



LIABILITY, WARRANTIES AND INSURANCE TO COVER DAMAGES IN CONSTRUCTIONS

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Abstract

In Portugal, new houses often come with many defects, usually associated with errors in design and execution. In many cases the responsibilities for damages caused by these errors are only attributed in court.

Another relevant aspect is related to the absence of a mandatory warranties and insurance system to cover damages in construction. Currently, private construction works have only a 5 year guarantee, regardless of the type of defect found, and there is no mandatory insurance associated with that guarantee. Regarding public construction works, the Public Contracts Code establishes warranties of 2, 5 and 10 years but no mandatory insurance.

In this study, we tried to focus on the various issues mentioned above. Initially, the defects in new construction are analyzed as well as all current Portuguese legislation concerning this issue. Then a study is done of the main insurances existing in our country and the liability, warranties and insurance systems in five countries - France, Spain, UK, USA and Canada – are examined in order to create a proposal of a liability, warranties and insurance system for Portugal.

Keywords: Insurances, warranties, liability, pathology, quality, construction, [defects in constructions](#)

1 INTRODUCTION

1.1 PRELIMINARY REMARKS

When a new house is bought it is unexpected, at least in the near future, to present defects. Nevertheless, when occurring, defects are expected to be quickly repaired without further inconvenience.

However, facts show that many recently built houses have pathologies. Furthermore, in most cases, the problems concerning repair works provided by the responsible parties (promoters and/or constructors) are only solved through judicial action.

Creating an effective warranties and insurance system to cover damages in construction would mean having a support for the attribution of responsibilities to the several intervening parties, thus enabling repair costs to be covered by insurance companies.

1.2 OBJECTIVES AND ORGANIZATION OF THE DISSERTATION

The main objective of the present dissertation is to propose the creation of a liability, warranties and insurance system to cover damages in constructions.

For that, this work is dividing in the following 5 parts:

- The first part, corresponding to Chapter 2, deals with the problem of defects in new constructions. Initially data is presented regarding the evolution rates of family growth, home growth and number of licensed houses in order to assess the development of construction in Portugal. Next, the defects in constructions are studied, particularly in newly built houses, analyzing the main errors, the pathologies associated with those errors and related construction elements, in order to compare with data collected from claims in France. Finally the repair costs of the aforementioned defects are compared with the costs undertaken during the construction stage;
- The second part, corresponding to Chapter 3, attempts to analyze Portuguese legislation concerning liability, warranties and insurance to cover damages in constructions. Also, the main problems with present legislation and recent proposals for its amendment are object of discussion. Finally a historical development of legislation concerning insurance issues in Portugal is done, enumerating the main changes since the beginning of the last decade;
- The third part, corresponding to Chapter 4, analyzes the existing insurance policies to cover damages in construction, paying particular attention to the policies that can be subscribed in Portugal. Also a study is presented of the protocol between the Order of Engineers and an insurance company and the function of Technical Inspection Agencies.
- The fourth part, corresponding to Chapter 5, describes the liabilities, warranties and insurance system in five countries (France, Spain, UK, USA and Canada). This description is complemented with a comparison between these systems and the one existing in Portugal.

- Finally, in the fifth part of this work which corresponding to Chapter 6, a proposal is made for a liability, warranties and insurance system for Portugal. For that, some issues are discussed regarding the creation of a Specialized Technical Commission and a data collection system for claims reported to insurance companies. Several measures are also presented for a new liability system for those involved in the construction process, a warranties system for public and private construction works and an insurance system for public and private construction works. Finally, a proposal is presented for a Technical Building Code, greatly relevant to achieving the aforementioned goal.

2 DEFECTS IN CONSTRUCTION

Throughout this chapter an analysis is undertaken regarding key aspects related to the development of construction and its defects.

The first noteworthy aspect concerns the prospects of growth of the rehabilitation market when compared with new constructions. The diminishing of housing growth rate and of number of licensed homes as well as the analysis of the trend in Europe, lead to the conclusion that, in the near future, the rehabilitation market in Portugal will grow significantly (Robinson, 2001; Afonso, 2007, Sousa , 2004). This aspect is of extreme importance for the proposal this dissertation is to present, since the warranties and insurance system does not cover only new constructions but also the modification, repair and maintenance of existing constructions.

Another conclusion that can be drawn from this chapter is related to the fact that the main defects in construction are due to errors in design/project (Esteves, 2008 and “Sycodés”, 2008). One aspect that may contribute for the solution of this problem is the implementation of certain measures concerning the responsibilities of the intervening parties, as well as the practical effects that Law 31/2009, of July 3, may generate. Other causes of defects in construction (construction errors and material related defects), should also be taken into account when setting up the system, which could happen with the recent changes produced by Law 31/2009.

The reparation cost of design/project related defects is another aspect that emphasizes the importance of designers' responsibility. Another relevant issue is need of extending the warranty period for design / project related defects, which now stands at five years for private construction works, since generally such defects take longer to become evident (OGO).

Facts demonstrate that the constructive element with higher percentage of defects is the facade of buildings and that the main problem is water leakage (“Sycodés”, 2008). These facts underline the importance of taking extra care to improve this situation, which could imply the creation of a Technical Construction Code in a similar way to other countries (such as Australia, New Zealand, United Kingdom, Japan, United States of America, Canada, Spain, among others).

3 LIABILITY, WARRANTIES AND INSURANCE IN CONSTRUCTION IN PORTUGAL

The analysis of the Portuguese legal framework confirmed that there is no liability, warranties and insurance system to cover damage in constructions. Such a system would increase the

protection of owners of buildings, also contributing to identify those responsible for the defects in construction. Currently, the existing legislation in Portugal is dispersed and raises several doubts; also some issues are left untackled (as the mandatory insurance to cover damages in constructions).

Regarding stakeholders' liability, in the Portuguese legal framework only the accountability of contractors and promoters is covered, the remaining parties are therefore acquitted of any responsibility. The contractor's liability is defined in the Portuguese Civil Code (*Código Civil Português* – CCivil), in Article 1208:

"The contractor shall perform the work in accordance with what has been agreed, and without vices that remove or reduce its value or its fitness for ordinary use or as in the contract."

However, with the Law 31/2009 it is established the qualification and the duties demanded to the technical personnel responsible for the development and the underwriting of the projects, the supervision and the project management.

As of the warranties to cover damage in constructions, the private construction works are governed by Article 1225 of CCivil, which only establishes the duration of a warranty, regardless of the type of defect:

"...if the contract is aimed for construction, modification or repair of buildings or other property which by its nature is for long-term, and in the course of five years from delivery, or during the warranty period agreed, the construction work due to soil or construction vices, modification or repair or for errors in its execution, wholly or partially collapse, or is defective, the contractor is liable for damage caused to the promoter or a the third party purchaser."

Regarding public construction the Portuguese legal framework was recently amended by the Public Contracts Code (*Código dos Contratos Públicos* - CCP) thus identifying three distinct warranty periods in accordance with the type of defects affecting the construction (Article 397):

- *"10 years in the case of defects in the structural building blocks";*
- *"5 years in case of defects related to non-structural building elements and installations";*
- *"2 years in case of defects related to equipment assigned to work, but it autonomously".*

As for compulsory insurance in the construction, there is only the insurance against accidents at work, which is outside the scope of this dissertation. For the coverage of damage, there is no law providing for the compulsory insurance contract.

It should be noted that, for public construction works requirement is made to for the contractor to issue a bond, amounting to 5% of the contract price, to ensure the conclusion of the contract, *"as well as the accurate and timely fulfillment of all obligations legal and contractual..."*. If the contract price is less than EUR 200.000 such a bond is not required, allowing for the retention of *"10% of the value of payments ..."* (Articles 88 and 89 of the CCP) implemented in the product requirement specifications. In order to strengthen the above-mentioned bond further settlement is demanded via the deduction of 5% the contractors (Article 353 of the CCP).

4 INSURANCE FOR CONSTRUCTION

In construction stakes tend to be superior to those found in different activities. This condition is reflected in the cautious approach insurance companies take for the celebration of contracts ensuring the coverage of damage in construction works.

In some countries a wide range of insurance policies are available, but in Portugal, the situation differs. There are three policies that stand out: professional liability insurance (covers the works of those involved in the construction process), full risk construction insurance (covers every risk of a construction other than those that are expressly excluded) and decennial insurance (covers defects in materials, errors in design and execution, affecting the stability of the building) (Montull, 2008, ASEFA, 2009 and Império Bonança, 2009).

Control Technician Organisms (*Organismos de Controlo Técnico – OCT*) have an important role in this context, since their task is to normalize the risks by communicating them to the insurers. Based on this information, the insurer is able to endorse a contract of insurance against damage in construction. The actions of the OCT leads to a higher quality of work, since this type of organism accompanies the construction works since the design phase until the end of the execution, drawing frequent reports that register the evidences found during the execution of the work.

5 LIABILITY, WARRANTIES AND INSURANCE SYSTEMS IN SOME COUNTRIES

Throughout this chapter liability, warranties and insurance practices undergoing in five countries - France, Spain, UK, USA and Canada - were object of careful study. These five countries were divided in two groups: Anglo-Saxon countries (where the Common Law is of the utmost importance) and the other countries where the law is more similar to Portuguese law.

Even though it is not addressed throughout this dissertation, it should be accentuated the contribution that the study of the Belgian liability, warranties and insurance system could bring to the discussion of the possibility of implementing new practices in Portugal. In Belgium insurance is only available on a voluntary basis, which differs from the mandatory insurance existing, for example, in France and Spain (Mascarenhas, 1990).

5.1 FRENCH AND SPANISH SYSTEM

The French system was implemented by Law 78-12 of 4 January 1978, called Spinetta Law (*Loi Spinetta*), which at the time amended Article 1792 of the French Civil Code, while the Law of the Building Ordinance (*Ley 38/1999, 5 de Noviembre, de Ordenación of the Construction - LOE*), introduced in Spain a new liability, warranties and insurance system to cover damage in constructions.

It is noteworthy that these countries' warranty schemes are compulsory with different lengths depending on the type of defect. In France, three warranties are required: "perfect finish" warranty (valid for 1 year - covers damage in pathologies object of "reserve" on receipt of the work), "proper functioning" warranty (valid for 2 years - covers damage in pathologies affecting the elements and equipment separable from work) and decennial warranty (valid for 10 years - covers damages that make the building or part inadequate for the purpose intended, as well as those affecting construction elements or equipment that are inseparable).

Moreover, in the Spanish warranty system requirement is made for: 1-year warranty: (the constructor is responsible for damages caused by poor execution), 3-year warranty: (all intervenient parties account for damages to the building) and 10-year warranty: (all intervenient parties are responsible for damage affecting the structural safety).

The French system requires two mandatory insurances: for damage reparation and decennial liability, whilst in the Spanish system there is a mandatory insurance for property damage or bond, with a validity of 10 years, though it is foreseen in the near future a requirement for mandatory insurance with durations of 1 and 3 years.