On Friday, October 18th 2024, the annual ESCL conference took place in Antwerp. The theme of the conference was ‘Design’. After the attendees were welcomed by Luc Imbrechts (Co-President of the Belgian Association for Construction Law), Marc Schoofs (Managing Partner of Fairway Law) and Rebecca Shorter (Chair of the UK Society of Construction Law) were the first act of this year’s conference.

The (drawings’) monopoly of the Architect – United Kingdom and Belgium

Marc Schoofs discusses the architect's monopoly on design from a Belgian perspective, while Rebecca Shorter addresses it from a British perspective.

Rebecca Shorter first describes the monopoly on the title ‘architect’ in the United Kingdom. Then, she discusses the responsibility for the design: there is no obligation to use an architect for design work. However, this is often done anyway due to the legal responsibilities of participants in the design process. Contractual obligations are often included in general conditions.

After the fire in the Grenfell Tower (72 dead and 77 injured), the ‘Building Safety Act 2022’ (BSA) was introduced, among other measures. This BSA has changed the legal landscape surrounding design responsibility. With legal accountability for 'dutyholders' there is an effort to ensure compliance with building regulations. The architect thus appears to play an important role within this new distribution of responsibilities. The commonly used sets of general conditions in the UK (such as: JCT 2024 D&B Contract; RIBA Building Regulations Principal Designer Professional Services Contract) have also been aligned with this new distribution in recent years.

In Belgium, the protection of the title and profession of the architect has been in place since ‘the Law of February 20, 1939’ (hereafter: the Law) as clarified by Marc Schoofs. Reasons for the legal protection include the safety of occupants, hygiene, aesthetic considerations in construction, preservation of artistic heritage, and protection of the capital invested in buildings. According to art. 4 of the Law, the State, provinces, municipalities, public institutions, and private individuals are obliged to hire an architect. The architect's contribution pertains to planning preparation and supervision of contract execution. Sanctions are imposed for not meeting the obligation to hire an architect, although exceptions can be made under specific Royal Decrees.

There is no legal definition of the professional responsibilities of the Belgian architect. His work is intellectual in nature: he must have studied all drawings and ensure they meet the required standards, but he does not have to draw everything himself and can allow others to do so. Whether the architect can combine his tasks with other work is not always legally clear. The Law of February 20, 1939 does however describe incompatibilities, and he must maintain independence.

Design liability of the German ‘Prüfingenieur’

Bastian Fuchs (lawyer at TOPJUS, New York), Rolf Katzenbach (Managing Director of International Consulting Office Professor Katzenbach) and Anke Werner (Project Manager at International Consulting Office Professor Katzenbach) present on the design liability of the ‘Prüfingenieur’ (Test Engineer; hereafter: PI) in Germany.

The legal basis for the design liability of the PI follows from the German constitution, which includes the individual's right to life and physical integrity. In the context of construction, this fundamental right translates into a four-eyes principle: there must always be an additional person monitoring construction projects, namely the PI. The project owner contacts the relevant authorities, which in turn engage a PI.

The PI checks for compliance with relevant standards. The arrangement regarding their responsibility is of a public law nature, and the PI has no responsibility or legal relationship with the architect or project owner. The state is liable for their actions, unless there is gross negligence involved. The final step in the process carried out by the PI is the 'Prüfberichte' (Test Report). In this process, the PI uses their expertise in areas such as structural and fire safety. Not all construction projects require a PI; there are five construction classes, and mandatory presence only applies to classes 4 and 5.

Not everyone can simply become a PI. Requirements include:

- Having completed their 35th year of life at the time of application.
- Having completed the appropriate education.
- Having at least ten years of relevant experience prior to applying.
- Being proficient in spoken and written German.

The design liability of the Maître d’Ouvrage délégué - France

Edouard Vitry (Partner at Addleshaw Goddard, Paris)

The Maître d’Ouvrage délégué (Delegated Client; hereafter: MOD) acts as a delegated client through a contract of mandate. This MOD enters into contracts with, for example, contractors and engineers in the name of the Client (French: Maître d’Ouvrage). Thus, a connection exists between the MOD and the Client, and the MOD must report to the Client.

The description of the assignment, as stated in the contract of mandate, is essential. It is relevant for liability and insurance. If the scope of the assignment exceeds what is defined in the contract of mandate, it may be classified as a service agreement. In that case, the tasks of the MOD do not solely involve

representing the Client but, in extreme cases, executing work comparable to that of other building operators.

Liability primarily results from contractual agreements (art. 1991 Code Civil) and from tortious acts towards third parties (art. 1240 Code Civil). Secondly, there is criminal liability. This is explicitly described in the contract of mandate and pertains to violations of specific regulations, for example, in the fields of environment, hygiene, and safety. Thirdly, there is a ten-year liability for the contractor (art. 1792 Code Civil). Due to this liability, contractors are required to obtain insurance.

Construction standards define good, not best engineering practice – Austria and Switzerland

Elisabeth Sperlich (Head of Governance, Policy and Legal at Austrian Standards International) discusses the Austrian situation. She explains that an Austrian standard (ÖVE/ÖNORM EN 45020:2007, art. 3.2) indicates that a standard is dependent on consensus and on consolidated results of science, technology, and experience. In principle, anyone can initiate the development of a standard. The development process takes five years and often culminates in a 'good practice': participants in the writing process discuss the 'best practices,' which are then diluted to meet the needs of the various participants.

Several essential terms for standards include rules of technology (the solutions most commonly used by practitioners) and the 'State of the Art' (a combination of science and practical experience). The rules of technology are at the bottom of the hierarchy, above them is the State of the Art, and above that is the State of Science, which is formed by scientific publications without practical experience being acquired. Austrian standards (ÖNORMEN) are commonly viewed as technological rules that reflect the State of the Art.

Standards are typically non-binding. However, they can become binding when referenced by the legislator or when part of a treaty. They can also have legal effect if they are incorporated into custom safety standards, or harmonised European standards.

Daniel Gebhardt (Partner at Neovius Advokatur & Notariat) addresses the Swiss situation, where the following types of standards exist: legal regulations and the norms therein, execution aids (issued by governments, without binding force), technical norms (from private standards-writing organisations, based on stakeholder consensus), and de facto standards (from industry groups, without binding force). The Swiss benchmark is the SIA standards.

Technical norms are not pure definitions; rather, due to their development process, they are often compromises. The process of writing standards is important, especially because various interest groups are involved. There is an acknowledged minimum, which simplifies complexities in construction.

References are also used within standards to other standards, which carries the risk that a reference remains unchanged, even though a new version has been released. It is important to assess whether one complies with the standards and also whether one meets modern technology standards. In Switzerland, as in Austria, there is no distinction between rules of technology and the State of the Art.

The position of the (authorities' appointed) Design Certifier in Romania

Răzvan Rugină (Lawyer, President of the Romanian Association for Construction Law) discusses the position of the Design Certifier in Romania. He talks about the Romanian Construction Quality System (hereafter: Construction Quality System). Within this system, verification and technical expertise of the design are conducted, among other activities. Mr. Rugină also describes the actors within the Construction Quality System: the DC, the Technical Expert, the Technical Execution Manager, and the Site Manager.

The DC is the person authorised to verify that the design complies with technical regulations and applicable fundamental legal requirements. There are conditions to become a DC, such as holding a bachelor's degree as an engineer or architect and having a minimum of eight years of professional experience (including at least three years in design work). There are also certain prohibitions (the DC may only work in fields for which they are certified) and incompatibilities (they may not verify designs they themselves have drawn). The liability of the DC is civil (related to, for example, FIDIC terms), criminal (which may lead to imprisonment), and administrative (fines).

The position of the (authorities' appointed) Design Certifier in Bulgaria

Adriana Spassova (Partner at EQE Control OOD, Board Member of the Bulgarian Association for Construction Law) discusses the DC in Bulgaria. Relevant in Bulgaria is the Spatial Development Act (hereafter: SDA). The SDA categorises construction projects into six categories and assigns an important role to the DC. The DC prepares the Compliance Assessment Report (hereafter: CAR), which is needed for a building permit, among other things. This role also involves liability: an administrative liability which may incur fines if the design does not meet the requirements. For this reason, the DC is also required to obtain insurance to cover professional liability towards participants in the construction process and third parties. There is also criminal liability in cases of fatalities or life-threatening situations.

Early contractor involvement: design responsibility in the frame of a 'Bouwteam', Alliance or Partnership

Andrea Chao (Partner at Bird & Bird) discusses the Dutch Bouwteam ('Construction Team') model, describing its temporary nature as a collaborative model. Within this framework, design is developed based on equality during the pre-contractual preparation phase. The historical roots of

the Bouwteam model trace back to the construction acceleration of the 1950s. The DG 2020 (Bouwteam) model, available since 2022, includes comprehensive and explicit descriptions of obligations, a pricing methodology, and establishes a bilateral relationship between the client, contractor, and other Bouwteam participants. She also examines four scenarios in which a design error occurs, each stemming from different causes, and the impact of these altered causes on the design liability of various parties involved.

Richard Bailey (Partner at Druces LLP in London) and Anthony Lavers (Kings College, London and Consultant at Crown Office Chambers, Inner Temple) focus on the UK situation of early contractor involvement. In most general conditions, contractors are involved at a later stage. Design and build contracts are the most common in the UK and are not originally designed for earlier contractor involvement, though it is not prohibited. Challenges include design due diligence, provisional sums, and the 'risk premium.' Two-phase contracts are also used to involve contractors earlier, but their involvement is primarily limited to cost-saving measures. Relevant for early contractor involvement is, among other things, whether there is a fixed price.

Material's choices & variations mean design responsibility – Italy, English law and UK projects

Martina Ferrin (Lawyer at DDC Studio Legale & Tributario, Milan) examines Italian law and jurisprudence. Italian construction contracts are both public and private, and she focuses specifically on the private variant. Relevant legal provisions for this type are Article 1665 et seq. of the Italian Civil Code, as well as Articles 1659 (approved project changes), 1660 (necessary changes), and 1661 (changes at the client's request). The Italian project manager is significant in legal cases involving material choice, as they are frequently held liable. The contractor is also critical in this context. The fire at Torre dei Moro in Milan in 2020 highlights the importance of thoughtful material choices, as the Torre's wall panels proved inadequate in terms of fire resistance.

Virginie Colaiuta (Partner at LMS Legal LLP, London) discusses English law, where the Supply of Goods and Services Act 1982 is particularly relevant because it contains an implicit obligation that goods must be of satisfactory quality and suppliers must perform their services with reasonable skill and care. For contractors, the more relevant obligation is to deliver work that is *Fit for Purpose*. Jurisprudence examples include Robin Rigg and Steel Company of Canada Limited v Willand Management Limited. The obligation to deliver Fit for Purpose generally remains even when the client requests changes. Specific regulation on these topics can be found in the FIDIC Red Book 2017.

Ekrem Kaya (Partner at HKA, Vice-President Turkish Association for Construction Law) discusses practical examples from construction projects in the UK. Research reports following the Grenfell Tower fire demonstrate that widespread negligence within both government and private organisations led to

the tower's high degree of fire risk. This negligence was particularly evident in regulation failures and mismanagement. Conversely, the Crossrail Project (the Elizabeth Line) serves as an example of a successful project. The management team prioritised compliance with environmental regulation, material quality, safety, and sustainability. Other examples include the Millennium Dome and the Millennium Bridge (London).

Fitness for Purpose & design/professional indemnity insurance – Netherlands and Denmark

Rob Bleeker (Lawyer at Rozemond Advocaten, Amsterdam) discusses the Dutch situation regarding UAV (general conditions for work) and UAV-GC (good and sound work) as well as the Dutch Civil Code (Article 7:17 on Normal Use). Providing incorrect information is sanctioned by the contractor's duty to warn. Liability for design errors differs depending on whether the engineer works for the client or the contractor. The question of what constitutes State of the Art is answered through Dutch case law. A key issue in Design and Build contracts is risk allocation in areas where the contractor lacks insight ('terra incognita'). Alternative conditions addressing risk allocation include the Bouwteam models DG 2020 and KBNL 2021. Insurance is also a relevant issue but is not always comprehensive.

Sara Due Ilsøe (Lawyer/Manager at Poul Schmith Advocates, Copenhagen) examines Fit for Purpose under Danish law. Danish law does not have a direct equivalent to Fit for Purpose but is based instead on negligence. The work must align with the contract, professional standards, and client instructions. Generally, the contractor is not liable if the standard for materials or professional practices was deemed adequate at the time the defect arose. Under Danish law, risk typically lies more with the client than the contractor, in contrast to the typical Fit for Purpose principle. A guarantee does not usually shift liability from the client to the contractor, unless the language is legally clear. Danish courts maintain this perspective even when using FIDIC contracts, which are common law-based. Danish insurance policies are primarily focused on liability for negligence and may not cover Fit for Purpose obligations.

New construction methods – Borderline engineering, renewable materials, etc. – Spain and future developments

Ignacio Santabaya (Partner at Pérez Llorca, Madrid) discusses contractor liability in Spain now and in the future. He describes modular construction as taking place under controlled conditions, away from construction sites. Modular construction includes not only the construction of entire buildings but also standardised components assembled on-site. He identifies sustainability and speed as key benefits of modular construction. Contractor liability applies outside the construction site to both the contractor and designer, while on-site, liability applies to the construction manager, project execution manager, and the structural engineer. Spain has not yet established specific liability allocation for modular construction.

Key factors will include whether the fault lies in the modules themselves or their installation. Relevant considerations include contracts, certification, and a general legal approach.

Frederik Foncke (COO Seco Group Belgium) spoke about risks, uncertainties, and the consequences of new construction methods. For solutions, he referenced the research report *Verzekerbaarheid Circulair Bouwen* ('Insurability of Circular Construction').

Roberto Panetta (Panetta Law Firm, ESCL Council Chairman) talked about the ESCL Conference 2025. It will take place on 26 and 27 September in Naples and will focus on Construction projects and their cultural context. Interested parties are welcome to send a summary of their contributions to the Conference to info@iscl.it by 17 January 2025. Click here for more information.