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Joint and several obligation of contractor and architect can no longer be contractually excluded for ten-year liability

With its decision of 5 September 2014, the Court of Cassation answered the question of whether the contractor and architect may contractually exclude their joint and several liability with one another and with the other building partners.If a defect in a work was caused both by a design error and by a fault in the execution of the works, the architect and the contractor can both be held jointly and severally liable, and each of them may be obliged to pay for the entire damage. For this it is required that both faults constitute "concurring faults". This implies that both faults are necessary in order to cause the same, complete damage.

In architectural contracts, such joint and several liability was almost always excluded.

A majority case-law had found that a contractor or architect could indeed validly exclude the joint and several liability with the other building partners in the event of concurring faults in the agreement with the principal, in so far as this exclusion is clearly and unambiguously expressed (1). This was based on the equivalence theory within the framework of the general liability law, which is not a matter of public order.

However, the ten-year liability of the architect and the contractor for stability-threatening defects (articles 1792 and 2270 of the Civil Code (CC)), is a matter of public order, as a result of which this period of ten years is a term of forfeiture that cannot be either suspended or interrupted (2).

In its decision of 5 September 2014, the Court of Cassation decided that the clause on the basis of which the architect, in the event of a concurring fault with that of the contractor, should owe compensation only for his share in the realisation of the damage, entails a limitation of the architect's liability vis-à-vis the principal in accordance with article 1792 CC. Due to the public-order nature of the ten-year liability for stability-threatening defects on the basis of art. 1792 (and 2270) CC, a contractual exclusion of the joint and several liability is not legally valid. Such a clause is in conflict with the public order, and thus is absolutely null and void. This applies for both contractors and architects.

The Court thus confirms the earlier case-law on the merits that the parties cannot depart by contract from the ten-year liability arrangement for stability-threatening defects by incorporating limiting clauses into the contracting agreement (3), but departs from the majority case-law on the merits by also ruling that the parties cannot agree to exclude the joint and several liability.

It should also be noted that the Court does not pronounce on the possibility of not limiting the ten-year liability for stability-threatening defects, but rather expanding it, e.g. by extending its term. Although the legal doctrine remains divided, the Courts of Appeal of Antwerp and Ghent have ruled that the parties cannot expand the ten-year liability period by extending its term for the principal's benefit. (4)

1) Brussels (2nd division) 11 December 2008, Rev.not.b. 2012, issue 3060, 117, note B. KOHL; Liège (20th division) 27 April 2007 and Brussels (2nd division) 29 May 2009, both cited by B. LOUVEAUX, "Inédits du droit de la construction" [Unpublished construction law decisions], JLMB 2011, issue 19, (884) 907-908; Liège 28 June 2002, RRD 2002, 105, and T.Aann 2003, 143, note; District Court of Nivelles 8 April 2011, Res Jur.Imm. 2011, 239; contra Brussels (2nd division) 12 October 2001, AJT 2001-02, 740, note G. BALLON, and JLMB 2002, 718.

(2) Cass. 22 December 2006, RW 2006-07, 1439, note A. VAN OEVELEN, and TBO 2007, 40, note; Cass. 27 October 2006, Pas. 2006, 2190, RABG 2007, 591, RW 2006-07, 1435, note K. VANHOVE, and TBO 2007, 34, note; Cass. 17 February 1989, Arr.Cass. 1988-89, 691, Bull. 1989, 621, Pas. 1989, I, 621, and RW 1988-89, 1267, note G. BAERT.

(3) E.g. Liège 22 November 2002, RGAR 2004, no. 13.881.

(4) Antwerp 4 November 2008, TBO 2009, 31, (confirming) note K.UYTTERHOEVEN, and NJW 2008, 930, (confirming) note S. MAES; Ghent 21 December 2007, T.Aann. 2011, 158, notes B. STROOBANTS and B. VAN LIERDE; contra: Commercial Court of Hasselt 30 January 2006, RW 2007-08, 1329; C. BURETTE and B. KOHL, "Responsabilité des intervenants à l´acte de construire postérieurement à la réception" [Post-acceptance liability of parties that intervened in the construction process], in M. DUPONT (ed.) Les obligations et les moyens d´action en droit de la construction [The obligations and the means of action in construction law], in Collection de la Conférence du Jeune Barreau de Brussels, Brussels, Larcier, 2012, p. (237) 278-279, no. 49.

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