

InfoPAK<sup>SM</sup>

## Construction and Projects Guide: France

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# Practical Law

# Construction and Projects Guide: France

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Provided by the Association of Corporate Counsel  
1025 Connecticut Avenue, NW, Suite 200  
Washington, DC 20036  
tel +1 202.293.4103  
fax +1 202.293.4107  
[www.acc.com](http://www.acc.com)

This InfoPAK<sup>SM</sup> provides a Q&A that gives a high level overview of the main trends and significant deals; procurement arrangements; transaction structures and corporate vehicles; financing projects; security and contractual protections that funders require; standard forms of contracts; risk allocation; excluding liability, including caps and force majeure; contractual provisions covering material delays and variations; appointing and paying contractors; subcontractors; licences and consents; projects insurance; employment laws; health and safety; environmental issues; corrupt business practices and bribery; bankruptcy/insolvency; public private partnerships (PPPs); dispute resolution; tax and mitigating tax liability; the main construction organisations; and proposals for reform.

To compare answers across multiple jurisdictions, visit the construction and projects Country Q&A tool at <http://uk.practicallaw.com/4-502-1260>.

This Q&A is part of the global guide to construction and projects law. For a full list of jurisdictional Q&As visit [www.practicallaw.com/construction-guide](http://www.practicallaw.com/construction-guide).

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# I. Overview of the Construction and Projects Sector

## A. What Are the Main Trends in the Local Construction and Projects Market? What Are the Most Significant Deals?

### I. Main Trends

The instability in the French construction market observed since mid-2012 appears to settle since mid-2013, although the construction market continues to slow down. Public works suffered a significant downturn of 20% compared to 2008 due to the small number of procurement contracts entered into by public entities. In August 2015, a fall has also been recorded in the residential sector (although milder than in the previous year) with:

- A 6% decrease in building permits issued to date.
- A 4% decrease in constructions started compared to August 2014.

Governmental reforms were implemented in early October 2014, providing incentives to first-time buyers. For example, the *Loi Pinel* of September 2014 aims at expanding the residential construction market through tax deductions. A new programme for urban renewal, consisting mainly of significant public investment in construction projects in economically disadvantaged neighbourhoods, has been launched for the 2014-2024 period.

### 2. Major Projects

Flagship projects include:

- The "*Grand Paris*" project, which aims at creating a larger metropolitan area by implementing a new transportation plan.
- Several skyscrapers in the *La Défense* area.
- High profile projects in the judicial sector, including the court of first instance (*Tribunal de Grande Instance*) in Paris.
- Large scale investment in rail links.
- The implementation of fibre optics, which cost is estimated at more than EUR20 billion in the next ten years.
- In the long term, the renovation of residential and non-residential buildings in compliance with the energy transition programme.

## II. Procurement Arrangements

### A. Which Are the Most Common Procurement Arrangements If the Main Parties Are Local? Are These Arrangements Different If Some or All of the Main Parties Are International Contractors or Consultants?

The main parties involved include the:

- Owner or developer known as the *maître d'ouvrage*. The owner often delegates part or all of his responsibilities to a *maître d'ouvrage délégué* to manage the project on his behalf.
- Architect (*maître d'œuvre de conception/d'exécution*) and consulting engineers (*bureau d'études techniques*) (BET), which are in charge of the design phase of a project and of monitoring the construction phase of the project.
- Health and safety protection co-ordinator (*coordonnateur de sécurité et de protection de la santé*) (CSPS) appointed by the owner, in accordance with mandatory rules, to monitor and manage health and safety risks during the life of the project.
- Contractor(s) in charge of the construction of the project.
- Subcontractors appointed by the contractor(s) with the approval of the owner in accordance with mandatory rules regulating subcontracting.

In the private sector, the owner traditionally distinguishes the design phase from the construction phase of the project. During the design phase, the owner directly appoints the design team to develop the project in three stages: the preliminary study (APS), followed by the detailed design (APD), which then forms the basis of the tender documents (DCE). On the basis of the DCE, the contractor(s) commit(s) to build the project for a fixed price (lump sum) or unit prices, in accordance with a defined schedule.

A new type of contract known as a guaranteed maximum price contract (*prix maximum garanti*) has recently emerged. The contractor undertakes to assist the design team and the owner during the design phase of the project to prepare an APD and/or DCE in line with the maximum guaranteed price, which is then converted into a lump sum price.

Procurement arrangements under which the contractor is responsible for the design and the construction of the project (design and build contracts and variants such as engineering, procurement and construction (EPC) contracts) are unusual in the domestic private sector, except for industrial installations (such as process plants and so on).

The owner may decide to contract with a developer through a *contrat de promotion immobilière*(CPI), by virtue of which the developer undertakes to ensure the performance of

a defined construction programme for a fixed price and completion date. The developer is liable to the owner for any delay in completion or price overruns.

In the public sector, procurement arrangements are strictly regulated by French law. They include:

- Traditional procurement. This involves the award of a construction contract to a contractor who has not been involved in the design phase of the project.
- Design and build contracts. Under this type of arrangement, the contractor undertakes to perform, and is responsible for, the design and construction of the project.
- Concession-BOTs (build, operate, and transfer).
- Partnership agreements (*see Section XXV.B*).

These procurement arrangements do not vary according to the nationality of the parties, but according to the size of the project and the legal or regulatory requirements.

## III. Transaction Structures

### A. What Transaction Structures and Corporate Vehicles Are Most Commonly Used in Both Local and International Projects?

#### I. Local Projects

Different transaction structures or corporate vehicles are used by investors according to the types of parties involved, their objectives and tax considerations. Special purpose vehicles are generally set up to isolate risk, with a parent company guarantee to facilitate the financing of the project.

Apart from corporate vehicles, several contractual structures are specifically available to organise relationships between contractors including:

- A *groupement momentané d'entreprises*, which is a temporary commercial association of contractors that contracts directly with the owner. It allows the members of the association to share the means at their disposal and ensure

efficient co-ordination of the project. The members of the association can choose between:

- a *groupement solidaire*, which creates joint and several liability for the execution of the project between the contractors;
- a *groupement conjoint*, which creates joint liability between the contractors for the execution of the project; or
- a *société en participation* (SEP), which is a flexible form of company without legal personality. It is set up by a customised shareholders' agreement and need not be registered other than for tax purposes.

## 2. International Projects

Structures are the same for local and international projects (see Section III.A.1).

# IV. Finance

## A. How Are Projects Financed? How Do Arrangements Differ for Major International Projects?

The financing of projects vary in complexity according to their size and type, but the main sources of finance remain cash, debt and equity finance, and all traditional forms of finance.

The main variation between international and local projects relates to the type of institution that may be attracted to fund the project and the complexity of the financing tools used. However, the mechanisms are generally the same.

Where the owner intends to sell the project after completion, certain types of agreement are available as tools facilitating the financing of the project. For example, a *vente en l'état futur d'achèvement* (VEFA) is a sale under which the owner immediately transfers to the buyers both the land and the existing works. All subsequent works, over which the seller continues to act as owner, are delivered to and paid for by the buyers as the works progress.

In the public sector, the use of public private partnerships (PPPs) is well developed, and different types of agreement exist that share the financial risks between the state and the private entity involved (see Section XXV.B).

## V. Security and Contractual Protections

### A. What Forms of Security and Contractual Protections Do Funders Typically Require to Protect Their Investments?

#### I. Security

Most of the usual forms of security available in construction projects internationally are available and generally used in France, including:

- First ranking securities over land.
- Security over assets.
- Parent company guarantees.

Lenders can require owners to obtain guarantees against performance from contractors and subcontractors to ensure they do not default on their obligations. Depending on the type of financing, lenders may also require that they be provided with contractors' invoices approved by the architect before disbursing funds.

#### 2. Contractual

Funding agreements may provide for step-in rights, which allow the lender to take control of the project where the contractor defaults on its obligations.

# VI. Standard Forms of Contracts

## A. What Standard Forms of Contracts Are Used for Both Local and International Projects? Which Organisations Publish Them?

### I. Local Projects

**Building works.** Standard forms of contract differ according to whether the project relates to private or public works. Construction contracts are generally made up of:

- A letter of appointment (*lettre d'engagement*) containing the price, dates for delivery and other essential terms of the agreement.
- General conditions (*cahier des clauses administratives générales*) (CCAG).
- Special conditions (*cahier des clauses administratives particulières*) (CCAP) adapting the general conditions to the specific nature of the project.

In the private sector, the main standard form contract is the AFNOR NF P 03.001 standard, which provides a standard form of CCAG that can be amended for use. It is a guide for contractors and owners.

Professional developers and *maîtres d'ouvrage délégué* have drawn up their own CCAG.

In the public sector, the CCAG is defined by law. The new set of construction CCAG (CCAG *travaux*) entered into force on 1 January 2010. These general conditions can be incorporated by reference but are not compulsory.

**Engineering works.** The architects' federation (*Conseil National de l'Ordre des Architectes*) (CNOA) provides standard forms of special and general conditions for preliminary studies, new builds, renovations, and so on.

### 2. International Projects

International projects can use the standard form contracts described for local projects but they most frequently use contracts specifically adapted from the standard form contracts provided by the International Federation of Consulting Engineers (*Fédération Internationale des Ingénieurs-Conseils*) (FIDIC).

Depending on the type and complexity of the project and on the tasks and risks shared between the employer and the contractor, either the Red Book (Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer) or the Yellow Book (Conditions of Contract for Plant and Design-Build) can be used. In cases

where the employer wishes the contractor to take total responsibility for the design and construction of the project, the Silver Book (EPC/Turnkey Projects) is preferred.

## VII. Contractual Issues

### A. Contractors' Risks

#### I. What Risks Are Typically Allocated to the Contractor? How Are These Risks Offset or Managed?

The types of risk and their allocation vary depending on the nature of the construction project. The main risks common to most projects are the unforeseen events or circumstances relating to:

- Errors, omissions or contradictions in the design specifications on which the contractor has relied to prepare his offer. Such risks are generally borne by the contractor, who represents and warrants to the owner that he has fully reviewed the design specifications and conducted all necessary additional studies. However, in public works contracts, the contractor may, in certain circumstances, have the right to an adjustment of the contract price due to unforeseen events or circumstances.
- Ground conditions. The owner provides the contractor with any and all surveys he has undertaken. As above, the contractor reviews them and conducts all additional surveys that he considers necessary to submit his offer to the owner. As a result, the contractor bears the associated risks.
- Cost escalations. These are borne by the contractor in international construction contracts, and in domestic, short-term contracts. Domestic long-term construction contracts generally provide for limited price revision mechanisms linked to common relevant market indexes.
- The surrounding area, such as difficult or constrained access to the building site or damage to nearby buildings and infrastructure. The contractor typically bears these risks, although insurance may be put in place in some cases.

## VIII. Excluding Liability

### A. How Can Liability Be Excluded or Restricted under Local Law?

In principle, parties are free to contract to exclude or restrict liability, including liability for indirect or consequential loss or future loss, including business profits.

However, in cases of intentional breach (*dol*) or gross misconduct (*faute lourde*) by the contractor, no exclusions or restrictions of liability apply.

In construction contracts, the parties' freedom is also limited by rules of public policy (*ordre public*) that cannot be excluded or limited. These rules include Articles 1792 and following of the Civil Code (*Code Civil*), which require three statutory guarantees to be provided by the contractor for events occurring after delivery:

- *Garantie de parfait achèvement*: this imposes an obligation on the contractor to make good any defect notified to him by the owner at the time of delivery or within one year of the date of delivery, regardless of the nature or extent of the defect.
- *Garantie de bon fonctionnement*: this two-year guarantee affects all equipment that does not form part of the structure of the building but which could be considered movable (for example, ventilation or heating equipment). The contractor guarantees that these elements are viable and do not impair the construction's main use.
- *Responsabilité décennale*: all contractors are strictly liable to the owner or buyer for ten years after delivery, for any defect hidden at the time of delivery that either compromises the integrity of the construction or renders it unfit for use.

Tortious liability towards third parties cannot be excluded or limited by contract. However, the owner and contractor can contract to determine how to apportion liability between them, especially where the tort is one of strict liability.

## IX. Caps on Liability

### A. Do the Parties Usually Agree a Cap on Liability? If Yes, How Is This Usually Fixed? What Liabilities, If Any, Are Typically Not Capped?

Caps on liability are not uncommon.

An aggregate cap covering the contractor's liabilities may be agreed, especially in industrial projects.

However, no cap can be applied where liabilities cannot be excluded or restricted (*see Section VIII.A*). As a result, the parties usually provide for separate caps to specific types of liability that can be restricted, such as liability for delays to completion.

## X. Force Majeure

### A. Are Force Majeure Exclusions Available and Enforceable?

The exclusion of liability for force majeure is provided for in Article 1148 of the Civil Code (*Code civil*). Liability can be entirely excluded for any loss arising from events that are:

- Unforeseeable.
- Unavoidable.
- External (that is, completely outside a party's control).

The effect of a force majeure event on the contract varies according to the nature of the event. It may:

- Suspend performance of the contract.
- Vary the contract by altering its scope.
- Terminate the contract where performance has been rendered impossible.

The parties can choose to apportion the risks of force majeure between them by agreeing that the contractor will either bear all risks associated with force majeure events, or on the contrary exclude his liability entirely.

In practical terms, parties should carefully draft their force majeure clauses to:

- Define which events amount to force majeure. Strikes, for example, may be excluded, or the parties may provide that only strikes affecting a particular sector amount to force majeure.
- Determine the steps necessary to recognise the existence of a force majeure event (notification within a defined period of time, third party confirmation, and so on).
- Determine the effects of a force majeure event. The parties may decide that the consequences of the event will be apportioned between them according to a certain formula or criteria (for example, the contractor will be entitled to an extension of time but will bear the disruption costs).

## XI. Material Delays

### A. What Contractual Provisions Are Typically Negotiated to Cover Material Delays to the Project?

In the case of delays to completion of the works or of intermediary delays to agreed milestones, penalties for delay are generally imposed on the contractor. These penalties are usually capped at 5% of the contract price.

The penalties for delay to agreed milestones are usually withheld from payments due by the owner. Where the contractor makes up time and delivers on the contractual completion date, any penalties he has incurred for delay during construction are reimbursed.

Where the delay is outside the scope of the contractor's liability, he is usually entitled to an extension of time and to the additional costs incurred as a result of the delays. The parties must pay careful attention to the schedule, which will be attached to the contract, to avoid, as far as possible, issues related to concurrent delays. In particular, the schedule should identify the critical path of the project and the milestones that must be respected to avoid any delay to the completion of the project.

## XII. Material Variations

### A. What Contractual Provisions Are Typically Negotiated to Cover Variations to the Works?

In commercial property development, variations to the works entitling the contractor to an adjustment of the contract price and/or an extension of time are generally limited to those variations imposed by the owner in writing. The parties generally provide thresholds over which the owner forfeits the right to impose a variation of the works, except where the variation is agreed by the parties. Variations of the works, such as those resulting from errors, omissions or contradictions in the design specifications are generally borne by the contractor (*see Section IX.A*).

In industrial projects, the contractor generally relies on the design specifications and is therefore entitled to an adjustment of the contract price and/or an extension of time if there is any variation to the design specifications, unless he was involved in the design phase and/or agreed to guarantee the performance of the project.

## XIII. Other Negotiated Provisions

### A. What Other Contractual Provisions Are Usually Heavily Negotiated by the Parties?

The following other contractual provisions are usually heavily negotiated:

- The price and payment timetable.
- Warranties.
- The risks of soil and sub-soil conditions.
- The definition of completion of the project.
- The construction schedule.
- Insurance.
- Performance bonds and guarantees.
- Regulatory changes.
- Termination provisions.

## XIV. Architects, Engineers and Construction Professionals

### A. How Are Construction Professionals Usually Selected? Following Selection, How Are They Then Formally Appointed?

The design team is usually appointed following a tender procedure organised by the owner. The object of the tender is to select the design concept for the project. In most cases, the design team must include a licensed architect in accordance with statutory rules.

The owner may also have to employ other construction professionals such as consulting engineers and a health and safety protection co-ordinator (*see Section II.A*), who are appointed contractually.

In the public sector, construction professionals are generally appointed following a tender procedure.

### B. What Provisions of Construction Professionals' Appointments Are Most Heavily Negotiated? Are Liabilities Routinely Limited or Capped in Construction Professionals' Appointments?

The liability of construction professionals is generally limited. In most cases, it is limited to employing their best efforts (*obligation de moyens*) rather than achieving a result (*obligation de résultat*). They also take out professional indemnity insurance to cover their liabilities to the owner.

Some construction professionals are bound by rules of public policy (*ordre public*) that cannot be excluded or limited (*see Section VIII.A*).

# XV. Payment for Construction Work

## A. What Are the Usual Methods of Payment for Construction Work? Are There Ways for the Contractor and Consultants to Secure Payment or Mitigate Risks of Non-Payment under Local Law?

### I. Methods of Payment

The following methods of payment are usually agreed by contract:

- No down payments except where specific and costly procurement is necessary for the project. However, in the public sector a down payment equal to 5% of the contract price may apply.
- Monthly advance payments corresponding to the progress of the works as certified by the *maître d'œuvre* and the owner.
- Final payment after delivery and certification of the works by the *maître d'œuvre* and the owner, taking into account any liability of the contractor (for example, for delay).
- An agreed proportion of the contract price is withheld by the owner as security for the cost of making good any defects arising out of the construction within one year following completion. Statutory rules provide that this amount cannot exceed 5% of the contract price. It can be replaced by a bank guarantee provided by the contractor.

The owner is legally required to provide the contractor with a bank guarantee covering all payments due by the owner. If the owner fails to do so within 15 days of receipt of formal notice by the contractor, the latter is entitled to suspend construction pending provision of the guarantee.

### 2. Securing Payment

Article 1799-1 of the Civil Code (*Code civil*) provides for a legal payment warranty delivered by the *maître d'ouvrage* for private construction works when the payment of the sums owed exceed a threshold set by decree.

## XVI. Subcontractors

### A. How Do the Parties Typically Manage Their Relationships with Subcontractors?

The use of subcontractors is strictly regulated under French law. Subcontractors and the method of their payment must be approved individually by the owner before the conclusion of any agreement with the main contractor.

In the public sector, the subcontractor must be paid directly by the owner. In the private sector, the contractor must either provide the subcontractors with a bank guarantee covering all sums due or ask the owner to pay the subcontractors directly. Subcontractors regularly approved by the owner have a direct action against him if the contractor fails to pay within one month of service of a formal notice.

If the owner has knowledge of the presence on the construction site of a subcontractor he has not approved, he must serve the contractor with a formal notice to seek approval. The owner may be liable in tort to the subcontractor.

If the subcontractor is approved by the owner and the payment terms are agreed by the owner, the subcontractor is legally entitled to bring his claim directly against the owner if the contractor fails to pay.

## XVII. Licensing

### A. What Licences and Other Consents Must Contractors and Construction Professionals Have to Carry out Local Construction Work? Are There Any Specific Licensing Requirements for International Contractors and Construction Professionals?

In principle, there are no legal licensing requirements for construction professionals, including the contractor. However, certain independent bodies, such as *Qualibat*, certify their level of expertise and practices. This certification may be required in the tender document, especially in the public sector and by insurance companies.

Access to certain construction professions is strictly regulated (for example, architecture, health and safety co-ordination and building surveying).

## B. What Licences and Other Consents Must a Project Obtain?

### I. Before

Before commencement of works, the owner must obtain administrative authorisations, including a building permit.

In addition, works on existing buildings may require a prior declaration (*declaration préalable*) or a building permit (*permis de construire*) depending on the resulting surface increase. In this regard, a decree of 5 December 2011 simplifies these administrative requirements and increases the threshold of floor spaces requiring a building permit. This decree, which entered into force on 1 January 2012, modified Articles R.421-14 and R.421-17 of the Town Planning Code (*Code de l'urbanisme*):

- All works for the creation of a "*surface hors oeuvre brute*" (SHOB) above 40 m<sup>2</sup> are subject to a building permit.
- All works for the creation of a "*surface hors oeuvre brute*" (SHOB) less than 40 m<sup>2</sup> are subject to a prior declaration.

The Decree of 24 March 2011 has changed the thresholds above which certain documents such as a public security study (*étude de sécurité publique*) must be attached to the building permit's application. In addition, a legislative order of 16 November 2011 modified and simplified the rules applicable to the calculation of floor surface taken into account for the granting of building permits and other aspects of town planning law.

### 2. During

During construction, the local public authority has the right to inspect the works, to make all checks it deems useful and to request the provision of technical documents relating to the works.

The local public authority controls compliance of the works with authorisations, including the building permit. In the event of non-compliance, the local public authority has the power to suspend ongoing works.

### 3. On Completion

On completion of the works, the owner must provide the local public authority with a certificate of completion and compliance of the works with administrative authorisations.

For certain constructions, such as towers or buildings that are open to the public, a specific authorisation is required from the local public authority, which is only granted following a visit to the construction site by a safety committee appointed by the *Préfet*.

## XVIII. Projects Insurance

### A. What Types of Insurance Must Be Maintained by law? Are Other Non-Compulsory Types of Insurance Maintained under Contract?

#### I. Compulsory Insurance

There are several types of mandatory insurance, including:

- *Assurance dommage ouvrage* (structural damage insurance). This insurance is obtained by the owner and covers the cost of remediation of any defects without prior determination of who is liable, provided that the defect occurs within the contractor's ten-year warranty (*responsabilité décennale*) (see Section XI.A).
- *Assurance responsabilité décennale* (ten-year warranty insurance). This insurance is obtained by the contractor and other construction professionals (consulting engineers, *maître d'ouvrage délégué*, and so on) to cover their liability under the ten-year warranty insurance.
- *Assurance de responsabilité civile* (professional indemnity insurance). Some construction professionals (for example, architects) are legally required to obtain insurance to cover all professional liabilities that may arise.

Both the structural damage insurance and the ten-year warranty insurance can be covered by a single insurance policy called *Police unique de chantier* (PUC).

#### 2. Non-Compulsory Insurance

Other optional insurance available includes:

- All site risk insurance. This covers all accidental loss affecting the building, equipment and materials stored on the site before completion of the works.

- Insurance covering loss resulting from specific events (for example, relating to ground conditions or damage to neighbouring buildings).
- Civil liability insurance (*Assurance de responsabilité civile*). This insurance is available to construction professionals that are not legally required to obtain insurance covering all their professional liabilities.

## XIX. Employment Laws

### A. What Are the Main Law Requirements for Hiring Local and Foreign Workers?

#### I. Local Workers

French law contains strict provisions on matters relating to employment, from the conditions of employment, to working conditions and dismissal or redundancy.

To allow the various public authorities (social security, labour inspection department and so on) to ensure compliance with French law, employers must make a prior declaration of employment (*declaration préalable d'embauche*). Where an employer fails to make such a declaration, he may commit the offence of "concealed employment" (*délit de travail dissimulé*), which is punishable by three years' imprisonment and a fine of EUR45,000. This fine can be increased up to EUR225,000 in cases where the offence is committed by the legal entity that hires the workers.

#### 2. Foreign Workers

Generally, EU citizens, nationals of signatories to the European Economic Area (EEA) agreement and Swiss nationals can work freely in France.

Other foreign workers must obtain a residence permit and an employment permit. If issued, a residence permit can be either:

- A temporary residence permit (*carte de séjour temporaire*), valid for a maximum of one year.
- A resident's card (*carte de résident*), valid for ten years subject to strict conditions.

These permits allow foreign nationals to work anywhere on the French territory.

Foreign workers have the same protections and are subject to the same regulations as national workers.

## B. Which Employment Laws Are Relevant to Projects?

French labour law regulates almost all aspects of an employee's relationship with his employer, including but not restricted to:

- The contents of the employment contract.
- Working time and minimum wage regulations.
- Health and safety requirements.
- Representation and union rights.
- Redundancy or other types of termination.

The professional organisations relevant to a particular sector have the power to vary certain aspects of French labour law through the conclusion of collective agreements (*conventions collectives*). In the construction sector, for example, the statutory working week (35 hours a week) is calculated on an annual basis (that is 1,645 hours a year) with weekly and daily ceilings, to take account of the particular constraints of the sector.

## C. Must an Employer Pay Statutory Redundancy or Other Payments at the End of a Project? Are All Employees Eligible?

French law and the relevant collective agreements (*conventions collectives*) set the conditions and the reasons for which a contract can be terminated by the employer and the sums due in compensation.

Employers can enter into employment contracts with employees for one or more construction projects, without having to justify the termination of the contract at the completion of the project(s). This is permitted subject to strict conditions under French labour law.

# XX. Health and Safety

## A. Which Health and Safety Laws Apply to Projects?

French law relating to health and safety matters on construction sites results principally from two EU Directives:

- Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work (Health and Safety of Workers Framework Directive), amended by Regulation 1882/2003, Directive 2007/30/EC and Regulation 1137/2008.
- Directive 92/57/EEC on the implementation of minimum safety and health requirements at temporary or mobile construction sites (Construction Site Health and Safety Directive).

To ensure the safety and protect the health of persons working on a construction project, the owner, the architect and the health and safety protection co-ordinator (CSPS) (*see Section II.A*) must apply the general principles of prevention set out in article L4121-2 of the French Labour Code (*Code du travail*).

These provisions impose an obligation on the owner, the architect and the CSPS to, for example:

- Restrict access to the site to authorised persons only.
- Co-ordinate the works to ensure maximum safety on site.
- Create a health, safety and working conditions committee (*comité d'hygiène, de sécurité et des conditions de travail*) (CHSCT) on construction sites.
- Develop a general co-ordination plan to promote health and safety (*plan général de coordination en matière de sécurité et de protection de la santé*) (PGCSS).

In addition, during the conception and construction phases of the project, the CSPS must document all information that will facilitate the prevention of safety risks during subsequent maintenance of the project (*dossier d'intervention ultérieure sur l'ouvrage*) (DIUO).

Any breach of these obligations may result in both tortious liability and criminal penalties.

## XXI. Environmental Issues

### A. Which Local Laws Regulate Projects' Effects on the Environment?

#### I. Air

The French Environmental Code (Code de l'environnement) provides for technical measures to be taken by decree to prevent atmospheric pollution and ensure the rational use of energy in construction or demolition works (Article L224-1, Environmental Code). No relevant decree has been taken yet.

## 2. Water

The impact of construction works on water is regulated by the French Environmental Code (*Code de l'environnement*), which sets out a series of specific authorisations required when the works may have effects on surrounding water sources (*Articles L214-1 to L.214-19, Environmental Code*). In addition, an authorisation from the local authorities is required for the discharge of wastewater (*Article L1331-10, Code of Public Health (Code de la santé publique)*)

## 3. Waste

With regards to waste management, the Decree of 11 July 2011 sets out a new organisation of waste management plans. The movement of wastes stemming from building and public works will be controlled according to the waste technical assessment (*diagnostic technique déchets*) for demolition or extensive renovation works.

## 4. Environmental Impact Assessments (EIAs)

A project's effect on the environment is regulated by a significant amount of legislation, which is for the most part contained in the French Environmental Code (*Code de l'environnement*). An owner may have to obtain an environmental impact assessment (*étude d'impact sur l'environnement*) (EIA), depending on the type and scale of the project (*Articles L122-1 to L.122-3, Environmental Code*). An EIA includes:

- A study of the pre-existing conditions of the site.
- A study of the indirect and direct, temporary or permanent consequences on the environment of the project, notably on the flora and fauna, ground, water, air, climate and neighbouring area.
- The environmental reasons for retaining the agreed concept or design among the other options available.
- The measures to be taken by the owner to eliminate, reduce or compensate the damaging effects of the project on health and the environment, and an estimate of the corresponding costs.
- An analysis of the method used to assess the effect of the project on the environment.
- For transport infrastructure projects, the EIA must include:
  - An analysis of the collective cost of pollution.
  - A calculation of the overall effect on energy consumption as a result of the project's operation.

The EIA is submitted to the local public authority for approval, which decides whether to authorise the project or not.

The Grenelle II Act of 12 July 2010 and the Decree of 29 December 2011, amended the rules applicable to EIAs. The purpose of this reform is to ensure closer harmonisation of the rules relating to EIAs with EU directives regulating environmental matters. The law provides clarification on the prescribed scope and content of the EIA. The local public authority's decision authorising a project sets out the measures that the owner must take to avoid, reduce and, if possible, offset the negative environmental effects of the project. Administrative penalties are imposed if these measures are not taken.

#### 4. Sustainable Development

Generally, French law tends to increasingly take environmental impact of real estate projects into consideration. For example, through a plot ratio bonus (*bonus de COS*) (allowed density of construction) for low-energy buildings.

In 2011, the French Supreme Administrative Court (*Conseil d'Etat*) issued a ruling (*CE 27 juin 2011 GIE Centre commercial des Longs champs*) that seems to consider that compliance with sustainable development including environmental protection is one of the criteria for the granting of the commercial operating licence (*autorisation d'exploitation commerciale*). The *Conseil d'Etat* cancelled a commercial operating licence because the project was contrary to the legislators' objectives, including sustainable development.

#### B. Do New Buildings Need to Meet Carbon Emissions or Climate Change Targets?

The French Government has set various ambitious goals in relation to climate change and carbon emissions. This has resulted, in particular, in the:

- Thermal Regulations 2000 (*Règlementation Thermique 2000*) (RT 2000).
- Climate plan of 2004, which pledged to reach the 2010 Kyoto Protocol targets.
- Thermal Regulations 2005 (*Règlementation Thermique 2005*) (RT 2005).
- Multi-year Sectoral Estimates Act 2005, which set out France's energy policy.

In addition, the Grenelle I Act of 3 August 2009 defined France's environmental goals by sector. In relation to the construction sector, the goals differ depending on whether the building is existing or new. For new builds, thermal regulations are designed to:

- Reduce energy consumption and greenhouse gas emissions.
- Encourage technological and industrial innovation.
- Preserve a balanced energy mix.
- Help achieve national energy independence.

The Grenelle II Act of 12 July 2010 imposes, in particular, an obligation on the owner to certify, on submission of the request for building permit, that a feasibility study of the energy supply has been completed and that the Thermal Regulations have been taken into

account. On completion of construction, the owner must provide the local public authority with a document certifying that the Thermal Regulations have been adhered to.

The Thermal Regulations 2012 (*Règlementation Thermique 2012*) (RT 2012) aim to limit a new building's primary energy consumption to below an average of 50 kWhEP/m<sup>2</sup>/year, with various adjustments (instead of 250 kWhEP/m<sup>2</sup>/year under RT 2005). The RT 2012 apply to building permits requested from:

- 1 January 2013 onwards for residential buildings.
- 1 January 2011 onwards for other buildings.

For existing buildings, the Grenelle I Act aims to reduce energy consumption by at least 38% by 2020 (40% for government buildings).

Investors have displayed an increasing desire to develop "green" real estate projects, partly because they wish to anticipate legislative changes to ensure that their buildings do not become prematurely obsolete. Investors bear the extra expenditure incurred in developing "green" projects so that their buildings remain attractive to future lessees and offer a competitive advantage when re-sold. Certain recognised standards exist, including high environmental quality (*Haute Qualité Environnementale*) (HQE) or low-consumption buildings (*Bâtiments de Basse Consommation*) (BBC).

## XXII. Prohibiting Corrupt Practices

### A. Are There Any Rules Prohibiting Corrupt Business Practices and Bribery (Particularly Any Rules Targeting the Projects Sector)? What Are the Applicable Civil or Criminal Penalties?

#### I. Rules

There are currently various rules in the Criminal Code punishing corrupt business practices and bribery. New legislation was enacted in 2007 against bribery and corruption of public officials.

## 2. Penalties

The legislation enacted in 2007 provides for heavy criminal penalties in cases of breach, such as fines and/or imprisonment.

# XXIII. Bankruptcy/Insolvency

## A. What Rights Do the Client and Funder Have on the Contractor's Bankruptcy or Insolvency?

Where a contractor becomes insolvent during construction, the owner may be able to do one or more of the following:

- Call on the performance bond, if any.
- Terminate the agreement to the extent permitted by insolvency law.
- Intervene in contracts with subcontractors and take over the responsibilities of the principal contractor, or appoint a third party as contractor.

# XXIV. PPPs

## A. Are Public Private Partnerships (PPPs) Common in Local Construction Projects? If So, Which Sectors Commonly Use PPPs?

PPPs are fairly common in France and can take the form of:

- Traditional French forms of legal agreements or arrangements that are comparable or equivalent to certain types of PPPs (for example, build operate transfer (BOT) concessions or public service delegations (DSPs), and so on).
- Long-term administrative leases (BEAs) and authorisations to temporarily occupy and build on public property (AOTs).
- A partnership agreement (*contrat de partenariat*) (CDP), which is an administrative contract under which the state or a state-run entity entrusts to a

third party, for a period set by investment amortisation or agreed financing terms:

- a comprehensive project related to the construction or conversion, upkeep, maintenance, operation or management of works, equipment or intangible assets necessary to public service; and
- the total or partial financing of the project, with the exception of any form of equity financing.
- The agreement may also have as its object all or a part of the design of such works, equipment or intangible assets, as well as the provision of services for which the public body is responsible under its public sector mission.

Public entities use these various agreements in different sectors, for example:

- Water distribution.
- The construction of public facilities, such as hospitals, prisons, sport and cultural facilities, and schools.
- Roads.
- Energy and waste processing facilities.

## B. What Local Laws Apply to PPPs?

France has implemented Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Consolidated Public Sector Directive).

Each type of PPP agreement (*see Section XXIV.A*) is regulated by specific legislation.

In practice, this means that PPP agreements:

- Are subject to public notice obligations.
- Must generally be put to competitive tender (the tender procedure varies according to the value of the contract and the project's characteristics).

Partnership agreements differ from general procurement contracts, in particular due to their financing methods. As a result, they are not regulated by general public procurement laws but by specific domestic legislation, such as Order No. 2004-559 on partnership contracts.

The Constitutional Council (*Conseil Constitutionnel*) (CC) has restricted the use of partnership agreements. They can only be used for reasons of public interest linked to the urgency or complexity of the project (CC decision No. 2003-473, 26 June 2003).

Partnership agreements can also be chosen if they provide more benefits than other types of public procurement contracts (*CC decision No. 2008-567, 24 July 2008*).

## C. What Is the Typical Procurement/Tender Process in a PPP Transaction? Does the Government or Another Body Publish Standard Forms of PPP Project Agreement and Related Contracts?

Generally the tender process for PPP agreements is as follows:

- A public notice procedure takes place.
- This is followed by a competitive tender. Tender procedures vary. There is generally a:
  - negotiated procedure (that is, where the contracting authority consults with economic operators and negotiates the terms of the contract with one or more of these operators); or
  - restricted request for proposal (RFP) (that is, where tender is made by invitation rather than open to the public).

In relation to partnership agreements, a preliminary assessment must take place before any tender to ensure compliance with the restricted conditions for using partnership agreements. This is known as a public sector comparator. If the use of a partnership agreement is approved, the tender process takes place but follows a slightly different procedure to the one described above.

The core negotiations of partnership agreements relate to the financing of the project.

# XXV. Dispute Resolution

## A. Which Are the Most Common Formal Dispute Resolution Methods Used? Which Courts and Arbitration Organisations Deal with Construction Disputes?

### I. Formal Dispute Resolution Methods

All types of dispute resolution methods are available in France, except in the public sector where the administrative courts may have exclusive jurisdiction.

Most frequently, disputes arising out of private domestic projects are resolved before the competent French courts or the court chosen by the parties in their agreement. In private international projects, the parties most frequently submit their dispute to arbitration, either ad hoc or institutional.

France has recently enacted new legislation on arbitration. The Decree of 13 January 2011 consolidates established principles of arbitration as set out by case law and international practice, and confirms France as an arbitration-friendly jurisdiction. French courts act in support of arbitration proceedings and the dedicated chamber of the Paris Court of Appeal is well known for developing case law favourable to arbitration. Paris is therefore often chosen as a seat for international arbitrations, whether or not the construction project underlying the dispute is based in France.

### 3. Courts and Arbitration Organisations

Courts at every level generally have a specific division that deals with property and construction matters. At first instance, this is usually a division of the *Tribunal de Grande Instance* for private construction projects.

Many arbitration institutions can be chosen to administer arbitration proceedings related to construction matters. The International Court of Arbitration of the International Chamber of Commerce (ICC) remains the most frequently chosen and highly recognised arbitration institution.

## B. What Are the Most Commonly Used Alternative Dispute Resolution (ADR) Methods?

ADR other than arbitration is traditionally little used in domestic projects.

However, the parties increasingly include expert determination clauses for certain specific aspects, such as the evaluation of the impact of a variation order, an unforeseen event or a concurrent delay, or the determination of the existence of a defect during construction. The expert can be chosen in the contract (an individual or a list) or by a court in interim proceedings. The parties can decide whether the expert's decision will be binding.

In international projects, ADR methods such as those provided in FIDIC contracts are frequently chosen through complex multi-tier clauses (dispute adjudication boards, mediation and arbitration).

## XXVI. Tax

### A. What Are the Main Tax Issues Arising on Projects?

A real estate developer resident in France for tax purposes is liable to pay:

- Personal income tax, at a progressive rate up to 45%.
- Corporate income tax, at a maximum rate of 34.43%.

Foreign developers that have a permanent establishment in France are subject to the same provisions. Under many tax treaties, a construction project on French territory constitutes a permanent establishment if the construction site is active for more than 12 months.

Construction activities in France are generally subject to 20% value added tax (VAT). Some specific construction projects are subject to 5.5% VAT (for example, social housing projects).

A planning taxation reform that entered into force at the beginning of March 2012 created two taxes:

- A planning tax (*taxe d'aménagement*), which replaces several national and local taxes, therefore simplifying the applicable framework.
- A low-density tax (*versement pour sous-densité*), which is applicable under a minimal density threshold. The previous framework was based on the very opposite rationale as a tax was applicable over a maximal density threshold.

## B. Are Any Methods Commonly Used to Mitigate Tax Liability on Projects? Are There Any Tax Incentives to Carry out Regeneration Projects?

The tax mitigation tools available include:

- The use of French or foreign structures (for foreign investors), which may reduce the tax burden on sale (for example, a share sale rather than an asset sale).
- The use of certain specific investment vehicles that minimise tax on investment transactions, such as real estate investment funds (*organismes de placement collectif immobilier*) (OPCIs).
- The use of shareholder loans, which may reduce the taxable amount for corporate income tax purposes, in accordance with French under-capitalisation rules.
- Extraordinary depreciation, which applies to buildings built in a zone identified as being in need of development, that is, either:
  - a rural revitalisation zone (*zone de revitalisation rurale*) (ZRR); or
  - an urban redevelopment zone (*zone de redynamisation urbaine*) (ZRU).

In addition, specific benefits apply to residential real estate with regulated rents. For example, French individual taxpayers receive a tax cut spread over nine years if they invest in residential real estate with regulated rents.

Specific tax incentives for individuals investing in the residential construction market were implemented in September 2014 under the Pinel Act. These incentives apply to taxpayers based in France who rent out new housing after purchase. The tax deductions vary between 12% to 21%, depending on the period of rent and the property price.

## XXVII. Other Requirements for International Contractors

### A. Are There Any Specific Requirements That International Contractors or Construction Professionals Must Comply with?

There are no additional specific requirements that international contractors must comply with.

## XXVIII. Reform and Trends

### A. Are There Any Proposals to Reform Construction and Projects Law? Are There Any New Legal or Regulatory Trends Affecting Projects?

#### I. Reform Proposals

New regulations are currently under preparation by the French Government. The purpose of these new regulations will be to:

- Enhance and accelerate the granting of building permits.
- Reduce the duration of administrative proceedings regarding recourse against building permits.
- Enhance the payment period by public entities in public works.

#### 2. Trends

Several possible reforms are under discussion aiming at favouring access to housing and improving constructability conditions.

## XXIX. Main Construction Organisations

### A. French Building Federation (*Fédération Française du Bâtiment*) (FFB)

**Main activities.** The FFB represents construction professionals before the central administration, the local public authority and policy makers on economic and construction matters.

W [www.ffbatiment.fr](http://www.ffbatiment.fr)

### B. National Federation of Public Works (*Fédération Nationale des Travaux Publics*) (FNTP)

**Main activities.** The FNTP is a federation of construction companies of all sizes which intervenes in public construction projects. The Federation promotes, defends, advises and lobbies on behalf of its members.

W [www.fntp.fr](http://www.fntp.fr)

## XXX. Online Resources

### A. Legifrance

W [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)

**Description.** Official website administered by French public authorities containing French regulations (lois, décrets, arrêtés) and courts decisions (Cour de cassation, Conseil d'Etat, cours d'appel). Partly translated into English (for guidance only).

## XXXI. About the Author

### A. Sébastien Bonnard

Brown Rudnick LLP

T +33 1 85 56 82 30

E [sbonnard@brownrudnick.com](mailto:sbonnard@brownrudnick.com)

W [www.brownrudnick.com](http://www.brownrudnick.com)

**Professional qualifications.** Member of the Paris Bar

**Areas of practice.** International and domestic construction; international arbitration.

#### Recent transactions

- Recently participated in the negotiation and/or monitored the execution of major construction projects in France (including skyscrapers at *La Défense*) and North Africa (including the renovation of a process plant).
- Recently acted as counsel in arbitrations under ICC rules, in particular relating to infrastructure projects and the exploitation of natural resources.

**Languages.** French, English