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# EFCA BOOKLET

**Comparative study about consulting engineers' liability and insurance requirements across Europe**

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# Preface

The integration of the European internal market constitutes the main objective of the European Union. The trans-national provision of consulting services encounters several barriers, among which is the difference between member states' legislation on liability and the insurance markets locally.

The purpose of this comparative report is to provide European member associations and their consulting engineering firms with an overview of the liability and insurance conditions in the member states. It summarises the answers received in 2009 from the member associations of 13 representative European countries, namely Austria, Belgium, Denmark, England, Finland, France, Germany, Hungary, Italy, the Netherlands, Norway, Spain, and Sweden. The analysis of the responses was commissioned to Stibbe Lawyers in Brussels, Belgium.

This booklet is not a detailed legal study; it does not cover all aspects in detail, and firms that are interested in other markets are advised to refer to legal specialists in those markets for further guidance.

We would like to thank everyone involved in the preparation of this booklet, especially the members of the Liability & Insurance Committee, the member associations that contributed the information for this report, and Ms Vera van Houtte and Mr Benoît Kohl from Stibbe Laywers for their contribution.

We would strongly encourage feedback on this report (to be sent to efca@efca.be) and will strive to include updates on the EFCA website in the future.

The Chair of the Liability and Insurance Committee

*Ulla Sassarsson*

The President

*Panos Panagopoulos*

# Contents

# Executive Summary

1. In most continental countries, the **applicable law** on liability is to be found mainly in the Civil Code. In England, the main source of law remains the court decisions, through case law, based on the "precedent" principle. In some countries, additional statutes provide for specific rules on the builder's liability. There are no specific statutes or regulations governing the consulting engineer's liability only. However, in some countries, General Conditions for Consulting Services have been approved by the professional bodies (used both by consulting engineers and architects).

2. The **length of liability periods** for most common situations regarding consulting engineer contracts varies between countries and type of situation. The range spans: from one or two years in some countries for specific defects (Spain or France for instance), three years (Austria), five years (Germany, Denmark, Norway), ten years (Belgium, France, Italy, Spain & Sweden), twelve years (England), twenty years (the Netherlands), to twenty-five years (Hungary).

3. There is no **statutory financial cap**. In Sweden and Norway, the General Conditions for Consulting Services provide for a financial cap; in Denmark the General conditions for Consulting Services provide for a financial cap in specific situations.

4. Some countries impose a general condition on a consulting engineer to carry out the work with reasonable (professional) **skill and diligence**, such as England, the Netherlands, Belgium, Sweden, Spain, Norway and Denmark. In some other countries however (such as France or Austria), the consulting engineer is under an obligation of **result** (or even of warranty): in case of defects to the building work, the consulting engineer's liability is presumed, which means he has the burden to prove that he is not liable because the defect was caused by force majeure, or the negligence of the employee or someone for whom the employer is responsible.

5. The question of whether the client who contracts with a main contractor has a direct **claim against the contractor's subcontractor** (for instance the consulting engineer hired by a contractor) is a much disputed one. Some countries (such as England, Belgium or Finland) tend to consider that a client generally has no claim against the sub-contractor, even in tort, for economic loss (except, in England, through the use of collateral warranties). In some countries, however, the client does have such a right of action, under certain conditions (for instance, in Germany or in Austria, under the conditions of the "protective effect" theory). In some other countries (such as France, Spain or Italy), a client can claim in tort against the sub-contractor. Of course, the client who wants to claim from a sub-contractor usually claims first from the main contractor, and the main contractor (or its insurance) claims against the sub-contractor (regress).

6. In almost all countries, a consulting engineer can be held **jointly and severally liable with other parties involved with him in the project**. In Denmark (ABR 89), partners are only jointly and severally liable to the client when working in a total-consultancy group.

7. As a matter of principle, there is no prohibition in the EU Member States for the consulting engineers to exercise their professional activities in the form of a limited corporation. Except in specific circumstances, the injured party has **no claim against individual members of the firm**.

8. In several countries (such as France, Spain or Belgium), consulting engineers are not allowed **to limit their liability** towards the client for serious hidden defects. Also, the length of the liability period can not be shortened in several countries. The validity of the limitation of liability clauses towards consumers is also limited. Moreover, in many countries, these clauses are not valid in the case of intentional or gross negligence.

9. All the EU Member States covered by this report respect the freedom of the parties to **negotiate contract terms**, subject to the application of mandatory laws. For instance, in several countries, the parties can agree on a penalty clause (liquidated damages). These liquidated damages are independent of the proof of the amount of

the damage actually suffered. However, the amount of the penalty can sometimes be reduced by a judge.

10. There is no uniform practice in the **use of Standard Forms of Contracts** specific to consulting engineers, which do not exist as such in several EU Member States.

11. The notion of "**collateral warranty**" is specific to English law. In the countries where there is no right of action of the third party against the consulting engineer, a right of action in contract can sometimes be established, in specific situations only, on the basis of a mechanism which can be compared to the collateral warranties of English law.

12. Clients increasingly have the right to make **payment retentions** as security for the performance of the services. **Bonds and guarantees** are not required by law, except in some countries in the case of public services.

13. **Intellectual property rights** of the consulting engineer are protected by the usual national or European legislation on intellectual property rights. In some countries (such as Denmark, Finland or the Netherlands), the transfer of IP rights is also laid down in the General Contract Conditions.

14. Even in the EU Member States where no mandatory insurance is imposed by statute, it is customary for contract conditions to require the consulting engineers to provide **insurance**. However, it is not possible to make general comments on the usual coverage, which depends on the project, or the duration of the insurance policy, which in turn depends on the duration of the liability periods.

15. Most countries have no statutory requirements about the **duty for the engineer to maintain any insurance**. This is the case for instance in Austria, Denmark, Italy (except for public works), Finland, Spain, Sweden, the Netherlands, Hungary, Germany and England. In France, engineers are considered as "constructeurs" and have a legal obligation to take out professional liability insurance. Belgian engineers are not obliged by law to take out any professional liability insurance, unless they also operate and are registered as architect.

16. It is generally considered that **insurance is readily accessible**, even if in some countries it is more difficult for a consultancy business to obtain liability insurance.

# 1. Applicable law and legal issues

## 1. Basis of the law

In most continental countries (*Austria, Belgium, France, Germany, Hungary, Italy, the Netherlands, Spain*), the applicable law on liability is normally found in the Civil Code. In these countries, as a matter of principle, there are no statutory provisions on the liability of contractors or engineers outside the Civil Code. In *Spain*, for damage caused by a mistake in the construction of a building, art. 1591 ff. of the Civil Code is applicable in conjunction with articles 17 and 18 of the Building Regulations law (Law 38/99 of 5 November 1999 reforming liability and insurance in the building sector ("*Ley de Ordenación de la Edificación*"). This law is also applicable to consulting engineers, when acting for instance as designer ("*proyectista*") or surveyor.

In some countries, specific rules on liability can also be found in the regulations on public works.

In *England, Denmark, Norway* and *Sweden*, private law is not codified in a "Civil Code".

In *Denmark, Norway* and *Sweden*, General Conditions for Consulting Services have been approved by the professional bodies. The ABR 89 (General Conditions for Consulting Services) in *Denmark*, the NS 8401, 8402 and 8403 (General Conditions of Contract for Design Commissions) in *Norway* and the ABK 09 (General Rules of Agreement for Architectural and Consulting Services) in *Sweden* constitute "the general basis of consultation agreements for professional assistance by architects and engineers". These Conditions are presented as an "agreed document" and can be considered as an example of soft law regulation in the construction sector. The environmental liability rules contained in the Swedish "*Miljöbalken and Skadeståndslagen*" are also relevant.

In *Finland*, applicable law on liability is to be found mainly in the tort liability act, the land use and building decree and the land use and building act. General Conditions (KSE95) as well as the Finnish building code also include articles about liability.

In *England*[1], the main sources of law are legislation (through Statutory Acts of Parliament) and the court decisions, leading to case law based on the principle of "precedent". Certain legislative Acts are particularly relevant to the construction industry, such as the "Housing Grants, Construction and Regeneration Act 1996" (HGCRA), which provides a variety of protections and rights to clients in this sector, including fair payment terms, a right to suspension and a right to statutory adjudication for speedy resolution of disputes. Other legislation relating to Health & Safety, corruption, etc, is also relevant.

## 2. Rules and statutes on limitation and duration of liability

In the countries where a Civil Code is in force, the rules on limitation and duration of contractual liability can be found in the Code. The duration depends generally on the type of damage caused by the negligence of the engineer.

- In *Belgium*, articles 1792 and 2270 of the Civil Code provide for a 10 year liability period for serious defects. For minor defects, the claim must be introduced within a "reasonable" time after the defects have appeared (with an ultimate limit of 10 years following the acceptance). If the acceptance of the building is split between a "provisional" and a "definitive" phase, the year (or two) between the two is considered a warranty period, during which the contractor has to remedy defects which become visible.
- In *France*, the duration is 10 years for serious defects to the works after completion (articles 1792-1 and 1792-2 of the Civil Code); there is also a 2-year liability for defects to the "*non indissociable*" elements of equipments of works (article 1792-3 of the Civil Code). There is a warranty of perfect completion, to which a contractor

1 The notes on England in this report are based on English law only.

is held during a period of one year after the approval (duty to repair all shortcomings indicated by the building owner (article 1792-6)).

- In *Hungary*, the duration of the liability is partly dependent on the nature of the defects or issues. The duration varies from 5 up to 25 years.

- In *Germany*, in line with articles 195 ff. of the Civil Code, consulting engineers are liable to the client for 3 years following acceptance of the works. This period starts from the end of the year in which the liability claim originated, or at the moment the client knew or should have known about the damage. In addition to this general rule, article 634 of the Civil Code establishes specific rules for construction contracts (which includes for instance design contracts), including a 5 year liability for defects in relation with works to a building.

- In *Austria*, the warranty system is independent from default and based on the principle that the client can expect to get a correct work, and can claim warranty if the work shows a defect. If the defect was actually caused by fault, the client can additionally get compensation for damages. The duration for warranty is 2 years for movable objects and 3 years for immovable (there are varying legal opinions as to whether a plan can be seen as movable – and therefore the 2 years could be applied – or if the result of the plan (i.e. a building) is crucial – and therefore the 3 years for immovable should be applied). The starting point of the duration is the acceptance by the engineer's client. When the claim is based on the engineer's negligence (liability claim), the duration is 3 years starting from the knowledge of the damage and of the author of the damage, with a maximal duration of 30 years.

- The *Dutch* Civil Code provides for a limitation to 5 years to claim damages on the basis of a contract (article 3:307 of the Dutch Civil Code). There is a possibility to interrupt the limitation period up to a maximum of 20 years (article 3:306 of the Dutch Civil Code). The DNR 2005 imposes a duty on the client to inform the consulting engineer "reasonably shortly" after he discovered or should have discovered the defect. The engineer's liability then expires 2 years after the client has brought the defect to light, and in any case 5 years after the completion of the consultation assignment.

- In *Spain*, according to article 17 of the Building Regulations law (Law 38/99 of 5 November 1999 reforming liability and insurance in the building sector), there is a 10 year liability for structural damage; shorter limitation periods have been fixed, for instance 3 years for defects that affect living conditions, or 1 year for the finishing works. The claim must be introduced within 2 years of the appearance of the defect (article 18 of the Law 38/99).

- In *Italy*, in the case of contractual liability, the limitation period is 10 years (article 2946). In some recent judgments (referring to professions other than technical ones), it has been specified that the limitation period runs from the moment that the injured party has knowledge of the damage, and not from the time that this damage occurred (or from the time the negligence has been committed). With regard to liability for public works, the period of limitation is 5 years, and this runs from the time the Public Administration has knowledge of the fact. Article 2226 of the Civil Code states that hidden defects must be notified by the client to the professional within 8 days of the discovery. The right of action against the professional shall cease one year after the handover of the works (in case of liability for hidden defects). This article may be applied (on the basis of some judgments) only to designers and not to consulting engineers who are for example supervising the construction works. In the case of extra-contractual liability, the limitation period is 5 years.

The situation in the Scandinavian countries is as follows:

- In *Denmark*, the general duration of liability claims is 3 years after a party discovered or should have discovered the defect. Regarding the liability for errors and negligence, Section 6.2.3.1. of the Danish ABR 89 provides that the liability of the consultant shall cease 5 years – or 10 years when the client is a consumer – after the completion of the consultation assignment or the handover of the building; in the case of consultancy provided for the execution of buildings and civil engineering

works, the consultant's liability shall cease 5 years after the handing over of the building or the works.

- In *Norway*, according to the General Conditions, the liability period is 5 years after the completion of the consultation assignment.
- In *Sweden*, the liability period is 10 years. The consultant's liability period starts from the date his assignment is completed. However, General Conditions ABK 09 provide for a period of 3 months to notify defects which should have been noticed at the final inspection of the works and at the latest within nine months from the date the client obtains knowledge of the damage.
- In *Finland*, there is no specific limitation provided in statute law (general limitation period is 3 years). Under the General Conditions (KSE95), the client has to present his claim for compensation without delay and no later than one year from the date when the error was determined to be attributable to the consultant's error. The final claim for compensation has to be presented by the client in writing within one year following the expiration of the consultant's liability period specified in the General Conditions (KSE95), on sanction of loss of his claim (article 3.2.5).
- Finally, in *England*, according to the Limitation Act 1980, the general limitation period for a claim in a (consulting engineer) contract is 6 years from the related non-performance. However, for contracts made under seal (which construction contracts often are), the liability period is 12 years (Limitation Act 1980, articles 5 and 8). In case of tortuous liability, the liability is 6 years from the date the damage was caused and 3 years from the date of any injury. Limitation periods, and the Limitation Act 1980, are currently the subject of Law Commission Review, which is proposing sweeping changes to limitation periods.

## 3. Statutory financial caps

In *Denmark, Norway* and *Sweden* there are no statutory financial caps. However, in *Norway*, general contract conditions NS 8401 and NS 8402 provide a cap of NOK 11.3 million and NS 8403 provides for a cap of NOK 3 million (each claim with an aggregate per project of NOK 9 million) in case the consultant causes damages while carrying out the assignment.

In *Sweden*, ABK 09 provides a cap in case the consultant causes damages while carrying out the assignment.

In *Denmark*, ABR 89 provides a financial cap in situations where the consultant has agreed on behalf of the client to supervise that the construction work is done according to contract: In such cases, the liability of the consulting engineer shall be limited to the amount of DKK 2.5 million.

A similar limit applies in *Finland*, where the General Conditions stipulate that the upper limit of the Consultant's liability for damage is defined in the contract. If the contract does not contain such a stipulation, his liability for damage shall in no case exceed the total remuneration forthcoming to the other contracting party. It shall be laid down in the contract whether any other kinds of liabilities affect the consultancy compensation and whether any liability insurances must be taken out. These restrictions do not however apply to cases involving malicious intent or gross negligence. A duty of care is imposed on professionals.

*Austria, Belgium, France, Hungary, Italy, the Netherlands, Germany* and *England* have no statutory financial caps on liability. Article 19 of the Spanish Law 38/99 of 5 November 1999 provides for a statutory financial cap in relation with the amounts to be covered by the mandatory insurance policy; however this cap does not prevent the victim from claiming against the constructor or the designer for the entirety of the damage suffered.

In several countries, such as the *Netherlands, Belgium* and *France*, courts have a right to moderate the damages claimed, inter alia on the basis of the theory of the "abuse of rights".

## 4. Duty of Care imposed on Professionals

No country has reported any specific rules for consulting engineers in relation to the duty of care imposed on professionals. It is therefore necessary to go back to the general private law rules on the duty of care imposed on the designer to assess the position of the consulting engineers in this respect.

In *Austria*, the warranty system is independent from any fault or liability: the client can claim warranty if the work shows a defect. If the defect was actually caused by fault, the client can additionally get compensation for damages.

The *Belgian* Civil Code contains no explicit general rule. However, there is a widely accepted principle that the designer (including the consulting engineer) has to perform his services with professional skill and efficiency and in accordance with professional standards. This rule is also mentioned explicitly in the Code of Deontology of the Architects. Except in some specific cases, the burden of proof lies on the client, who has to prove the engineer's negligence (obligation of means).

In *France*, as in *Belgium*, the designer must apply the so-called rules of the art (règles de l'art). The principle that the consulting engineer has to perform his services with professional skill and efficiency also applies here.

In *Hungary*, building law imposes several duties on the professionals, in varying phases of the construction project (for example, building permits, tender, construction documents, etc.) No specific rule is mentioned regarding the nature of the consulting engineer's obligations.

In *the Netherlands*, the general rule on the standard of care is laid down in article 7.401 of the Dutch Civil Code. The consulting engineer has to provide the standard of care expected of a professionally skilled service provider. An obligation of means is imposed on the consulting engineer. His services must comply with the current state of science and technology at the time the service is provided. If the consulting engineer was not or should not have been aware that his services were unfit for purpose, taking into account his professional knowledge of his science and technology, the damage is not for his risk or account.

In *English* contract law, the duty of care exists in implied rules as well as standard forms of contracts (such as the ACE (Association for Consultancy and Engineering) standard forms of contract). The implied duty of the designer is to carry out his duties with proper skill and care and in a workmanlike manner; in other words to the standard of the typical skilled and competent practitioner in the profession concerned.

In *Spain*, there is no obligation of result. However, the promoter/developer is obliged to take out a ten year guarantee insurance policy, through which, in the case of structural damage, or serious damage arising in the said period, he will immediately be indemnified by the insurance company. The insurance company is then subrogated claim against the party responsible for the damage.

In *Italy*, Article 1176 of the Civil Code states that "in fulfilling the obligations inherent to a professional activity, diligence must be evaluated in relation to the type of activity rendered". Furthermore, article 2236 of the Civil Code states, about professional services, that "if the service implies the solution of technical problems on an especially difficult level, the person rendering the service is not liable for damages, unless these are due to either intent or gross negligence". Regarding the burden of proof, case law has determined that the obligation undertaken by the consulting engineer is related to performance-guaranteed execution (obligation of result), while that of the site engineer is a best-endeavours obligation (obligation of means).

In *Finland*, under the General Conditions (KSE95), consulting engineers have an obligation to carry out their work with reasonable professional skill and diligence.

Finally, in *Denmark, Norway* and *Sweden*, there is no specific rule imposed on designers. General rules on performance can be found in the standard forms of contract. For instance, in *Sweden*, the ABK 09 provides that the designer shall carry out his work according to good professional practice. He is liable for negligence in the exercise of his assignment.

## 5. The rights of third parties (funders, purchasers and tenants) and the ability to bring a claim against the consulting professional

A first aspect of this issue is whether a third party who suffers damage as the result of a professional's negligence in the performance of a contract can sue that professional.

In *France* and *Belgium*, it is widely accepted that the potential claim against the consulting engineer for defects in real estate is implicitly assigned by the client to the purchasers of the property: the right to claim is, as it were, an accessory to the property and follows it to whoever becomes its owner.

Another aspect is whether the client who contracts with a main contractor has a claim against the contractor's subcontractor (for instance the consulting engineer hired by a builder). Since there are no direct contractual links between the client and the consulting engineer, one would expect that the claim is in tort. However, this process is far from being harmonised across the Member States. For instance:

- Such a non-contractual liability (liability in tort) was eliminated in *England* by the House of Lords 1990 decision Murphy vs. Brentwood. It is no longer possible for a third party to claim against the consulting engineer for economic loss in case of defective work. However, it is still possible to claim for damages caused to the property or to the person as a result of such work (for instance, if a piece of roofing comes loose due to an engineer's negligent design and causes personal injury). However, warranties or collateral warranties, with respect to third party rights, are commonplace. These contracts create a contractual relationship (rights and obligations) between parties collateral to the main contract. In relation to design and construction, the warrantor might be the design consultant, subconsultant, contractor, subcontractor or supplier (warranting the performance of their services, construction works or supplies under the main construction contract or appointment with the project promoter or developer). The beneficiary would typically be the purchaser, tenant or possibly a funder with an interest in the project/development, but having no direct link or relationship with the construction team. Under the appointment or construction contract, the promoter/developer has a right of action against the construction team in the event of default or losses arising on the project. Without such a warranty, the purchaser/tenant/funder, on completion of the project, has no contractual right of action against the defaulting construction team member in the event of them being at fault (although there may be other avenues of redress). By way of example, a consultant may warrant, to the purchaser, reasonable satisfactory performance of his services as provided to the developer under the design services appointment. The warranty is thus collateral to the design services appointment.
- In *Germany*, since 1963, the client has no tort claim against the subcontractor. In very specific situations, there is a possibility for the client to claim damage on a contractual basis, when the contract between the contractor and the sub-contractor has a "*protective effect*" for the client. The "protective effects" theory permits a court to hold that a third party has a claim against the defendant when this third party (victim) is someone the defendant could expect to be harmed by a breach of contract.
- The theory of the "*protective effect*" has been imported from Germany to Austria: the theory applies in cases where the consulting engineer, acting as a sub-consultant, acts against (statutory or contractual) rules which have a protective effect for third persons, and causes precisely the damage that the rules are designed to avert.

- The same applies as a matter of principle in *Finland*, where the client has no claim against the sub-contractor, even in tort.
- In *Italy*, the site owner can sue the sub-contractor on a tort basis (article 2043 or article 1669 of the Civil Code).
- The same applies in *The Netherlands* where third parties are allowed to bring a claim in tort against the consulting engineer who acted as a subcontractor (article 6:162 of the Civil Code), without prejudice however to the liability of the contractor itself (art. 6: 171 of the Civil Code).
- In *Spain*, case law clearly allows the site owner to bring an action against the subcontractor.
- In *France*, after many twists and turns of the Cour de Cassation, it was decided in 1991 that the right of action of the client against a subcontractor (for instance, consulting engineer) is an action in tort. An issue arose, however, in connection with the difference in the [duration of the] prescription of the action against the subcontractor in that case. This issue has now been resolved by the adoption of a new article 1792.1 in the French Civil Code which provides in this specific case the same prescription period as for the decennial liability.
- In *Belgium*, the question is also controversial. The right of action of the client is extremely limited in comparison with the French solution: since there is no contract between the client and the sub-contractor (engineer), the only claim of the client rests on article 1382 of the Civil Code (liability in tort). However, in a leading case (7 December 1973), the Belgian Supreme Court has decided that a party to a contract has a claim against the subcontractor if, and only if (i) the breach of the contract is also negligence in the sense of article 1382 - a violation of law or negligence other than contractual breach) and if (ii) the damage claimed is not a damage resulting merely from the non-performance of the contract. The second condition is seldom met in the case of damage caused by the sub-contractor.
- In *Sweden*, as well as *Denmark* and *Norway*, the client's chance of obtaining compensation from the subcontractor is rather poor, because of the lack of direct contractual relationship. Direct action in contract exists when the subcontractor provides misleading information or some sort of warranty for his work. An action in tort is possible when the damage caused to the client can be classified as "property damage". Then, usually, the client claims from the consultant, and the consultant's insurance company claims from the subcontractor (regress). A third party can claim directly against the client, consultant or sub-consultant for personal injuries or property damages caused by negligence.

It should be noted that, in most countries, actions based on tort are subject to statutes of limitation which are different from those for contractual claims.

## 6. Joint and several liability

In almost all countries, there is a principle that the consulting engineer can be held jointly and severally liable, which means that any single defendant who is held jointly and severally liable may be requested by the claimant to pay 100% of the damages. The defendant who paid the claimant has recourse against the other jointly and severally liable defendants for their portion of the damages, but bears the risk of their insolvency (the so-called 'deep pocket' syndrome). In other words, if one of the jointly and severally liable contractors or consulting engineers goes bankrupt, the client can oblige one of the others to pay, even when their share of the damage is small.

This principle is sometimes confirmed by an explicit provision of the Civil Code. For instance, in *Germany*, article 840 § 1 of the Civil Code states that: "if more than one person is responsible for damage arising from a tort, then they are jointly and severally liable". A similar provision exists in *Italy* (articlo 2053), *Spain* (article 107) and *the Netherlands* (article 6:102). In *England*, the same principle is recognised by article 1 of the Civil Liability (Contribution) Act 1978.

In *Austria*, according to the Civil Code (ABGB), the consulting engineer is jointly liable when he acts with intent or when it is not possible to determine his proportion of the damage and that of the other actors. In other words, joint liability is not applicable when only one party proves negligent and the proportion of responsibility can be determined. If the consulting engineer and other actors work together in the form of "*Arbeitsgemeinschaften*" (an informal cooperation foreseen in the ABGB and often used for cooperation in certain projects), all partners of the "*Arbeitsgemeinschaft*" are jointly liable.

In *Belgium* and *France*, the so-called "*in solidum*" liability between those responsible for the same harm has been recognised for a long time by case-law.

However, statutory joint and several liability does not exist as such in *Hungary*. Clients often try to push for joint and several liability in a separate agreement, but this is a matter of negotiation between the consulting engineer and the client.

Finally, in *Denmark*, article 6.2.5 of the ABR 89 states that "Where the consultant shares with one or more other parties liability to the client in respect of loss in connection with building or civil engineering work or preparation for such work, the consultant shall be liable only for that part of the client's loss which corresponds to the share of the total guilt attributable to the consultant". This rule contrasts with the general practice in *Danish* law concerning joint and several liability for the losses of the injured party (with subsequent recourse among the defendants). This exclusion of joint and several liability is not applicable to the individual consultants in the case of a so-called "total-consultancy". The term "total-consultancy" means a form of consultation in which one consultant or a group of independent consultants in one single joint agreement with the client undertake all, or the major part of, the consultation work involved in a given project. In such a case, each consultant is fully liable for the work involved. A similar provision exists in *Norway* (article 5.5. of the General Conditions NS840).

## 7. Corporate versus personal liability

This depends on the type of person whose liability is claimed: when the consulting engineer is an employee, it is widely accepted that he will never be liable towards his employer or third parties, except in the case of gross negligence or intentional fault.

The question is somewhat different when analyzing the potential liability of the consulting engineer as a member of the Board of Directors of a firm. In this case, the directors have no personal liability for the debts of the corporation if this is a properly organized, maintained and capitalized corporation: if such a corporation undertakes an obligation and causes injury to a third party, only the corporation and not the directors are legally responsible as a matter of principle (and if a corporation does not have sufficient assets to satisfy the liability, the creditors are not entitled to claim against the personal assets of the directors). There is an exception to this rule in the case of penal infringements committed by the directors or in other specific situations resulting from company laws from the individual Member States. For instance, in *England* and except for a contractual exclusion (such as the exclusion provided for in the ACE standard forms of appointment), nothing prevents an injured party from seeking damages from an individual member of a firm of consulting engineers, if that individual's negligence caused the injured party to suffer loss. The same applies in *Finland*, where there is no prohibition for the consulting engineers to exercise their professional activities in the form of a limited corporation but, since the injured party may claim against individual members of the firm, there is little benefit in using a limited corporation for that purpose.

However, when the consulting engineering activity is not operated in the form of a corporation, but in the form of a partnership (or a trust), the partners have in this case an unlimited liability for debts incurred in the business.

There is no prohibition in the Member States for consulting engineers to exercise their professional activities in the form of a limited corporation (except, in some countries, when the consulting engineer also acts as a registered architect).

## 8. Laws of particular relevance to consulting engineers

Generally speaking, the responses to the questionnaire underline that there are no specific rules in the Member States which are particularly relevant to consulting engineers only.

As mentioned previously, *Norway*, *Sweden* and *Denmark* widely use standard conditions (soft law) which govern several aspects of the contractual relationship between the consulting engineer and the client (see above).

In *England*, the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 96) provides, inter alia, for fair payment terms, the right to suspend work for non-payment; it prescribes notices with respect to payment as well as mechanisms in relation to withholding of payment; it also provides for a specific dispute resolution procedure for resolving construction disputes (including adjudication).

In *Austria*, there are standards governing several aspects of the contractual relationship between a client and a consulting engineer, which can be made applicable. There are also professional laws and codes of ethics but they only cover professional behaviour, rights and duties of the consulting engineers.

In other countries, such as *Belgium*, *Italy* or *France*, very specific regulations for architects also apply to consulting engineers when they act as an architect and are registered as architect. Several Member States have also adopted regulations that grant architects a monopoly for the design of (some types of) buildings. In some countries (e.g. *Germany* and *Italy*), this monopoly is shared with engineers.

There are no other specific rules to be mentioned in any Member State.

## 9. Other relevant issues

The most important issue to note is that in some countries, consulting engineers are not allowed to limit their liability towards the client for damage to serious hidden defects. In both *France* and *Belgium*, articles 1792 and 2270 of the Civil Code – as well as articles 1792-1 to 1792-4 in *France* – are mandatory: any limitations of liability for these damages are void. The same solution applies for instance in *Italy*. In *Spain*, liability to the client can be limited by signing an agreement. In *England*, contracting parties are not permitted to exclude or limit liability with respect to death, personal injury or fraudulent misrepresentation.

Generally speaking, the validity of the limitations of liability is subject to the general law of contract of each Member State. For instance, in *Germany*, clauses which limit the liability sum are only valid if the liability sum is still reasonable in relation to the design, and corresponds to the expected damage. In *Belgium* and *France*, such a limitation of liability clause is valid only if it does not have the effect of discharging the engineer of his obligations. The validity of these clauses with regard to consumers is also limited. Moreover, in many countries, these clauses are not valid in cases of intentional or gross negligence. In *England*, in addition to the common law requirements, the Unfair Contract Terms Act 1977 (UCTA) also contains important rules on the effectiveness of exclusion or limitation of liability clauses. In particular, this act limits the ability of a contract party to rely on terms which exclude or limit its liability. The UCTA requires an exclusion clause to satisfy the requirements of reasonableness. Thus, clauses limiting liability for all damage resulting from negligence have to be fair and reasonable.

In *Spain*, the social security law excludes the possibility of insuring against punitive damages which are a consequence of negligence in health and safety measures.

In *Finland*, consulting engineers can theoretically limit their liability to the client for serious hidden defects, but de facto, such agreements are hardly ever concluded.

Finally, it is important to bear in mind that if the client is a private individual, the protection provided by domestic consumer laws will apply (for instance the rules on unfair contract terms in consumer contracts, distance selling when applicable, commercial practices and codes of conduct, defective goods....). This observation applies to all EU Member States.

In any case, contractual limitations of liability are not enforceable vis-à-vis third parties.

# 2. Contractual arrangements

## 1. The ability/freedom of the parties to freely negotiate contract terms

In all the Member States covered by this report, there is full freedom of the parties to negotiate contract terms, provided that mandatory laws are respected (such as the consumer protection laws or, in some countries such as *France*, *Italy*, *Spain* or *Belgium*, the mandatory rules on liability for serious hidden defects). Parties usually refer to standard terms or conditions in their contract. This is the case in *Denmark, Norway, Sweden, the Netherlands* and *England* for instance. However, even in these countries, it is still possible for the parties to deviate from such standard conditions and to draft a tailor-made contract. Finally, when contracting with the Public Authorities, the contract is generally based on standard conditions for public contracts, which can only be modified to a limited extent.

In several countries, for instance *Belgium* and *Austria*, the parties can agree on a penalty clause (liquidated damages). These liquidated damages are independent of the proof of the amount of the damage actually suffered. In *Austria*, it is possible to agree on a contract penalty that is independent of any fault or negligence. In several countries, the amount of the penalty can be reduced by a judge.

## 2. Use of standard forms; benefits and disadvantages

There seems to be a large variety of practices and situations in each of the countries which were analyzed.

In some countries, it is not customary to use standard forms of contract in the construction sector, except in the case of public works.

- For instance, in *France*, the parties in the public works sector use the Cahiers des Clauses Administratives Générales (CCAG) conditions; similarly in *Belgium*, the conditions for the performance of public works are contained in the Cahier Général des Charges (CGC); in *Germany*, in the VOB Teil B; general conditions for public work contracts also exist in *Italy* and *Austria*.
- In *Hungary*, some companies (clients, designers or insurance companies) have developed their own contractual conditions, but these conditions cannot be considered as standard conditions for the whole sector. The same applies in *Spain*, where there are no standard forms for consulting engineers and their clients.

In other countries, such as *Denmark*, *Norway* and *Sweden*, the organisations for engineers and architects have drafted standard forms of contracts. However, many big clients still prefer to use their own contracts which they try to impose on the consulting engineers.

In the *Netherlands*, NLingenieurs, the Dutch association of consulting engineers, has set up standards for general conditions together with the professional organisation for architects (BNA). Use of these standard forms of contract is not mandatory for NLingenieurs and BNA members. However, there is evidence that more than 80% of the NLingenieurs members do use the standard forms of contracts. The most widely used standard contract conditions are the DNR 2005 (some of the members have their own general conditions but these conditions are often based on the standard conditions of NLingenieurs such as the DNR 2005).

In *England*, some standard forms are also widely used in the building construction area. Some of them are specifically dedicated to consulting engineering activities. This is the case, for instance, for the ACE agreements, the FIDIC (International Federation of Consulting Engineers) White Book or the NEC3 professional services contract. These standard forms of appointment usually require the consulting engineers to provide professional insurance coverage.

## 3. Collateral warranties

A "collateral warranty" is a legal term with a specific meaning under *English* law. A collateral warranty is a contract which gives a third party collateral rights in an existing contract entered into by two separate parties. For instance, an architect or a consulting engineer is appointed to design a building for a developer, who will later sell this building to a purchaser. Due to the "privity of contract" rule, the architect or the consulting engineer would normally only be contractually liable to the client should defects arise. The collateral warranty establishes a contractual relationship between the purchaser and the architect or the consulting engineer in the case of defects which appear after the sale of the building.

The right of a third party to sue the consulting engineer is dealt with in section 1.5 above. In countries where there is no right of action of the third party against the consulting engineer, a right of action in contract can sometimes be established, in specific situations only, on the basis of a legal mechanism which can be compared to the collateral warranties of common law. There is no use of collateral warranties in, for example, *the Netherlands*, where third parties have the right to sue in tort (article 6:162 BW).

## 4. Bonding, guarantees and payment retention

In almost all the Member States covered by the present report, a growing tendency can be observed in situations where clients use a payment retention mechanism (in *England* however, financial guarantees and retention for consultants is unusual although the requirement for parent company guarantees is increasing). Moreover, warranties have become more frequent in recent years because of the clients' fear of bankruptcy of the consulting engineer. For instance, clients frequently demand a specific guarantee when the consulting engineer is a member of a consortium. These bonds and guarantees are not required by law, however.

In several countries, a mandatory guarantee has to be provided by the consulting engineer engaged in a public works contract. For instance, a 5% warranty is required in *Spain* and *Belgium* for contracts with a public authority; in *Italy*, however, the Public Contracts Supervising Authority has established that consulting engineers are not obliged to give the said guarantees, except in the case of payment by instalments, where the consulting engineer will then be required to give a guarantee equal to the amounts to be paid by the principal.

Such guarantees are not frequently used in *Austria*.

## 5. Intellectual property rights

In all EU Member States, the intellectual property rights of the consulting engineer are protected by national or European legislation on intellectual property rights. The protection and/or the transfer of property rights on the works performed by the consulting engineer are generally laid down in the contract.

In *Denmark*, property rights are dealt with in Chapter 4 of the general conditions for consulting services (ABR 89). The same is true in *Finland* under the KSE95, in *Norway* under the NS8401 (article 6.1) and in *the Netherlands*, where articles 45 to 48 of the DNR 2005 contain specific regulations in relation to the transfer of IP rights to the consulting engineer's client. In *Sweden*, ABK 09 contains stipulations concerning intellectual property rights. The main rule is that the right to the result of a project remains with the consultant unless otherwise agreed in writing.

## 6. Insurance

National rules dictate whether or not consulting engineers are obliged to insure their professional liability. The existence or the absence of a statute or regulations relating to the mandatory professional liability insurance in the construction sector is covered in Section 3.1. However, even in Member States where no mandatory insurance is imposed by any statute, the contractual provisions often require the consulting engineers to take out insurance.

- In *Denmark*, all standard conditions of contract require the consulting firm to be insured. However, it is not possible to generalize coverage, which depends on the project. The duration of the cover is generally 5 years following handover of the building (10 years in the case of private consumers).

- Similarly, in the *Netherlands*, there is no statutory obligation for a consulting firm to have insurance (see below). However, NLingenieurs members are required to carry insurance cover for at least €1M. Consulting firms that are not a member of NLingenieurs or other trade organisations have no insurance obligation. However, clients often ask for such an insurance (no figures are available on this issue).

- The same is true in *Finland*, where statute law does not impose any mandatory insurance. However, it is customary to find in the contract conditions a duty for the consulting engineer to be covered by insurance.

- In *Sweden*, according to the general conditions ABK 09, there is a duty for the consulting engineer to be insured. The limit for the liability according to the ABK 09 is 120 base amounts, approximately SEK 5 Mio, and the duration is 10 years. The typical standard professional damage insurance for architects and consultants is based on the ABK 09 and has the same limit of 120 base amounts per claim, with a maximum of 360 base amounts per year. The insurance is renewable on a yearly basis and covers damages resulting from all of the consultants' ongoing projects. If the contractor requires insurance with an insurance amount earmarked for one specific project and that covers the full 10 years' duration period, the consultant can subscribe to special project insurance. In most of these cases, the contractor sets a higher amount than 120 base amounts and is almost always the one who pays for the insurance, even if the consultant is the insured party.

- In *Norway*, the General Conditions NS8401, NS8402 and NS8403 also impose on the consulting engineer a duty to be insured. The limit for the liability according to these General Conditions is 150 base amounts, approximately NOK 11 Mio, and the duration is 5 years.

- The same solution applies in *England* where standard forms of contract governing the relations between the client and the consulting engineer generally require the consulting engineer to be insured.

Finally, in countries where there are no general conditions as such, it is less frequent for contracts to require the consulting firms to provide insurance, except in public works.

- This is for instance the case in *Belgium* and *Hungary*. However, even in these countries, there is a growing tendency for contracts to stipulate a duty on the consulting engineers to be insured, especially in the case of public works and large projects.

- A similar observation is made in *France*, where the client often tries to insist on a decennial insurance, also for constructions exempted of the compulsory insurance. However, the market does not offer such insurance. The consulting firms generally have two annual insurances: a compulsory insurance, with a limit of guarantee of €3 Mio, and a professional liability insurance to cover all kinds of liability except the decennial liability, with a cover depending on the average price of the projects studied (between €1 to 10 Mio).

- In *Germany* also, despite the absence of general conditions specifically applicable to the consulting engineers, most consulting engineers are in fact covered by professional liability insurance. This is especially the case for the consulting

engineers who intend to act as architect, because one of the requirements prior to the registration at the BAK (Bundesarchitektenkammer - professional body of architects) is that architects have taken out a professional liability insurance.

- The same applies in *Austria*, where it is very common for contracts to require the consulting engineer to provide insurance. This insurance is normally not connected with a certain project but is a general coverage up to a certain liability sum. Of course, the necessary minimum insurance sum that is required from the consulting engineer by the client often depends on the size and complexity of the project.

# 3. Insurance

## 1. Statutory requirements

Several countries have no statutory requirement on the duty to maintain any insurance. This is the case for instance in *Austria, Denmark, Norway, Italy* (except for public works), *Finland, Sweden, the Netherlands, Hungary, Germany* and *England* (except for common business operational insurances such as motor vehicle, employer's liability, public liability, etc) : in all these countries there is no legal requirement for the consulting engineer to take out any professional liability insurance or for the client to take out any project specific defect liability insurance. It is worth observing that, in some of these countries, general contractual conditions always require the consulting engineer to take out professional liability insurance (see above). In addition, social law generally requires the employer (public or private) to insure its employees, including coverage for workplace accidents; however, this is not a duty which is specifically imposed on consulting engineers or contractors. In *Spain*, article 19 of the Law 38/99 of 5 November 1999, reforming liability and insurance in the building sector, imposes a duty on the promoter/developer to be covered by insurance for the appearance of serious defects for 10 years following completion of the works. However, no professional liability insurance is imposed on the contractor or the designer.

In *France*, engineers have a legal obligation to take out professional liability insurance. Specific rules on this obligation have been established in the Code des Assurances (insurance regulations). According to article L241.1 of the Code des Assurances, the person or entity whose professional liability may be established under article 1792 of the Civil Code has to be covered by insurance. Accordingly, the obligation to take out professional liability insurance applies to the "constructeurs", which refers to architects, engineers or contractors having a contract with the client. The liability insurance covers the engineer for a period of 10 years following acceptance of the works. It covers damage which jeopardizes the stability (essential elements) of the works or the suitability of the works, taking into account the client's intended use. The insurance cover is mostly limited to the total construction sum. The damage for which engineers can be liable and which is not in the scope of the decennial guarantee is not covered by the professional liability insurance of engineers (see above). In other words, not all possible damage is covered by the engineer's legal obligation to take out professional liability insurance.

Finally, Belgian engineers are not obliged by law to take out any professional liability insurance. However, article 4 of the Architects Statute Act of 1939 contains such an obligation. This means that when the consulting engineer is registered as an architect, he has to take out professional liability insurance. The insurance duty covers the contractual liability before acceptance, the 10 year liability period following acceptance, as well as tortuous liability. The scope of the professional liability insurance for architects is therefore extensive.

## 2. Insurance markets

Survey responses indicate a tendency to consider that access to the insurance market is relatively easy, even in countries where the building insurance market has shrunk (such as *Belgium*, *Norway*, *Austria* and *Denmark*). Some professional organisations

of engineers (such as *Italy*, *Denmark* and *England*) have concluded agreements with insurance companies in order to provide an insurance policy specifically covering consulting engineering activities. In some countries, difficulties can arise when clients want a higher coverage than the one set in the general conditions. While large consulting firms generally have no problems in finding additional coverage, smaller firms can experience difficulties.

## 3. Decennial liability insurance

No specific information is available on this issue. For decennial liability and the insurance of such liability, see above (including sections 1.2 and 3.1). No companies in *Italy* provide a decennial liability insurance for professionals, but it is possible to overcome this problem by including the consulting engineer as an insured party in the constructor's ten-year policy.

## 4. Other relevant issues

The following additional comments were provided in the survey responses:

- In *Hungary* the amount of the required insurance coverage is frequently an obstacle to getting projects (for instance at the European level) for Hungarian consulting engineers.
- In *Sweden* and *Norway*, although most insurance companies offer professional indemnity insurance to some extent, only the bigger ones also offer project insurance.
- In *England*, insurance coverage is typically offered on an each and every claim made basis. The cover typically includes contractual liabilities, including third party and personal injury claims. ACE (consulting engineers' professional body) offers a managed professional indemnity insurance scheme for its members. This scheme is supported by a panel of three brokers (Griffiths, & Armour, Heath Lambert and Willis).
- In *Italy*, a recent survey of the insurance market of professional liability insurance for consulting engineers shows that the Lloyd's share has increased to 30% for engineering companies, which is due to the existence of an agreement between Lloyd's and the OICE (consulting engineers professional body).

# Appendix I Survey questionnaire

## 1.0 Applicable law and legal issues:

**Include in this Section a summary of the laws (where applicable) relating to:**

**(1)** The basis of the law (Statute, Codes, Court imposed/precedence etc)

**(2)** Rules and statutes of limitation and duration of liability

**(3)** Any statutory financial caps

**(4)** The duty of care imposed on professionals

**(5)** The rights of third parties (funders, purchasers and tenants) and their ability to bring a claim against the consulting professional

**(6)** Joint and several liability (does the law allow an injured party to recover all losses from a party that has only contributed to part of the losses?)

**(7)** Corporate versus personal liability (for example can an injured party claim against the individual members of the firm?)

**(8)** Any laws particularly relevant to consulting engineers (such as laws providing for fair payment terms, dispute resolution, interest for debts etc)

**(9)** Any other relevant issues (such as exclusion of certain classes of damages, laws that cannot be excluded by the parties in contract)

## 2.0 Contractual Arrangements:

**Include in this Section:**

**(1)** The ability/freedom of the parties to freely negotiate contract terms (such as financial caps, exclusion of consequential losses, liquidated damages etc)

**(2)** The frequency and use of standard forms and specify what benefits (and/or disadvantages) such forms provide (such as financial caps and other protections)

**(3)** The use of collateral warranties to provide a contract (and right to sue) between the CW beneficiary (funder, purchaser, tenant etc) and the consulting firm

**(4)** The frequency an use of bonding, guarantees, payment retention

**(5)** If relevant how are intellectual property rights addressed between the contracting parties

**(6)** How common it is for contracts to require the consulting firm to provide insurance (if relevant specify type of coverage and typical duration)

## 3.0 Insurance

**Include in this Section an insight into country insurance matters:**

**(1)** Does statute specify any insurances that consulting firms must maintain (Professional Indemnity, Public (or General) Liability, Employers Liability etc)

**(2)** How easy is it to obtain required insurance coverage

**(3)** If relevant, add any obligation vis a vis decennial liability insurance

**(4)** If available add some commentary on the local insurance market

# Appendix II Glossary

## CIVIL CODE
A body of private law developed from Roman law as set forth in the Justinian code. It is based on the judicial application of a certain legal code to a particular case by learned jurists and theorists, in conformity with logical and systematic deduction.

## CLAIM
A demand for payment of damages by one party against one or more other parties.

## COMMON LAW
The body of legal principles and rules of action that derive their authority solely from a society's usages and customs or from the judgments and decrees of the courts.

## CONSULTANTS
A person or entity who provides professional advice or services.

## CONTRACT UNDER SEAL
Contracts under seal derive its binding force from its form alone. It is in writing and is signed, sealed and delivered by the parties.

The principal effect of executing a contract under seal is that the limitation period (i.e. the time following a breach of contract in which the innocent party is entitled to commence proceedings to enforce the agreement) is extended from 6 to 12 years.

## DEFECT
The fact that a portion of the work, as actually constructed, does not conform to recognized rules, to qualitative or quantitative specifications or, in case the same are insufficient, is not fit for its purpose.

## DESIGN
The process of applying engineering principles in a disciplined way to provide a practical and economical solution to a required task or process.

## LIABILITY
A debt of responsibility; subjection to an obligation; an obligation which may arise by a contract made or by a wrong committed.

## LIQUIDATED DAMAGES
A sum established in a construction contract, usually as a fixed sum per day, as a genuine pre-estimate of the damages which will be incurred by the owner due to the failure to complete the work on schedule.

## NEGLIGENCE
Failure to exercise that degree of care which an ordinary careful and prudent person would exercise under similar circumstances.

## TORT
A wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction.

## WARRANTY
A written contract in the favour of the beneficiary in order to compensate the latter against financial loss caused by material damage and/or personal injury.

# Appendix III Liabilities for Consulting Engineers

| | Source of Law | Duration of liability | Rights of third parties/extra contractual liability | Duty of care | Statutory financial caps | Joint & several liability | Use of standard forms of contract |
|---|---|---|---|---|---|---|---|
| ***Austria*** | Civil Code (ABGB) | 3 years counted from knowledge of the damage and the author of the damage.<br><br>If the damage or the author of the damage is not known (or was caused by a criminal action) the duration of liability is 30 years. | Right of action if the consulting engineers acted against the consumer protection law.<br><br>In specific cases, employer can bring on a contractual basis a claim in tort against the sub-contractor. | Warranty system independent from fault or liability.<br><br>If defect was caused by fault, client can additionally get compensation for damages. | None | Yes, when the consulting engineer acted with intent (i.e. not with negligence only) or when his contribution to the damage and those of other actors are not determinable.<br><br>In a 'Arbeitsgemeinschaften' (an informal cooperation foreseen in the ABGB), all partners are jointly liable. | Standard forms are provided by the Chambers.<br><br>Major public clients use their own contracts. |
| ***Belgium*** | Civil Code | 10 years for serious defects.<br><br>For minor defects, within a "reasonable" time after the defects appear (with maximum of 10 years after acceptance). | Limited employer's right of action against sub-contractor (in case of violation of law or tortuous behaviour and if the damage is not resulting merely from the non-performance of the contract). | Widely accepted principle that the designer has to perform services with skill and efficiency in accordance with professional standards. Burden of proof on client. | None, but courts have the right to moderate the damages claimed. | Yes ('in solidum' liability) | Public contracts: Cahier Général des Charges (CGC) |

| | Source of Law | Duration of liability | Rights of third parties/extra contractual liability | Duty of care | Statutory financial caps | Joint & several liability | Use of standard forms of contract |
|---|---|---|---|---|---|---|---|
| **Denmark** | Private law<br><br>(ABR89 General conditions for Consulting Services have been approved of the professional bodies within the building industry) | Max. 10 years<br><br>3 years from discovery of defects<br><br>ABR 89 (General Conditions for Consulting Services):<br>5 years from handover.<br>10 years when the client is consumer. | Employer has very limited tort claim rights against sub-contractor. | Consulting engineer has an obligation of means. Services must comply with scientific & technological state of the art at the time the service is delivered. | None, but ABR 89 provides cap of DKK 2,5 m (for supervision and inspection). | Excluded under the ABR 89<br>(however, not for 'total consultancy', i.e. single joint agreement between client and one consultant/ group of independent consultants). | FRI & DANSKE ARK have jointly set up standards for general conditions. Not compulsory. |
| **England** | Court decisions (case law). Also certain legislative Acts (e.g. Housing Grants, Construction and Regeneration Act 1996).<br>NB: Legal systems differ in England, Wales, Scotland and Northern Ireland | Limitation Act (1980):<br>6 years for claims under tort (from the date the damage was caused; 3 years from the date of injury) or contract;<br>12 years for claims on contracts under seal. | No liability in tort: third parties cannot claim against consulting engineer for economic loss due to defective work, but can claim for damages to property/ person due to defective work.<br>Warranties or collateral warranties with respect to third party rights are common place. | Under contract law, duty of care exists both in implied rules and in standard form of contracts. Implied duty of the designer is to carry out duties with proper skill and care in professional manner. | None | Yes | ACE agreements, FIDIC white book, NEC3 professional services contract |

| | Source of Law | Duration of liability | Rights of third parties/extra contractual liability | Duty of care | Statutory financial caps | Joint & several liability | Use of standard forms of contract |
|---|---|---|---|---|---|---|---|
| ***Finland*** | Private Law<br><br>Tort liability act, land use and building decree, building act<br><br>KSE95 (General Conditions) | General Limitation period is 3 years<br><br>Client has to present claim within 1 year | Client has no claim against the sub-contractor, not even in tort. | KSE95: obligation to carry out the work with reasonable professional skill and diligence. | KSE95 :<br>Upper limit should be defined in the contract. If not, consultant's liability for damage shall in no case exceed the total remuneration forthcoming to the other contracting party. | Finnish consultant service is not several and joint liable, except when working in joint ventures | |
| ***France*** | Civil Code<br>Spinetta law (1978) | 10 years for serious defects.<br><br>2 years for defects to "non-dissociable" elements of equipments of works.<br><br>1 year warranty of perfect completion. | Employer's right of action against sub-contractor.<br><br>Third parties may present claim against consulting engineers for any damage. | Designer must apply the 'state of the art' and perform with professional skills and efficiency. | None, but courts have the right to moderate the damages claimed. | Yes ('in solidum' liability) | Public contracts: Cahiers des Clauses Administratives Générales – CCAG conditions) |
| ***Germany*** | Civil Code | 3 years following acceptance of works.<br><br>Specific rules for construction contracts, e.g. 5 year liability for defects in relation to works to a building. | Employer has no tort claim against the sub-contractor. In specific cases, employer can claim damage on a contractual basis. | | None | Yes | Public contracts: VOB part B |

| | Source of Law | Duration of liability | Rights of third parties/extra contractual liability | Duty of care | Statutory financial caps | Joint & several liability | Use of standard forms of contract |
|---|---|---|---|---|---|---|---|
| ***Hungary*** | Civil Code | 5-25 years, depending on type of defect or issue. | | Building law imposes duties on professionals at various phases. No specific rule on the nature of the consulting engineer's obligations. | None | No. It is sometimes included in a separate agreement, at request of the client. | No common standard forms; some companies have developed their own contractual conditions. |
| ***Italy*** | Civil Code | 10 years in the case of contractual liability.<br><br>For public works: 5 years, from the time the public administration has knowledge of the fact. | Site owner can sue sub-contractor on a tort basis. | Under case law, there is an obligation of result on the consulting engineer, and an obligation of means on the site engineer. | None | Yes | Public contracts: general conditions apply |
| ***Netherlands*** | Civil Code<br><br>DNR2005 (Standard conditions) | Maximum 20 years; contractual limitation to 5 years after completion<br><br>DNR2005: 2 years after client's notification of defects. | Third parties can sue sub-contractor on a tort basis (without prejudice to the contractors' liability) | As per Civil Code, consulting engineer has an obligation of means. Services must comply with scientific & technological state of the art at the time the service is delivered. | None, but courts have the right to moderate the damages claimed. | Yes | NLengineers & BNA have jointly set up standards for general conditions (DNR2005). Not compulsory but used by over 90% of members. |

| | Source of Law | Duration of liability | Rights of third parties/extra contractual liability | Duty of care | Statutory financial caps | Joint & several liability | Use of standard forms of contract |
|---|---|---|---|---|---|---|---|
| **Norway** | Private law<br><br>NS 8401, 8402 and 8403 (General Conditions of Contract for Design Commissions) | NS8401, 8402 and 8403:<br>5 years after completion of the assignment | Employer has limited tort claim rights against sub-contractor. | General rules on performance are included in standard forms of contract. | None, but NS 8401and 8402 provide cap of NOK 11,2 m;<br>NS 8403 provides cap of NOK 3 m; each claim with an aggregate per project of NOK 9 m | Excluded under NS 840 (however, not for 'total consultancy', i.e. single joint agreement between client and one consultant/ group of independent consultants). | RIF has drafted standard forms of contract. Not compulsory.<br>Big clients have their own contracts which they try to impose on the consulting engineers. |
| **Spain** | Civil Code<br>Building regulations law (38/99 of 5/11/99) | 10 years for structural defects; 1 or 3 years for other defects<br>Claim must be introduced within 2 years from appearance of the defect. | Site owner can sue sub-contractor. | No obligation of result. | In contract Financial cap in relation to the amounts to be covered by the mandatory insurance policy. | Yes | No common standard forms; some companies have developed their own contractual conditions. |
| **Sweden** | Private law<br><br>ABK 09 (General Rules of Agreement for Architectural and Engineering Consultancy Services) | 10 years from completion.<br><br>3 months for notification of defects and at the latest within 9 months from knowledge of the damage. | Claim rights against employer, consultant or sub-consultant for personal injuries or property damages, caused by negligence or tort.<br><br>Liability for certain environmental damages. | General rules on performance are included in standard forms of contract.<br>ABK 09: the consultant shall carry out his work according to good professional practice, and is liable for negligence in the exercise of his assignment. | None, but ABK 09 provides cap in case of damage while carrying out the assignment and for delay. | (Yes) | Standard forms of contracts to be prepared by representative building sector organisations.<br>Certain clients have their own contracts which they try to impose on the consulting engineers. |

**Note on corporate & personal liability**

*General to all countries:*

**Employees**: not liable to employer or third parties except in case of gross negligence or intentional fault.

**Board of Directors**: no personal liability for the debts of the corporation. In case of injury to a third party, only the corporation and not the directors is legally responsible, except in the case of penal infringements committed by the directors or other specific situations.

**Partnerships**: partners have an unlimited liability for debts incurred in the business.

# Appendix IV Insurance for consulting engineers

| | Legal obligation? | Obligation from another source? | Coverage & duration | Use of bonding, guarantees, payment retention |
|---|---|---|---|---|
| ***Austria*** | No | Very common contractual requirement for general coverage | Depends on size and complexity of the project | |
| ***Belgium*** | No for engineers.<br>PI insurance compulsory for architects. | No general conditions, but a growing tendency to impose a contractual duty, especially for public works & large projects. | | Mandatory guarantee for public works and services contracts (5% warranty). |
| ***Denmark*** | No | Standard forms of contract generally require the consulting engineer to be insured. | Coverage is specific to each project. Duration is generally 5 years after handing over of the building (10 years for private clients.) | Most unusual |
| ***England*** | No | Standard forms of contract generally require the engineer to be insured. | | Use of financial guarantees and retention is not common practice. |
| ***Finland*** | No | Standard forms of contract generally require the consulting engineer to be insured. | Usually CE has normal continuous insurance of some amount and if necessary, coverage may be expanded for a specific (larger) project when normal coverage isn't sufficient.<br>The duration is normally as long as consultant's liability i.e. until guarantee time expires or, if there is no guarantee time, within one year following completion of the project. | Most unusual |
| ***France*** | Yes (covering decennial liability and for damages affecting structural building elements) | Client often tries to ask for additional PI insurance. | For compulsory insurance: limit of guarantee of €3M. For professional liability insurance: cover depends on average price of projects (€1-10M). | |
| ***Germany*** | No | Most consulting engineers do take a professional liability insurance. | | |
| ***Hungary*** | No | No general conditions, but a growing tendency to impose a contractual duty, especially for public works & large projects. | | |

| | Legal obligation? | Obligation from another source? | Coverage & duration | Use of bonding, guarantees, payment retention |
|---|---|---|---|---|
| ***Italy*** | Compulsory for public projects exceeding €10M | | | Guarantee not required for public works, except for payments by instalment, in which case guarantee is equal to the amounts to be paid by the principal. |
| ***Netherlands*** | No | NLEngineers requires its members to have insurance cover for minimum €1M. Clients often ask insurance cover. | | |
| ***Norway*** | No | Insurance is required under NS840 conditions | Limit 150 base amounts i.e. NOK 11M. Duration: 5 years | |
| ***Spain*** | No for contractors or designers. Promoter/ developer has to be insured for appearance of serious defects within 10 years of works completion. | | | Mandatory guarantee for public works contracts (5% warranty). |
| ***Sweden*** | No | Insurance requirement under ABK 09 conditions (Obligation to subscribe for and to maintain consultancy liability insurance corresponding to agreed liability) | Limit: 120 base amounts per assignment, i.e. SEK 5M (maximum 360 base amounts/ year). Duration: 10 years. Insurance offered to members of the STD-companies) | Most unusual |

**Note** : the tables in the appendix should not be taken as an isolated quick reference and should be used with due care.


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