DAY CONFERENCE ON CONSTRUCTION LAW

30 November 2007

Many factors in the increasing importance of construction law to society influenced the decision of ESADE Law School (URL) to include it when programming its Continuing Education Day Conferences. Experience of applying the Building Act (*Ley de Ordenación de la Edificación*, LOE), in force since May 2000 but only recently established in legal terms, has helped consolidate new approaches to the complex field of construction and the roles of the different agents involved. One further factor was the recent publication of the Building Technical Code (*Código Técnico de la Edificación*, CTE), effectively the new regulatory framework that the LOE establishes as the basic compulsory regulations on building safety and habitability. It should also be borne in mind how much the construction sector affects the interests of the family (right to housing, sector employing a high percentage of the population, etc.).

It was in this context that in late November last year, ESADE Law School (URL) and a group of Barcelona law firms with wide experience in construction law (Arasa & De Miquel Advocats Associats, Comas & Pinyol Advocats and Lexland Abogados) organised a Day Conference on the subject. The result of this business-university collaboration, backed by *La Gaceta de los Negocios*, *La Tribuna del Derecho* and *Togas.biz*, essentially targeted architects, quantity surveyors, developers, constructors and lawyers with an interest in construction law. Addressed by some well-known specialists in the field and attended by 126 delegates, the conference was inaugurated by Dr Enric Bartlett, Vice-Dean for Continuing Education. Among the main topics dealt with were the demarcation of liability of the various building agents and aspects of the Building Technical Code that directly affect the building process and its cost. The programme took the form of two Working Sessions, which served to illustrate for those present the most significant innovations introduced by these regulations. The conference ended with a full round table looking at how construction processes were evolving and highlighting the defects of current regulations. The discussion that followed these interventions was proof of the interest aroused by this important subject.

The **First Working Session** entitled **"Liability of the different building agents. Demarcation"** was **chaired by Mr Marcos Jover,** Lawyer, Partner in Arasa & De Miquel Advocats Associats, and **speakers were Mrs Montserrat Pinyol**, Lawyer, Partner in Comas & Pinyol Advocats and **Mr Alejandro Tintoré,** Lawyer, Partner in Lexland Abogados, who dealt with legal aspects of the subject.

Mrs Pinyol addressed the *basic issues to be considered in the liability regime of the various building agents framed in the LOE* 38/1999 of 5 November, coming into force on 6 May 2000 *and in the CTE***,** Royal Decree 314/2006 of 17 March, coming into force on 29 March 2006 and implementing the 2nd final provision of the LOE. The *basic issues* analysed included the subject of reception of works (Art. 6 LOE), essential for calculating the terms of liability and guarantee established in the law. She also included pathologies (Art. 17 LOE), compulsory insurance (Art. 19 LOE), building types affected and an analysis of damage both covered and excluded by the LOE. In the second part of her address, the speaker dealt with *active legitimation* (Art. 17.1 LOE), and the figure of the developer (Art. 9.1 LOE). The third part was devoted to discussing *passive legitimation* (Chap. III, LOE and Art. 5.1, CTE) and reviewed liable agents,

with special emphasis on proprietors and users (Art. 16 LOE; Art 8.2 CTE) and their responsibility in the use and maintenance of dwellings, also covering non-liable agents (without prejudice to action for recovery), ending with an analysis of the scope of agents' liability: individual and joint liability (Art. 17.2 and 3 LOE). Fourthly, she dealt with *terms of guarantee and prescription*: ten-year, three-year and one-year guarantees (Art. 17 LOE), and two-year prescriptions (Art. 18 LOE), noting that the LOE has established a fair balance between the rights of users and professionals (…).

Mr Tintoré's address was entitled *"Means of defence available to building agents against claims for building defects".* Based on an initial premise: the system of liability for building defects contained in the LOE is highly protective of the rights of the person acquiring a dwelling. This is because the right to housing is enshrined in the Spanish constitution, acquiring a home is the most important investment a person makes throughout their lifetime, and the transfer to the area of construction law the rights that consumers and users enjoy in other fields. He then analysed the nature of the liability envisaged in the LOE: anyone taking action on building defects need only certify the existence of the damage whose redress they request, and that it has occurred within the guarantee period (annual, triennial or ten-year) established by law. From then on, it is the agents involved in the building, now the defendants, who must certify that they are not liable for the condition. This may be because the damage arose outside the building process, or because causes named in the LOE concur that exempt the building agents from possible liability. These are force majeure and/or chance, blame of the aggrieved party itself and third party action (Art. 17.8 LOE). Because causes of exoneration from liability are given in the LOE, other causes previously used have lost all currency. There has therefore been an *objectivation* of the liability that only lacks validity in international relationships between agents involved in construction. This is one of the essential modifications introduced by the LOE in defence of parties affected by building defects, impeding direct defence of building agents in external relationships with aggrieved parties (…).

The **Second Working Session** was entitled **"The Building Technical Code. General features. Changes implied by its application".** Its **Chairman** was **Mr Rafael Gómez de la Serna,** Lawyer, Associate of Lexland Abogados. Other **speakers** were **Mr Victor Fanlo**, Architect, Member of the Managing Committee of the Association of Forensic Examiners of the COAC (Catalan Architects' Association) and **Dr Francesc Labastida**, Architect, Technical Consultant of the Governing Committee of the COAC, ex-Dean of the Catalan College of Architects, who shared the task of analysing and appraising the CTE. The session gave a mainly technical overview of the core contents, spirit and purposes of these regulations.

Mr Fanlo began with a brief survey of the background to the CTE. He reminded the audience that the LOE had arisen from demands and pressures of the market and the insistence of the sector in sharing liability between all agents involved in the building process. He emphasised that Art. 3 of the LOE creates the concept of *Technical Code*, defining it as the regulatory framework that establishes the basic quality requirements of buildings and their installations if they are to comply with basic requisites. He also pointed out that the LOE envisages regular updating of the CTE, a clear advance that reflects the accelerated change brought by new technologies. He then described the CTE's long gestation period and how early drafts full of vague legal concepts were subsequently at least partially corrected by the intervention of the *Building Forum* and

contributions from architects, technical architects and developers. This gave rise to substantial modifications, until the current and much more acceptable version was obtained. He also outlined the CTE's structure: It is divided into two parts, Part I including General Provisions and basic building quality requirements (Chap. 3), and Part II the *Basic Documents* required to comply with basic requirements; these work by setting the levels, values and parameters to be met when required by the Basic Document concerned. Finally, the speaker pointed out that currently eleven Basic Documents (DB) have been approved, equivalent to more than a thousand pages and that these are already in force and under application (…).

Dr Labastida began by describing how sector professionals had received the CTE with a mixture of interest and concern and that many points still had to be clarified. He concentrated on the *Basic Documents* (DB) and their contents, which he considered lacked legal rigour due to poor communication between lawyers and experts during the CTE's drafting, with inevitable repercussions in its application. The DB form Part II of the CTE and are designed to comply with the CTE's basic requirements. The DB are based on a consolidated knowledge of building techniques, and must be updated in parallel with technical advance and social progress; they are approved by regulation. On how the DB relate to basic requirements, he indicated that these requirements are the quality requisites and services that buildings must offer to achieve the quality required by society. Specifications and amounts are established in the DB which contain the form and conditions under which these requirements must be complied with, determined through performance target levels, limit values or other parameters. Throughout his markedly critical address he stressed the lack of clarity of the technical standards and the dearth of instruments to apply them.

Mr Fanlo then returned with three final observations on the CTE: its lack of transversality, the economic problems of developers and, in the legal sphere, the change of orientation implied by its being based on a performance system (…).

The **Third Session** consisted of a **Round Table** entitled **"Final balance sheet. Evolution of processes relating to construction. Pros and cons. Defects in the regulations in force.** It was **chaired** by **Dr Juli De Miquel,** Lecturer in the ESADE Law School (URL), Partner of Arasa & De Miquel, and the **speakers,** in order of intervention, were **Dr Fernando Valdivia**, Incumbent Magistrate in Court of the First Instance no. 4 of Barcelona, **Mr Celestí Ventura,** General Manager of a sponsoring company, Vice-President of the Catalan Association of Technical Architects and Architects, **Mr Pere González Nebreda,** President of the COAC's Association of Architectural Forensic Inspectors, and **Mrs Montserrat Pinyol**, Lawyer, Partner of Comas & Pinyol Advocats. The chairman asked each speaker one specific question:

Dr Valdivia was asked what he would highlight in processes where the LOE is applicable, compared to those where Art. 1591 of the Civil Code used to and still does apply. The speaker replied that given the oral and public nature and immediacy of the new LEC (civil law procedure), the judge hears evidence from lawyers in a single act and understands that the "key" evidence is the inspector's view, along with documentary evidence about the building. Judges are not trained in technical aspects of construction, and in these circumstances the inspector becomes "the eyes of the judge". A confusing report is useless: it must be direct, clear, transparent and efficient. The inspector is expected to provide a description of what has happened. Another

outstanding point was that of regulatory integration or *hetero-integration* through other regulations. Among other examples he remarked that Law 32/2006 of 18 October features the clear concept of a businessman developer. This law assumes the notion of the High Court, which compares the developer to a contractor because he benefits from the product he sells. Apart from this, in Art. 3 of Royal Decree 1627 of 1997, the concept of business professionalism appears. Further figures also appear with specific content and range of liabilities: for example, if the quantity surveyor is also works manager, he ends up resolving technical etc. conflicts. On this matter, he indicated that integration regulations are regularly applied in the courts. As regards the application of Art. 1591 of the Civil Code, Dr Valdivia stated that the Art. 1591 channel may be applied as an accumulative action. He concluded by pointing out that if judges still use Art. 1591 it is because there are many processes, but the structure *decidendi* now depends on the new parameters of the LOE.

Mr Ventura was asked how developers viewed application of the CTE, and whether it was appropriate in times of real estate recession. The speaker opened by saying that times of crisis are a good occasion to reflect on new habits and processes. He felt that this was not a problem of opportunity or cost: the real problem today lies in the developer's acquisition of land. Another problem arises from the regulations themselves, or rather, the attempt to regulate everything. Developers feel they have to comply with too many regulations. He indicated that the Preamble states what must be done to encourage innovation, changing from a prescriptive system to a performance system. However, in practice, the system is still prescriptive. He also questioned how regulations of such magnitude could be created without first harmonising some important points, which now enter into flagrant contradiction. For example, permanent ventilation, going against external noise, and energy economy. He concluded by voicing his fears as a developer-constructor: a) innovation is an aptitude that either exists or does not exist; it cannot be acquired by Royal Decree. b) If liability is linked to blame, it is very difficult to achieve motivation. c) The CTE focuses so closely that it turns the developer into a controller who must be able to justify everything. There is a danger that the new generations will believe that they are directing, when in fact they are only controlling, and may even think that planning is enough to comply with standards.

Mr González Nebreda was asked if there was any conflict between the CTE and municipal urban ordinances, and if so, which regulation prevailed, and also who had to comply with the CTE. The speaker replied that many conflicts were already arising and, that everyone involved in construction must comply with the CTE, including Town Halls when granting licences and service companies. In his judgement, the controversy arose from an increasing tendency to dictate standards at all levels, starting with the European and ending up in municipal ordinances. Sometimes these standards are too interventionist, trying to regulate everything. This summer during the day conferences organised every 2 or 3 years for architects and lawyers by the General Council of the Judicial Authority the subject was raised, and the following conclusion was reached: we must be clear that criteria for urban control arise from urban laws which are local competencies. However, regulations on what buildings are like, their form, their characteristics, etc., depend on the CTE. In other words, everything referring to building issues will be regulated in the CTE, while everything referring to land use planning will be regulated by municipal ordinances, on the understanding that these must be modified if they contradict the CTE. In the meantime, if a conflict occurs, the CTE will prevail.

Mrs Pinyol was asked how the new regulations would affect the area of accident rates in construction. The speaker said that the response to this question was given in the LOE and the CTE, whose Preamble had much to say on quality. She remarked that the *Building Register* always had to be handed over at the end of works, documenting the project with all its modifications and the relationship of the agents, instructions for use and maintenance, users had to know their liability, etc. She also emphasised the importance of judges of the first instance in construction issues, since it is they who are responsible for executing judgments. She assessed the work of inspectors and the lawyers' dependence on them when defending their clients. Finally, looking at the pros and cons, the speaker concluded by pointing out that the pros are the situation we have now, the new regulations, with liabilities of ten, three and one years and prescriptions of two years, while the cons were the previous situation, with a liability of ten plus fifteen, in other words twenty-five years. Another pro is the new LEC, which allows immediate action, court attendance, improved attention to clients, and greater speed.

To questions by the public, Dr Valdivia replied that he agreed there was a need for judges and courts specialising in construction issues, bearing in mind the technical questions they have to deal with. Such specialisation has already occurred in matters affecting minors and in commercial law. There was also a need for good lawyers specialising in this matter.

Study prepared by Dr Maria Dolors Oller i Sala, Lecturer in the ESADE Law School

* A more detailed summary is available in the Spanish version.