

## A COMPARISON OF LIABILITY AFTER TAKE OVER

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### LIABILITY AFTER TAKE-OVER: AN INTERNATIONAL COMPARISON

#### **Introduction**

In Holland the law on construction is governed mainly by general conditions. The Civil Code has a section on the law of services, but this law is rarely called upon in construction cases. Two sets of general conditions govern most construction contracts: for the traditional way of working (the employer takes care of the design) the Uniform Administrative Conditions 1989 are used. For design and build contracts the Uniform Administrative Conditions for Integrated Contracts 2005 are used. The subject of this paper are the clauses in both conditions on liability after take over.

You are kindly requested to answer the following questions.

Please describe in detail how in your country liability after take-over differs from the Dutch general conditions.

Please also describe the discussions your system has lead to and how judges deal with these issues.

Your answers should not be longer than 4 pages (line spacing single).

## Situation 1: Employer responsible for design

The Dutch Uniform Administrative Conditions of 1989 (UAC 1989) meant for the situation in which the employer takes care of the design and the contractor realizes the design, contain the following clause on liability after take over:

### Clause 12. Contractor's Liability after Completion and Acceptance

1. The Contractor's liability for any shortfall in the Works shall cease after the date on which the Works are considered completed and accepted in accordance with the provisions of paragraphs 1 or 2 of Clause 10.
2. An exception to the provision in paragraph 1 shall apply:
  - a. (.....)
  - b. if the Works or any part thereof contain any hidden defect caused through fault of the Contractor or his suppliers or subcontractors or his staff or labour and the Contractor is notified of such hidden defect within a reasonable period of time after it has been discovered.
3. Any defect as referred to under b in paragraph 2 shall be regarded as a hidden defect only if despite close supervision during the execution of the work or at the inspection of the Works as referred to in paragraph 2 of Clause 9 such defect could not reasonably have been discerned by the Employer's Agent.
4. Actions on account of hidden defects cannot be brought after five years have elapsed since the date referred to in paragraph 1.
5. If a defects liability period is provided for in the Specification, for the purposes of this Clause the date referred to in paragraph 1 shall be replaced by the day following the expiry of that period and "inspection of the Works" shall mean the inspection referred to in paragraph 6 of Clause 11.

This clause had given rise to a lot of case law concerning the matter if a defect is a hidden defect. It also has given rise to discussions whether it is acceptable that a contractor can get away with a defect, which is qualified as hidden because supervision (which is not obliged and is being paid for by the employer) was inadequate.

### Questions:

1. Describe the system of liability after take over according to the rules used<sup>1</sup> most often.
2. How are hidden defects (see clause 12 section 3 of the UAC 1989) described in your system? Does it make a difference if prior to take-over or during take-over the employer was assisted by professionals (like an architect or civil engineer)? Does it make a difference if the employer himself is considered to be a professional?
3. Does it make a difference for the liability of the contractor if a defect was or could have been discovered a) prior to or b) at the time of the take-over or c) after take-over? If so: describe the difference.
4. How long can the employer take action against the contractor after take-over?
5. Is the liability limited to a certain amount? If so describe how.
6. How do you look at this Dutch clause?
7. Which specific legal problems play a role in your system concerning liability after take over when the employer is responsible for the design?

### Situation 2: Contractor takes care of designing and building

The Uniform Administrative Conditions for Integrated Contracts 2005 contain the following clause on liability after take over:

- 28-1. After the actual date of completion and acceptance, the Contractor shall no longer be liable for defects in (any part of) the Works, unless:
- (a) he is to blame for those defects or is liable for those defects pursuant to law, contract or opinions prevailing in society;
- and furthermore:
- (b) the Employer failed to discover those defects prior to the completion and acceptance;
- and furthermore
- (c) the Employer should not reasonably have had to detect those defects at the time of acceptance of the Works.
- 28-2. The action due to a defect for which the Contractor is liable pursuant to section 1 shall be inadmissible if it is filed after the expiry of:
- (a) five years after the day referred to in section 1; or
  - (b) ten years after the day referred to in section 1, if the Works is about to collapse in whole or in part or becomes or is about to become unfit for the purpose for which it is intended according to the Contract and this can only be

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<sup>1</sup> In Holland the Civil Code is hardly relevant in construction law, but of course that might be different in other systems. The purpose of this comparison is to compare the most well used regulations irrespective of their character.

remedied or prevented by making extraordinary and very expensive provisions.

- 28-3. The total damage to be compensated by the Contractor pursuant to the first section shall be limited to 10% of the price stated in the Agreement in so far as that price is related to the realisation of the Works by means of Design and Construction Work. If the sum thus calculated is less than 1,500,000 euros, the compensation to be paid to the Employer shall be a maximum of 1,500,000 euros.
- 28-4. If the Employer's Requirements prescribe a defects liability period, the day following the expiry of that period shall replace the day referred to in section 1.

### Questions:

1. Describe the system of liability after take-over according to the rules (see note 1) used most often.
2. How are hidden defects (see par. 28 section 1 sub b and c the UAV-IC 2005) in contracts of this nature described in your system? Does it make a difference if prior to take-over or during take-over the employer was assisted by professionals (like an architect or civil engineer)? Does it make a difference if the employer himself is considered to be a professional?
3. Does it make a difference for the liability of the design and build contractor if a defect was or could have been discovered a) prior to or b) at the time of take-over or c) after take-over? Take into consideration your answer to question 2. If it makes a difference: describe the difference.
4. How long can the employer take action against the contractor after take-over?
5. Is the liability limited to a certain amount? If so describe how.
6. How do you look at this Dutch clause?
7. Which specific legal problems play a role in your system concerning liability after take over when the contractor is responsible for the designing and building?

**Thank you very much for your cooperation!**