

Legal Impact Assessment

Building Defect
Insurance in Belgium
and France

Background

The Finnish Ministry of the Environment is preparing to reform the Finnish Land Use and Building Act. The planned reforms include revising sections on building with the aim of enhancing the quality of building and decreasing the number of building defects in private and public projects.

A preliminary survey has identified various explanations for the poor quality of building: Unclear division of responsibilities and liabilities – especially when subcontracting in chains or when projects involve non-professional builders – is one key reason. Additionally, the current liability periods are considered too short, and may contribute to the number of defects.

At the present, the Ministry is examining the possibility of implementing a model where the main contractor would be liable for all the subcontractors. The expectation is that this system would lead to an increase in demand for building insurances. Therefore, the Ministry is looking to assess possible social and economic implications of the planned amendments by conducting a review in countries where building insurance is more widely used.

As part of this process, the Finnish Ministry of the Environment has asked for a memorandum providing an overview on the specific requirements under Belgian and French law related to building defects, the responsibilities associated therewith and insurance obligations.

Legal Impact Assessment – Belgium

This memorandum will cover the following questions:

- What are the different parties involved in construction projects and their liabilities?
- What are the local practices and legislation regarding building defects?
- What are the local practices regarding construction warranties and their validity period?
- What type of impacts have the aforementioned practices/regulations had on the construction industry?
- What type of insurance requirements are there for building projects?

We will analyze each question separately in the light of Belgian law and practice. We thereafter provide some specific legislation and rules that govern the contracting of construction works.

A. What are the different parties involved in construction projects and their liabilities?

Different stakeholders are involved in building defect, notably:

- Actors directly involved in the construction project;
- Subcontractors;
- Safety coordinator; and
- Insurance companies.

The actors directly involved in a construction project can be defined as the project owner, the project ownership assistant, and the service contractor or the real estate developer.

It is common that the project owner or the actors directly involved in the construction project hires subcontractors to perform part or all of the building works. In case subcontractors are being engaged by the service contractor itself, the latter will in principle be liable for the mistakes of the subcontractors. The project owner can address itself directly to the service contractor for compensation in case of damage. It is up to the service contractor to get compensation from the subcontractor that caused the damage.

In case all contractors are being engaged directly by the project owner, each contractor will be individually liable towards the project owner. The latter should then make claim against the concerned contractor in case of damage.

- Safety coordinator

The intervention of a safety coordinator is mandatory for all construction sites where more than one contractor is working, even if these contractors never come to the site simultaneously. Self-employed people and utility companies (who, for example, connect the water pipes) are also considered as contractors. This regulation applies to both new construction and renovation work. The safety coordinator must mitigate the risk arising from the interaction of different contractors.

Two different "type" of safety coordinators must be involved: a so-called "*design coordinator*" and a "*realization or implementation coordinator*".

The design coordinator focuses on coordinating the activities and desiderata of the intervening parties in the design (client, architect, etc.). The realization coordinator focuses on coordinating the simultaneous and consecutive activities on the construction site.

Coordination aims to ensure that clients, designers or contractors take appropriate preventive measures to ensure that work is carried out in a safe and healthy manner when constructing a new

home or when maintaining or repairing an existing home. Both coordinators are also responsible for providing advice.

For buildings with a total surface of less than 500 m², a more flexible regime is provided that allows contractors themselves to perform the function of coordinator.

- Architect

The architect has a central role in the entire building process. Besides in the design phase of the project, an architect will be involved during the entire construction process whereby he must monitor the progress but also control whether the works are being done in accordance with the plans, quality requirements, legal norms, and the specifications. He must regularly inspect the works carried out by the contractors, detect execution errors and resolve these together with the responsible contractor.

Once the contractor is of the opinion that his work has been completed, he will request the provisional acceptance of his works. Prior to such acceptance, the project owner will inspect the works to assure that these have been done in accordance with the plans, specifications, standards, etc. and no mistakes or damages are detected. If mistakes are detected, a detailed report will be made thereof. The contractor will be obliged to correct all shortcomings, damages, etc. The final delivery of the works takes place one year after the provisional acceptance on condition that the contractor has corrected all shortcomings. The architect plays an essential role during the acceptance phase of the works as he has the technical knowledge required to assist the project owner in inspecting the delivered work.

- Insurance company

Insurance companies will be involved only when building defects are detected and the liability of the contractor is evaluated. In case of a conflict, they might require to be involved in any court case to assure that their interest is protected.

Considering the risks associated with large construction projects, insurance companies impose different safety standards to prevent accidents. They might also inspect construction sites to assure that the (legally) imposed standards are respected. They can impose additional measures if needed.

B. What are the local practices and legislation regarding building defects?

From a Belgian legal perspective, different legislation and local practices apply regarding building defects.

The basis of the liability of architects and contractors is formed by the articles 1792 and 2270 of the Belgian Civil Code that provide a ten-year liability. This liability regime has been introduced not only to protect constructors but also to safeguard public safety. The ten-year liability is consequently of public order and cannot be deviated from.

Besides the ten-year liability regime, the liability of architects and contractors can also be based on other legal grounds. Article 1147 of the Belgian Civil Code provides a guarantee against hidden defects in the building based on non- or wrongful execution by the architects or/and the contractors of the works.

Article 1641 et seq. of the Belgian Civil Code allow buyers of a building to hold architects and/or contractors liable for hidden defects of a building that make it unfit for the use it was intended for, or that reduce its usability to such an extent that the buyer would not have acquired it, or at least not at the price that was paid.

Specific legislation also applies in case a house, apartment, etc. is "bought on plan" meaning that a building project is proposed by a promotor whereby candidates can then buy a house or apartment as proposed on the plans developed by the promotor. In such case, the Breyne Act of 9 July 1971 ("*Loi Breyne du 9 juillet 1971*") will regulate all the contractual aspects of the construction. The Breyne Act, which contains various mandatory provisions, regulates, in the interest of the purchaser, certain

aspects of the contract of a sale that takes place based on predefined plans (i.e. for apartments to be built) and turnkey contracts (i.e. single-family houses under construction).

C. What are the local practices regarding construction warranties and their validity period?

C.1. The ten-year liability of architects and contractors

C.1.1. Conditions for the application of the ten-year liability

The legal basis for the ten-year liability of architects and contractors is laid down in the articles 1792 and 2270 of the Belgian Civil Code. Both articles provide that the architect as well as the contractor(s) are liable during a period of ten years after the completion of the works.

This liability is a contractual liability so that it can only be invoked by the principal of the works, i.e. the client. Third parties can thus not invoke the ten-years liability against a contractor or architect. They shall have to base their claim on extra-contractual liability.

The liability in principle affects all contractors that are involved in the building process (i.e. architects, engineering bureaux, subcontractors, etc.). However, the client will only have a claim against the architect and principal contractor it has signed a contract with. The ten-year liability will thus be applicable towards subcontractors but can only be invoked by the principal contractor and not the client itself. In case of defects have been caused by a subcontractor, the client will have to address itself to the principal contractor for compensation. The latter will then on its turn make a claim against its sub-contractor to get compensation for the damages paid to the client.

In case the principal/client wants to hold a subcontractor directly liable, it will have to base the claim on extra-contractual liability.

There are four conditions for the application of the ten-year liability:

- there must be a construction contract in place;
 - for a building or "major real estate work";
 - the defect must affect the robustness of the building; and
 - the fault of the contractor or architect must be demonstrated by the client.
- Construction contract

The ten-year liability will only be applicable insofar a construction contract has been signed.

This condition implies that agreements for the purchase of real estate are not covered by this ten-year liability of contractors and architects. In case, for example, a person would buy a house that was constructed by the contractor itself, the buyer will not be able to invoke the ten-year liability and will have to base its claim on other legal grounds. There is only one exception for the buildings that fall within the scope of the Breyne Act. According to this act, the buyer of the building is equated with the contractor for the application of the ten-year liability.

- Major work - structure

The ten-year liability only applies to the construction of buildings or major works in real estate. The following are thus covered: the construction of houses, major home improvements, office buildings, sports complexes, dikes, metal structures, pylons, etc. It is also accepted that the ten-year responsibility extends to the main components of the building that guarantee its "durability over time", to the elements that constitute its structural work, such as frames, roofs, walls, etc.

It should be noted that the reference to the notion of “*major structure*” is broader than that of a building, it includes an installation for heating, water distribution, electricity, sewerage, etc.

- A serious defect

The defects must be serious and pose a threat to the robustness of the building in the short or long term. Any defect that significantly affects the stability of the building or one of its major components will be considered serious. Consideration must also be given to defects that may, even gradually, affect the strength or stability of a structure.

Note that these principles are applied with the necessary flexibility by the Belgian courts to protect to clients. Defective materials that compromise the stability of a structure have led to liability on this ground: the wrong composition of the concrete floor, defects in the drain pipes, humidity due to porous stones, etc. all fall within the application of the ten-year liability.

In regard to soil defects, the architect (or engineer) could be held liable since his/her primary task is to study the quality of the soil and ensure that it is suitable to support the planned property complex. In fact, it is not so much a matter of “soil defect” as it is a matter of “a design defect due to the inadequacy of the foundations considering the nature of the soil”.

C.1.2. Starting point of the ten-year liability

The starting point of the ten-year liability is the date of final acceptance of the works, i.e. the date on which the client/principal accepts the proper execution of the works. This is in principle a formal process so that the date thereof can be exactly defined.

C.1.3. Exemption of the ten-year liability

The ten-year liability of architects and contractors is considered of public order so that it cannot deviated from. Any provision limiting this liability is consequently to be considered null and void.

As it is of public order, the liability of the architect or contractor remains in place even in case the defect is due to the intervention of the client/project owner.

To invoke a mistake or intervention by the client, the architect or contractor will have to demonstrate the following:

- that the damage is due to a lack of maintenance, despite the advice given by the contractor; and
- that he has intervened in the execution of the work despite the warnings of the architect or contractor. In case such intervention by the client can be demonstrated, the contractor will in principle be dismissed from liability; or
- that he has ignored the contractor's warnings and has deliberately taken risks by making unwise choices. If this case is upheld by the judges, the manufacturer's liability will only be partially released

Furthermore, the architect or contractor may also try to be exonerated from responsibility by proving that the damage was caused by persons that are not allowed to enter the site (e. g. malicious damage). This will partially depend also on whether sufficient measures were taken to stop third parties from entering the construction site.

C.2. Contractual liability under ordinary law for hidden defects based on Article 1147 of the Civil Code

C.2.1. Conditions for the application of contractual liability for hidden defects

The conditions for applying liability for latent or hidden defects differ from those for ten-year liability, although some of them are nevertheless common. These different conditions are discussed below.

- Construction contract

Liability for hidden defects is based on the wrongful performance under a construction contract.

- A hidden defect

This defect must not, unlike ten-year liability, have a certain degree of seriousness. However, it needs to constitute a defect in the design or construction of the building.

For a defect to qualify as a hidden defect, it must be a defect that could not be detectable at the time of acceptance of the works. The Belgian supreme court ruled in this respect that the contractor, after acceptance of the works, remained liable for hidden defects as these cannot be considered as accepted by the client considering their hidden nature.

The hidden defect is thus the one that even after a careful examination cannot be detected by a prudent and diligent person, possibly assisted by an independent expert skilled in detecting technical issues. The hidden nature of the defect will be evaluated by a judge, in particular considering the concrete technical knowledge of the project owner.

Liability for hidden defects is nothing other than an action under common liability law resulting out of the wrongful or non-performance of the architect or the contractor.

C.2.2. Who can bring the action for contractual liability?

The action for hidden defects is to be introduced by the person who engaged the architect or contractor. It is up to the contracting party to prove the existence of a defect affecting the work, i.e. a defect in the contractor's performance of its obligations, the effect of which is revealed after the final acceptance of the works.

It results from the combination of the articles of the Civil Code as well as the fundamental principles of the general theory of obligations that the common law liability action is open to the contracting authority, its successors or and its creditors.

C.2.3. Starting point of the contractual liability

The Court of Cassation has specified that the action for liability for hidden defects must be initiated within a reasonable time after the discovery of the defect. This is also to avoid that the damage resulting from the defect would not increase further. What is to be considered as reasonable will depend on the exact circumstances of the case.

C.2.4. Exemption of the contractual liability

Liability for hidden defects is, unlike the ten-year liability, not a matter of public order and can thus in principle be waived by the parties.

Note, however, that the Act of 6 April 2010 on market practices and consumer protection ("*Loi du 6 avril 2010 relative aux pratiques du marché et à la protection du consommateurs*") sanctions unfair terms and conditions that release contractors from liability for fraud, gross negligence or any failure to perform an obligation consisting of one of the main deliveries under the contract.

C.3. Guarantee for hidden defects based on Article 1641 et seq. of the Civil Code

C.3.1. Conditions for the application of guarantee of the seller

- A defect

This guarantee can, as well as the ones mentioned above, be implemented in the context of public and private constructions projects.

The Civil Code defines a hidden defect affecting a product sold as being the one that makes it unfit for the use it is intended for, or that reduces its use to such an extent that the buyer would not have acquired it if he had known the defect, or at least at a much lower price.

Such a defect does therefore not only constitute a defect that is clearly not inherent to the product (for example, a serious moisture problem) but also a so-called functional defect, i.e. one that does not

affect the product as such but its use for which the buyer had acquired it. To be able to make use of article 1641 of the Belgian Civil code the defect must thus be hidden, sufficiently serious, and exist (at least its origin) at the time of the purchase.

Examples of such hidden defects are the sale of a building for which no valid building permit was obtained or of which the conditions of the permit were not respected.

- Hidden defect

A hidden defect is a defect that is not visible or not perceptible. It is a defect that the buyer did not know and should also not have known at the moment of the purchase. It is a defect that could not be detected at the moment of delivery but only following the use, disassembling, research, etc. It is therefore a defect that cannot be discovered by a careful but normal investigation immediately after delivery, considering the technical knowledge of the buyer, the nature of the product and the circumstances of the purchase.

The liability for hidden defects allows the buyers of a building to address the contractor directly even though there is no contractual relationship between the buyers and the contractor. They will thus be able to summon the contractor directly for hidden defects of the building.

C.3.2. Who can bring the action for the guarantee of the seller?

The right of action under article 1641 of the Belgian Civil code is of a contractual nature so that in principle only the purchaser can invoke this article.

C.3.3. Starting point of the guarantee of the seller

A purchaser who discovers a hidden defect must take legal action within a reasonable time so that it is still possible to examine the existence of the hidden defect and its implications on the product (i.e. building).

Belgian case law typically considers that the time limit runs from the date of completion of the property if the use thereof makes it possible to detect the defect. Otherwise, the time limit will start from the date of discovery of the defect by the purchaser.

C.3.4. Exemption of the guarantee of the seller

Article 1641 of the Belgian Civil code is not considered of public order so that it can be contractually deviated from. It should be noted in practice that the vast majority of acts of sale contain a clause exempting the seller from liability for hidden defects.

D. What type of impacts (especially financial ones) have the aforementioned practices/regulations had on the construction industry?

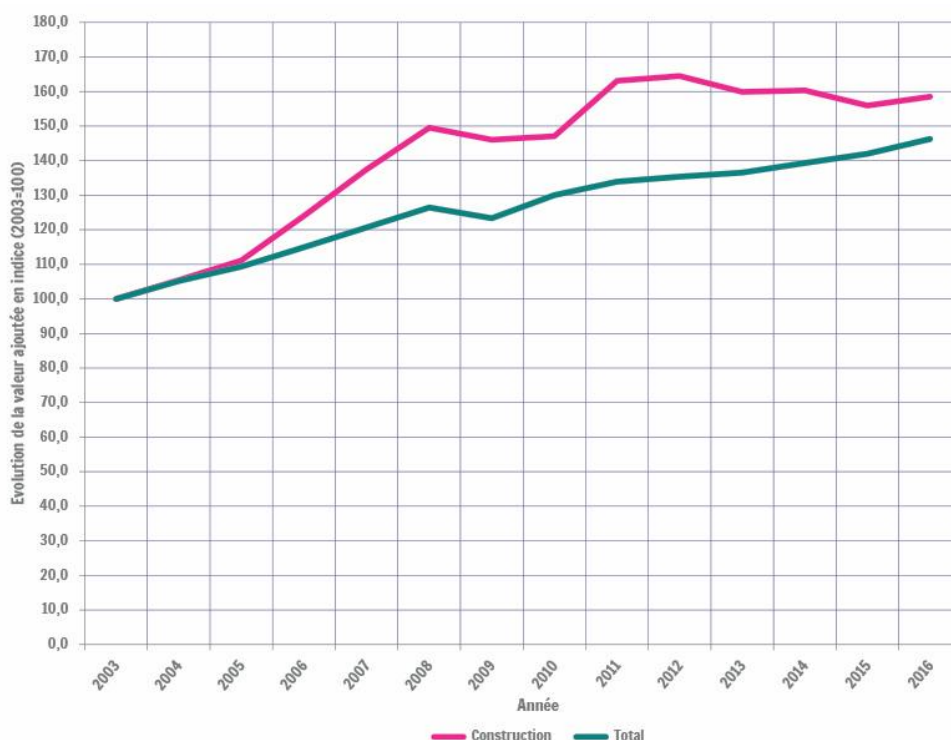
It is difficult for us to estimate the impact of the regulation set out above. It is however clear that the obligations of contractors and architects are increased leading to more cases whereby their liability is being questioned. This has logically an impact on the insurance fees that must be paid but also on the building costs that increase considering the higher risks.

The various obligations that have been imposed by the authorities for construction sites and the protection of the persons working on these sites, have had a positive impact on work accidents but have further led to an increase of the building costs.

In accordance with the below statistics, the construction sector generated 4,769.9 million euros of value added in 2016, so the construction sector represents 5.4% of total value added in Wallonia. In comparison, this sector generated 5.3% of the country's value added.

Value added is an economic indicator that measures the wealth created by a company, sector of activity or economic agent while the construction sector, on the other hand, is defined as follows: building construction, real estate development, road and rail construction, network and line construction, other civil engineering construction, demolition and site preparation, electrical, plumbing and other installation work, finishing work, other specialized construction work.

We can therefore observe that the construction sector is in full swing. However, no statistics are available to date on the implementation of the new insurance legislation in this sector.



E. What type of supervision takes place during or after the construction project?

As indicated above, a safety coordinator must be appointed for each construction project. They have to be involved as of the design phase so that sufficient safety measures are being imposed avoiding accidents.

Belgium has furthermore transposed the EU Directive 92/57/EEG.

F. Insurance requirements?

F.1 Ten-year liability insurance

Belgium introduced, in 2017, a compulsory ten-year liability insurance to be subscribed by contractors, architects and other parties involved in the construction of real estate work (i.e. "*Loi du 31 mai 2017 relative à l'assurance obligatoire de la responsabilité décennale pour les entrepreneurs, architectes et autres intervenants du secteur de la construction de travaux immobiliers*").

The new legislation puts an end to the discrimination identified by the Constitutional Court in its decision No. 100/2007 of 12 July 2007. In that judgment, the Court noted that discrimination "is not, however, the consequence of the insurance obligation imposed (on architects) by the contested law but rather of the absence of a comparable obligation applicable to the "other parties involved in the deed of construction". Before this legislation, an insurance was only required for the architects and not the other parties of a building project. Belgian Constitutional Court judged that it was discriminatory.

The insurance aims to cover the ten-year liability of contractors and architects covered by this law (see point B1). Other grounds for liability (for example, for hidden defects) are, in principle, not covered. They may, however, subscribed more typical insurances such as the civil liability insurance.

The aim of the insurance is to protect consumers in the event of the insolvency of the parties involved on the construction sites. In the event of a ten-year liability claim, the insurance policy should in principle pay out faster than in the case of a legal claim, since it is not necessary to find out who is responsible for the compensation. Depending on the insured amount, the policy is also intended to cover the costs of reconstruction in the event of a construction fault.

The ten-year liability insurance must be subscribed if the following three conditions are being met:

- It relates to work on buildings, or related intellectual performance (i.e. architectural plan);
- The building is mainly intended for residential purposes (it does not apply to industrial or office buildings);
- The works require the intervention of an architect.

The insurance can be a global policy covering all the works a contractor is developing or can be an insurance that is entered for a specific project.

A global policy can also be subscribed per project whereby all contractors that will be active for the project are covered. The participants to the project will then have no obligation to sign an individual insurance.

As proof that a valid insurance has been signed, the contractor must submit a certificate issued by its insurance company to the project owner, the architect, the Belgian Social Security Office and, at first request, the agent authorized to supervise the application of the law.

Compared to the French scheme, the insurance obligation remains limited. The law only applies to dwellings located in Belgium and intended mainly for individual housing. Buildings such as student rooms, monasteries, hospitals, civil engineering works do not fall within the scope of the law.

As mentioned above, it is only compulsory to insure its ten-year civil liability. Furthermore, only specific risks must be insured that mainly relate to the strength and the stability of the building. Unsuitability of the construction is, for example, not to be insured.

Some claims are excluded by law, such as cosmetic damages, or material damage of less than 2,500 euros.

Architects, contractors and other service providers who do not comply with this legislation may be fined between 26 and 10,000 euros. This applies not only to the non-subscription of compulsory insurance, but also to non-compliance with the formalities associated with the insurance subscription.

F.2 Insurance for all construction site risks (“ABR”)

This insurance covers the damage to the construction site, the works and the materials that occur during the construction or the renovation of a building. It in principle covers:

- Material damage to the building due to the works or the maintenance;
- Theft on the construction site, loss and damage to the construction works;
- Accidents on the construction site.

The ADR insurance does not cover physical injuries of employees as this is in principle covered by the labor accident insurance.

The ADR insurance is typically extended for the coverage of damage towards third parties.

G. Registration requirements for contractors and architects?

G.1 Recognition of contractors for public works

To be able to carry out work of a certain nature and size for a public authority, the contractor must be recognized by the Belgian authorities and meet a number of conditions. The recognition is granted by the competent regional minister on the advice of the federal recognition committee. The conditions for recognition mainly relate to:

- Technical competence;
- Financial capacity;
- Professional integrity.

Once the recognition is obtained, the contractor will be able to participate to public tenders and, thus, public projects. The recognition is valid for a period of 5 years after which it must be renewed.

The contractors are subdivided into various categories depending on the size of the works they can subscribe for and the (sub)categories in function of the specific nature of the works. Once a recognition is granted in a certain category or sub-category, the authorities can trust that the approved contractor is technically competent to perform these works and that it is a sound financial company.

The requests for recognition are being reviewed and judged by a specific Commission for the recognition of contractors. This commission provides advice on:

- All requests for recognition;
- Renewal of a recognition;
- The equivalence of recognitions by foreign authorities;

- All requests for deviations.

G.2 Architects

The title of “architect” is a protected title implying that only persons that have a valid master degree in architecture engineers with a specialization in architecture can profile themselves as architects. Penal sanctions are provided for people using the title while not having a valid degree.

Specific requirements also apply for architects organized under a company. It is so f. ex. required that all directors of the company wear the title of architect and are registered with the “*Orde van Architecten*” being the professional organization of architects. The core task of this organization is to draft the professional rules (i.e. deontological rules) for architects, and to ensure that they are properly observed. The Order of Architects therefore monitors the qualitative practice of the profession of architect. In addition, it supervises the access to the profession and more specifically the control of the compulsory internship.

H. Temporary partnerships

For large construction works (i.e. apartment buildings, office buildings, hospitals, etc.) whereby various contractors are involved, temporary partnership are typically being formed. These are then established for the duration of the project and are afterwards liquidated. This, in principle, facilitates the organization of large projects as the realization thereof will be coordinated by one central body supervising the works. The entire structure and management can be tailored to the needs of the projects.

Such partnership is formed by a contract whereby the roles, responsibilities, contribution of each of the parties, financing, division of liability, functioning, managing organs, intellectual property rights, etc. are regulated.

I. The well-being of the employees in the performance of their work

The Belgian legislator has transposed the EU Directive 92/57/EEG of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile constructions sites.

These rules provide that in the execution of the project, the client, the project supervisor responsible for execution, or the project supervisor responsible for supervision of execution, are responsible for organizing the coordination of the activities of all persons present on the construction site and for the cooperation between them. They are also responsible for designating a safety and health coordinator during the implementation of the entire project.

The first project supervisor responsible for execution who operates on the site should serve prior notice to the competent authority that a construction site is being set up, if this is required.

All contractors must comply with the safety and health provisions laid down by the Belgian Royal Decree. This obligation applies to employees, to self-employed persons and to the employers who themselves work on the site together with their employees.

The project supervisor responsible for execution is at the top of the pyramid. He has the following obligations:

- he must comply with the safety and health requirements himself
- he must ensure that they are complied with by all contractors and subcontractors involved in executing the project, even if he only has an indirect link with these contractors or subcontractors
- he must also ensure compliance by the workers.

The contractor has the following obligations:

- he himself must comply with the safety and health requirements
- he must ensure that his own direct subcontractor complies with them
- he must also ensure that his subcontractor's subcontractors and every other subcontractor down the line comply with them
- he must ensure that the workers comply with them
- he must ensure that anyone posting workers to him complies with them.

The subcontractor has the following obligations:

- he himself must comply with the safety and health requirements
- he must ensure that his own direct subcontractor complies with them
- he must ensure that his own workers and his direct subcontractor's workers comply with them
- he must ensure that anyone posting workers to him complies with them.

The law also provides in the possibility to set up a coordination structure on the construction site. This structure may involve, among others, the project supervisors, representatives of the contractors and of the workers, and prevention advisers. The setting-up of such a structure depends on the scope of the construction site and the degree of the risks. The intention is that only large-scale construction sites are required to establish such a coordination structure.

Legal Impact Assessment – France

In France, Building defects are addressed at different points in time:

- On the one hand, as a precautionary measure, building defects are handled upstream by carrying out on-site inspections in case of major construction works.
- On the other hand, building defects are handled downstream as well, after the completion of the construction works, by ensuring the owner (« *maître d'ouvrage* ») that the financial implications of structural damage which involve carrying out appraisals are borne by an insurance company.

In this respect, a legal regime of liability and insurance obligations are in effect. These are regulated by the French Construction and Housing Code (*hereinafter the "CHC"*), as well as the French Insurance Code.

That being said, please find below our answers to each of the questions included in the scope of work.

1. What are the roles of the different parties involved?

Different stakeholders are involved in building defect insurance, notably:

- actors directly involved in the construction project,
- subcontractors,
- companies controlling the works performed,
- insurance companies.

1.1 Actors directly involved in the construction project

Under French law, several types of agreement may be entered into regarding a construction project, depending on the level of involvement of the party in the project.

Please find below a table summarizing the different actors and their main characteristics:

Project ownership assistant (« <i>assistant à la maîtrise d'ouvrage</i> »)	Owner's representative for the building works (« <i>maître d'ouvrage délégué</i> »)	Service contractor (« <i>locateur d'ouvrage</i> »)	Real estate developer (« <i>promoteur immobilier</i> »)		
<ul style="list-style-type: none"> - Assistance and consulting missions such as: <ul style="list-style-type: none"> o administrative matters o financial matters (draft budget, estimated costs, valuation etc.) o technical matters (defining the specifications, performing studies, etc.) 	<ul style="list-style-type: none"> - Acts in the name and on behalf of the owner throughout the duration of the construction project in various matters such as: <ul style="list-style-type: none"> o administrative matters o financial matters (establishment of the financial timetable, control and signing of the expenditures) o technical matters (drawing up of preliminary studies (« <i>études préliminaires</i> »), drafting of 	<ul style="list-style-type: none"> - All constructors (e.g. project supervisor, construction company) are considered as service contractors <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%;"> Project supervisor (« <i>maître d'œuvre</i> ») <ul style="list-style-type: none"> - Intellectual services such as: <ul style="list-style-type: none"> o Design of the project o Drawing up of plans o Listing of the materials to be used o Assistance in selecting the construction company </td> <td style="width: 50%;"> Construction company (« <i>société de construction</i> ») <ul style="list-style-type: none"> - Material missions such as: <ul style="list-style-type: none"> o Performance of the works o Supply of equipment and materials </td> </tr> </table>	Project supervisor (« <i>maître d'œuvre</i> ») <ul style="list-style-type: none"> - Intellectual services such as: <ul style="list-style-type: none"> o Design of the project o Drawing up of plans o Listing of the materials to be used o Assistance in selecting the construction company 	Construction company (« <i>société de construction</i> ») <ul style="list-style-type: none"> - Material missions such as: <ul style="list-style-type: none"> o Performance of the works o Supply of equipment and materials 	<ul style="list-style-type: none"> - Full control of the project such as: <ul style="list-style-type: none"> o Development of a construction program o Performance of all administrative formalities o Execution of the construction through service contractors
Project supervisor (« <i>maître d'œuvre</i> ») <ul style="list-style-type: none"> - Intellectual services such as: <ul style="list-style-type: none"> o Design of the project o Drawing up of plans o Listing of the materials to be used o Assistance in selecting the construction company 	Construction company (« <i>société de construction</i> ») <ul style="list-style-type: none"> - Material missions such as: <ul style="list-style-type: none"> o Performance of the works o Supply of equipment and materials 				

	<p>contracts, assistance in selecting the construction companies and/or the architect, signing of contracts)</p>	<ul style="list-style-type: none"> o Supervision of the works o Verification of works' compliance <p>Are considered as project supervisors: architect¹, engineering; consultants (« <i>bureau d'étude</i> »), etc.</p>	
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1.2 Subcontractors

It is common that the main contractor hires subcontractors to perform part or all of the building works.

1.3 Companies controlling the works performed²

Other than the actors directly involved and their subcontractors, technical control offices (« *bureau de contrôle technique* »), also play an active role in construction projects and related building defects.

Indeed, in some cases, French regulations provide technical control procedures at the design stage but also during the construction works.

These technical control offices are private companies approved by the Ministry in charge of construction, (e.g. Socotec, Dekra, Veritas...). They are tasked with working towards the prevention of the different technical difficulties which may arise.

Technical control is mandatory for certain works and more specifically for the following buildings³⁴:

- establishments open to the public classified into categories 1, 2, 3 and 4;
- buildings whose last floor level is located more than 28 metres from the highest floor level accessible to public emergency services vehicles and fire engines;
- buildings, other than industrial buildings;
 - o with cantilevered elements spanning more than 20 metres or beams or arcs spanning more than 40 metres, or
 - o with parts buried more than 15 metres below the ground or foundations of more than 30 metres deep, or
 - o requiring underpinning operations or support work for adjacent works of more than 5 metres high;
- buildings situated in areas with a seismic activity level of 4 or 5 whose last level floor is located more than 8 metres from the ground;
- buildings whose defect would present a high risk for persons and the same risk due to their socio-economic importance or buildings whose operation is primordial for the purposes of civil security, defence or maintaining public order;

¹ Article 10 of the law of July 3, 1977: architect must be registered at the Order of Architects. They also have to take out obligatory ten-year insurance as they explicitly fall into the scope of article 1792 et seq. of the French Civil Code.

² Article L.111-23 et seq. and R.111-38 et seq. of the CHC

³ Article R.111-38 of the CHC

⁴ As far as technical control state procurement contracts are concerned, decree n°99-443 of May 28, 1999 also refers to general technical specifications applicable to such technical control

- wind turbines whose mast and nacelle heights above the ground are greater than or equal to 12 metres.

Mandatory technical control concerns the solidity of the servicing work, foundations, structural work, fencing, roof covering and elements of equipment which are inseparable from these works, as well as the safety conditions of the persons in the buildings⁵.

It should be noted that when technical control is not mandatory, the building owner may do so at his own initiative.

1.4 Insurance companies

Lastly, as far as building defect insurance is concerned, insurance companies indeed play a major role.

However, in practice, insurers do not ask to be kept informed about each site, which would not be feasible. As a result, they do not supervise building projects.

⁵ Article R. 111-39 and R. 111-40 of the CHC

2. What are the local practices regarding construction warranties and their validity period?

The law provides for several warranties which are due after the completion of the building. In addition, parties are free to negotiate and conclude additional warranties.

Please find hereinafter a table summarizing the main characteristics of each legal warranty:

Warranty	Scope	Duration	Starting date
Warranty of apparent defects (« <i>garantie des désordres apparents</i> ») ⁶	It covers the repairs for defects in the construction or lack of conformity when apparent	Until the latest date between: - approval of the work - expiration of a period of one month after the purchaser has taken possession The purchaser must bring the action within the year after said latest date	
Warranty of sound insulation (" <i>garantie phonique</i> ") ⁷	It covers the works required to comply with legal and regulatory provisions	1 year	As from the date on which the purchaser has taken possession
Warranty of perfect completion (« <i>garantie de parfait achèvement</i> ») ⁸	It covers the repairs of all the shortcomings indicated either through reservations mentioned in the document recording the acceptance or by way of written notice	1 year	As from the date of the acceptance of the work
Warranty of good functioning (« <i>garantie de bon fonctionnement</i> ») ⁹	It covers the damage affecting the other elements of equipment (which are not covered by the ten-year warranty)	2 years	As from the date of the acceptance of the work
Ten-year warranty (« <i>garantie décennale</i> ») ¹⁰	It covers the damage, even those resulting from a defect of the ground, that compromises the stability of the building or that, by affecting it in one of its essential component parts or one of its complementary elements, rendering it unsuitable for its purposes	10 years	As from the date of the acceptance of the work

It should be noted that the ten-year warranty ("*garantie décennale*") is the cornerstone of the building warranties in France. It takes place in parallel to a structural damage insurance ("*assurance dommage-ouvrage*"). They both have to be taken out from an insurance company.

Please find below a deeper analysis of said warranties.

⁶ Article L. 261-5 of the CHC / Article 1648 of the French Civil Code

⁷ Article L. 111-11 of the CHC

⁸ Article 1792-6 of the French Civil Code

⁹ Article 1792-3 of the French Civil Code

¹⁰ Article 1792 et seq. of the French Civil Code

2.1 Ten-year warranty (« garantie décennale »)

The ten-year warranty is governed by articles 1792 et seq. of the French Civil Code, articles L. 241-1 et seq. of the French Insurance Code and by various standard clauses (articles A. 243-1 et seq. of the French Insurance Code).

Essentially, this warranty establishes a presumption of liability: builders are deemed to be automatically responsible for certain damage affecting their work. This is a public policy warranty.

ü Who has to take out this insurance?

This insurance must be taken out by all builders (“*constructeurs*”). The following are considered to be builders:

- Any architect, contractor, technician or other person bound to the building owner by a contract for services;
- Any person who sells, after completion, a work which he built or had built;
- Any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a services provider (e.g.: real estate developer, individual house builder).
- The builder of a work or part of a work or of certain elements of equipment.

Among the stakeholders listed in question 1:

- Service contractor and real estate developer bear a ten-year liability,
- Technical control offices also bear a ten-year liability which may be called into play if damage occur, even though its mission consisted in inspecting the solidity of the building.

Subcontractors are not subject to said warranty as they have no direct link to the building owner. Nonetheless, they remain liable towards the main contractor and as such, it is common for the main contractor to require that subcontractors provide such insurance.

In the event of a damage, the building owner may seek the liability of any stakeholder who has to take out this insurance (e.g. architect, main contractor, technical control office). It is worth noting that each party may also act against the others (for instance if the building owner activated only the architect’s insurance, the latter will seek the liability of the other parties which have contributed to the damage).

Nonetheless, there are various strictly defined exceptions which escape this insurance obligation.

Firstly, the State will not be required to take out this insurance when building for its own use¹¹. Moreover, certain works, notably maritime, lakeside, river, road infrastructure works, port, airport, heliport works, etc escape the insurance obligation. Works pertaining to road networks, pedestrian works, carparks, networks, pipelines cables and their supports, to transportation, production and distribution of energy, etc. are also excluded from the ten-year insurance, provided that these works are not ancillary to works that are subject to this insurance obligation. Lastly, this insurance obligation is not applicable to constructions which existed before the opening of the construction site, unless they become fully incorporated into the new construction, causing them to be technically indivisible¹².

It is worth noting that the insurance policies taken out for building works destined for purposes other than habitation may contain warranty caps.

ü What is its purpose?

¹¹ Article L. 243-1 of the French Insurance Code

¹² Article L. 243-1-1 of the French Insurance Code

It guarantees all works, even those resulting from a defect of the ground, that compromises the stability of the building or that, by affecting it in one of its essential component parts or one of its complementary elements, render it unsuitable for its purposes.

It also covers damage which affect the solidity of the elements of equipment of a work, but only when these are an indissociable and integral part of the works of development, foundation, envelope, core or cover.

The criterion for application of the warranty is therefore the seriousness of the damage.

Lastly, action under the ten-year warranty is transmitted to the successive purchasers of the building.

ü *When does it have to be taken out? and for how long?*

It has to be taken out before the construction works begin.

It lasts for ten years as of the acceptance of the building.

The ten-year warranty is managed in the form of a capitalisation contract: the regime is based on the principle of a single premium paid at the beginning of the works which must be used to pay all claims which arise during a period of ten years starting from acceptance of the building.

ü *What are the sanctions if the insurance is not taken out?*

Criminal sanctions may apply: six months' imprisonment and/or a fine of EUR 75,000.

However, these sanctions are not applicable to an individual person building a house to live in or for a spouse, his ascendants, his descendants or those of his spouse to live in.

In addition, in the event of damage caused due to failure to take out insurance, it is possible to invoke the civil liability of the person who breached his obligation.

ü *How to activate the insurance?*

This insurance only pays out if the liability of the guaranteed party is proven.

This means that in practice, an amicable (by the insurers) or court-ordered expert appraisal is carried out to determine the extent of the damage and the liability of the parties involved.

2.2 Structural damage insurance (“assurance dommage-ouvrage”)

Structural damage insurance is governed by articles L. 242-1 et seq. of the French Insurance Code as well as by various standard clauses (articles A. 243-1 et seq. of the French Insurance Code).

Essentially, this insurance must supply the funds to repair the damage caused by building defect and covered by ten-year warranty, independently of any steps to identify liability. Thus, the owner carries out repair works with the funds collected from the insurer who, in turn, will bring action against the liable parties. This enables the owner to avoid having to evoke the liability of the various parties involved in the construction process, which can result in long and costly litigation.

ü *Who has to take out this insurance?*

Any natural person or legal entity who, acting as building owner, seller or agent of the building owner, has construction works carried out must take out this insurance. Real estate developers are also included. Moreover, the insurance must also be taken out on behalf of successive owners. Given that the structural damage insurance is a property insurance, i.e. it is attached to the ownership of the building, it automatically continues in the event of the death of the insured or the sale of the insured building, the insurance is legally transferred (no formalities required) with the title and automatically continues in favor of the heir or the purchaser.

Nonetheless, there are various strictly defined exceptions which escape this insurance obligation. Firstly, the State will not be required to take out this insurance when building for its own use¹³. Certain public entities, law entities having concluded a partnership contract, as well as private law entities of a certain economic size, also escape this insurance obligation¹⁴. Moreover, certain works, notably maritime, lakeside, river, road infrastructure works, port, airport, heliport works, etc escape the insurance obligation. Works pertaining to road networks, pedestrian works, car parks, networks, pipelines cables and their supports, to transportation, production and distribution of energy, etc. are also excluded from the ten-year insurance, provided that these works are not ancillary to works that are subject to this insurance obligation. Lastly, this insurance obligation is not applicable to constructions which existed before the opening of the construction site, unless they become fully incorporated into the new construction, causing them to be technically indivisible¹⁵.

ü *What is its purpose?*

It guarantees, irrespective of any identification of responsibilities, the payment of all work to repair damage covered by the ten-year warranty.

As in the case of the ten-year warranty, structural damage insurance policies taken out for building work destined for purposes other than habitation may contain warranty caps.

ü *When does it have to be taken out? and for how long?*

It has to be taken out before the construction works begin.

It lasts for ten years and comes into effect at the end of the warranty of perfect completion ("*garantie de parfait achèvement*").

ü *What are the sanctions if the insurance is not taken out?*

Criminal sanctions may apply: six months' imprisonment and/or a fine of 75,000 euros.

However, these sanctions are not applicable to an individual person building a house to live in or for a spouse, his ascendants, his descendants or those of his spouse to live in.

In addition, in the event of damage caused due to failure to take out insurance, it is possible to invoke the civil liability of the person who breached his obligation.

ü *How to activate the insurance?*

The process is as follows:

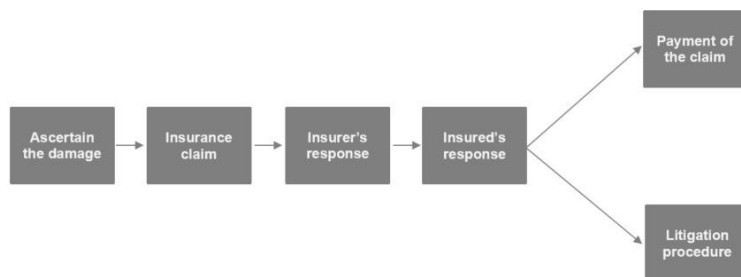
When the owner decides to implement its structural damage insurance, the structural damage insurer will have an expert appraisal carried out amicably in order to designate the builders who are to be blamed for the building defect and the damage caused. All the builders and their insurers should be contacted and most of the time convened to this amicable expert appraisal. Following this expert appraisal, the builders/ their insurance can either agree to the allocation of liability and the related costs, or they can oppose it. In the last case, the structural damage insurer may have to initiate legal proceedings against the builders/ their insurers which do not agree with the expert's conclusions in order to be reimbursed.

¹³ Article L. 243-1 of the French Insurance Code

¹⁴ Article L.242-1 of the French Insurance Code

¹⁵ Article L. 243-1-1 of the French Insurance Code

However, in some circumstances, the owner may choose to directly activate the builders' liability insurance (for example when no structural damage insurance has been taken out). In this case, the implementation procedure of the structural liability insurance (per the law) does not have to be abided by. As a result, the insured loses the protection provided by the law pertaining to the timeframes. Indeed, the insurer will not be under the obligation to respond within sixty (60) days of receipt of the claim nor will it need to make a settlement offer within ninety (90) days of the claim. This means that the implementation procedure will be at the discretion of the insurer who can take long periods of time to implement the insurance. In practice, such cases often lead to litigation which will result in the commissioning of court-appointed experts.



The conditions for implementing the insurance are strictly governed by the law:

- Insurer's response:
 - 60 days as of filing of the insurance claim: during this period, the insurer must inform the insured of its decision to implement the coverage.

In the event of exceptional difficulties due to the nature or seriousness of the damage, the insurer may propose to extend the period within which it has to make a settlement offer. This additional period is dependent on the express acceptance of the insured party and cannot exceed 135 days.
 - 90 days as of filing of the insurance claim: when the insurer accepts the implementation of the coverage, it has 90 days to make a settlement offer.
- Payment of the insurance claim:
 - Payment within 15 days of notice of acceptance of the offer: should the insured accept the offer, the insurer has to disburse the funds within 15 days following the notice of acceptance.

3. What type of impacts (especially financial ones) have the aforementioned practices/regulations had on the construction industry (and building defects)? What type of cost effects do the insurance requirements have on construction?

The practices/regulations have two main impacts:

- increase in the price of the construction project due to the payment of insurance premiums,
- substantial increase in the number of expert appraisals (amicable or ordered by the Court).

3.1 Pricing

The insurers who offer the warranties are in competition and are free to set pricing conditions.

In order to fix the insurance premiums, the insurers take the following elements into account, notably:

- the cost of the construction;
- the professional qualification of the builders;
- the existence and extent of any technical inspection of the works by a technical control office;
- the existence of optional guarantees such as warranty of perfect completion or coverage of consequential damage after acceptance of the building (for example, loss of rent if the premises are temporarily uninhabitable);
- the existence of a soil analysis.

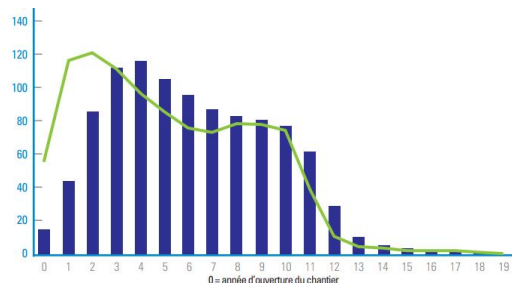
The "Fédération Française de l'Assurance" groups together « Fédération française des sociétés d'assurances » (FFSA) and « Groupement des entreprises mutuelles d'assurance » (GEMA). As such, its members are insurance and reinsurance firms operating in France, i.e. 280 companies representing more than 99% of the market.

The Federation carried out a study on key data for the year 2017¹⁶. The following information can be drawn from the study in terms of construction.

In 2017, insurance premiums paid represented more than 2 billion euros, divided as follows:

- 72.7% in ten-year warranty,
- 27.3% in structural damage insurance.

Most claims are filed between years 3 and 5 after the beginning of the construction works:



¹⁶ Internet link : <https://www.ffa-assurance.fr/etudes-et-chiffres-cles/assurances-de-biens-et-de-responsabilite-donnees-cles-par-annee>

3.2 Mandatory expert appraisal

An expert appraisal is mandatory in the context of the structural damage insurance in order to assess the scope of the damage and the respective responsibilities of the parties involved in the construction project.

Expert appraisals are conducted by experts who either work in insurance companies or are self-employed (very common in France). Pursuant to article A. 243-1 appendix II of the French Insurance Code, "the damage is recorded, described and assessed by an expert, a natural or legal person, appointed by the insurer."

If proceedings are initiated before a Court, the expert will be appointed by the Court, selected among a national list of experts categorized into area of expertise, drawn up by each Court of Appeal. The experts registered on the list held by the Courts of Appeal have to meet specific conditions as set out in Decree No. 2004-1463 of 23 December 2004 on judicial experts (e.g. : they have to send a file with their details, experiences, area of expertise, etc. and cannot be over seventy (70) years of age) for them to be eligible.

However, if the insurer evaluates the damage at an amount of less than EUR 1,800 or considers that the implementation of the warranty is clearly unjustified, it is not obliged to have an expert appraisal carried out¹⁷.

The expert appraisal involves two reports:

- The preliminary report: this indicates the protective measures to be taken to avoid any worsening of the damage. It also contains an analysis of the damage, which enables the insurer to reach a decision of implementing the insurance cover.
- The final report: this establishes the final measures to obtain full repair of the damage, as well as the estimation of their costs. The amount of the compensation is broken down between the cost of the works and ancillary costs.

Should the experts fail to reach an agreement in case of an amicable settlement, legal proceedings have to be initiated in order to obtain the commissioning of a court-appointed expert.

It is worth noting that when an expert is appointed by a court, the expert appraisal may last for a long time (several months or years).

The burden of proof is borne by the party which initiates the proceedings and, as a result, the latter has to advance the costs of the expert. This results from the combined reading of articles 1353 of the French Civil Code and article 9 of the French Civil Procedure Code (see below) that it is up to the plaintiff to prove what it puts forward.

- Article 1353 of the French Civil Code: *"Whoever claims the performance of an obligation must prove it. Reciprocally, the person who claims to be free must justify the payment or the event that led to the termination of his obligation."*
- Article 9 of the French Civil Procedure Code: *"It is incumbent upon each party to bring forward, in accordance with the law, the evidence necessary for its claim to succeed."*

As a result, the party which initiates the proceedings will bear the related costs (notably the costs of the expert appraisal) and will have to perform the tasks requested by the expert (for instance the preparation of fee quotes during the expert appraisal).

¹⁷ Article A. 243-1, annex II of the French Insurance Code

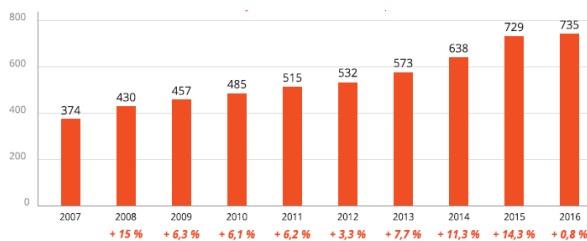
In general, the proceedings will be initiated by the party that does not agree with the other. For example, if the insured is dissatisfied with the insurer's proposal for compensation or its refusal to compensate, it can initiate the proceedings.

4. Other experiences regarding the French model – especially regarding its effectivity in reducing building effects

A study was carried out in 2018 by the "Agence Qualité Construction (AQC)", an association which groups together the principal professional organisations in the construction sector in order to prevent building defects and improve the quality of construction¹⁸.

In particular, the objectives of the study were to establish the recurrent pathologies and their costs by taking existing buildings into account.

This study depicts a curve representing the amounts incurred by builder's liability insurers (in millions of euros):



It shows an average increase of + 7.8% per year since 2007.

In addition, the elements of the building which incur the highest repair costs were analysed for the period 2015-2017, showing the following per category of assets:

- Individual houses
 1. Interior flooring
 2. Superficial foundations
 3. Frame beams pillars (excluding the structure alone)
- Collective housing
 1. Interior flooring
 2. Water networks inside the building
 3. Frame beams pillars (excluding the structure alone)
- Business premises
 1. Interior flooring
 2. Windows and French windows (excluding roofing)
 3. Metal roofing

In practice, it has been observed that the insurance obligations imposed on the abovementioned actors may have led to them to no longer feeling accountable in case of building defects. Indeed, given that builders, real estate developers as well as the building owner have to take out compulsory insurance that caters for building effects, they tend to rush the construction process, putting quantity over quality. These constructions bear, more often than not, building defects that they believe will be handled by the insurance companies.

¹⁸ Internet link: <http://www.qualiteconstruction.com/sites/default/files/2018-07/R-Observatoire-Qualite-Construction-2018.pdf>

However, from the end-user/consumer point of view, building owners may find themselves in situations whereby insurance companies refuse to repair the damage caused.

Firstly, not all damage is covered by the insurances; both the ten-year warranty and the structural damage insurance only repair specific building defects. Thus, other damage (works which are non-compliant but do not compromise the stability of the building nor render it unsuitable for its purposes, caused by a foreign cause or due to the misuse of the works, damage to interior fittings and furniture, etc.) which occur either before the acceptance of the building or which aggravate after the ten-year period, are not repaired.

Building defects that do not fall under the ten-year liability insurance, remain covered by the other warranties (as described below + see table at Section 2 of the memorandum).

- Warranty of apparent defects (« *garantie des désordres apparents* ») - article L. 261-5 of the CHC / article 1648 of the French Civil Code.
This warranty will cover the repairs for defects in the construction or lack of conformity when apparent during one (1) year as from the latest date between either the acceptance of the work or the expiry of a period of one (1) month after the purchaser has taken possession.
- Warranty of sound insulation (« *garantie d'isolation phonique* ») - article L. 111-11 of the CHC.
This warranty will cover the works required to comply with legal and regulatory provisions pertaining to sound insulation.
- Warranty of perfect completion (« *garantie de parfait achèvement* ») - article 1792-6 of the French Civil Code.
This warranty will cover the repairs of all the shortcomings indicated either through reservations mentioned in the document recording the acceptance or by way of written notice within one (1) year as from the date of acceptance of the work.
- Warranty of good functioning (« *garantie de bon fonctionnement* ») - article 1792-3 of the French Civil Code.
This warranty will cover the damage affecting the other elements of equipment (which are not covered by the ten-year warranty) within two (2) years as from the date of acceptance of the work.

Should building defects covered by the abovementioned warranties occur after the expiry of their respective warranty period, such warranties may no longer be activated and the builder is no longer liable in this respect.

An action under ordinary law of contractual liability could be possible if, for instance, the builder did not respect the terms and conditions of the agreement signed with the owner. As a result, such action will depend on the contractual provisions stipulated in the agreement at hand.

Moreover, building defects caused by the poor execution of an activity which was not explicitly covered in the insurance policy are also not repaired. Indeed, an insurer will only be required to implement the insurance taken out by a builder for the activity declared in the insurance policy. Such circumstances may imply lengthy litigation procedures to obtain reparation of the damage as the insurance policy is not directly applicable.