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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* for ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

In France, construction law is mainly a matter of private law (Civil code; Construction and Housing code). The Civil code contains several provisions on the construction contract (*contrat d'entreprise*), also known as the *contrat de louage d'ouvrage*. The construction contract (*contrat d'entreprise*) governs the relationships between the project owner (*maître d'ouvrage*) and the contractor.

The design is generally prepared by an architect/project manager (*maître d'œuvre*) who supervises the construction works on behalf of the project owner. However, engineering, procurement and construction (EPC) contracting (*conception-réalisation*) and turnkey (*clef-en-main*) contracting are becoming more and more prevalent.

Real estate development contracts (*contrats de promotion immobilière*) (Art. 1831-1 of the Civil code), in which the developer acts on behalf of the project owner who owns the land, are also a form of private law construction contract where the developer takes care of the design and construction.

While architects generally prepare the design and follow the procurement process and performance of the works, thereby acting as management contractors overseeing the works of package contractors, some designers may work on the basis of design-only contracts. This takes place in the context of specific expert design, for elements of the construction works that are performed under technical assistance contracts.

Public law construction contracts are governed by the Public Procurement code (*Code de la commande publique* – CCP). Similar to other European Union (EU) countries, these contracts are either public procurement contracts (*marchés publics*) or concessions (*concessions*). Concessions generally cover a larger scope, including design, construction and operation. Public procurement contracts, on the other hand, may be for works only, for design and works, or for design, construction and maintenance.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracts are uncommon in France for two main reasons. Firstly, the CCP and EU law strictly regulate the procedures for procurement of construction contracts, so it is not profitable to use collaborative contracts. Secondly, the French contractual tradition favours the risk allocation method rather than collaborative contracts.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

In contract law, the main concept is freedom of contract (Art. 1102 of the Civil code). Thus, contractors are relatively unfettered in the form of the contract they choose.

Nevertheless, in public law, contracts can (and, in practice, quite often do) refer to the general administrative clauses published on 30 March 2021 in the General Conditions of Contract for public works (*Cahier des Clauses Administratives Générales des marchés publics de travaux* – CCAG), which provide the framework and the main principles of public sector contracts.

In private law, the system is the same, with the AFNOR (*French Association for Standardisation*) NF P 03-001 standard published in October 2017 centralising the general administrative clauses applicable to private contracts, which can be quoted in the contract and become binding.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

When the construction contract is an administrative contract, the contractual documentation generally includes the following elements:

- the Special Conditions of Contract (CCAP), in which all the special conditions of the construction contract are specified, such as the price, the conditions for termination, the penalties incurred, the exemption clause, etc.;
- the Special Technical Conditions of Contract (CCTP), in which all the special technical conditions of the contract are specified; and
- the CCAG, commonly used although not mandatory, whose provisions are applicable when the CCAP are silent.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

A distinction must be made between private and public law rules.

In private law, a contract is formed when the wills of two parties converge. There are several necessary components (Art. 1128 of the Civil code): the consent of the parties; their capacity to contract; and a lawful and certain content. The formal requirements are limited. Some obligations can be added, particularly in situations where the balance of power between the contracting parties is unequal (e.g. where the project owner is not a professional).

In public law, on the other hand, the regulations are numerous and precise. The CCP and EU law set the procedural standards to be followed, in particular to comply with the principles of freedom of access to public procurement, equal treatment and proportionality.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

In the strictly regulated framework of public law, letters of intent do not exist. The pre-contractual phase, from the call for tenders through the negotiations to the signing, is completely regulated by law, and the freedom of the parties is reduced.

However, letters of intent do exist in private law. They are the first written act by which the parties acknowledge the result of the negotiations. If a letter of intent is not binding on the parties and does not create any contractual obligations, it can be used as evidence. Indeed, under French law, a party may be held liable by the other in the event of negotiations in bad faith.

If it is binding, a letter of intent will generally be an early works agreement enabling the contractor to start working on the construction design while the other key terms of the construction contract are negotiated.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

A contractor's employees are covered under the general workplace accident regime, which is part of the social protection system.

Contractors' all-risk insurance (*assurance tout risque chantier*) is not compulsory, but is generally purchased by the employer, covering damages and losses during the works. The employer will also purchase insurance covering damage to the structure of the works and fitness for purpose for 10 years from taking over (*assurance dommage-ouvrage*), which is compulsory (Art. L.242-1 of the Insurance code).

While the employer will claim against its own *dommage-ouvrage* insurer, the insurer will have rights of subrogation against the contractor, who needs to purchase decennial liability insurance (*assurance de responsabilité décennale*). Decennial liability insurance is the only compulsory insurance policy for a contractor (Art. L.241-1 of the Insurance code). It is also compulsory for a designer – similar to a professional indemnity insurance in common law countries.

Architects also have compulsory individual civil liability insurance (*assurance de responsabilité civile professionnelle*). Such third-party liability insurance policies are generally purchased by participants in construction works, whether designers or contractors, even when they are optional.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

There are statutory requirements in the following areas covered by construction contracts:

(a) **Labour** – there are no specific rules for employees in the construction sector, except those working on construction sites, who must hold a building and public works identification card (*carte BTP*). The French Labour code applies to workers in France. Some distinctions exist, notably between workers from another EU country and other foreign workers (residence permit/specific authorisations).

(b) **Tax** – there is a specific VAT reverse-charging mechanism that has applied since 2014 for the subcontracting of construction works.

(c) **Health and safety** – health and safety standards are strictly regulated by the Labour code and by EU law. In particular, there is a general safety obligation for employers towards employees. A health and safety coordinator (*coordonnateur en matière de sécurité et de protection de la santé*) is nominated, and a general coordination plan and health and safety protection plan must be established. References to these legal health and safety requirements can be found in Arts 5.1, 5.2 and 5.3 of the AFNOR NF P03-001 standard and in Art. 31.4 of the CCAG.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The contractor has two major obligations regarding the execution of the construction. Firstly, he must build in accordance with the instructions received, but also, and above all, he must comply with the construction rules and good industry practice (*les règles de l'art*).

These rules were partly codified in Book I of the Construction and Housing code, and can be found in the Unified Technical Documents (*Documents Techniques Unifiés* – DTU), which centralise the contractor's obligations. The rules which where codified have recently evolved, thanks to the promulgation in 2020 and 2021 of several decrees and ministerial orders following Order n°2020-71 of 29 January 2020.

In addition, in order to obtain the necessary administrative authorisations for construction, contractors are required to comply with building and fire safety standards. Fire precautions are defined by Art. L.141-1 of the Construction and Housing code and include fire prevention and fire evacuation facilities.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Retention clauses are possible under French law. In practice, they are frequent in the event of a delay in the completion of the work. The amount is often provided by the contract within the limit of 1/3000th of the price per day of delay, and 5% of the amount of the contract for private contracts, or 10% of the amount of the contract for public contracts.

The main purpose of the retention of a guarantee is generally to cover the repair of defects during the period of responsibility for defects. For this purpose, law n°71-584 of 16 July 1971 prohibits the retention of more than 5%.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bond guarantees are uncommon in the public sector, mainly because they are not provided for in the regulatory procedure of the CCP – although in practice they are sought after. However, performance bond guarantees are common in the private sector.

There are two main categories of performance bonds under French law: the standard guarantee (*cautionnement*) and the on-demand guarantee (*garantie autonome*). The standard guarantee (Art. 2288 of the Civil code) is a unilateral contract by which the person who guarantees an obligation binds himself to the creditor to fulfil this obligation if the debtor does not fulfil it himself. Pursuant to an on-demand guarantee (Art. 2321 of the Civil code), the guarantor undertakes, in consideration of an obligation undertaken by a third party, to pay a sum to the beneficiary of the guarantee on demand. In practice, it is rare to see fully unconditional on-demand guarantees. Performance bonds are generally closer to standard guarantees, although the drafting can vary from one project to the next.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Guarantees by parent companies for the actions of their subsidiaries (*garanties maison-mère*) are common. These parent company guarantees are more or less binding for the parent company, depending on the drafting, and can take the form of on-demand guarantees (*garantie autonome*), standard guarantees (*cautionnement*), or comfort letters (*lettre d'intention*).

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Retention of title rights are mainly provided by the mechanism of the retention of title clause (*clause de réserve de propriété*) (Art. 2367 of the Civil code). It must be contractually agreed by the parties at the conclusion of the contract.

However, suppliers of materials and subcontractors in the context of public works benefit from the privilege of *Pluviôse An II* for wages related to works on the site, and for materials and objects that have been used directly in the performance of the works. Moreover, the contractor has the right to withdraw materials and supplies that have not been incorporated into the building.

There used to be a specific privilege on the proceeds of sale of a building for the benefit of unpaid contractors and architects who worked on the construction of such building, in Art. 2374, 4° of the Civil code. However, this specific privilege was terminated as a result of the general reform of the law of security interests (ordinance n°2021-1192 of 15 September 2021).

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Construction contracts are supervised by the project manager (*maître d'œuvre*). The project manager's role is to design, coordinate and control the proper performance of the construction works. Usually in France the project manager (*maître d'œuvre*) is an architect. They act before the works begin, especially on the preliminary studies, and directs the execution of the contracts for the works.

Architects are not subject to any particular duty of impartiality. They work for their client (*maître d'ouvrage*), and instruct the contractor on behalf of their client. Architects have a legal obligation to advise the project owner, and other specific obligations may be freely stipulated in the contract. As the profession of architect is tightly regulated in France, an architect must also comply with rules of conduct. Some of these rules are legal, others purely professional.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

"Pay when paid" clauses may be included in the contract by the parties. Nevertheless, in the private sector, the main contractor must provide payment guarantees to his subcontractors, in the form of personal and joint guarantees, or delegation of payment. The employer will normally require the main contractor to provide evidence that such payment guarantees in favour of the subcontractors have been put in place.

In the public sector, for all contracts governed by the CCP, there is a direct payment mechanism. A subcontractor has the right, once it is declared and its conditions of payment have been approved, to be paid directly by the employer. Any waiver is void. Thus, "pay when paid" clauses are of limited interest.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be

paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Construction contracts generally contain liquidated damages clauses (*clauses pénales*), by which a party to a contract undertakes to pay its co-contractor a lump sum in the event of non-performance of its obligations.

These types of clauses can be combined with other contractual measures. The amount of liquidated damages set in the contract is at the discretion of the parties, although there are limits: the penalty must not be manifestly excessive or illusory/derisory. Otherwise, it could be revised by a judge, in compliance with Art. 1231-5 of the Civil code.

Public construction contracts generally contain liquidated damages clauses which are very similar to the one described above. The judge will also check if the penalty is not manifestly excessive or illusory/derisory.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

In public law, the CCP provides for two types of modification: conventional (review clauses as defined in Art. R.2194-1 of the CCP); and unilateral. As contracting authorities are public entities, they have prerogatives of public power (*prérogative de puissance publique*) allowing them, with the objective of general interest and public order, to modify the contract.

The counterpart of this modification right is that the contractor has the right to be indemnified for the additional costs. The contractor cannot oppose the unilateral modifications of the contract by the contracting authority, but he can request financial compensation for these changes.

Moreover, the modification cannot lead to a substantial change to the contract. In such case, the amendment would be irregular.

In private law construction contracts, amendments can only be made by the common agreement of the parties. Nevertheless, certain exceptions exist, notably in case of *force majeure* (Art. 1218 of the Civil code) and hardship (*théorie de l'imprévision*) (Art. 1195 of the Civil code), which allow a contract that has become excessively onerous to be unilaterally terminated.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

It is possible for the employer to omit work from the contract. In a public law construction contract, the employer will then have the right to maintain the financial balance of the contract. In a private law construction contract, the contractor's agreement will need to be obtained.

Omission of works is addressed in the two main contractual standards in France. Art. 15 of the CCAG states that below the 5% reduction limit for lump sum contracts and the 20% reduction limit for measurement contracts based on unit prices, the contractor may not oppose the reduction. Similarly, Art. 11 of the ANFOR NF P03-001 standard states that, in the event of a decrease in the volume of work, the contractor may not raise any claim if the decrease is less than 10% of the initial amount. Beyond that, the contractor is entitled to compensation.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Art. 1194 of the Civil code states that contracts bind the parties not only to what is expressly written, but also to all the consequences which equity, usage or the law give to them.

Thus, beyond correct performance of the contract, there are several implicit obligations to be complied with. Good faith in the pre-contractual phase, but also during the execution of the contract, is an example. Several obligations flow from the duty of good faith, such as the duty to inform.

Fitness for purpose is an implicit obligation in the decennial liability that applies to contractors (Arts 1792 of the Civil code), and this means that contractors need to guarantee that: (i) the works structure will not suffer damages; and (ii) the works will remain fit for purpose for 10 years from handover. Good faith and contractual loyalty, as well as the decennial liability rules, are also implied terms in public construction contracts.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Completion of the work is considered a firm commitment (*obligation de résultat*), different from a "best endeavours" undertaking (*obligation de moyens*), which means that the contractor must complete the work and cannot simply prove that he has done his best (or even everything possible) to achieve this.

Therefore, in most cases, financial penalties are imposed on the contractor if the delay is attributable to the contractor. Issues of time and penalties for exceeding time limits are contractually arranged by the parties (*freedom of contract*).

In order to escape liability, the contractor can generally claim under clauses such as *force majeure*. *Force majeure* is defined in Art. 18 of the CCAG and Art. 10.3 of the AFNOR NF P03-001 contractual standard. It includes bad weather, strikes and requisition orders.

There is no specific legal rule regarding concurrent delays. The consequences are generally apportioned between the parties depending on their respective responsibilities for the delay. Then, usually, flexibility is favoured in the interests of effective performance of the contract (e.g. in the form of extensions of deadlines and a delay management schedule).

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Contractors, architects and technicians participating in construction works are subject to a common liability regime, which is the "builders'" liability regime:

(i) the 10-year warranty (*garantie décennale*) of Art. 1792 of the Civil code, which creates an obligation to correct any damage that compromises the solidity of the work or that affects one of its constituent elements or one of its equipment elements, making it unfit for its purpose;

(ii) the two-year warranty (*garantie biennale*) of Art. 1792-3 of the Civil code, which guarantees the proper operation of any equipment forming part of the works; and

(iii) the one-year full completion warranty (*garantie de parfait achèvement*) of Art. 1792-6 of the Civil code, which creates a one-year defects liability period covering all defects to the works.

For any other dispute stemming from a private law construction contract, there is a five-year limitation period (Art. 2224 of the Civil code) from the date when the events causing the damage were known to the aggrieved party. This period can be contractually adjusted between one and 10 years.

For claims originating from public law construction contracts, the limitation period is four years to claim debts due from the public administration. It is also important to note that specific rules and time limits are provided in the CCAG.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Contractual provisions setting time limits for bringing claims under a construction contract are generally upheld by French courts. Such provisions include Art. 55 of the CCAG, which provides that any disagreement must give rise to a pre-contentious claim first, and when the disagreement is related to the project of final account, the pre-contentious claim must be sent to the public authority within 30 days after receipt of the project of final account by the constructor.

The correct application of such provisions is always checked by the administrative courts, and their potential breach is sanctioned by inadmissibility of the claim (*Conseil d'Etat*, 16 December 2009, n°326220).

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

There are no mandatory provisions under French law. Thus, it is the parties who contractually stipulate who bears the risk of unforeseen ground conditions.

In practice, it is often the project owner who bears the risk. Indeed, this is what happens when the contract does not specify who should bear the risk. The theory of unforeseen circumstances (*théorie des sujétions imprévues*) allows compensation to be obtained by the contractor for losses arising from unforeseen ground conditions in the context of public law construction contracts.

In private law construction contracts, the theory of unforeseen circumstances (*théorie de l'imprévision*) may play an equivalent role, in that it enables the contract to be renegotiated (modified or terminated) in the event of new circumstances, unforeseen at the time of execution of the contract, which have made the contract excessively onerous to perform.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

The situation is similar to that outlined in the previous question. There is no mandatory provision in the law. Thus, it is the parties who contractually provide who is to bear the risk of a change in law affecting completion of the works.

However, if the parties do not stipulate otherwise, in public law construction contracts, the administration must ensure a certain protection against changes in law. This is particularly the case thanks to the *fait du prince* theory. This legal theory provides that the administration's contractor is entitled to full compensation for the costs caused by a measure taken unexpectedly by the administration (that is also the employer), if this measure has disrupted the performance of the work contemplated in the contract.

In private law on the other hand, in the absence of a clause that would contractually create an obligation on the project owner, the contractor alone usually bears the consequences of a change in law.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

Background intellectual property generally remains with the original owner, while intellectual property developed for a project (foreground intellectual property) is either assigned or licensed to the project owner.

For such foreground intellectual property, it is the architect-designer/project manager (*maître d'oeuvre*) who owns the intellectual property. Art. L.112-2 of the Intellectual Property code protects plans, sketches and plastic works relating to architecture. The architect's work is part of their intellectual and moral heritage (whether they work for a private or public person).

The moral rights of the architect ensure the protection of their work (in particular, against unreasonable modification or destruction). The economic rights of the architect over their work allow them to grant onerous licences to the owners of the construction in order to possess the rights of use, representation and reproduction. While economic rights can be assigned, the moral right remains with the architect.

3.10 Is the contractor ever entitled to suspend works?

The exception of non-performance (*exception d'inexécution*) (Art. 1219 of the Civil code) allows the contractor to refuse to fulfil its obligations if the other party does not fulfil its own. This principle can also be found in most contracts, particularly in the case of non-payment. This is, for example, provided for in Art. 53 of the CCAG on late payment.

In public law, however, these possibilities are reduced because the public administration has exorbitant rights which reduce the contractor's ability to suspend the work. Such a suspension might be forbidden, as this could otherwise contravene the administration's obligation to ensure continuous performance of public services in the general interest.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

It is usual to see termination clauses in public and private law construction contracts, where termination must be preceded by a sufficient period of notice, often in the form of a formal notice or a termination notice.

In public law contracts, the public authority is always entitled to terminate the contract, at any time, on the grounds of general interest, subject to prior notice and the compensation of the constructor (Art. L.2195-3 of the CCP and Art. 49 of the CCAG).

The contracting authority is also entitled to terminate the contract in case of breach of contract by the contractor. Such termination is also generally subject to prior notice (Art. L.2195-3 of the CCP and Art. 50.3 of the CCAG).

Lastly, the administrative contract can be terminated by the public authority on the grounds of *force majeure* (Art. L.2195-2 of the CCP) and when specific events occur, such as the death of the contractor or bankruptcy after the receiver has agreed the contract(Art. 50.1 of the CCAG).

On the other hand, in public construction contracts, the contractor is never entitled to terminate the contract unilaterally, except in cases of extended *force majeure*. They will always need to obtain a prior authorisation from the contracting authority or the judge, even in cases where the termination is requested on the grounds of a breach of contract by the contracting authority.

In private law, contracts follow the principle of contractual freedom, but the parties may provide for termination clauses, often in the event of serious non-performance or non-payment (termination for fault). Termination may be unilateral (if provided for) or by mutual agreement of the parties. Art. 22 of the ANFOR NF P03-001 standard specifies the termination conditions.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

In public law construction contracts, the public authorities can always terminate the contract in the general interest. In this case, the contractor is compensated not only for the loss suffered, but also for the loss of profit (*bénéfice escompté*). However, no fault or negligence must be attributable to the contractor.

In private law construction contracts, the conditions and consequences of termination for convenience must be agreed contractually. Otherwise, article 1794 of the Civil code states that, for fixed price contracts, the contractor will be compensated for all his expenses, all his work and everything he could have earned from the project. In this sense, a claim for loss of anticipated profits could be entertained by a judge but not a loss of opportunity (*perte de chance*).

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

In French law, *force majeure* is provided for in Art. 1218 of the Civil code, and is defined as an event beyond the aggrieved party's control which could not be foreseen at the time of the conclusion of the contract and the effects of which cannot be avoided, preventing the performance of the obligation arising from the contract. The aggrieved party can claim for an extension of time, and either party can terminate in case of extended *force majeure*.

A contract which has become uneconomic might lead to a claim under the *imprévision* theory, under public or private law (Art. 1195 of the Civil code), rather than under *force majeure*.

3.14 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

All persons who are not parties to the contract are third parties (*tiers*). Two central principles in French law apply to third parties. First, the principle of privity of contract (*effet relatif*) (Art. 1199 of the Civil code), which provides that only the parties to the contract are subject to its binding effects, means that third parties cannot rely on the contract. The second principle to consider is the principle of opposability (Art. 1200 of the Civil code), which provides that the contract is opposable to and by third parties. Thus, the third party cannot demand the execution of the contract, but can rely on it to prove a fact.

There are also two situations where the third party is involved in the contract because they are a beneficiary: stipulation for third parties (*stipulation pour autrui*) (Art. 1205 of the Civil code); and promises to stand surety for another (*promesse de porte-fort*) (Art. 1204 of the Civil code).

In the context of the sale of construction works, any rights the seller has to claim against the contractor under the mandatory regime of decennial liability guarantee or under the general contractual liability regime are transferred to the buyer. The subsequent owner of a building will therefore be able to claim against the contractor, even if this is not expressly stipulated in the conveyancing agreement.

In public contracts, third parties can claim for the benefit of rights emerging from a "regulatory clause" (*clause réglementaire*) or any clause that directly infringes the third party's rights. The claim must be lodged within two months from the publication of the contract's award notice.

3.15 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Direct agreements are used in France as a form of security, particularly in the context of public-private partnerships (PPP) and concessions, i.e., in project finance transactions. They will essentially be direct agreements which: (i) involve the contracting authority in the subcontract between the project company and the EPC contractor; and (ii) involve the lenders in the concession or PPP agreement between the contracting authority and the project company. The practice of collateral warranties is not as prevalent as it is in common law jurisdictions.

One agreement used in French project finance transactions, in addition to direct agreements, is the tripartite agreement (*accord tripartite*). Its aim is to ensure compensation of the lenders and hedging banks if the concession or PPP agreement is cancelled or withdrawn before it has become effective, but after it has been signed and a fixed interest rate set.

3.16 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In French law, set-off (*compensation*) (Art. 1347 of the Civil code) makes it possible to extinguish debts between two persons who are reciprocally debtors and creditors of each other. It takes place as soon as it is invoked by the parties, on the date when the conditions are met, and without any maximum limit.

Set-off may be legal in origin if the debts are all due, fungible, certain, reciprocal and liquid. A set-off can be conventional and freely organised by the parties. It can also be ordered by a judge.

3.17 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

The duty of care as such does not exist in French law. There is, however, a general pre-contractual obligation to inform (Art.

1112-1 of the Civil code). This obligation to inform can neither be limited nor excluded. It remains a duty of the contractor during contractual performance. Thus, a party may be sanctioned on the basis of a failure to provide information, or on the basis of bad faith.

There are other duties of care during performance of the contract, particularly pursuant to consumer law and labour law. In recent years, French law has also developed the duty of vigilance of parent companies and ordering companies (law of 27 March 2017 n° 2017-399), which requires parent companies to take preventive measures and monitor the actions of subsidiaries with regard to compliance with respect for human rights, ethical and environmental issues, and civil liability. The concrete impact of these new legal provisions remains marginal in France at this stage.

3.18 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

In a situation of conflict between the parties and in the event that the clauses of the contract are ambiguous, it is the judge who decides by his sovereign power of appreciation, taking into account the parties' common intention.

In practice, the judge has two methods at his disposal: *in abstracto* assessment; and *in concreto* assessment. The first is to reconstruct, *in concreto*, the common intention of the parties, the reasons which led them to contract and the meaning they gave to the clauses of the contract. If this intention cannot be identified, the judge uses the *in abstracto* method and compares the interests of the parties with the average interests of individuals in the same situation. The aim is to find out what a reasonable person would have chosen in that situation. The judge then uses reference standards.

3.19 Are there any terms which, if included in a construction contract, would be unenforceable?

Although contractual freedom is the rule, some clauses may be unenforceable ("deemed unwritten" – *réputée non écrite*). This is particularly the case if the clause is contrary to French public order (*ordre public*) or mandatory rules (*lois de police*) within the meaning of Art. 3 of the Civil code. Examples include the decennial liability regime and the protection of subcontractors in accordance with law n°75-1334 on subcontracting, or all the rules related to public domain protection.

In addition, there are rules specific to contract law which prevent the inclusion of certain clauses. For instance, if an obligation is conditional, the condition cannot depend on the party who benefits from such obligation (*condition potestative*) (Art. 1304-2 of the Civil code).

3.20 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The extent of the architect's obligations depends on the nature of the contract with the project owner. The liability that applies is therefore the same as that for construction law in general and depends substantially on what has been contractually agreed.

The architect/designer will be bound by decennial liability in the same manner as the contractor and other builders. If the construction works structure is defective or if the works are no longer fit for purpose within the 10 years following handover, this could be the result of faulty design. The designer would then be responsible.

3.21 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

All parties involved in construction works (contractors or engineers) are bound by decennial liability (Articles 1792 of the Civil code). They must rectify or bear the financial consequences of rectification if, within 10 years from handover: (i) the works structure suffers damages; or (ii) the works are no longer fit for their intended purpose.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Traditionally, disputes are settled in court (civil court for private contracts and administrative court for public contracts). However, for reasons of time and cost, alternative methods of dispute resolution are becoming more common and are now preferred. These include, in particular, mediation and conciliation procedures. One of the aims of the CCAG and the AFNOR NF P03-001 standard is to avoid recourse to the courts by contractually setting out the methods of dispute settlement.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

The use of adjudication processes is developing in France, although there are no statutory adjudication processes yet, except for claims below €5,000 where the client is not a professional (decree n°2019-1333 of 11 December 2019). The same applies to interim dispute resolution, which makes it possible to avoid costly and slow litigation. Of particular note is the development of dispute review boards, which are a mainstay of FIDIC (*Fédération Internationale des Ingénieurs Conseils*) contracts, and can increasingly be seen in French standard construction contracts, such as: the CCAG for public works since 2009; the private construction contract NF P03-001 standard since 2017; and the construction subcontracts issued by the French federation of public works (*Fédération nationale des travaux publics*) since 2018.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

The use of arbitration tribunals is becoming increasingly popular in France, but it is still not in the majority and is not used specifically in public law contracts, even though article L.2197-6 of the CCP now authorises the use of these tribunals.

It occurs more frequently in private law contracts, and particularly in international contracts. Recourse to an arbitral tribunal may be stipulated by the parties in the contract (*clause compromissoire*) or decided by mutual agreement once the dispute has arisen (*compromis d'arbitrage*). The most frequently chosen arbitration rules are the rules of arbitration of the International Chamber of Commerce.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

As the arbitral tribunal is a private court, arbitral awards are effective if the parties comply spontaneously. If the award needs to be made enforceable, the *exequatur* procedure must be followed.

Under French law, there are only five situations in which *exequatur* is not granted (Art. 1520 of the Civil Procedure code): the arbitrators were not competent; the arbitral tribunal was set up irregularly; the arbitral tribunal exceeded the missions entrusted to it; the arbitral tribunal failed to comply with the adversarial principle; or the award is contrary to public order. These situations are similar to those mentioned in the New York Convention.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

In France, there is a difference between the civil courts for the private sector and the administrative courts for the public sector.

In case of private dispute, the civil court is competent to hear the case. The appeal is made to the Court of Appeal. Finally, the *Cour de Cassation*, the highest civil court, may be consulted after the appeal. Before the judge of first instance, it takes at least a year to obtain a decision, especially as the experts' reports that are required are often numerous and complex. From the introduction of an appeal to the Court of Appeal, it takes a year to a year-and-a-half to obtain a decision.

In the event of a public dispute (i.e., where one of the parties is the national government, a local government or an agency), such as a dispute regarding public works, the administrative court is competent to hear the case. Appeals are made to the Administrative Court of Appeal. Finally, the State Council (*Conseil d'Etat*), the highest administrative court, may be consulted after the appeal. Before the judge of first instance, it takes a year to obtain a decision. From the introduction of an appeal, it takes a year to two-and-a-half years to obtain a decision from the Administrative Court of Appeal.

However, there are emergency procedures, known as emergency interim proceedings (*référés*), which allow the claimant to obtain provisional decisions on the constitution of a provision, guarantees or restoration.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

A distinction must be made between European and non-European countries. The Member States of the EU are subject to common rules, in particular the Brussels I *bis* Regulation of 12 December 2012, which stipulates that the judgment of a Member State has effect in all Member States. No additional procedure is necessary: the foreign European decision has the authority of *res judicata* in France, although an additional regularity check can be requested.

For court decisions made outside the EU, the traditional procedure is that of exequatur. Three cumulative conditions are then required: the recognised competence of the foreign court; the conformity of the decision with French international public order; and the absence of fraud. Nevertheless, it is possible for the judgment to produce effects without binding recourse to the exequatur procedure (automatic recognition, probative force and *de facto* effect).

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