CONSTRUCTION LAW INTERNATIONAL

FROM THE IBA INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE OF THE ENERGY, ENVIRONMENT, NATURAL RESOURCES AND INFRASTRUCTURE LAW SECTION (SEERIL)

Vol 20 ISSUE 3 ISSN 1819-1371 DECEMBER 2025

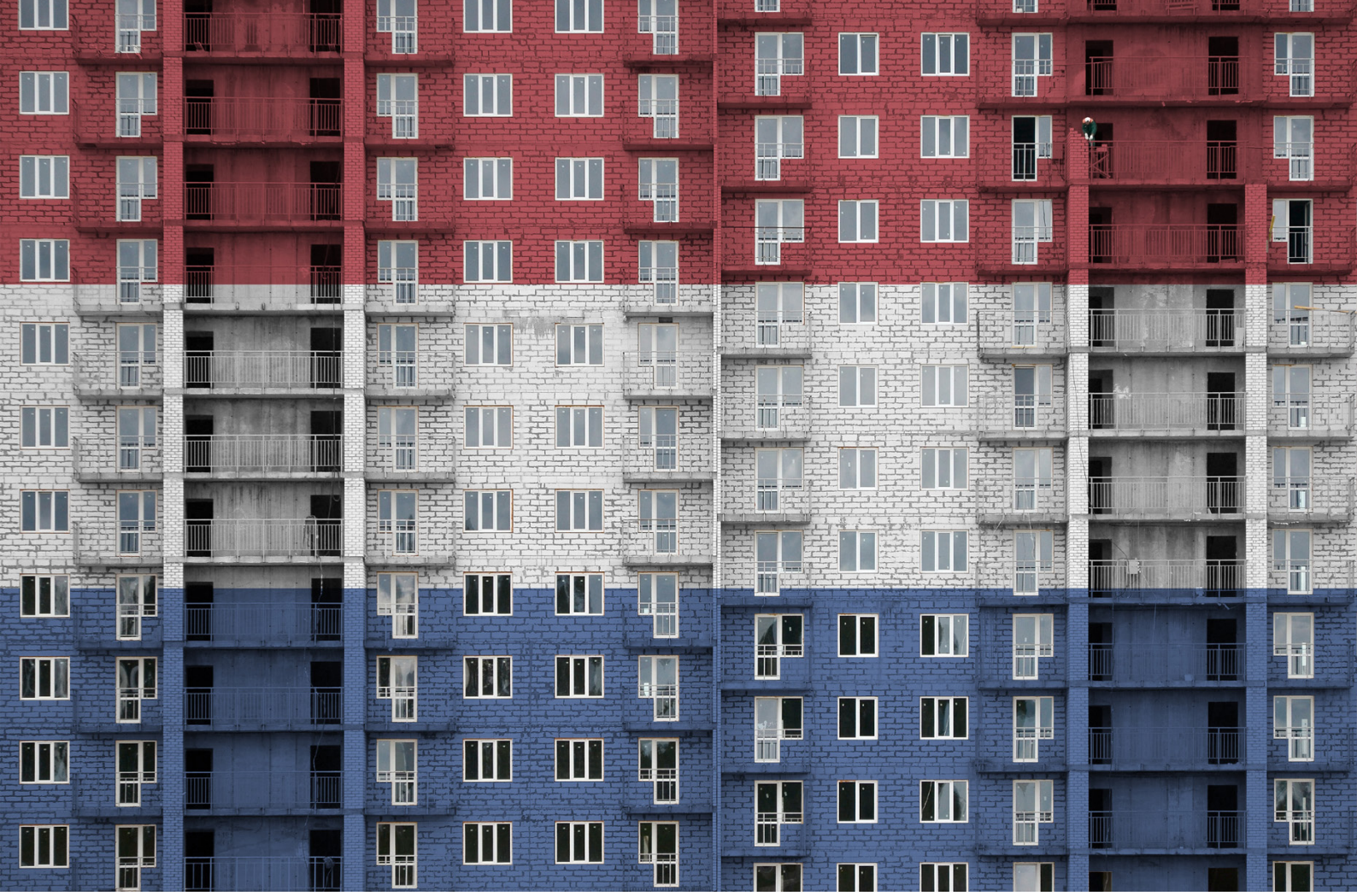
INTERNATIONAL BAR ASSOCIATION

the global voice of the legal profession

Force majeure and beyond: the evolution of risk allocation in Indian infrastructure contracts

The Colombian legal regime on future budgetary allocations in public private partnerships

A new legal regime redefining contractor's liability: a cautionary tale when contracting (FIDIC) projects in the Netherlands



Netherlands flag depicted in paint colours on a multi-storey residental building under construction. Credit: mehaniq41/Adobe Stock

Jacob Henriquez
Ploum, Rotterham

A new legal regime redefining contractor's liability: a cautionary tale when contracting (FIDIC) projects in the Netherlands

Introduction

On 1 January 2024 the Quality Assurance Act for Construction[1] (the Act) came into force in the Netherlands. The Act is – inter alia – aimed at strengthening the legal position of Employers and improving the quality and safety of construction projects. In order to achieve this aim, stricter supervision and accountability measures for contractors have been introduced.[2]

The Act amends the Dutch Civil Code (DCC) on five different topics, which are all found in the statutory provisions dealing with Contracting of Work (title 7.12 DCC). The focus in this article is on one of these five amendments, namely the new and revised liability provision introduced by this Act. The amendment to the current statutory liability provision is considered the most relevant and impactful.

I will preface the new liability provision of the Act against the current legal backdrop of the liability provision in title 7.12 DCC, which helps to give a better understanding of the amendment itself and its implications for FIDIC projects in the Netherlands.

The new Dutch liability provision

The Act introduces a new paragraph (named paragraph 4) to the existing article 7:758 DCC paragraphs 1–3, of which paragraph 3 already deals with the issue of the Contractor's liability. Article 7:758 paragraph 3 DCC reads: 'The Contractor is released from liability for defects that the Employer reasonably should have discovered at the time of delivery.'

Dutch law, dealing with Contracting of Work, consequently has a cut-off point at the time of delivery when it comes to Contractor's liability for defects or damages to the works. Central to that cut-off point is whether or not the Employer should have noticed a defect in the works at the time of delivery.

Paragraph 4 (introduced by the Act) also deals with contractor's liability and reads:

> 'By way of derogation from the third paragraph, in the case of contracting for construction works, the contractor is liable for defects that were not discovered at the time of delivery of the work, unless these defects cannot be attributed to the contractor. This paragraph may not be deviated from to the detriment of the employer, insofar as the employer is a natural person not acting in the course of a profession or business. In other cases, deviation to the detriment of the employer is only permitted if it is explicitly included in the agreement.'

There are five noteworthy changes introduced by this new liability provision, which are highlighted below.

Five noteworthy changes to contractor's liability in the Netherlands

First, the new liability provision is only relevant to so-called 'construction works'. The reason why this is relevant to note is that 'Contracting of Work' in the Netherlands is far broader and covers much more than only construction works. To give just two examples, repairs to a bicycle or a television fall under the same legal regime as the construction of an underground multi-level parking garage or complex road infrastructure work. They all are considered 'Contracting of Work' under the DCC. The Act therefore introduces a liability provision specifically aimed at construction works, which is to be considered one of the subcategories of Contracting of Work. This also means that as from 1 January 2024 the Netherlands has two different liability regimes in title 7.12 DCC, which is expressed in the Act: 'By way of derogation from the third paragraph, in the case of contracting for construction works [...]'. The third paragraph (mentioned above) remains in place, while a new fourth paragraph is added to the provision.

Second, and again this is specifically for construction works, there is no longer a cut-off point at the time of project delivery when it comes to the Contractor's liability for defects. The situation is reversed. The Act makes clear that the Contractor is and remains liable for defects that were not discovered (by the Employer) at the time of delivery of the work. This means that if an Employer complains to the Contractor about a defect that should have been discovered at the time of project delivery, but does so after project delivery, the Contractor would still be liable for defects, except for defects not attributable to the Contractor. This is illustrated by the part of the provision that reads: '[...] the contractor is liable for defects that were not discovered at the time of delivery of the work, unless these defects cannot be attributed to the contractor.' This is new and redefines contractor's liability for construction works in the Netherlands.

The Contractor is released from liability for defects that the Employer reasonably should have discovered at the time of delivery

Of course, under Dutch law there are still time bars which need to be taken into account as well as the obligation for an Employer to complain about a defect within a reasonable time. But the cut-off point for liability after project delivery for defects that the Employer should have discovered at the time of delivery no longer applies to construction works in the Netherlands. This ties into one of the main goals of the Act, mentioned in the introduction to this article, the aim of which is to strengthen the legal position of Employers.

Third, and connected with the previous point, is that the allocation of the burden of proof also changes as a result of the new paragraph 4. The statutory text implies that the Employer must make it plausible that there is damage resulting from a defect that was not discovered at the time of delivery of the work. If the Employer succeeds in proving this, it is then up to the Contractor to defend themselves by arguing that the defect was indeed discovered and/or that the defect cannot be attributed to the Contractor.

Also, if the agreement is with a natural person (as the Employer), the Contractor may not deviate from the liability provision to their detriment. It is therefore a mandatory provision in business-to-consumer construction agreements as evidenced by the phrase: 'This paragraph may not be deviated from to the detriment of the employer, insofar as the employer is a natural person not acting in the course of a profession or business.'

Lastly, in other cases (meaning business-to-business transactions between professionals), deviation of the liability provision to the detriment of the Employer is only permitted if it is explicitly included in the agreement: 'In other cases, deviation to the detriment of the employer is only permitted if it is explicitly included in the agreement.' As described in the Explanatory Memorandum, this means that the parties can only agree to a different allocation of liability by express mutual agreement to that effect. It has been made clear in the Explanatory Memorandum that, from a legal point of view, it would not suffice to have a deviating condition included in general terms and conditions applicable to the agreement.[3]

Consequences for the Dutch construction market

The fact that under the Act the parties can only agree to a different allocation of liability by specific mutual agreement to that effect and not through reference to general terms and conditions, has affected the way in which agreements for Dutch construction projects are negotiated and concluded. While in the Netherlands there has been legislation (albeit fairly concise) dealing with Contracting of Work since 2003, there is a much longer tradition of concluding agreements for construction work by referencing much older, well-known, widely used and elaborate general terms and conditions.

Prominent examples are the Uniform Administrative Conditions for the Execution of Works and Technical Installation Works 2012 (the Dutch abbreviation is UAV 2012) for execution-only agreements; and the Uniform Administrative Conditions for integrated contracts 2005 (the Dutch abbreviation is UAV-GC) for design and construction projects (hereinafter together GTCs).

When the legislation came into force, these GTCs had a liability provision that was contrary to the Act.[4] This resulted – among other things – in it being necessary to update the liability provision of the UAV-GC: the 2005 version was updated in a 2025 version. In this updated version, provision was aligned with the Act by placing the liability clause in the Model Agreement rather than in the general terms and conditions together with an option clause in the Model Agreement to be chosen by the negotiating parties.

However, the UAV 2012 update is still being discussed. In an attempt to eliminate the contradiction between the liability provisions in the Act and in the UAV 2012, the Dutch Government – in a move that rather surprised the Dutch construction market – proceeded to publish a new 2025 version of the UAV on 26 February 2025. This deleted the liability provisions in the UAV 2012 (known as par. 12 UAV 2012). The rationale was that by deleting these contradictory provisions, there would no longer be a contradiction and the statutory liability in the Act would apply.

This means that for the Dutch construction market a mere reference to the UAV 2012 or the UAV-GC 2005, in an agreement for construction works, will be in violation of the law, specifically on the aspect of liability of the contractor for defects that the Employer should have noticed at the time of delivery of the project. In business-to-business agreements for construction works, such a violation leads to the provision being voidable on the grounds of being contrary to a mandatory provision of law.

How does the Act affect FIDIC projects in the Netherlands?

My professional experience as a construction lawyer has been that over the past ten years it has become increasingly common to find FIDIC-based projects in the Netherlands. A reason for this could be found in the further liberalisation of the European market and the need for Employers to contract specialised contractors out of their home states for specific projects. The influx of offshore and onshore wind projects in the Netherlands also seems to be a contributing factor. The most used FIDIC conditions of contract in the Netherlands, seen in my practice, are the Red, Yellow and Silver Books which will be the focus of the following paragraphs.

Regarding the FIDIC conditions of contracts, let us take the FIDIC Red Book (second edition, 2017) as an example. It uses Particular Conditions A (contract data) for the parties to enter the project-specific data such as the total liability of the Contractor under or in

connection with the Contract (sub-clause 1.15 of the Particular Conditions part A). This is similar to the FIDIC Yellow Book 2017 (also sub-clause 1.15 of the Particular Conditions part A) and the FIDIC Silver Book 2017 where this is stated in sub-clause 1.14 of the Particular Conditions part A.

As the FIDIC General Conditions and the Particular Conditions part B, by which the General Conditions may be amended, are interconnected, I will discuss them together in the paragraph below. In the General Conditions of the FIDIC Red Book there is a limitation of liability provision in (unsurprisingly) sub-clause 1.15. This limitation of liability provision, including the carve-out in the last paragraph in cases of fraud, gross negligence, deliberate default or reckless misconduct, is not contrary to the Act. The same goes for the limitation of liability provision in sub-clause 1.15 of the FIDIC Yellow Book 2017 and in sub-clause 1.14 of the FIDIC Silver Book 2017. The reason is that the nucleus of the liability provision in the Act is that the Contractor *is* liable towards the Employer for defects that were not discovered at the time of delivery of the work. The Act does not go as far as to ban any limitations to said liability of the Contractor.

Another provision in the General Conditions worth consulting is Clause 11 – *Defects after Taking Over*, and the way in which the Contractor's liability is dealt with, specifically in sub-clause 11.1 – *Completion of Outstanding Work and Remedying Defects*; and sub-clause 11.2 – *Costs of Remedying Defects*. Sub-clause 11.1 makes it clear that the Contractor shall execute all work required to remedy defects or damage of which a Notice is given to the Contractor by (or on behalf of) the Employer on or before the expiry date of the DNP for the Works or Section or Part.[5] All work mentioned above shall be executed at the risk and cost of the Contractor.[6]

This limitation in time regarding the Contractor's liability under Clause 11 of the General Conditions is also not contrary to the Act because it does not absolve the Contractor of liability for defects or damage arising after Taking-Over. Therefore, it is safe to conclude that the parties negotiating a FIDIC Red Book, Yellow Book or Silver Book contract may refer to these clauses in the General Conditions without amendments and at the same time be compliant with the Act.

However, if the negotiating parties to a FIDIC contract decide to amend the General Conditions through Particular Conditions part B, for example by agreeing that the Contractor is absolved of liability towards the Employer on project delivery as an amendment to sub-clause 11 FIDIC Red, Yellow or Silver Book 2017 (eg, as a reference to the provision in article 7:758 paragraph 3 DCC), it is important to take into account that for construction works the Act does not allow to deviate from its liability provision unless the parties have explicitly and willingly done so by express mutual agreement. It is therefore advised to keep all relevant records of the negotiations taking place on the subject of liability and make sure that the particular conditions part B clearly reflect the mutual agreement to deviate from Clause 11 of the General Conditions.

Conclusion

The cautionary tale referenced in the title of this article is the change in contractor's liability for construction works that was enacted through the Act. It is a major change, as it is a 180-degree shift from the liability regime that was previously in place for construction works, and that is still in place for other types of Contracting of Work (title 7.12 DCC). It is important for contracting parties to a FIDIC contract to remember that if and when a deviation from this new liability regime is negotiated, it must be done specifically and via mutual agreement. A mere reference to general terms and conditions that contain a deviation from this new liability rule would not suffice. It is therefore advised to maintain a record of all relevant documents pertaining to the negotiations on the subject of liability, and make sure that the agreement concluded clearly reflects the deviation.

Notes

1 In Dutch: 'Wet Kwaliteitsborging voor het Bouwen'.
2 Explanatory memorandum accompanying the Act (*Kamerstukken II*, 2015/16, 34 453, No 3), p 2.
3 Explanatory memorandum accompanying the Act (*Kamerstukken II*, 2015/16, 34 453, No 3), p 91.
4 Not including the updated version of the UAV-GC, which is the UAV-GC 2025, and which incorporates the amendments introduced by the Act.
5 If the Defects Notification Period is not stated in the Particular Conditions part A, it is one year (sub-clause 1.1.26 FIDIC Red Book 2017; sub-clause 1.1.27 FIDIC Yellow Book 2017; and sub-clause 1.1.24 FIDIC Silver Book 2017).
6 Sub-clauses 11.2 FIDIC Red Book, Yellow Book and Silver Book 2017.

Jacob Henriquez is a partner at Ploum Law Firm in the Netherlands. He specialises in international construction law. He can be contacted at **j.henriquez@ploum.nl**.