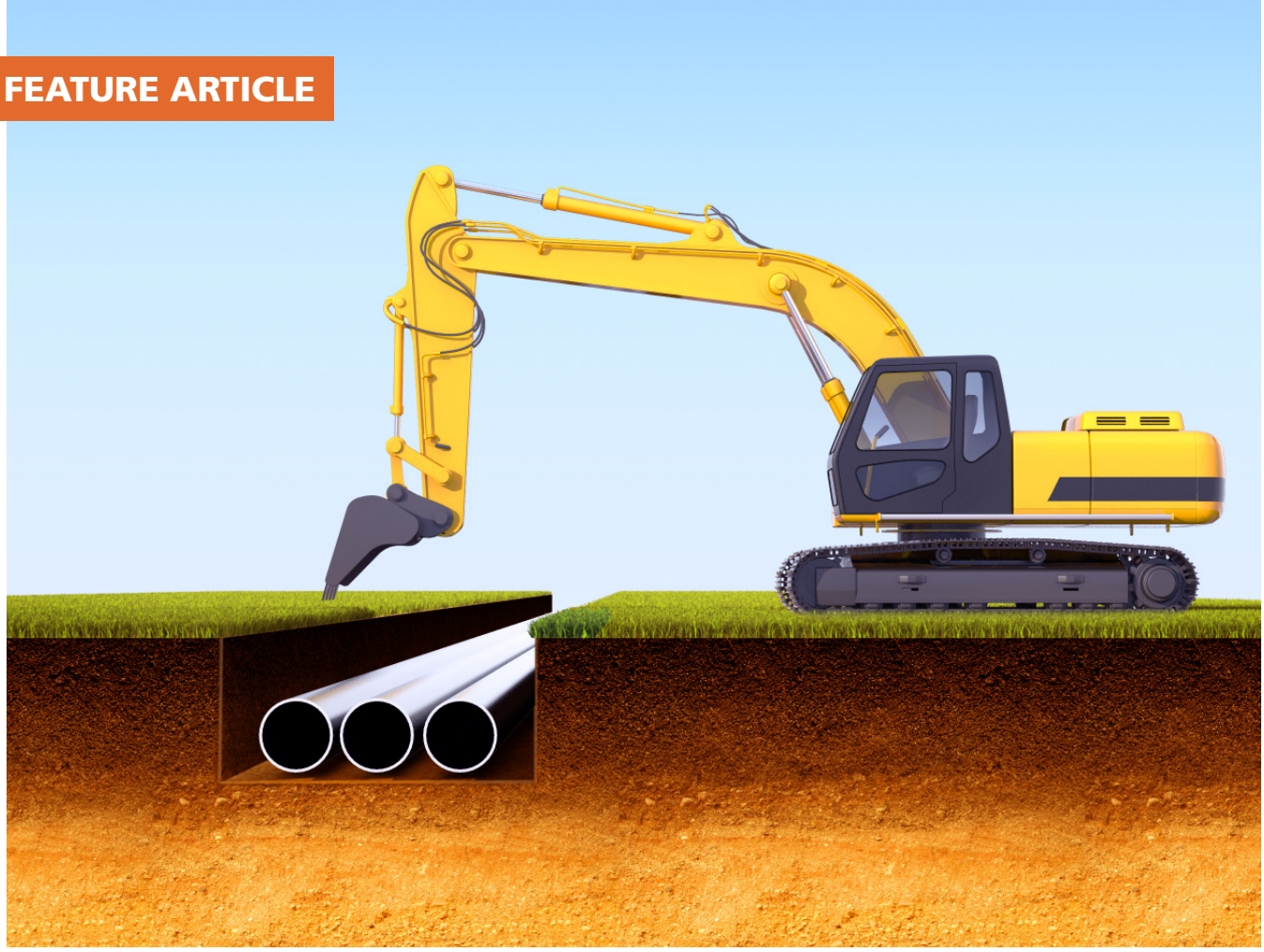

Credit: Egorov Artem/Shutterstock

Risk relating to ground conditions under French and English law*

The characteristics of the ground, including the rock nature and resistance, the existence of groundwater, mines, fractures and underground quarry and pollution, may lead to significant cost and time consequences affecting construction projects. The allocation of the costs and risks of ground conditions is often a source of tension between contractors and employers. This article aims to explore the legal principles governing the liability of contractors that may derive from ground conditions under French and English law.

Ground conditions under French Law

Contractor's liability under Article 1792 of the French Civil Code

A mandatory principle defining the liability of a contractor derives from Article 1792 of the French Civil Code, which provides that:

> 'Any builder of a construction is liable as of right, towards the building's owner or purchaser, for damages, even resulting from a defect of the ground, which imperil the stability of the building or which, by affecting it in one of its constituent parts or one of its equipment items, render it unsuitable for its purposes.
>
> Such liability does not take place where the builder proves that the damages were occasioned by an extraneous event.'[1] (emphasis added)

Accordingly, ground conditions do not constitute a basis for exonerating the contractor from liability within the circumstances

expressly defined in Article 1792 of the French Civil Code.

Article 1792 indirectly implies that surveys and studies are done in relation to the ground conditions so that the construction is solid and fit for purpose. Even when the contractor is not responsible for the design of the construction, it must ensure that the stability of the construction is not imperilled by the ground conditions. Otherwise, the contractor may be held liable under Article 1792.[2]

However, the contractor will not be liable for defects resulting from ground conditions if the burden to conduct a ground survey was expressly allocated to the project owner.[3]

a contractor is expected not only to make its best endeavour on the construction project, but also to actually deliver the result he promised

The contractor's obligation also applies in the event of works to a pre-existing construction, unless the renovation works are marginal and non-structural. Thus, the contractor will be liable under Article 1792 for substantial renovation works.[4]

Furthermore, under French law, the contractor has a duty to advise its client or employer: it will have the obligation to make all necessary enquiries, to express the relevant observations and to make the necessary reservations when performing its work. This duty applies to all contractors involved in a construction project, regardless of the nature of the contract.[5]

Consequently, even when the contractor is acting on the instructions of an expert, the contractor must conduct the minimal verifications to ensure the works are feasible and must advise the employer if necessary. Failure to do so may result in the contractor being held liable.[6]

The contractor must go so far as to refuse to carry out the construction works if the ground conditions make it impossible to comply with the obligations assumed. Thus, in a decision rendered in 1976, the French Court of cassation ruled that a contractor that was aware of defects affecting the ground 'Should have refused to perform the work', even though it was acting in accordance with clear instructions from the employer, which knew that the ground was not suitable for the construction.[7] Since the contractor did not refuse to perform the work, it was held liable.

Scope of contractors' liability under French Law

In principle, the contractor has an obligation to a committed result (*obligation de résultat*) as opposed to a general obligation to provide services and materials (*obligation de moyens*).[8] Thus, a contractor is expected not only to perform to the best of its abilities on the construction project, but also to actually deliver the result promised.

If the contractor has an obligation to a committed result, the risk for ground conditions is typically allocated to it. However, the contractor's liability is not without limits.

The contractor has limited liability in the event the employer is aware of the ground conditions and nonetheless accepts the risks affecting the construction. Indeed, if the employer is aware that the ground conditions may result in defects but refuses to pay for a survey, it may be considered partially liable and therefore excludes the full liability of the contractor.[9]

In addition, contractors are not always solely liable for defects resulting from ground conditions under Article 1792. Indeed, liability is shared with other parties involved in the construction project. In particular, the architect of the project is also responsible for carrying out the appropriate ground survey and can be held liable if it fails to do so.[10] The liability of the architect for defects resulting from ground conditions is, however, excluded when its contractual obligation is limited to the obtaining of a construction permit.[11] According to Article 1792-1 of the French Civil Code:

'Shall be considered as builders of the work:

1. Any architect, contractor, technician or other person bound to the building owner by a construction contract;

2. Any person who sells, after completion, a work which he built or had built;

3. Any person who, although acting as an agent for the building owner, performs duties similar to those of a construction contractor.'[12]

Furthermore, parties can agree to limit or exclude their liability. A contractor can exclude its liability for indirect or consequential losses, including loss of business or profits.

However, exclusion of liability will not be valid in several situations.

First, pursuant to Article 1231-3 of the French Civil Code, a party cannot limit its liability in a case of gross negligence (*faute lourde*) or willful misconduct (*dol*).[13]

The contractor is expected to provide a minimum standard of performance and the limitation of liability is not accepted when this minimum standard is not met.

The exclusion of liability is not possible when it would be so broad that the obligation of a party becomes insignificant. This derives from the *Chronopost*[14] case, where the Court of cassation found that a party cannot include in the contract a clause limiting its liability to the extent that, even when it fails to perform the contract at all, that party is not or only minimally liable. This decision is now codified in Article 1170 of the French Civil Code.[15]

Pursuant to Article 1792-5 of the French Civil Code, liability is established as per public policy (*ordre public*) in several situations.[16]

First, with respect to the *garantie de parfait achèvement*. This is a one-year warranty that applies to all defects indicated by the employer within one year following the handover (Article 1792-6 of the Civil Code).

Second, under the *garantie biennale*, that is a two-year warranty applicable to all defects affecting separable equipment that can be detached from the main construction without damaging the latter or being damaged (Article 1792-3 of the Civil Code)

Third, pursuant to the *garantie décennale*, a ten-year warranty applicable to defects that compromise the stability of the construction or make it unfit for purpose (Article 1792-4-1 of the Civil Code).

Article 1792-5 implies that the above-mentioned warranties cannot be contractually limited or excluded.[17] As a result, French law seems to be particularly protective of the employer and makes contractors bear a high level of risk.

Article 1218 of the French civil code on *force majeure*

Although contractors are usually liable for defects resulting from ground conditions under Article 1792, this liability is not without limit. As explained above, contractors must carefully consider the nature of the ground and the feasibility of the project, but in some cases, they will not be liable even if the defects affecting the building are caused by ground conditions.

Under French law, a contractor is not responsible for any event considered *force majeure*, for instance, damages resulting from an earthquake, insofar as the contractor has respected any specific construction rules pertaining to earthquakes in that region.

Article 1218 of the French Civil Code provides that:[18]

> 'In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects cannot be avoided by appropriate measures, prevents performance of his obligation by the debtor.
>
> If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharged from their obligations under the conditions provided by articles 1351 and 1351-1.'

A contractor is expected to provide a minimum standard of performance and the limitation of liability is not accepted when this minimum standard is not met.

There are three criteria to prove that a *force majeure* event occurred, exonerating a party to a contract from liability.

First, exteriority (*extériorité*): the event is beyond the affected party's control. The event must not result from the affected party or from anything or anyone that would lead to the liability of the affected party (eg, its employees).

Then, unforeseeability (*imprévisibilité*): the event could not have been reasonably foreseen at the time of the conclusion of the contract.

Finally, irresistibility (*irrésistibilité*): the effects of the event could not be prevented through appropriate measures. This is determined *in abstracto* by French courts by referring to whether an average person in the same circumstances could have continued to perform their obligations. If performance were possible, even if costly, the event cannot qualify as *force majeure*.

However, the threshold for relying on *force majeure* under French law is high, and courts will carefully consider whether all criteria have been met and if a particular event prevented the Contractor from fulfilling its obligations.

For instance, in a decision dated 24 March 1993, the Court of cassation considered that since the construction in question was built on clay ground, formerly exploited as a quarry, the ground shift that occurred could not been considered as unforeseeable. Therefore, *force majeure* was an ineffective defence.[19]

On the other hand, in a decision dated 20 November 2013, the Court of cassation held that since a ground shift could not have been detected by a conventional ground survey, such a ground shift, by its magnitude, constituted *force majeure*, resulting in the contractor not being held liable for the defects.[20]

In this respect, case law holds that contractors are only required to carry out appropriate surveys to the extent that there is reason to suspect that a defect in the ground is likely to damage the construction. Thus, the French Court of cassation held that a ground slide that caused significant damage to a building was an unforeseeable event of *force majeure*, even though no ground survey had been conducted.[21] Indeed, the Court of cassation held that 'nothing could lead the architect or the contractor to anticipate the existence of such geological phenomena in the area in question' and that, consequently, 'the defect in the ground that caused the damage to the building' was unforeseeable.

Most of the time, the qualification of *force majeure* results from a combination of factors. In a 2006 case,[22] a mudslide penetrated an apartment, causing extensive damage and the death of a person. The liability of the city of Tulle, owner of the building, was sought, but the Court of cassation ruled that it was a *force majeure* event. Firstly, the mudslide was a consequence of exceptionally heavy rainfall that characterised an unforeseeable and irresistible event. Secondly, the ground upon which the building was constructed was by nature fragile and sloping, which had exacerbated the mudslide. As these ground features were not attributable to the building owner, the Court of cassation concluded that the exteriority test was also satisfied. Thus, all criteria of *force majeure* were met.

Article 1195 of the French Civil Code on *imprévision*

For a long time, *imprévision* (changes of circumstances) has been neglected by French law in private contracts.[23] Following a reform of the French Civil Code in 2016, the new Article 1195 entitles parties to a contract to renegotiate the terms of the contract when an unforeseeable change of circumstances occurs.

Article 1195 of the French Civil Code provides that:

> 'If a change of circumstances that were unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party that had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The affected party must continue to perform its obligations during the period of renegotiation.
>
> If the renegotiation is refused or fails, the parties may agree to terminate the contract or to turn to a court or arbitral tribunal to adapt the contract. In the absence of such an agreement in a reasonable time, upon the request of any party, a court or tribunal may amend or terminate the contract. In such circumstances, the court or tribunal would determine the date and conditions of the termination.'[24]

When the negotiation fails, the parties may turn to a court or arbitral tribunal to seek a remedy. The court or arbitral tribunal will determine whether a major change of circumstances occurred, and if so, will amend or terminate the contract.

The relevant contract must have been concluded after 1 October 2016 in order for a party to rely on the doctrine of *imprévision*,[25] and the contracting parties remain free to exclude or adjust the regime of *imprévision*.

A crucial requirement is to demonstrate that the economic imbalance between the parties is excessive as a consequence of the change of circumstances. Not every change of circumstances will qualify as *imprévision*: for example, a minor change that makes the performance of the contract more costly for a party is not sufficient. On the contrary, a change of circumstances that amounts to nullifying any benefit to a party will often be considered as *imprévision*.

So far, it is unclear to what extent the new Article 1195 will have an impact on construction contracts. Indeed, most construction contracts already provide that the contractor is responsible only for the work that was foreseeable at the time of the contract. As a result, contractors are usually entitled to an additional payment for works that are not predictable.[26]

Ground conditions under English law

Contractors' liability under English law

The English legal system is not generally prescriptive with respect to the obligations between contractual parties, which are in principle considered equal. That is why contracts governed by English law often include limitation of liability clauses, liquidation of anticipated damages and waivers of consequential loss.

Under English law, there is no specific statutory provision that prescribes the liability of contractors for defects resulting from ground conditions, as is the case in Article 1792 of the French Civil Code.

Nonetheless, contractors can, of course, be held liable for defects caused by ground conditions under English Law.

Where defects are not specifically defined in a contract, caselaw indicates that they must be considered as 'anything which renders the [construction] […] unfit for the use for which it is intended, when used in a reasonable way and with reasonable care'.[27]

Under English law, an important distinction must be made between a patent and a latent defect. A patent defect is a defect that is detectable either at practical completion or during a defect liability period, whereas a latent defect is a hidden defect, which may not become apparent for many years.

Latent defects, as opposed to patent defects, were defined in *Baxall Securities Ltd & Anor v Sheard Walshaw Partnership & Ors* as follows:

> 'The concept of a latent defect is not a difficult one. It means a concealed flaw. What is a flaw? It is the actual defect in the workmanship or design, not the danger presented by the defect […] In my judgment, it must be a defect that would not be discovered following the nature of inspection that the defendant might reasonably anticipate the article would be subjected to.'[28]

It is likely that ground conditions will result in latent rather than patent defects. Indeed, most of the time, such defects will appear only after major events, such as ground shift or earthquake, and will not be visible at practical completion.

When a defect is patent, the contractor may, under most of the standard contract forms, be held liable and asked to make good the defect during the defect liability period, which usually is a six- or 12-month period from practical completion.

The Latent Damage Act 1986, amending the Limitation Act 1980, introduced a statutory liability period with regard to negligence claims for latent defects. Where there is a latent defect, the time limit is six years from the date on which the cause of action accrued, which will be the date when the damage occurred. For a contract under seal, the period is 12 years.

Under English law, an important distinction must be made between a patent and a latent defect. It is likely that ground conditions will result in latent defects rather than in patent defects.

With respect to ground conditions, the position of English law dates to the end of the 19th century, in *Bottoms v York Corporation*.[29] In this case, the contractor found that the ground that was excavated required unforeseen measures to complete construction. The contractor therefore requested an additional payment, but it was ruled that there was no representation or warranty as to the nature of the ground and that the contractor was not entitled to additional payment.

Thus, the risk of unforeseen ground conditions rests with the contractor and unless there are specific provisions in the contract regarding this matter, the contractor is not entitled to request additional payment and time.

In *Bacal Construction (Midlands) Ltd v Northampton Development Corporation*,[30] it was held that where the contractor had prepared the design of a building relying on inaccurate data provided by the employer in the tender documents, the contractor was entitled to bring an action for breach of an implied term. In this case, the contractor discovered tufa (a low-density porous rock) in the ground that was not indicated in the data provided by the employer. In addition, the employer had indicated that the contractor's design had to take into account the ground conditions as shown in the tender data, which did not include any warning about the presence of tufa.

However, contractors may also be responsible for conducting the appropriate ground study and survey when they are involved in a construction project.

In *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*,[31] Obrascon Huarte, a Spanish contractor, filed a claim

against the Government of Gibraltar in relation to a contract for the design and construction of a road and tunnel under Gibraltar Airport. The contract incorporated the FIDIC Yellow Book Conditions.

A contaminated land desk study, which was provided to the contractor, outlined the history of the area and indicated that the ground was likely to be contaminated. While the work was in progress, the contractor eventually encountered contaminated soil and proposed to re-design the tunnel. However, a few months later, the Government of Gibraltar terminated the contract because of the contractor's failure to progress the work.

The main issue was whether the amount of contaminated materials in the ground to be excavated was reasonably foreseeable by an experienced contractor at the time of tender:

Asphalt and soil layers, with visible damage from water erosion. Credit: RachenStocker

if not foreseeable, it would not have been the contractor's risk. Akenhead J indicated that:

> 'The real issue on analysis is whether [the contractor] judged by the standards of an experienced contractor would or should have limited itself to some analysis based only on the site investigation report and the Environmental Statement.' (para 213)

Then, Akenhead J held that:

> 'I am wholly satisfied that an experienced contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise.' (para 215)

Eventually, guidance was provided as to how the contractor should have conducted its work in order to comply with its obligations. In particular, the contractor should have:

> '(a) [made] a substantial financial allowance within the tendered price for actually encountering and dealing with a large quantity of such material" and "(b) [planed and priced] for a post-contract site investigation to determine wherein the made ground particularly in the critical tunnel area the contaminants were going to be found.' (para 223)

In *Van Oord UK Ltd & Anor v Allseas UK Ltd*,[32] Allseas UK Ltd (AUK) was engaged as a contractor to carry out offshore and onshore works involved in the laying of gas pipelines. AUK subsequently engaged Van Oord UK Ltd and Sicim Roadbridge Ltd (together OSR) to carry out 'the procurement, supply, construction, installation, flooding, cleaning, gauging and testing of pipelines, and certain on-shore works'.

OSR made three claims against AUK, one of them being 'A claim for disruption and prolongation arising out of what is alleged to have been unforeseen ground conditions'. The court therefore attempted to determine whether the ground conditions were reasonably unforeseeable, which would have justified granting OSR a delay for completion.

In that context, Coulson J stated that:

> 'Contractors are provided with all available information as to ground conditions, but ultimately it is a matter for their judgment as to the extent to which they rely upon that information. In my view, it is wrong in principle for a contractor to argue that, merely because, in some particular locations, the conditions were different to those set out in the pre-Contract information, those different conditions must somehow have been unforeseeable.' (para 192)

He added that:

> 'Every experienced contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall.' (para 193)

Finally, he concluded that:

> 'Accordingly, by reference to the ground information available to OSR, I conclude that, if there were different conditions from those described in the Contract documents (which I do not accept), they were conditions which could reasonably have been expected to have been foreseen by an experienced contractor.' (para 196)

Therefore, ground condition was not an acceptable basis for requesting an extension of time since the defects affecting the ground could have been foreseen.

A recent case, *PBS Energo AS v Bester Generacion UK Ltd and another*,[33] upheld the above decisions. In this case, the court also had to consider a litigation in which the allocation of risk for ground conditions was in dispute. The facts were as follows: the employer hired a contractor to engineer, procure and construct a biomass power plant in Wales under a FIDIC 1999 Silver Book agreement. The contract provided that the employer would make available to the contractor all relevant data relating to, among other things, ground conditions. However, Clause 4.10 also provided that:

> 'The condition of the Site (including Sub-Surface Conditions) shall be the sole responsibility of the Contractor and the Contractor is deemed to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may affect the Works, the remedying of Defects and the selection of technology and (save where otherwise set out in this Contract) the Contractor accepts entire responsibility for investigating and ascertaining the conditions of the Site'.

Clause 4.12 also provided that the contractor accepted responsibility for completing the project 'except for Unforeseeable Difficulties', that were defined as 'any and all difficulties and cost, which the Contractor acting with Good Industry Practice could not reasonably foresee, especially events of Force Majeure'.

The data provided by the employer showed that asbestos was not only present on the construction site but was also found in the ground. The contractor sought to obtain an extension of time, but the employer refused.

The construction project was not completed and both parties sought to terminate the contract and claimed damages. The contractor argued that the employer failed to respond to several of its claims for an extension of time and additional payment, while the employer alleged that the contractor abandoned and failed to comply with a notice to correct.

it is clear that English case law expects construction contractors to make reasonable inquiries to ensure that the ground is suitable for the project

The court ruled in favour of the employer, stating that the contractor took the risk for ground conditions and that the discovery of additional asbestos on site was not an unforeseeable difficulty. The court held that the facts established that 'the asbestos discovered was not a new discovery, or different from what had been indicated by the previous findings, but simply a more detailed manifestation of what was shown by the earlier materials'.

Eventually, the court relied on the *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* and *Van Oord UK Ltd & Anor v Allseas UK Ltd* cases to conclude that 'reliance on ground investigations as being 100% accurate is not likely to be successful'. In addition, the court held that the burden of proving that the excessive asbestos contamination was unforeseeable lay with the contractor, stating that 'It is not enough therefore for [the contractor] to point to the discovery of asbestos in more granular detail than previous reports had suggested. It must show that the asbestos discovered was unforeseeable.' Thus, the contractor was not entitled to an extension of time or additional payment and was in breach of the contract.

In light of the *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* and *Van Oord UK Ltd & Anor v Allseas UK Ltd* cases, as upheld by the *PBS Energo AS v Bester Generacion UK Ltd and another* case, it is clear that English case law expects construction contractors to make reasonable enquiries to ensure that the ground is suitable for the project.

In particular, a contractor which does not undertake any ground studies or surveys, or that relies exclusively on a previous study or survey provided to it without any further verification, cannot invoke ground conditions to exclude its liability or to request an extension of time, unless otherwise agreed in the contract.

Scope of Contractors' liability in English law

Construction law is generally based on two standards of performance. On the one hand, Section 13 of the Supply of Goods and Services Act 1982 provides that with regard to contract for the supply of services, and that unless otherwise agreed, a professional contractor will have a duty to act with reasonable skill and care. It is a rather low standard, given that 'It is sufficient if [a contractor] exercises the ordinary skill of an ordinary competent man exercising that particular art'.[34]

On the other hand, the fitness for purpose obligation imposes a higher duty since it is an obligation to achieve a certain result, a breach of which does not require proof of negligence. In construction contracts, unless otherwise agreed, a fitness for purpose obligation will often be implied where a contractor is responsible for the design of a building. On the contrary, where the contractor is not responsible for the design, an implied term requiring fitness for purpose is less likely.[35]

In addition, it is generally accepted that under English law, the parties to a construction contract are entitled to shorten the statutory defects period, including the latent defects period.

a professional contractor will have a duty to act with reasonable skill and care. It is a rather low standard

However, pursuant to the Unfair Contract Terms Act 1977, a party cannot exclude or restrict its liability for death or personal injury resulting from negligence (section 2(1)). Furthermore, in the case of other loss or damage, a party may exclude or restrict its liability for negligence only if the term or notice satisfies the requirement of reasonableness (section 2(2)).

Case law confirms that a clause aimed at shortening the defects period can be enforceable. Accordingly, a clause providing that 'No action or proceedings under or in respect of this Agreement shall be brought against the Contractor' after one year from the date of practical completion was held to be enforceable and prevented the employer from bringing a claim against the contractor.[36]

Similarly, it was considered that a clause which provided that 'All claims by the CLIENT shall be deemed relinquished unless filed within one (1) year after substantial completion of the Services' was enforceable and did not fall within the scope of the Unfair Contract Terms Act 1977.[37] It was pointed out that such a clause is acceptable since its purpose was to provide some form of certainty and not to prevent the client from making any claim.

However, this does not necessarily prevent the employer from filing a claim in the event of a major defect, such as a defective workmanship, that is, when the completed work falls outside the building plans and specifications.[38]

It is also widely accepted that a party cannot exclude liability for its own dishonesty, which means that liability for fraud cannot be excluded.

With regard to ground conditions, the allocation of risk depends mainly on the contractual provisions. Some standard forms of contracts, including the JCT contracts, do not include specific provisions on ground conditions. Consequently, the contractors are likely to bear the risks of defects and damages resulting from ground conditions. On the other hand, some standard forms of contract contain specific provisions on allocation of risk related to ground conditions. For instance, the NEC3 Engineering and Construction Contract provides for a limitation of liability for the contractor in case of unforeseeable defects resulting from ground conditions.

In conclusion, and contrary to French law, a wide freedom of choice is given to the parties in the determination of liability under English law. Few statutory rules limit the contractual choice of the parties, although there are a limited number of situations in which the liability of a contractor cannot be limited or excluded.

Force majeure, frustration, and hardship under English law

Under English law, unlike French law, few statutory remedies are available to a contractor seeking to limit its liability for defects resulting from ground conditions, and the remedies must be found in the contract.

First, *force majeure* is not a standalone notion in English law. Performance of the contract will only be excused on account of unexpected circumstances, such as ground conditions, if they fall within the limited doctrine of frustration, which will apply unless otherwise agreed by the parties.

Under the doctrine of frustration, if performance of a contract becomes impossible, the parties may no longer be bound to perform their obligations and may be discharged.

The principle was clearly outlined in *Taylor & Anor v Caldwell & Anor*:[39]

> 'The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.'

It is now broadly accepted that a frustrating event is an event which (i) occurs after the conclusion of the contract; (ii) is so essential that it distorts the contract beyond what was contemplated by the parties at the time of the conclusion of the contract; (iii) is not due to the fault of either party; and (iv) makes the performance of the contract impossible, illegal or substantially different from what was contemplated by the parties.

As these criteria are very strict, it is in practice difficult to prove that an event amounted to frustration therefore discharging the parties.

Parties to a contract are in any event free to provide for a more protective standard in their contract, for example, by including a *force majeure* clause, thus avoiding problems due to the very narrow scope of frustration.

Finally, English law does not provide a right to renegotiate or terminate the contract in the event of a major change of circumstances. Indeed, there is no equivalent to the *imprévision* doctrine under English law.

Consequently, where parties to a contract want to provide for the discharge of performance when a change of circumstances occurs, they must include a hardship clause in the contract.

Conclusion

Dealing with defects resulting from ground conditions can be a real struggle for contractors involved in construction projects.

Under French law, contractors are less likely to limit or exclude their liability. Indeed, in numerous situations, contractors' liability cannot be excluded or even limited. For instance, the *garantie de parfait achèvement, the garantie biennale* and the *garantie décennale* cannot be excluded.

In this respect, English law seems to be more permissive, as parties to a contract have a broad freedom to define the extent of their liability.

On the other hand, English Law does not provide statutory provisions on *force majeure* and *imprévision*, which can be a real loophole for contractors unable to cope with the consequences of ground conditions. In addition, the doctrine of frustration is very limited and, in many cases, unlikely to discharge the parties from performance of their obligations.

Notes

* Contracts: frustration, Practical Law Commercial

1 *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.*
Une telle responsabilité n'a point lieu si le constructeur prouve que les dommages proviennent d'une cause étrangère.

2 Les risques tenant à la nature du sol, Jean-Pierre Karila, RDI 1997 p 545.

3 Cass Civ 3, 12 novembre 2014, 13-19.894.

4 Cass Civ 3, 24 janvier 2001, 99-10.538.

5 Cass Civ 3, 27 janvier 2010, 08-18.026.

6 Cass Civ 3, 11 mars 2015 13-28.351 14-14.275.

7 Cass Civ 3, 26 octobre 1976, No. 75-10.407 '*Mais attendu que la cour d'appel a relevé que l'entrepreneur, dont l'attention avait été attirée sur les difficultés pouvant résulter de la construction sans fondations sur terrain remblaye, aurait dû refuser l'exécution d'un tel travail ; Qu'elle a pu en déduire qu'une part de responsabilité incombait audit entrepreneur*'.

8 Cass Civ 3, 27 janvier 2010, 08-18.026 '*Mais attendu que, quelle que soit la qualification du contrat, tout professionnel de construction étant tenu avant réception, d'une obligation de conseil et de résultat envers le maitre d'ouvrage […]*'

9 Cass Civ 3, 19 janvier 1994, 92-14.303.

10 Cass civ 3, 21 novembre 2019, 16-23.509 '*M. A..., auteur du projet architectural et chargé d'établir les documents du permis de construire, devait proposer un projet réalisable, tenant compte des contraintes du sol, la cour d'appel, qui a constaté que la mauvaise qualité des remblais, mis en œuvre avant son intervention, était la cause exclusive des désordres compromettant la solidité de l'ouvrage, en a exactement déduit, sans être tenue de répondre à des conclusions que ses constatations rendaient inopérantes, que M. A... engageait sa responsabilité décennale*'; also see Cass civ 3, 23 mai 2007, 06-15.668

11 Cass Civ 3, 7 octobre 2014, 13-19.867.

12 The French original version of Article 1792-1 states as follows:

> "*Est réputé constructeur de l'ouvrage:*
> *1. Tout architecte, entrepreneur, technicien ou autre personne liée au maître de l'ouvrage par un contrat de louage d'ouvrage;*
> *2. Toute personne qui vend, après achèvement, un ouvrage qu'elle a construit ou fait construire;*
> *3. Toute personne qui, bien qu'agissant en qualité de mandataire du propriétaire de l'ouvrage, accomplit une mission assimilable à celle d'un locateur d'ouvrage.*"

13 '*Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qui pouvaient être prévus lors de la conclusion du contrat, sauf lorsque l'inexécution est due à une faute lourde ou dolosive*'. Pursuant to Ordonnance no 2016-131 of 10 February 2016 – Article 2, Article 1231-1 applied to contract concluded after 1 October 2016.

14 Cass. Com., 2 octobre 1996, 93-18.632.
15 '*Toute clause qui prive de sa substance l'obligation essentielle du débiteur est réputée non écrite*'. Pursuant to Ordonnance no 2016-131 of 10 February 2016 – Article 2, Article 1231-1 applied to contract concluded after 1 October 2016.
16 '*Toute clause d'un contrat qui a pour objet, soit d'exclure ou de limiter la responsabilité prévue aux articles 1792, 1792-1 et 1792-2, soit d'exclure les garanties prévues aux articles 1792-3 et 1792-6 ou d'en limiter la portée, soit d'écarter ou de limiter la solidarité prévue à l'article 1792-4, est réputée non écrite.*'
17 Article 1792-5 of the French Civil Codes provides that:

> *'Any clause in a contract whose purpose is either to exclude or limit the liability provided for in Articles 1792, 1792-1 and 1792-2, or to exclude the guarantees provided for in Articles 1792-3 and 1792-6 or to limit their scope, or to exclude or limit the joint and several liability provided for in Article 1792-4, is considered null and void.'*

The French original version of Article 1792-5 states as follows:

> *'Toute clause d'un contrat qui a pour objet, soit d'exclure ou de limiter la responsabilité prévue aux articles 1792, 1792-1 et 1792-2, soit d'exclure les garanties prévues aux articles 1792-3 et 1792-6 ou d'en limiter la portée, soit d'écarter ou de limiter la solidarité prévue à l'article 1792-4, est réputée non écrite.*'

18 '*Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur.*
Si l'empêchement est temporaire, l'exécution de l'obligation est suspendue à moins que le retard qui en résulterait ne justifie la résolution du contrat. Si l'empêchement est définitif, le contrat est résolu de plein droit et les parties sont libérées de leurs obligations dans les conditions prévues aux articles 1351 et 1351-1.'
19 Cass Civ 3, 24 mars 1993, 91-13.541.
20 Cass Civ 3, 20 novembre 2013, 12-27.876.
21 Cass Civ 1, 6 mars 1967, 65-12.607.
22 Cass Civ 2, 13 juillet 2006, 05-17.199.
23 Cass Civ, 6 mars 1876, "Canal de Craponne'.
24 '*Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.*'
25 Article 1995 of the French civil code was modified by Ordonnance no 2016-131 of 10 February 2016 – Article 2.
26 Hugues Périnet-Marquet, *L'impact de la réforme du droit des contrats sur le droit de la construction,* (RDI 2015) p 251.
27 *Yarmouth v France* (1887) 19 QBD 647.
28 *Baxall Securities Ltd & Anor v Sheard Walshaw Partnership & Ors* [2002] EWCA Civ 9 (22 January 2002).
29 *Bottoms v York Corp* (1892) HBC (4th ed), Vol 2, p 208.
30 *Bacal Construction (Midlands) Ltd v Northampton Development Corporation* (1975) 8 BLR 88, CA.
31 *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) (16 April 2014).
32 *Van Oord UK Ltd & Anor v Allseas UK Ltd,* [2015] EWHC 3074 (TCC).
33 *PBS Energo AS v Bester Generacion UK Ltd and another* [2020] EWHC 223 (TCC).
34 *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118.
35 Sarah Thomas, 'Contractual chestnuts: fitness for purpose', Practical Law Construction Blog.
36 *Inframatrix Investments Ltd v Dean Construction Ltd* [2011] EWHC 1947 (TCC) (25 July 2011); *Inframatrix Investments Ltd v Dean Construction Ltd* [2012] EWCA Civ 64 (03 February 2012).
37 *Elvanite Full Circle Ltd v AMEC Earth & Environmental* (UK) Ltd [2013] EWHC 1191 (TCC) (24 May 2013).
38 *Inframatrix Investments Ltd v Dean Construction Ltd* [2011] EWHC 1947 (TCC) (25 July 2011), para 64.
39 *Taylor & Anor v Caldwell & Anor* [1863] EWHC QB J1 (6 May 1863).

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