

Draft bill to reform the schemes of liability in construction law

On 13th March 2007, the Luxembourg minister of justice introduced draft legislation (bill 5704) with the aim of reforming the schemes of liability in Luxembourgish construction law and the related Civil Code articles. The bill is intended to clarify and harmonise the construction law statutes applying to the various participants involved in the real estate market including professionals (seller of property to be erected, building contractor etc.) as well as private individuals.

The current scheme in place is unclear and complex. Professionals and private individuals, for example, may be confronted with diverse liability schemes in the scope of a same property transaction leading for example to different durations for recording and reporting defects affecting a building. For the time being, constructors' liability varies depending on whether they are acting as the seller of the property to be erected, "*locateur d'ouvrage*"¹, or as the seller of an erected building.

Hence, professionals involved in construction law as well as private individuals are welcoming this bill with a degree of relief. There is also some expectation that all difficulties and confusion arising as a result of the current statutes in force will be removed.

The draft legislation includes the following.

- Removing the actual distinction between defects of buildings and lack of conformity and to establish a unique scheme. According to the new draft of article 1642-1 of the Civil Code relating to the sale of the property, the obvious defects (defects and lack of conformity²) should be reported within one month from the date when the buyer has taken possession of the property. Any warranty claim should be submitted within one year from the date of taking possession thereof.
- Giving the same status to both (i) the professional who buys a property with the intent to resale it at a later date and, (ii) the buyer of a property to be erected and to apply to those people the same scheme of liability that applies to constructors as per article 1792 of the civil code. It should be noted that not only the Chamber of Trades (*chambre des métiers*) according to its note dated April 23rd 2008, but also the Chamber of Commerce according to its note dated June 16th 2008, are strongly against such common status by rightly arguing that the sellers of erected buildings have never been *maître d'ouvrage*³ and, therefore, have never been involved in building the property. As such, it is believed that it would be illogical to consider they are bound by biennial and decennial warranties.
- Creating a sole acceptance between the building contractor and the *maître d'ouvrage*, therefore removing the second acceptance of the building by the purchaser. The chamber of commerce, which is in favour of such a change, is nevertheless concerned that such an acceptance between the building contractor and the *maître d'ouvrage* results in the warranty and appeal periods starting for the purchaser whereas the latter has not been party to such acceptance.
- Establishing a constructor's presumption of liability for defects resulting from a lack of conformity or latent defect⁴. Constructors can escape liability only by evidencing

that the damages are not connected to their mission, or that they are resulting from an unforeseen event beyond their control being considered as a *force majeure* case or from the normal use of the work. It is noteworthy that architects and engineers are escaping this presumption of liability whereas the bill intends to maintain liability for default regarding defects caused by a lack of surveillance.

- Removing the traditional distinction between major and minor work leading to the application of either the decennial warranty or the biennial warranty and, be willing to submit to the decennial warranty scheme any defect resulting from a lack of conformity or a latent defect rendering the property unfit the purpose for which a party acquired it. All the other latent defects will be submitted to the biennial warranty scheme. Even if the chamber of trades and the chamber of commerce are positively welcoming the deletion of this traditional distinction between minor and major work that leads to a lot of precedents, they nevertheless intend to propose a more complete and precise draft of the articles of the civil code governing that area of law in order in order to avoid difficulty in interpreting and applying the biennial and decennial warranties.

As it stands, the bill is intended to be welcomed in a positive manner as it will simplify the schemes of liability in construction law. However, some points and articles still need to be more precisely reviewed, clarified and drafted. They need to take into account the notes of the professional chambers to avoid any inconsistency or ambiguities leading to difficulties in applying or interpreting the new law.

Notes and definitions :

1. The “*locateur d’ouvrage*” is the person in charge of executing the works in the course of a contract for services such as the architect and the building contractor
2. The lack of conformity is a defect rendering goods unfit for the purposes for which goods of the same type are normally used or rendering the goods not compliant with the description mutually agreed between the seller and the buyer
3. The “*maitre d’ouvrage*” is the person who is or will be the owner of a land and as such decides to make built a property on such land by hiring professional in the field of construction. It is up to him, after being sure of the feasibility of the project and of the opportuneness of the planned transaction, to determine its location, to define and finance the project, to fix the provisional budget, to choose the process according to which the work will be realized and to enter with the project managers and the building contractors, into contracts for the analysis and execution of the work.
4. A latent defect is a defect the purchaser could not have detected because of the nature of the sold work, and that he could not have known at the time of the sale.

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