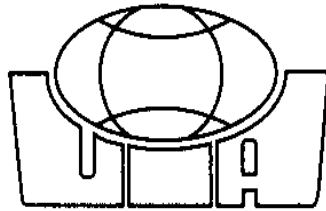


# 53<sup>rd</sup> UIA CONGRESS

Seville - Spain  
October 27-31, 2009



## REAL ESTATE COMMISSION

Wednesday, October 28, 2009

### LEGAL PROBLEMS ON CONSTRUCTION SITES

### ROLES AND RESPONSIBILITIES OF THE DESIGNER (*PROGETTISTA*) AND OF THE “WORKS MANAGER” (*DIRETTORE DEI LAVORI*) IN CONSTRUCTION PROJECTS UNDER ITALIAN LAW

Carlo H. Mastellone  
Studio Legale Mastellone  
Via Gustavo Modena 23, Florence, Italy  
Tel +390554620040 / Fax+39055475854  
[c.mastellone@studiomastellone.it](mailto:c.mastellone@studiomastellone.it)

© UIA 2009

## Summary of contents

1. General considerations
2. Obligations undertaken by professional technical consultants
3. Nature of the professional consultant's responsibility
4. The "subjective" element of the professional consultant's responsibility
5. The resolution of technical problems of special difficulty
6. Defects and non-conformity of the work
7. Responsibility of the designer in case of projects/plans supplied by the principal
8. Responsibility of the professional consultants in case of plans supplied by the constructor
9. Joint responsibility of the designer (*progettista*) and of the building contractor (*appaltatore*)
10. Specific duties of the designer (*progettista*)
11. Specific responsibilities of the works manager (*direttore dei lavori*)
12. Non contractual responsibility (*responsabilità extracontrattuale*) under art. 1669 civil code
13. Duties and responsibilities of the principal and of designer and works manager "responsible for the works" ("*responsabile dei lavori*") with regard to the matter of health and safety of work on building sites
14. The rules on health and safety on building sites according to the application and interpretation of the Italian Supreme Court

### 1. General considerations

The professional technical consultants (*professionisti tecnici*), generally architects or engineers, who are instructed by clients to attend to the planning and supervising of construction works in Italy, are referred to as the *progettista* (designer) and as the *direttore dei lavori* (works manager). The same individual may be instructed for both roles.

The Italian Civil Code rules laying down the obligations and responsibilities of such professional consultants are not as detailed as one would expect in light of the importance of their roles in construction projects, to the point that, for example, in private building contracts the existence of plans is merely hypothetical and not an essential element of the agreement, whilst in public procurement contracts plans and projects are an essential element (art. 16, Law of February 11, 1994 requires plans - divided in three levels, preliminary, definitive and executive plans (*progetto preliminare, definitivo ed esecutivo*)). Furthermore there are no Civil Code rules expressly governing the designer's liability, and this is due, in principle, to the strong dividing line between the activity of the designer and of the builder, that act in a regime of reciprocal autonomy and whose duties and obligations are governed by a different civil code regime.

The "professional technical consultant" should not be confused with the "works assistant" or the "building site director" (*capo-cantiere*), who are merely employees of the constructor/builder and act according to the builder's directions and instructions and have no autonomous decision-making powers.

When the designer (*progettista*) and/or the works manager (*direttore dei lavori*) has a direct contractual relationship with the principal, being instructed by the latter, his contract is governed by the rules on work/services by independent contractors (*contratto d'opera*, art. 2222 and following Civil Code) and in particular by the rules on services rendered by professional consultants (art. 2229<sup>1</sup> c.c.) whereby such consultants agree to perform a work or a service (*opera* or *servizio*) and to perform their mandate personally. Whilst the builder is

---

<sup>1</sup> Art. 2229 **Exercise of intellectual professions:** "The law specifies the intellectual professions for whose exercise registration in special rolls or lists is required. Verification of the requisites for registration in rolls or lists, the keeping of same and disciplinary power over registered members are vested in professional associations, under the supervision of the State, unless the law provides otherwise. Judicial review of the denial of registration in or cancellation from these rolls or lists and against disciplinary measures which entail loss or suspension of the right to exercise a profession is admitted in the manner and within the times established by special laws".

subject to the rules on construction contracts (*contratto di appalto*, arts. 1655 et seq. Civil Code).

The designer has the specific role of drawing up plans and projects whilst the “works manager” has the specific role of controlling the compliance of the building works with the rules of the art.

## 2. Obligations undertaken by professional technical consultants

A professional consultant is required to possess the specific technical know-how to ensure in any case the result promised to the principal, and the services rendered are evaluated on the basis of “diligence”.

There is an ongoing debate concerning the nature of the obligations of the professional consultant, i.e. whether they are obligations of “means” or of “result” (*di mezzi* or *di risultato*). Generally speaking, such obligations are classified as obligations of means e.g. of conduct, whereby the professional consultant simply agrees to perform a certain activity as a means to achieve the result/s expected by the principal, but not to achieve a given result; diligence here is measure used to assess whether the obligations have been complied with properly.

It follows from the principle that a consultant is not required to achieve a given result, that the consultant is entitled to receive payment of his fees even in the absence of a result, on condition that the services are performed with the necessary degree of diligence. However the jurisprudence recognises the right of the principal to insert a clause in the contract making payment of the fees conditional upon achievement of an agreed positive result for the client (Corte di Cassazione (Supreme Court) March 21, 1997 n. 2540).

In practice, the significance and effect of this distinction is relevant in connection with the burden of proof as well as with the contents and object of the proof itself. The creditor of a result is simply required to prove the existence of a binding agreement, whilst the creditor of a conduct is required to prove additionally the negligence of the debtor, just like for the obligations arising out of tort (*atto illecito*).

As regards the object of the proof, in the presence of obligations of means, the party claiming breach of contract and damages is required to prove the lack of prudence (*imprudenza*) or negligence (*negligenza*) of the debtor, whilst with obligations of result, the burden of proof is satisfied if the claimant proves that the result has not been achieved: in any event the professional consultant is entitled to prove that breach has been caused by the “impossibility of performance” (art. 1218<sup>2</sup> c.c.), due to circumstances beyond his control - this is known under Italian law as a “relative presumption” (*presunzione relativa*) with the right of the other party to prove the opposite.

In reality it appears difficult to deny that the consultant’s obligation implies a given result, considering that this is the circumstance that distinguishes the independent work contract (*contratto d’opera*), that includes intellectual services, from the subordinate employment contract, whereby the employee agrees to dedicate his energies to the employer by performing the tasks entrusted according to the employer’s direction and control and independently of a result.

If one uses the word “result” as referring not only to a tangible product, but also to an intangible asset that is autonomous from the energy and the activity that has produced it, one is already dealing with the sphere of the suppliers of intellectual services, for example the plans drafted by a professional consultant.

---

<sup>2</sup> Art. 1218 **Liability of debtor**: “The debtor who does not exactly render due performance is liable for damages (1223) unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him (1256 ff.)”.

### 3. Nature of the professional consultant's responsibility

The responsibility of the professional consultant is contractual in nature (*responsabilità contrattuale*) and derives from a contract for intellectual consultancy services (*contratto di prestazione d'opera intellettuale*). The jurisprudence recognises that responsibility may also arise in tort (*responsabilità da atto illecito*, Corte di Cassazione October 6, 1997 n. 9705; Corte di Cassazione August 7, 1982 n. 4437). It is useful and appropriate to underline the difference of discipline of the two kinds of liability: in the case of responsibility from contract (*responsabilità contrattuale*), the amount of damages for breach of contract is limited to the damages that are foreseeable at the time when the obligation arises (art. 1225<sup>3</sup> Civil Code), whilst in the case of responsibility in tort (*responsabilità extracontrattuale*) such limitation does not apply:

- a) as regards the issue of the burden of proof, in case of breach of contract it is sufficient for the claimant to prove the existence of the credit and of the breach of contract of the other party, whilst the debtor is required to prove that he cannot be held responsible; in case of liability in tort, i.e. from an illegal fact or act regardless of a contract, the damaged party is required to prove both that the conduct of the other party has caused the damages and also that the conduct is due to gross negligence or wilful misconduct
- b) as regards an action for damages, if liability is caused by a breach of contract, it is time-barred within 10 years (at the latest), whilst a shorter period (normally 5 years) applies in case of liability from tort.

### 4. The "subjective" element of the professional consultant's responsibility

An action for liability from breach of contract (art. 1218 c.c.), as well as for liability in tort (art. 2043<sup>4</sup> c.c.) must be based on the existence of wilful misconduct or negligence of the party held responsible, whilst only in exceptional cases damages are awarded in the presence of an "objective" responsibility, i.e. responsibility that arises regardless of the negligence or wilful misconduct of the party held responsible.

**Wilful misconduct** (*dolo*) arises when the person whose action or omission has caused the damages, wilfully expected and wanted such result, whilst in the case of negligence (*colpa*) the person whose action or omission causes the damages, does not wilfully want the result, nevertheless such result is caused by his negligence, imprudent conduct or lack of expertise, or by non-observance of laws, regulations, orders or disciplines (art. 43 penal code).

**Negligence** has various degrees of intensity:

- a) gross negligence (*colpa grave*), that sometimes is considered as equivalent to wilful misconduct, occurs in the presence of a non excusable negligence, i.e. in the presence not only of a lack of diligence of the "good pater familias" (*buon padre di famiglia*), but also of a minimum elementary degree of diligence that all persons observe;
- b) slight/modest negligence (*colpa lieve*) occurs when the conduct of a person is lacking compared to the general conduct of the average person (*good pater familias*);
- c) slightest negligence (*colpa lievissima*), for negligence of a marginal nature, is relevant only in case of responsibility in tort (*responsabilità extracontrattuale*).

---

<sup>3</sup> Art. 1225 **Foreseeability of damages**: "If the non-performance or delay is not caused by the fraud or malice of the debtor, compensation is limited to the damages that could have been foreseen at the time the obligation arose".

<sup>4</sup> Art. 2043 **Compensation for unlawful acts**: "Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages".

The degree of **diligence** is laid down by art. 1176<sup>5</sup> c.c. as the measure of the conduct of the debtor in the performance of an obligation that is due, and includes the combination of care and attention (*cure e cautele*) that every debtor must use in the performance of his obligations, taking into account the nature of the contract and of the circumstances of fact.

Diligence is therefore an objective parameter, not an individual criteria, that should be measured in a manner that is more or less strict depending on the individual contract and on the nature of the activity carried out: as regards the contract for intellectual services (*contratto d'opera intellettuale*), the parameter of reference shall not be that of the average person, but the parameter connected to the specificity of the profession and implies compliance with objective criteria deriving from technical rules.

The jurisprudence in recent years has affirmed that the conduct of the “works manager” (*direttore dei lavori*) must not be assessed with reference to the “normal” degree of diligence but with reference to the “effective” diligence in the circumstances, i.e. it has considered the person’s effective conduct in relation to the nature and the specificity of the professional consultant’s mandate undertaken, as well as the effective circumstances in which the services have been rendered (Corte di Cassazione November 28, 2001, n. 15124; Corte dei Conti (High Court of Accounts), September 18, 2001 and Corte di Cassazione August 29, 2000, n. 11359). According to Corte di Cassazione judgment of November 28, 2001, n. 15124 on the issue of responsibility following defects or non-conformity of works under a construction contract, the works manager appointed by the principal, although performing professional consultancy work consisting of an obligation of means and not of result, since he is called upon to carry out his activity in situations that require the use of specific technical competences, must use his own intellectual and operational resources to ensure, with regard to the works in course of realization, the result/s that the principal expects to achieve, hence his performance under the contract must not be evaluated with reference to the “normal” concept of diligence, but on the basis of the *diligentia quam in concreto*; therefore the “works manager” has the duty to ascertain the conformity both of the work in progress with the project as well as the conformity of the manner of implementation of the work with the itemized list of works (*capitolato*) and/or with the technical rules. Hence the works manager shall not escape responsibility if he omits to supervise and to give the appropriate orders in this connection, as well as to control the compliance by the builder and, in default, to report to the principal (Corte di Cassazione July 20, 2005, n. 15255).

As regards the concept of **expertise** (*perizia*), this may be defined as the technical knowledge acquired through study and experience, which in the field of the professions, is very near to the concept of diligence. The professional consultant is required to have the necessary expertise, and this is a pre-condition of the contract (*presupposto contrattuale*) because, in default, the object of the contract is not achievable; it is also possible to conceive a pre-contractual responsibility of the professional consultant who, although being aware of his lack of expertise (*imperizia*) in respect of the services as laid down in the contract, has nevertheless accepted the mandate to perform those professional services.

The opposite of expertise, i.e. lack of expertise (*imperizia*), is based on ignorance and error. Prudence is considered as a pre-condition of any person’s actions that every person, independently of his knowledge (that may be more or less specialised), must follow if he desires to avoid negligence (with the consequential responsibility). With regard to the

---

<sup>5</sup> Art. 1176 **Diligence in performance**: “In performing the obligation the debtor shall observe the diligence of a good pater familias. In the performance of obligations inherent in the exercise of a professional activity, diligence shall be evaluated with respect to the nature of that activity”.

profession, the conduct of the professional consultant is considered imprudent if he acts without considering in advance all the possible risks connected with his actions.

Apart from the situation of error by the consultant, where the conduct may or may not amount to negligence, the responsibility of the professional consultant is evaluated based on the combination of articles 1176 and 1218 civil code, in the sense that the consultant is always responsible for his conduct even in the event of slight negligence (*colpa lieve*).

Finally on this point, it is not clear whether even for the professional consultant, the presumption of negligence against the builder pursuant to article 1669<sup>6</sup> civil code applies; following the theory of the responsibility in tort (*responsabilità extracontrattuale*), as a joint responsibility, one should conclude in the affirmative, cf. the judgement of the Tribunal of Perugia, January 9, 1996, in the case of the collapse of a building (*rovina di edificio*), the responsibility that the law presumes against the builder, extends also to the architect or engineer responsible for the planning (*progettista*) as well as to the works manager. However it appears that the Corte di Cassazione, January 28, 2000, n. 972, takes an opposite view, when it underlines the necessity for the courts to duly specify the reasons upon which the breach of the works manager is based, and thus it appears to indicate that specific evidence is necessary in this connection. However this judgement is not clear as regards the title of responsibility upon which the claim is based. Furthermore the Tribunal of Rome judgment of July 20, 2000, requires the principal who intends to sue the works manager pursuant to art. 1669 civil code, to submit evidence of the “cause and effect” relationship between the breach of the works manager and the existence of the defects or non-compliance.

## **5. The resolution of technical problems of special difficulty**

The responsibility of the professional consultant in general is governed by articles 1176 c.c. and 1218 c.c.: art. 2236<sup>7</sup> c.c. provides for a decrease of responsibility if the consultant’s services as laid down in the contract imply the resolution of technical problems of special difficulty, this occurs when the intellectual undertaking required in the circumstances is higher compared to the average professional consultant level and the consultant must engage in activities of a higher level that determine an obligation of means.

Under art. 2236 c.c. the consultant is responsible towards the principal only for wilful misconduct or gross negligence, and the burden of proof falls upon the consultant himself (Corte di Cassazione 7 August 1982 n. 4437, Corte di Cassazione 12 June 1982 n. 3604). In other words, art. 2236 c.c. derogates to the ordinary regime of responsibility and provides for the situation where if the consultant is required to resolve technical problems of extraordinary difficulty, he may only be held responsible for gross negligence. The jurisprudence interprets the expression “gross negligence” (*colpa grave*) (Corte di Cassazione 21 April 1977 n. 1476, Tribunale Milano 14 October 1963) as non excusable errors due to their manifest importance, as well as the conduct of ignorance that is not compatible with the degree of training and preparation that a certain profession requires or that may be presumed from the reputation of the consultant.

---

<sup>6</sup> Art. 1669 **Destruction of and defects in immovables**: “*In the case of buildings or other immovables intended by their nature to last for a long period of time, if within ten years from completion the work is totally or partially destroyed by reason of defects in the soil or in construction, or if such work appears to be in evident danger of destruction or reveals serious deficiencies, the contractor is liable with respect to the customer and his successors in interest, provided notice of said destruction or defects has been given within one year of their discovery. The right of the customer is prescribed in one year from the notice*”.

<sup>7</sup> Art. 2236 **Liability of person rendering professional services**: “*If the professional services involve the solution of technical problems of particular difficulty, the person who renders such services is not liable for damages, except in case of fraud, malice, or gross negligence*”.

## 6. Defects and non-conformity of the work

Under art. 2226<sup>8</sup> c.c. the supplier of works to third parties may be held responsible for non-conformity of the works, and such responsibility ceases if the works are expressly or tacitly accepted and the defects are easily recognisable (on condition that they are not hidden with wilful misconduct), and the principal has a duty to notify the non-conformity and defects within eight days from discovery.

The question whether the rules laid down by art. 2236 civil code apply to the contract for intellectual services is unsettled; for those who follow the theory that the professional consultant does not have an obligation to ensure a tangible or intangible result (Corte di Cassazione November 8, 1985 n. 5463, Corte di Cassazione July 21, 1972 n. 2495), but only to supply highly qualified services, a breach of contract is to be put in relation to the non achievement of a useful result; as regards the diligence of the performance and the absence of negligence, it follows that art. 2226 civil code is not applicable because there is no work in respect of which it is possible to verify the existence of defects or nonconformity. On the other hand, those who follow the theory that there is a necessary relation between intellectual services and an obligation of result, conclude that art. 2226 c.c. is applicable in any event (Tribunale di Casale Monferrato November 9, 1968, Corte di Appello Palermo February 19, 1959).

In reality the jurisprudence (Corte di Cassazione April 24, 1996 n. 3879, Corte di Cassazione December 1, 1992 n. 12820, Corte di Cassazione May 7, 1988 n. 3389) considers the application of art. 2226 civil code admissible only in situations where there exists an obligation of result - where the consultant has an obligation to supply a logical, complete and defined entity in which the work of the consultant materialises, creating something of new, that coincides perfectly with the client's interest, for example the technical plans of the designer (*progettista*).

According to the strictest legal writers (G. MUSOLINO, *La responsabilità civile nell'appalto*, Cedam, Padova, 2003; id, *La responsabilità del professionista tecnico - Ingegnere, architetto, geometra* /quarta ed. Maggioli, Rimini, 2004; *La responsabilità civile nell'appalto. Responsabilità contrattuale ed extracontrattuale, concorso di colpa, garanzie*, in "Enciclopedia", Collana diretta da Paolo Cendon, n. 58. Cedam Padova), art. 2226 c.c. is applicable only to the contract for manual work and not also to the intellectual work of the technical consultant (*progettista, direttore dei lavori*), because in the latter there is no provision for the delivery of goods or merchandise that can be easily evaluated, notwithstanding the absence of specific knowledge or technical investigation, but to the contrary the discovery of defects requires highly specialised knowledge and the defects themselves will arise only with the passing of time and with the practical implementation of the planned work.

It follows from the non application of art. 2226 civil code to intellectual work, that actions for damages are time-barred within one year from delivery, although it will be possible to invoke the application of the normal 10-year time bar period concerning the obligations arising from a contract (art. 2946<sup>9</sup> c.c.).

---

<sup>8</sup> Art. 2226 **Deviation and defects in work**: "the express or tacit acceptance of the work releases the worker from liability for deviation or defects if, at the time of the acceptance, they were known to the principal or easily detectable, provided that, in the latter case, they were not fraudulently concealed. The principal shall, under penalty or forfeiture notify the worker of the deviation or hidden defects within eight days from their discovery. The action is prescribed in one year from the date of delivery. The rights of the principal in case of deviation or defects in the work are governed by Article 1668".

<sup>9</sup> Art. 2946 **Ordinary prescription**: "Except in cases in which the law provides otherwise, rights are extinguished by prescription after the lapse of ten years".



## 7. Responsibility of the designer in case of projects/plans supplied by the principal

Looking at the situation where the plans and projects are not supplied by the builder/constructor (*appaltatore*), but by the principal (*appaltante*), the issue is whether the principal's responsibility should be cumulated to the architect's responsibility or whether the principal's responsibility attenuates the architect's responsibility or whether it excludes it.

The concept should be clear: if the constructor (*appaltatore*) realizes that there is a defect in the plans (even prior to commencing the execution of the works), based upon the general rules of diligent and correct behavior, both at the pre-contractual as well as at the contractual stage in the course of the execution (arts. 1337 and 1375 civil code), the constructor should notify the principal in a timely manner, failing which he would incur a liability; the purpose of exonerating the constructor from liability, a communication to the works manager, if the principal has appointed one, is considered equivalent to a communication directly to the principal himself (cf. Cass., 6 June 1961, n. 1309). Should the builder fail to notice the defect of the projects, it is accepted that the builder cannot be expected to have the same technical knowledge of the designer (*progettista*), hence in this sense the constructor would generally be considered exempted from liability for not having noticed the existence of defects in the plans.

However the constructor has the duty to supply a perfect work, and this involves also a profile of diligent behaviour, hence the courts conclude that the constructor is expected to carry out something more than a mere verification of the "technical feasibility" of the plans, and it follows that in case of defects of the plans, the presence of negligence on the part of the constructor is the rule whilst the lack of negligence is considered an exception.

The jurisprudence on the point is rather uncertain, there are cases where the courts have held that the duties of the constructor do not include a duty to verify whether the project is functional to the result pursued (Cass. December 4, 1991, n. 13039, Corte di Appello Perugia March 12, 1991) whilst other judgements (Cass. January 22, 1985 n. 241) put the accent on the responsibility of the constructor for the defects of the project affirming that there is a presumption of negligence against the constructor, who is therefore expected to satisfy the burden of proof of the exemption from liability (i.e. to prove the lack of any negligence on his part).

Certain judgements go even further, by stating that if the plans are supplied by the principal, the constructor has an institutional duty to carry out an investigation on the nature and on the consistency of the soil, whilst this is not a duty of the designer, unless the agreement expressly provides for the contrary, with the consequence that in case of collapse of the building caused by failure of the soil, the sole party responsible vis-à-vis the principal would be the constructor, whilst the designer would be exempted from any responsibility (Cass. March 18, 1987 n. 272): in substance the courts suggest a form of so-called objective liability (*responsabilità oggettiva*) that appears on the face exceedingly burdensome for a party that is not a specialist in planning.

The above jurisprudence is questionable also because the responsibility of the designer is conditional upon the presence of gross negligence and wilful misconduct (*dolo* and *colpa grave*), which is typical of contracts for the supply of professional services, whilst to the contrary the hypothetical responsibility of the constructor does not benefit of such limitation, since he does not qualify as a "professional consultant".

It appears clear that by restricting the responsibility of the professional consultant within the traditional terms, the jurisprudence is led to reconstruct the hypothetical negligence of the constructor no longer as a contributory cause (*concausa*), but as the sole cause of the damages, thus making the constructor the sole and exclusive party responsible vis-à-vis the principal even for defects that pertain exclusively to the plans, and this is done for the purpose

of not leaving without any imputations a number of possible damages that it would not be fair to hold the principal responsible for.

### **8. Responsibility of the professional consultants in case of plans supplied by the constructor**

As regards this situation, the crucial problem is to assess whether, in the presence of defects of the plans, the principal has or does not have a direct cause of action against the designer (in addition to a cause of action against the constructor, of which the designer, in the circumstances, is classified as an “auxiliary” under Article 1228 of the civil code): in the circumstances one should be aware that there is no direct contractual link between the principal and the designer, since the latter is contractually linked only with the constructor pursuant to a contract for the supply of services (*contratto d’opera*).

The jurisprudence on this point (Cass. April 14, 1984 n. 2415, Cass. April 28, 1984 n. 2676, Cass. August 27, 1994 n. 7550, Cass. August 25, 1997 n. 7992), used to base itself on the noncontractual interpretation of Article 1669 civil code (specifically concerning the defects of the plans that are the cause of the collapse of a building or of the risk of the collapse), and reached the conclusion whereby such civil code provision may be used by the principal also against the designer, with the consequential application of the general rules concerning burden of proof, prescription and loss of rights (*prescrizione* and *decadenza*).

In reality if the cause of action of the principal against the designer were construed on the basis of the general principles concerning noncontractual liability (tort, arts. 2043 or 2050 civil code), as suggested by certain authoritative legal writers, the rights of the principal would receive a much better protection, because the short prescription and loss of rights terms laid down by Article 1669 civil code constitute substantial limitations compared to the general rules on compensation of noncontractual damages.

### **9. Joint responsibility of the designer (*progettista*) and of the building contractor (*appaltatore*)**

According to the traditional interpretation, joint liability is admissible only between different obligations deriving from the same contract, whilst there can be no joint liability for damages of the designer and of the builder/constructor since their respective responsibility is based on different kinds of contract (professional consultancy contract vs. a construction contract). However legal writers in more recent times have suggested a more flexible approach - the denial of the possibility of a joint liability between the designer and the builder is considered a violation of the fundamental principle of “*equità*”, based upon which it is argued that the responsibility may be both in contract and in tort and that damages may be apportioned between all and any parties that have contributed to causing the damages. The Corte di Cassazione has ruled in recent years there if damages are caused by two or more persons contributing to the damages, such as damages suffered by the principal of a building project that are caused by the combination of breach of contract by the designer and the builder, both should be held jointly responsible towards the principal (judgement September 23, 1996 n. 8395).

### **10. Specific duties of the designer (*progettista*)**

For billing purposes, the consolidated text on the tariff of fees for professional services rendered by architects and engineers<sup>10</sup>, describes the duties of the designer as the following

---

<sup>10</sup> Legge 2 marzo 1949, n. 143, Testo unico della tariffa degli onorari per le prestazioni professionali, dell’ingegnere e dell’architetto,

(art. 19 letters a) through f): a) preparation of the summary project of the building ; b) preparation of the summary estimate; c) preparation of the executive project with comprehensive designs in a number and scale sufficient to identify all the parties; d) preparation of the detailed estimate and of the report; e) design of the details of the building and of the decorations; f) assistance in negotiations for the contract for the supply and for the orders, including the preparation of the relevant itemised list of works (*capitolati*). In addition to being responsible for preparing the plans and projects, the designer also has the duty to take care of a number of preliminary activities, such as the following:

**a) to determine the borderlines and distances from other buildings:** if it is found that the building has been so badly planned that it is built on land owned by a neighbour, which makes the project completely useless, the designer is held entirely responsible without the possibility of invoking an evaluation of his professional responsibility with reference only to gross negligence (*colpa grave*) pursuant to art. 2236 c.c. (Corte di Cassazione March 29, 1979 n. 1818): tracing borderlines does not fall within the category of technical problems of particular difficulty that would allow the designer to escape liability for damages, since this is a kind of activity that even a lower level technical professional (a *geometra*), would be able to attend to; the same applies to the violation of rules on minimum distances between buildings.

**b) geological survey:** if the foundations are subsequently found to be unsuitable, due to the failure of the professional consultant to attend to the necessary geological researches, the consultant will be held responsible for damages; if on the other hand the consultant has carried out the normal survey, and has thus complied with his duties, and the building collapses or in any event damages occur as a result of a particular defect of the soil that escaped to the survey, the designer is entitled to invoke to his defence the so-called “geological surprise”. However the designer is held responsible towards the principal and third parties, if by under-estimating the evident risk of landslide, due for example to the clay soil or to infiltration of water, he commits an error in calculating the instability of the ground upon which the building works will take place, and therefore causes the collapsing of a pre-existing building as well as damages to nearby buildings (Corte di Cassazione January 5, 1976, n. 1, Corte di Cassazione September 7, 2000 n. 11783).

According to a certain jurisprudence (Corte di Cassazione July 12, 1986 n. 4531) when the designer on the basis of the normal level of diligence referred to by art. 1176 c.c., and therefore independently of a specific contract clause, does not require the builder or does not himself carry out the necessary research to acquire all the geophysical data that are necessary for the resolution of the problems concerning the foundations, and because of the defects of the soil damages to the building occur, the designer himself is not directly responsible towards the purchasers of the apartments of the building that has suffered damages; however he is responsible for reimbursing to the builder (seller of the apartments) any damages that the builder is liable to pay to the purchasers of the apartments (Corte di Cassazione September 23, 1996 n. 8395, Corte di Cassazione April 23, 1993 n. 4921).

**c) Interpretation of the laws and regulations:** if the designer is charged with the responsibility of carrying out a feasibility study on the possibility of building on a certain plot of land according to the applicable laws and regulations, the designer may be held responsible for breach pursuant to art. 2236 c.c., only in the presence of wilful misconduct or gross negligence if the investigation implies the resolution of problems not only of a technical but also of a legal nature that are particularly complex (Corte di Cassazione January 27, 1977 n. 404): the liability is excluded in the case that the interpretation of the rules to be applied is uncertain.

**d) Preparation of the projects:** the direct responsibility of the designer for preparation of the projects is a well-established principle, cf. his direct responsibility also for the structural aspects

of the work, Law n. 1086 of 1971, art. 3, para 1; the designer is responsible for breach of contract if it results that the projects is not performable due to technical errors. If a defective project is accepted by the client without objections, the consultant cannot invoke a reduction of his contractual responsibility towards the client pursuant to art. 1227<sup>11</sup> c.c. (Corte di Cassazione April 6, 1983), according to which if the creditor's own negligence has contributed to causing the damages, the amount of damages is reduced: if the client has commissioned to the consultant to draw up building plans, these should be in compliance with all technical rules and with the building rules, and it is found that the project cannot be implemented due to technical errors that have made it impossible for legal authorities to approve the project and issue a licence, the designer is certainly responsible towards the principal and cannot claim payment of a fee since the client has not obtained any useful result (Corte di Cassazione July 22, 1960 n. 2089).

**e) Reinforced concrete calculations:** if the designer is an engineer (the law reserves to engineers admitted this category of calculations) under no circumstances can he escape responsibility for errors of calculation arguing that the activity implied the resolution of technical problems of special difficulty: in the presence of the errors of calculation of the designer who is an engineer, that cause the structure to be subject to excessive strain, the consultant will be held liable for the increased costs of demolition and reconstruction of the work (Corte di Cassazione October 17, 1985 n. 51113, Corte di Cassazione December 21, 1978 n. 6141, December 11, 1972 n. 3557). A certain jurisprudence identifies the basis for the responsibility of the consultant towards the principal for errors in calculating the resistance of the amount of reinforced concrete, pursuant to art. 1669 c.c. as for the builder, rather than on the contract on work by independent contractors (*contratto d'opera*) (Corte di Cassazione April 14, 1984 n. 2415), as for the builder.

### **11. Specific responsibilities of the works manager (*direttore dei lavori*)**

The role of the “works manager” is to represent the interests of the principal on the building site and to carry out the “direction and surveillance” of the works (“*direzione e sorveglianza dei lavori*”). For billing purposes the tariffs (art. 19, letter g) refer to “direction and high surveillance of the works with periodical visits in the number of necessary, in the works manager’s exclusive opinion, with the issuance of the directives and orders (*disposizioni e ordini*) for the execution of the planned work in its various execution phases and surveillance of its positive outcome.” Hence the works manager’s responsibilities involve a duty of surveillance to ensure the positive outcome of the works together with the right and duty to issue directives and orders aimed at the said objective.

According to the prevailing jurisprudence (Corte di Cassazione March 22, 1995 n. 3264, December 1, 1992 n. 12820, November 8, n. 5462) the obligation of the works manager is an obligation of “diligence” and not of “result” - it is an intellectual activity carried out by means of a number of periodical visits and direct contacts with the technical bodies of the builder, with the duty and right to issue instructions and orders to ensure the correct performance of the works under the construction contract and to verify that such orders and instructions are diligently enacted by the builder. If the works management (“*direzione dei lavori*”) is entrusted to the designer, the applicable contract would give rise to an obligation of result and not of means (Corte di Cassazione April 22, 1974 n. 1156).

---

<sup>11</sup> Art. 1227 **Contributory negligence of the creditor:** “If the creditor’s negligence has contributed to cause the damage, the compensation is reduced according to the seriousness of the negligence and the extent of the consequences arising from it. Compensation is not due for damages that the creditor could have avoided by using ordinary diligence”.

The jurisprudence distinguishes between the works manager appointed by the principal to act on his behalf and the works manager that is an employee of the builder: the latter is responsible for surveillance of the normal operations of the building site. The works manager may be held responsible for defects of the work only when such defects derive directly from breach of the duty of surveillance, whilst he cannot be held responsible for defects caused by activities in respect of which it is not reasonable to expect that the works manager would intervene (Corte di Cassazione May 9, 1980, n. 3051; Corte di Cassazione March 29, 1979, n. 1818; Corte di Cassazione October 28, 1976, n. 3965; Corte di Cassazione October 16, 1976, n. 3541; Corte di Cassazione February 7, 1975, n. 475; Corte di Cassazione July 12, 1965, n. 1456; Corte di Cassazione July 4, 1962, n. 1705).

Specific examples of responsibility of the works manager are as follows:

**a)** in the case of **variations during works in progress** (*variazioni dell'opera*), the works manager is responsible for scrupulously following the indications of the designer and will be considered at fault if he causes damages by departing from the plans and projects (Corte di Cassazione May 17, 1979 n. 2841)

**b) incorrect instructions:** the works manager is responsible if the instructions given are technically in error or go beyond his powers and authority (Corte di Cassazione January 29, 1983 n. 821);

**c) checking the materials:** the works manager is responsible if he is entrusted with checking the quality of the materials used (Corte di Cassazione November 25, 1976, n. 4445), however both the works manager and the builder have the right to be held harmless by the supplier of the materials.

**d)** The builder is always responsible **towards third parties** for damages that occur during the course of the works, unless the builder acts as a mere performer (*mero esecutore*), but the works manager may be held responsible if the damages derive from the plans and projects in respect of which he should have verified the risks and dangers in their implementation or in the event that the damages are caused by instructions given by the works manager that the builder has scrupulously followed. The responsibility of the works manager is excluded in the event of failure to comply with his duties of surveillance because the precautions that have to be put into place to prevent damages to third parties fall under the responsibility of the builder, in his autonomy, or of the building site director (*direttore di cantiere*) appointed by the builder, hence the works manager shall be liable only in case of an exceptional involvement in the organisation of the works (Corte di Cassazione October 16, 1976 n. 3541);

**e)** the works manager has the duty to request a technical verification of the premises if the surveys of the soil appear insufficient (Corte di Cassazione April 27, 1993, n. 4921), this being an area that traditionally falls under the builder's competence (Corte di Cassazione January 29, 2002, n. 1154; *contra*: Corte di Cassazione November 7, 2000, n.11783, has ruled according to the traditional interpretation and has excluded the responsibility of the works manager in these cases).

**f)** The works manager has the duty to **identify any inaccuracy of the plans** and of the performance and to verify materially the outcome of his indications, and to notify in a timely manner the principal of any further breaches by the builder (Corte di Cassazione August 29, 2000, n. 11359; in this sense Corte di Cassazione May 30, 2000, n. 7180). The works manager must not authorise the use of materials of the worse quality compared to those listed in the itemised list of works and materials (*capitolato*) because his power to represent the principal is limited to the technical area and he has no power to authorise variations of the works.

In conclusion, the works manager has the duty to supervise the performance of the works according to the perfect rules of the art (*a perfetta regola d' arte*) and the use of suitable

materials, and in case of damages he is responsible for professional negligence pursuant to articles 2236 and 1668<sup>12</sup> c.c.

## **12. Non contractual responsibility (*responsabilità extracontrattuale*) under art. 1669 civil code**

According to the prevailing jurisprudence (notwithstanding contrary indications by legal writers), the provisions laid down by art. 1669<sup>13</sup> c.c. constitute a kind of tort (*responsabilità extracontrattuale*), the rule of public order is laid down for reasons and objectives of general interest, with the result that this provision is considered applicable even to cases where there is no direct contractual relationship between the party that has suffered damages in the party that has caused the damages. Therefore art. 1669 c.c. is applicable (Corte di Cassazione April 18, 1984 n. 2676; April 26, 1993 n. 4900) not only to the builder but also to the designer and to the works manager, and even the principal himself who has instructed the latter (if the principal attended to the construction of the building with his direct management, i.e. personally supervising the works so as to render the builder a “mere executor” of the principal’s orders, Corte di Cassazione May 30, 2003, n. 8811)

The liability in tort (*responsabilità extracontrattuale*) under art. 1669 c.c. is therefore a joint liability for damages, being it sufficient for such joint liability that the actions and omissions of each party have contributed, in an effective manner, to produce the event, whilst it is irrelevant that such actions and omissions constitute autonomous and separate illegal acts or breaches of different legal rules (Corte di Cassazione October 14, 2004, n. 20294, Corte di Cassazione August 22, 2002, n. 12367, Corte di Cassazione November 28, 2001, n. 15124).

Certain Supreme Court judgements have ruled that the application of art. 1669 c.c. can be invoked even by third parties (Corte di Cassazione December 14, 1993 n. 12304), who have suffered damages from the collapse of the building.

## **13. Duties and responsibilities of the principal and of designer and works manager “responsible for the works” (*responsabile dei lavori*) with regard to the matter of health and safety of work on building sites**

The matter of health and safety of work on building sites is dealt with in great detail in the recent Consolidated Text – Legislative Decree (D.Lgs.) 81/2008 [arts. 88 et seq., *Titolo IV – Cantieri temporanei e mobili – Capo I - Misure per la salute e sicurezza nei cantieri temporanei o mobili*]

The Consolidated Text lays down a number of definitions [Art. 89. Definizioni]

a) principal [*committente*] is the person or entity on behalf of which the entire project of works is carried out, and in the case of a public procurement, the principal is the entity holding decision-making powers as well as the expenditure authority relating to the management of the construction contract

b) “responsible for the works” [*responsabile dei lavori*] is the person or entity entrusted by the principal for the planning or control of the execution of the works, and such subject coincides

---

<sup>12</sup> Art. 1668 c.c **Contents of warranty against defects in work:** “*The customer can demand that the non-conformity or defects be eliminated at the expense of the contractor or that the price be reduced proportionately, without affecting compensation for damages in case of fault of the contractor. However, if the non-conformity or defects in the work are such as to render the work completely inadequate for its purpose, the customer can demand the dissolution of the contract*”.

<sup>13</sup> Art. 1669 **Destruction of and defects in immovables:** “*In the case of buildings or other immovables intended by their nature to last for a long period of time, if within ten years from completion the work is totally or partially destroyed by reason of defects in the soil or in construction, or if such work appears to be in evident danger of destruction or reveals serious deficiencies, the contractor is liable with respect to the customer and his successors in interest, provided notice of said destruction or defects has been given within one year of their discovery. The right of the customer is prescribed in one year from the notice*”.

with the designer [*progettista*] in the stage of planning, and with the works manager [*direttore dei lavori*] for the stage of execution of the works.

The obligations of the principal and/or of the responsible for the works are as follows [art. 90. *Obblighi del committente e/o del responsabile dei lavori*]:

1) the principal or the responsible for the works in the planning stage of the works, and in particular at the moment of the technical choices, in the implementation of the project and in the organization of the operations of the yard, shall comply with the general principles and protection measures concerning safety and health on the workplace. For the purpose of the implementation in conditions of safety of the works and of the work stages to be carried out simultaneously or in different times, the principal and the responsible for the works must indicate in the projects the duration of such works or stages of works

2) the principal or the responsible for the works, in the stage of planning of the works, shall evaluate, if applicable, the so-called plan of safety and coordination [*Piano di Sicurezza e Coordinamento*]

3) in case of simultaneous presence on the building yard of two or more enterprises, the principal and the responsible for the works at the time of giving instructions for the planning, shall designate a planning coordinator [*coordinatore per la progettazione*]

4) in the case of the presence, even not simultaneously, of two or a more enterprises, the principal or the responsible for the works, prior to appointing the builder, shall designate the coordinator for the execution of the works [*coordinatore per l'esecuzione dei lavori*]

Such appointments are conditional upon the existence of certain qualifications laid down by the law.

The following are the duties of the principal or of the responsible for the works, even in the event that the works are entrusted to one builder:

a) to verify that the builder holds the necessary technical and professional requirements in relation to the functions or the works to be entrusted,

b) to require the enterprise to present a declaration of the annual average personnel chart, showing qualifications, together with details of the filings in respect of the staff as regards the National Social Security Institute (INPS), and the National Institute for assurance against accidents at work (INAIL) and the pension funds [*casse edili*] as well as a declaration concerning the applicable national collective bargaining agreement stipulated by the most representative unions, applicable to the staff employed by the enterprise

c) to forward to the competent administration prior to the commencement of the works in respect of which the appropriate licenses have been issued [*permesso di costruire* or *denuncia di inizio attività*], the names of the enterprises charged with the performance of the works together with the documents listed above.

The necessary technical and professional requirements will be considered satisfied by means of presentation by the enterprise of a certificate of enrolment at the chamber of commerce, as well as the so-called "single document" attesting that the social contributions position is in order [*documento unico di regolarità contributiva*] together with an affidavit attesting the possession of the other conditions.

The following are the responsibilities of the principal and of the responsible for the works

1) the principal is exonerated from the responsibilities connected with the compliance of the obligations in so far as such obligations are entrusted to the responsible for the works. However such appointment shall not free the principal from the responsibilities connected to verifying the compliance of articles 90 and 99 and verifying the activity of the coordinator for the execution stage as regards the duty to signal any breaches in respect of the obligations of the freelance consultants, employers, executives and managers [*dirigenti e preposti*], of the general protection measures and of the prescriptions of the safety and coordination plan

2) designating the coordinator for the planning and the coordinator for the execution of the works shall not free of the responsible for the works from the responsibilities connected with verifying compliance of the obligations of drawing up the safety and coordination plan and verifying the activities of the coordinator for the execution stage.

Certain preliminary notifications are required to be made to the local health office as well as to the so-called provincial employment directorate [*unità sanitaria locale* and *direzione provinciale del lavoro* ]

The Consolidated Text n.81/2008 lays down a number of penalties for violation of the obligations entrusted to the principal and/or the responsible for the works

a) arrest from three to six months and monetary fine [*ammenda*] from € 2.500 to € 10.000 [breach of art. 90, para 1, second sentence, 3, 4 e 5;

b) arrest from two to four months and monetary fine from €1.250 to €5.000 for breach of art. 90, para 9, letter a);

c) monetary administrative sanction from €1.200 to €3.600 for breach of art. 101, para 1, first sentence;

d) monetary administrative sanction from €2.000 to €6.000 for breach of art. 90, para 9, letter c).

The absence of the “*documento unico di regolarità contributiva*” (“DURC”), even in case of change of the builder, shall render the effectiveness of the building license momentarily void [*l'efficacia del titolo abilitativo e' sospesa*]. The same sanction is laid down in the event of absence of the safety and coordination plan all of the official file of the works [*fascicolo dell'opera*], or the absence of the preliminary notification

#### **14. The rules on health and safety on building sites according to the application and interpretation of the Italian Supreme Court**

The Supreme Court (*Corte di Cassazione*), Penal Sections, has over the course of time, given a better definition and specifications of the duties and obligations of the principal and of the responsible for the works, both in implementing the Legislative Decree 81/2008 as well as the previous legislation [D.Lgs. 494/96, D.Lgs. 528/99].

Cassazione Penale, Section III – judgment no. 21995 of May 19, 2003, Coco: the judgment gives special attention to the role of the principal who is defined as the subject on whose behalf the builder carries out a project involving a building site. According to the approach of the law (at the time: D. Lgs. n. 494/1996, now superseded by Consolidated Text 81/2008) the principal [*committente*] and no longer the employer [*datore di lavoro*] is the “pivot” around which the safety on building sites rotates. The latter is under the obligation to comply with the duties under art. 3 del D. Lgs. n. 494/1996 (now art. 90 D.Lgs. 81/08) unless he appoints a responsible for the works [*responsabile dei lavori*]. In this case the Corte di Cassazione refers to a formal appointment, and does not consider sufficient the simple presence on the building site of a person who “represents” the principal [*committente*] himself.

Cassazione Penale, Section III – judgment no. 29149 of August 10, 2006 , Chiusi

The Supreme Court has reached the conclusion that the principal is freed from the penal obligations under D. Lgs. n. 494/1996 only if the mandate entrusted to the responsible for the works is accompanied by a proxy whilst it is not sufficient to have appointed a responsible for the works without a proxy in favour of the latter, that in the circumstances had not been expressly granted.

Cassazione Penale, Section III - judgment no. 7209 of February 21, 2007 , Bellini



Another judgment condemning a principal considered expressly in the judgment as the subject under obligation, to observe the duties imposed by the legislation on safety at work. The Corte di Cassazione has held that the principal is exonerated from liability following the appointment of a responsible for the works, however within the proxy and limited to the mandate entrusted and adds that “there appears to be no doubt that also in light of the new legislation, the principal remains obligated to ensure observance of the duties imposed by the rules on safety at work”. “The conditions that allow the exoneration from liability to operate as an effect of the appointment of a responsible for the works are therefore the following: 1) a timely appointment in relation to the measures concerning safety at work to be complied with; 2) the proxy conferred to the responsible for the works extends to the said measures.

Furthermore the judgement deals with the issue of whether failure of the knowledge of penal law may constitute a justification, and the Supreme Court confirms its consolidated jurisprudence that “it is not possible to excuse the person who is required to observe the minimum level of safety measures to be implemented in temporary building sites since he is required to inform himself on the penal laws that govern the matter, the interested person has a duty to verify the conformity of the contract with the safety rules”, and in the circumstances under examination “ignorance of penal law cannot be considered without negligence (*incolpevole*) due to its inevitable character (*inevitabilità*) because the interested party has not complied, with the criteria of the normal diligence, to the so-called duty to inform himself (*dovere di informazione*) by carrying out all useful enquiries the purpose of becoming aware of the contents of the laws in force”.

Cassazione Penale Section IV – judgment no. 7714 of February 20, 2008, M. A. and P. R.

This judgement of the Supreme Court deals with art. 6 para 2 D. Lgs. n. 494/1996 on temporary or movable building sites, as amended by D. Lgs. n. 528/1999 and today replaced by art. 93 para. 2, D. Lgs. n. 81/2008, containing the new Consolidated Text on health and safety on workplaces, concerning the responsibility of the principal and of the responsible for the works, connected with the verification that the so-called “coordinators” should comply with their obligations.

The Supreme Court has confirmed the condemnation issued by the Tribunal and by the Court of appeal of two principals (*committenti*) for failing to control that the coordinator had carried out his duties of verifying the observance of the prescriptions contained in the safety plan (*piano di sicurezza*) and to coordinate, and for failing to exercise, in the dual role of principals and of responsible for the works carried out in the circumstances, the power and authority to require to the coordinator to order that the works be suspended, having the power to act in lieu of the coordinator in case of failure to act by the latter.

Art. 6 para 2 D. Lgs. n. 494/1996 (as amended by D. Lgs. n. 528/1999) provides that “the designation of coordinators for planning and of coordinators for execution of the works does not exonerate the principal nor the responsible for the works from the responsibility connected to verifying compliance of the obligations referred to at art. 4, para 1, and art. 4 para 1 letter a) and states that “the legislator of 1999 has considered it appropriate not only to indicate in more specific terms the obligations of the principals and of the responsible of the works, but has also increased its contents by establishing that they have a duty to carry out a function of “super-control”, verifying that the coordinators comply with their obligations which include to verify the application by the builders and other enterprises and by the freelance professionals of the provisions contained in the safety and coordination plan as well as a correct application of the work procedures”

“The above derives from the consideration that the persons in question are those in whose interest the works are carried out, hence according to the very general principal of the legal

system whereby '*ubi commoda, ibi incommoda*', for the purpose of ascertaining whether the coordinator has noted or has failed to note the observance of certain prescriptions contained in the safety plan, it is not necessary to hold special and specific competences, since this involves mere comparison between what is being performed and what should have been performed based upon the prescriptions contained in the safety plan"

According to the Supreme Court, the legislator's intention was to reinforce the protection of the workers in relation to the risks to which they may be exposed and by providing for a particularly wide responsibility of guarantee by the principals or the responsible for the works, the latter have, although with different conditions compared to employers, executives and managers [*datori di lavoro, dirigenti and preposti*], the duty to take care of the health and physical integrity of the workforce and ultimately and in case of breach by the persons, they are responsible for observance of the conditions of safety provided by the law".

"There is no doubt that the coordinator had the obligation to verify the application of the safety plan and of the relevant legislation and to undertake the appropriate initiatives to ensure that prosecution of the works on the roof would take place in safety conditions with the installation of suitable scaffolding, so as to avoid the danger of workers falling, but it is equally true that the principals, who concentrated upon themselves also the function and the duties of the responsible for the works, had the obligation deriving from the law to control in turn that the coordinator had effectively and correctly, with attention and in a precise manner, attended to his functions of verifying that the coordinator had noted or failed to note any omission in the observance of the prescriptions contained in the safety plan"

"There is no doubt – concludes the Supreme Court – that in light of the dual role of principals and of the responsible for the works carried out in the circumstances under examination, they certainly had the authority to compel the coordinator to order not to proceed further with the works unless the scaffolding had been made compliant with the laws, since they have the authority to replace the coordinator himself in case of breach by the latter".

Cassazione Penale Section IV – judgment no. 23090 of June 10, 2008 Pubblico Ministero and S. G.

The definitions of the various roles and positions in building sites (art. 89 D.Lgs. n. 81/2008) has remained unchanged compared to the previous statute (D. Lgs 494/96) except for the responsible for the works (*responsabile dei lavori*) and the coordinator for the execution of the works (*coordinatore per l'esecuzione dei lavori*). The principal has an option - and not a duty - to appoint a responsible for the works, however if and when appointed, the responsible for the works coincides with the designer for the planning stage (*progettista per la fase di progettazione dell'opera*) and with the works manager (*direttore dei lavori*) for the stage of execution of the works.

The Corte di Cassazione has stated that the designer for the planning stage and the works manager (*direttore dei lavori*) for the stage of execution of the works do not automatically coincide with the responsible for the works pursuant to art. 89 Consolidated Text, but have to be appointed by means of specific letters of appointment and entrusted with delegations of authority

The case under examination concerned a principal who had been sent to trial for "homicide for gross negligence" (*omicidio colposo*) following an accident that occurred to a worker of a building company who, whilst working on a ladder six metres high to deal with demolition works, had fallen and died. The principal was accused of being responsible for gross negligence (*negligenza, imperizia e imprudenza*) for having failed to verify the compliance of the measures contained in the safety and coordination (D. Lgs. n. 494/1996) and for failing to

verify the application by the enterprises of the measures contained in the said safety and coordination plan.

The *Tribunale* acquitted the principal excluding his responsibility for having appointed, for the carrying out of the demolition and reconstruction works, an enterprise that had its own works organisation and for having appointed a responsible for the works (*responsabile dei lavori*).

The state attorney (*Pubblico Ministero*) filed a recourse against the judgment of the Tribunal, arguing that the Tribunal had given an incorrect interpretation of the entire set of rules of the laws on safety on building sites, that is “finalised at entrusting to the principal a role of surveillance in his position as subject who instructs third parties of the execution of works” and argued that the Judge had erroneously interpreted the Decreto Legislativo n. 494 of 1996 assimilating the responsible for the works to the principal of the construction contract (*appaltatore*), failing to consider that the legislator had set up two autonomous positions, the former being only a option”.

The IV Penal Section of the Corte di Cassazione upheld the recourse of the state attorney and annulled the first instance judgment arguing that “the judgment by excluding that the principal (*committente*) may be held responsible for violations put into place by the constructor (*appaltatore*) within his organisation and of the persons who assist him in the management and organization of the safety measures, has given an erroneous interpretation of the entire set of rules laid down by the Decreto Legislativo n. 494 of 1996 (as amended by the Decreto Legislativo n. 528 of 1999)”.

The Supreme Court has again confirmed that the principal (*committente*) constitutes the pivot with regard to safety in temporary and mobile building sites (Cass. Section III, July 7, 2003, n. 28774, Szulin), and the consolidated principle of law whereby “the principal remains the subject obligated, by way of a original and principal obligation, to the observance of the obligations imposed in the field of safety on workplaces (cf. Cass. Section III, 25.01.2007, n. 7209, Bellini; conf. Section IV, 06.12.2007, n. 7714, Mandatati)”, and provides an important verification as regards the appointment by the principal of a person holding the position of responsible for the works (*responsabile dei lavori*), the definition of which is laid down by art. 89 para. 1 letter c) D. Lgs. n. 81/2008 containing the consolidated text on health and safety on workplaces.”

“The exemption of the principal from the responsibilities that the law imposes upon him occurs only following the appointment of the responsible for the works and within the limits of the mandate conferred to the latter”; the Court refers to the contents of art. 6 para 1 D. Lgs. n. 494/1996 whereby “from the formulation of the above rule it clearly emerges that the legislator, in providing for the exoneration of the principal from responsibilities concerning safety of work on building sites, has subordinated such exoneration to the appointment of a responsible for the works, however within the limits of the delegation conferred to him. Hence the appointment of the responsible for the works must necessarily be accompanied by a formal act of delegation (*atto di delega*) which grants decision-making powers to the above said responsible for the works, which are connected with evidence powers of expenditure and more in general determining the sphere of competence conferred to him”.

“In substance the legislator has not predetermined the effects of the appointment of the responsible for the works, having expressly established that the area of exoneration from responsibility of the principal depends on the contents and on the extension of the mandate conferred to him” (cf. Cass. Section III, n. 7209/2007 cit.).

The conditions for the principal being exonerated from responsibility are: the appointment of a responsible for the works, the timeliness of such appointment in relation to the measures to be observed in respect of safety on work and that the delegation conferred to the responsible of works includes the said measures; such conditions in the case under examination had not been

respected since the appointment of the works manager [*direttore dei lavori*] did not include any delegation, and since the professional mandate concerning the coordinator for the planning and the execution of the works had been formalized by notifying to the Inspectorate for the works [*Ispettorato del Lavoro*] the preliminary notification concerning the works in question only after that the works had commenced and after the date of the accident on the workplace had occurred”