



Will a ten year guarantee become a
common rule ?

From the Optional Instrument on
European Contract Law to the
harmonisation of warranties in the
Construction Industry

Prof. Dr. Benoît KOHL

University of Liège and Paris II
Attorney (Stibbe Brussels)

I. Short comparative overview of the contractor's liability

- 1. Conformity

- The constructor has to build a structure that is fit for its intended use (general use or specific purpose) : FR – SP – DE – AUS – GR

⇒ Principle of perfect final result: the constructor will be liable unless he proves that the client's specifications were the cause of the problem or in case of *force majeure*

- Contractor only bound to prove he carried out the work in accordance with the plans and specifications in a workmanlike manner, using proper materials : UK traditional rule

⇒ no liability if the building is not fit for its purpose
BE, SWE, NL : solution in between (ex : BE)

Short comparative overview of the contractor's liability

- 2. Liability for defects after handing over the structure

NB: the French traditional distinction between “*non conformity*” and “*defect*”
<-> many other Members States and EU and international approach in relation with the sale contract (a.o. Directive on consumer goods ; CISG)

- **Prescription of remedies based on non-conformity**

20 y. : PB ; 6-12 y. : UK ; 10 y. : BE, FR, SWE, IT, GR ; 5 y. : DE ; 3 y. AUS

- **Limitation of liability clauses ?**

Yes : ex : UK, DE, NL, AUS..

No : ex. : BE, FR, IT...

- **Contractor's mandatory liability insurance ?**

Yes : FR

No : other countries

Short comparative overview of the contractor's liability

- **3. Specificities in the housing sector**
 - Mandatory rules (consumer protection) :
See in FR, BE or (partially – not regarding guarantee or liability issues – NL).
NB : UK : Defective Premises Act 1972
 - Soft Law : ex : NHBC (UK) / GIW (NL – before its removal) : Common trends to offer a 10 year guarantee to consumers

II. Towards an harmonisation ?

- Academical and Political history of the Harmonisation :
 - Construction Industry : from the Mathurin (1988) and the GAIPEC Report (1992) to the Chapter “Construction Contract” of the DCFR (2008)

NB : PEL SC art. 2:111 : 3 years liability , but “*the running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of, the facts giving rise to the claim including the type of damage*” + Max 10 years (30 years in case of claims for personal injuries)

But : “*the parties may deviate from the prescription rules*”
- Commission’s Proposal of Optional Instrument (10/2011)

- Impact of the Optionnal Instrument on the Construction Industry
 - At first sight : regulates the sale contract only : importance for the sale/purchase of construction products
 - However, also covering construction contracts :
 1. Contract Qualification issue :

A “sale contract “*means any contract under which a business transfers or undertakes to transfer the ownership of goods to another person (the buyer), and the buyer undertakes to pay the price; **it includes a sales contract under which the seller is to manufacture or produce the goods for the buyer** »*

- However, also covering construction contracts :

1. Application to the “Linked Contract”:

*“Any reference to a sales contract in this instrument includes a reference to a sales contract under which the seller undertakes to **perform a service for the buyer in relation to the goods** »*

- Comment 1 : Several similar activities within the construction industry will be sometimes governed by the EU Regulation, sometime not (complexity for building operators)
 - Ex : Maintenance service : difference to be made between maintenance operated on a good sold or not by the professional
- Comment 2 : Difficulties in “chains” of contracts (depending whether some parties chose or not for the Optional Instrument)

- Impact on the national mandatory rules which aim to protect the weak party ?

See the EU Optional Instrument Proposal : “(2) *Issues within the scope of the instrument but not expressly settled by it are to be settled in accordance with the principles underlying it **without recourse to national laws***”.

- Ex : In FR/BE, the “*responsabilité décennale*” (decenal liability)
- Ex 2 : In FR/BE the “*action directe*” (direct claim) from the subcontractor against the principal
- Is the freedom to chose for the Optional Instrument a real freedom ?
- 2012/2013 : Draft Regulation on a European Common Sales Law

Initial draft : +/- reproduction of the Optional Instrument ; See comments *supra*

EU Parliament : Limitation of the scope to the sale of the digital content + internet sales

- European Contract Law Principles = voluntary basis
- Even less impact than the UN Convention on Internal Sales of Goods
- > Missed Goal (not ambitious enough, where it would have been possible, if limited to principles of contract and sales contract (consumer sale already harmonised ; strong experience with the widely accepted UNIDROIT Principles and the UN Convention, etc.)
- Full harmonisation of EU construction law possible ?
 - Too early : in some countries, the construction contract is heavily regulated
 - Why not begin smoothly by an harmonisation of European consumer construction law ?

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University of Liège and Paris II

Solicitor (Stibbe Brussels)

benoit.kohl@ulg.ac.be