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INTERNATIONAL BAR ASSOCIATION

Unforeseen Subsurface Conditions: Eternal Dilemma
Webinar presented by
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French Law Approach

by

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Article 1792 of the French Civil Code

"Any builder of a work is liable as of right, towards the building 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."

*"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."

Article 1792 of the French Civil Code

The phrase «vice du sol», which litterally means «defect of the ground», intends to refer to the impact that the characteristics of the ground may have on the construction.

The contractor is responsible for all damages deriving from the ground conditions under Article 1792 that may affect the **stability of the overall construction or one of its main components**.

The contractor must ensure that the construction is fit for its purposes.

Ground conditions **do not represent a ground for exoneration of liability** of the contractor as Article 1792 of the French Civil Code expressly refers to them.

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Article 1792 implies that the **contractor has the obligation to survey and study** the ground conditions so that the construction to be realised is solid and fit for its purposes.

For instance, research, study and survey, the characteristics of ground, including the rock nature and resistance, groundwater, existence of mines, fractures and underground quarry and pollution.

The same obligation is imposed also in the event of **works to be performed on a pre-existing construction** unless the renovation works are marginal and not structural.

As under French law, the contractor has a **duty to advise** its client/employer, he will have the obligation to make all the necessary enquiries, express the relevant observations and make the necessary reservations.

The contractor must even refuse to perform the construction works if the ground conditions are contrary to the obligations he has assumed.

Article 1792 of the French Civil Code

Given the content of Article 1792, **the parties could negotiate and agree the allocation of risks** deriving from ground conditions with regard to the costs of the works rather than in relation to any other aspect that may affect the stability of the construction itself, which remains subject to the legal guarantees imposed by French law.

Example:

The existence of pollution is often discovered in the case of earthworks and would not typically affect the stability of the construction but may affect the aptitude of a construction to be fit for its purposes

Contracts for Public Works

Contractors to contracts for public works may invoke the *théorie des sujétions imprévues* if there is no express clause for contractual allocation of risk.

The contractor would be entitled, under certain conditions, to full compensation for the loss caused by unforeseen ground conditions, including the costs of additional works.

The conditions must be unforeseen, abnormal and unaffected by the will of the parties

Article 1195: *Imprévision*

«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."

"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."

Imprévision

The relevant contract must have been concluded after 1 October 2016 in order for a party to rely on the doctrine of *imprévision*

The contracting parties are free to exclude or adjust the regime of *imprévision*.

A crucial requirement is to demonstrate that the economic imbalance between the parties is excessive.

In a 2015 decision on economic hardship as defined in the UNIDROIT Principles, the French *Cour de cassation* ruled that increase of the prices by the suppliers of the affected party between 4% and 16%, which resulted in the reduction of the affected party's gross margin by nearly 60%, did not constitute an event that fundamentally altered the equilibrium of the contract.

The Contractor's Liability

In principle, the contractor has usually an obligation to a committed result (*obligation de résultat*) as opposed to an obligation to provide services and materials to complete some works (*obligation de moyens*).

That is why the risk for ground conditions is typically allocated to the contractor.

The contractor's liability is not without limits.

The contractor would have only a limited liability in the event the employer has deliberately accepted the risks affecting the construction as a result of the ground conditions, of which the employer was aware.

The contractor is not responsible for an event that would constitute a *force majeure* even, that is for instance for damages deriving from any earthquake to the extent that the rules applicable to constructions to make them seismic resistant in the specific region have been respected by the contractor.

Article 1218 of the Civil Code: Force majeure

"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 could not 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."

"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. "

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- 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 (for example its employees).
- Unforeseeability (*imprévisibilité*) = **could not have been reasonably foreseen** at the time of the conclusion of the contract.
- Irresistibility (*irrésistibilité*) = the effects of the event **could not have been 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 still been able to perform its obligations. If performance were possible, even if very costly, the event cannot qualify as force majeure.

Contractual Liability under French Law

Parties can agree to limit or exclude their liability. Contractor can exclude its liability for indirect or consequential losses, including loss of business or profits.

Exclusion of liability will not be valid if:

- a party is guilty of gross negligence (*faute lourde*) or willful misconduct (*dol*)
- the exclusion of liability is too broad and thus insignificant
- liability is established as per public policy (*ordre public*), which includes, for instance:
  - *garantie de parfait achèvement* = one-year warranty, which applies to all defects indicated by the employer within one year after the handover (Article 1792-6 of Civil Code)
  - *garantie biennale* = two-year warranty, which applies to all defects affecting separable equipment, which can be detached from the main construction without damaging the latter or been damaged (Article 1792-3 of the Civil Code)
  - *garantie décennale = ten-year warranty*, which applies to defects that compromise the stability of the construction or make it unfit for its purposes (Article 1792-4-1 of the Civil Code)

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