then impleaded the architect responsible for the design and supervision of the work, as a third party defendant. The lower court, while finding that the architect had not inspected the woodwork prior to installation as he should have done, nevertheless dismissed the claim against the architect on the ground that a contractor cannot be considered a simple executor of work, that he cannot complain about not having been supervised by the architect, who is not his guardian, and that the architect had not contracted any obligation to the contractor. The Cour de Cassation annulled this decision, holding once again that, notwithstanding the absence of contractual relations between them, the architect and contractor can be liable to each other in tort even when the tortious event constitutes at the same time the breach of a contractual obligation towards the owner. The lower court should have determined, the Cour de Cassation said, "whether the architect's default / in neglecting to inspect the woodwork prior to installation / of itself and quite apart from any contractual viewpoint did not constitute a tort towards the contractor entitling it to recover damage ..." (Cass. Civ. 3ème May 30, 1969).

Where a contractor has been sued by the owner or a third party on account of a building defect, it is not enough to justify a claim for indemnification against the architect to allege only a general failure by the architect in his duty of supervision. One case in point is similar on its facts to the Canadian case, Demers v. Dufresne Engineering et al. In this case, while a building was being constructed by a contractor under the supervision of two architects, a balcony of the building collapsed killing one worker and injuring two others. The collapse was due to the fact that only half the quantity of the steel reinforcement required for the balcony had been used for its construction. Thereafter, certain of the contractor's executives and the contractor were held criminally and civilly liable for the accident. They then sued the architects to recover 50% of the damages

for which they were liable. The lower court gave judgment for plaintiffs, holding that the architects had insufficiently supervised the work. The lower court noted that, while the accident was due to negligent execution of the work by the contractor (not faulty design), the architects had the ability "to exercise over him effective, direct and daily control". The Cour de Cassation annulled this decision. It stated that, by basing its decision on the obligation the architects had to supervise, without determining in what respect the architects had committed a tortious act (acted negligently) towards the contractor, the lower court had failed legally to justify its decision (Cass. Civ. November 7, 1962).

The case was remanded to the Cour d'Appel of Dijon which dismissed the contractor's claim, holding: (a) that it was difficult to admit that the person who had caused the accident, namely the contractor and its agents, could transfer a share of the responsibility resulting from its own fault to the architects simply by invoking a general failure of supervision (the point made by the Cour de Cassation); and (b) even if the architects had committed a fault (faute) towards the contractor, this fault could not be considered as being the direct or proximate cause of the damage. To be a joint tort-feasor, each must have contributed to the entire damage. But, the court said, the lack of supervision of the architects could not itself have caused the collapse of the balcony and the damages suffered, whereas the negligence of the contractor was sufficient (Cour d'Appel de Dijon December 22, 1964).

Another case is to the same effect. In this case, the lower court had held the supervising architect and the contractors liable in solidum to the owner for the repair of defects to a central heating system. With respect to the architect's obligation to supervise, the Cour de Cassation said that the architect's duty of supervision "does not oblige him to be constantly on the site nor does it substitute for supervision by the contractor of his own personnel". As the lower court had not, according to the court, sought to determine "if the architect's obligation of supervision ... would have been of a kind to prevent the defect", its decision should be annulled (Cour de Cass. 3ème May 25, 1976).

However, in some cases, where negligent construction appears to have been particularly flagrant, the contractor is relieved of having to prove that the damage it suffered was caused by a specific breach of the engineer's contractual obligation to supervise. Thus, in a case where only two years after completion of a building a large portion of the ceiling of an

apartment in the building collapsed, the Cour de Cassation held that it could be deduced that the architect must have been negligent in carrying out its supervisory and managerial functions (Cass. Civ. 1ère July 13, 1961).

Similarly, where the architect has totally neglected its obligation of supervision, and the defects in the building works are serious, the Cour de Cassation will hold the architect liable without requiring that the damage be shown to result from a specific negligent act. Thus, in one case, the Cour de Cassation refused to annul a decision in which the supervising architect was made to bear half the damages caused by the contractor after noting that the damages consisted, among other things, in cracks in facade and internal bearing walls and infiltrations of rainwater through the walls and after noting that the architect, who had a general obligation of supervision, failed to appear on the site until after the construction work was completed (Cass. Civ. 3ème May 22, 1973). Similarly, in another case, a contractor was sued for having failed to treat timber used in house construction with insecticide, as required by the contract (and the absence of which would have threatened the stability of the building), and impleaded the architect responsible for supervising the execution of the work as a third party defendant. The architect challenged the impleader. After determining that the architect was obligated to supervise the work and to verify that the materials employed had been treated and after finding that, instead of doing so, the architect had "purely and simply turned this matter over" to the contractor, the Cour de Cassation denied the challenge to the impleader (Cass. Civ. 3ème January 31, 1969).

The last-mentioned case is also of interest as, under the construction contract with the owner, the contractor had expressly assumed "sole responsibility" for the supply and installation of building materials and "sole responsibility for defects" which could result therefrom. The assumption of these obligations by the contractor in the construction contract was not found by the court to limit the architect's supervision obligation towards the owner (consistent with the Civil Code, Art. 1165, see footnote on page 12) or to prevent the contractor's tort action against the architect based on an alleged breach of it.

(ii) Public Law

In cases concerning public works, where the contractor is a defendant in an action instituted by the owner for building defects and impleads the engineer

or architect as a third party defendant, the administrative courts require the contractor to establish that the engineer or architect has acted with gross negligence (faute caractérisée et d'une gravité suffisante) (Cons. d'Et. October 21, 1966, Benne). The higher degree of negligence required by the administrative courts is said to be justified on the ground that (i) it is paradoxical for the contractor who is at fault to claim against the architect for having supervised him badly, and (ii) more than a simple breach of contract by the architect should be proved to establish a claim in tort.

On the other hand, where the contractor claims against the supervising architect to recover damages which the contractor has suffered directly (rather than indirectly through the owner) as the result of an act or omission of the architect, it is sufficent if the contractor establishes mere negligence on the part of the architect. Thus, a flooring contractor had been retained by the owner to install floor coverings in 132 houses. Due to the bad workmanship of the general contractor, the flooring contractor was obliged to do important cleaning up work which was not provided for as part of its contract. The lower court had found the architect and the owner jointly and severally liable to reimburse the flooring contractor for the cost of this additional work. The Conseil d'Etat* rejected an appeal against this decision, stating that, as the failure of the general contractor to do the cleaning up work, provided for in its contract, was due partly to the negligence of the architect in supervising the general contractor, the architect had committed a tort such as to make it liable to the flooring contractor (Cons. d'Et. May 28, 1975, Brandon).

It seems difficult to justify why the tort standard should vary with the manner in which proceedings are brought. Furthermore, while the fact that the contractor is at fault may justify limiting the extent of the architect's liability for lack of supervision, it does not satisfactorily explain the need for the double negligence standard in tort applied by the administrative courts.

Like the judicial courts, the administrative courts hold that the fact that the construction contract may have assigned total responsibility for the activity giving rise to the defect to the contractor is not a

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* The highest court in the administrative court system.

defense by the supervising architect or engineer in an action for contribution brought against it by the contractor (see note of Moderne to Cons. d'Et. May 28, 1975, Brandon).

(2) Liability to Other Third Parties

(a) Users of the Works

As stated earlier, decennial liability attaches to the works, not the original owner, so that successors in title to the works may claim against the builders, including the engineer, on the basis of this liability standard established by Article 1792 of the Civil Code.

A lessee whose quiet enjoyment is disturbed by building defects has a right of action in contract against its lessor. It may also have a right of direct action in tort under Article 1382 of the Civil Code against the builders, including the architect or engineer responsible for the design and supervision of the works, if it can establish negligence (faute) on their part (Cass. Civ. 1ère October 9, 1962).

In the case of public works, similar rules apply: a user of the works may have a right of action against the owner or the builders assuming he can prove negligence. Nevertheless, the administrative courts are prepared to presume negligence in certain cases (e.g., a contractor's negligence was presumed when a gangway it had installed over a pit dug on a public way collapsed injuring a pedestrian, Cons. d'Et. May 29, 1968, Dame Veuve Moreau).

(b) Other Third Parties

Passers-by who suffer damages (e.g., personal injuries due to falling building materials) and neighbors who suffer damage from the works may have a right of action against the builders, including the engineer, in tort under Article 1382 of the Civil Code. To do so, they must establish the negligence (faute) of the builder (Cass. Civ. 3ème December 10, 1970). They may also, among other things, bring suit against the owner under Article 1386 of the Civil Code; in this event, they are relieved of having to prove negligence and have merely to prove their damage resulted from a construction defect.

In the case of public works, third parties not participating in the works who suffer damage therefrom have a right of action against the owner or any of

the builders, including the engineer, without having to prove negligence (Cons. d'Et. October 11, 1968, Allard). To recover, they have merely to establish a causal connection between the execution of public works and the damage they suffered, provided the damage does not result from force majeure or contributory negligence.

V. LIABILITY OF BUILDERS IN SOLIDUM

Faced with the frequent difficulty of accurately apportioning damage in construction cases and concerned to ensure compensation of the victim (whether the owner or third parties), the French courts often render judgments holding two or more of the builders participating in a project liable in solidum, that is jointly and severally, to the victim for the damage. Such judgments are ordinarily pronounced in cases where the negligence (faute) of several participants is believed to have contributed to causing the damage.

For instance, in a case decided in 1980 by the Cour de Cassation, a subcontractor of the general contractor (who was in liquidation), the architect and the engineer were held liable in solidum for 75% of the costs of repair of a defective heating and hot water system (the remaining 25% of the costs being imposed on the owner). The defective heating and hot water system resulted from the absence of a water treatment system. The judgment in solidum was said by the court to be justified against each party on the ground that each had committed an act of negligence (faute) contributing to the damage: the specialist engineer was found to have breached his contract for not warning the owner of the risks of omission of the water treatment system; the architect was found to have breached his contract for not having verified that provision for a treatment system was made; and the subcontractor was found to have breached a duty to the owner in tort for undertaking the installation without warning the owner of the absence of a water treatment system (Cass. Civ. 3ème March 25, 1980).

In cases where construction defects are held to result, in part, from faulty supervision by an engineer or architect, such engineer or architect may be held liable in solidum with those responsible for the faulty execution of the work (Cour d'Appel de Paris 1ère March 30, 1973; Cass. Civ. 3ème April 29, 1974).

Where a party is made liable in solidum with another participant in a project and pays the full amount of the judgment, it may seek contribution from the other participant in a subsequent tort action (action récursoire) in which it must establish such participant's negligence (which may, as we have seen, consist in the breach of a contractual obligation to the owner).

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September 29, 1983