

GETTING THE DEAL THROUGH

Construction

in 31 jurisdictions worldwide

Contributing editor: Robert S Peckar

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Netherlands

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AKD Prinsen Van Wijmen

1 Joint ventures

Must foreign designers or contractors enter into a joint venture with a local contractor to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

Under Dutch law, there is no obligation for foreign designers or contractors to enter into a joint venture with local contractors in order to obtain design and/or construction projects. Given the specific rules and regulations regarding legal topics such as labour, environmental, zoning, tax and construction law, foreign designers and/or contractors may wish to enter into some kind of collaboration with local parties as they are more acquainted with such rules and regulations.

When setting up business in the Netherlands, foreign companies must comply with certain administrative requirements such as registration at the Chamber of Commerce (according to the Commercial Registers Act). As in other EU countries, public procurement law is based on the EU Directives 2004/18/EC and 2004/17/EC in principle. In the Netherlands these Directives have been incorporated into two ministerial decrees on government procurement. Public procurement law prohibits any discrimination against foreign companies and allows parties to form joint ventures in order to meet the requirements necessary to obtain a contract.

2 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before they took such a step?

As in other countries, if a foreign company wants to set up a local operation in the Netherlands, it should become familiar with the laws and regulations applicable. Areas such as labour law, zoning law and construction law may vary significantly from other countries. In particular, administrative procedures necessary to obtain building permits and environmental permits can be time-consuming. Except for the legal differences between countries, foreign companies should also get acquainted with the local ways of doing business in the Netherlands.

3 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

The title 'architect' is protected by law. Only persons that meet the statutory provisions and are registered may use the title architect. Based on EU legislation, qualified architects in other member states are allowed to use this title in the Netherlands. Working without a licence is liable to punishment by law.

4 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There are no laws requiring a minimum amount of local labour to be employed on any particular construction project. In public procurement matters, however, it is allowed to require the involvement of a certain number of employees who are unemployed or have physical limitations.

5 Local labour law

Are there any labour laws applicable to construction and infrastructure projects?

There are no specific labour laws exclusively applicable to construction and infrastructure projects. General laws apply such as the Working Hours Act, the Act on Minimum Wage and Minimum Holiday Allowance and the Working Conditions Act.

However, there is a collective labour agreement (CAO) applicable especially to construction workers. This collective agreement is declared generally binding for a fixed term until 30 June 2009 and regulates the rights and obligations for both employers and employees. All employers in the construction sector are bound by these rules.

6 Healthy and safety regulation

Are there any specific health and safety rules regulating the construction industry?

The Working Conditions Act imposes certain obligations on employers to safeguard the health and safety of employees and other people. This Act provides for the protection of employees in general and not just for the construction workers.

According to the Working Conditions Act, the employer is responsible for a good working conditions policy. In order to pursue an efficient working conditions policy, the employer must have a clear understanding of the potential risks within the company. In this respect, the employer must make a risk assessment and an evaluation of the potential risks and existing problems related to work within the company.

7 Close of operations

If a foreign contractor, who has been legally working, decides to close its operations, what are the legal obstacles to closing up and leaving?

If a foreign contractor has been working via a Dutch company (for example a limited liability company (BV) or a public limited liability corporation (NV)), this company can be wound up by dissolution initiated by the shareholders' meeting. In this case the assets are liquidated and divided among the creditors by a liquidator appointed

at the shareholders' meeting. However, if the debt to creditors exceeds the total of the assets, the liquidator is obliged to file for bankruptcy. If not, it may be held liable by creditors.

A company may also be wound up by filing for bankruptcy at the request of the board of directors, with permission of the shareholders, or at the request of creditors. In this case the company must be in debt with at least two creditors. Under insolvency law it is possible for the receiver to claim against the board of directors in person if the company did not publish the annual accounts within 13 months of expiry of the financial year, or did not keep proper records. Claims may also be filed by creditors, for example if the directors entered into contracts knowing that the company would not be able to pay the debt. Whether there will be any termination payments due will depend on the nature of the contract and whether such termination causes a breach of contract.

8 Standard forms of construction contracts

What standard-contract forms are used for construction and design?

In recent years many larger construction and infrastructure projects were realised by means of DBFM (design, build, finance, maintain), DBFMO (design, build, finance, maintain, operate), BOT (build, operate, transfer) or BOOT (build, own, operate, transfer) types of contract. Although, as in other jurisdictions, such contracts are tailor-made for each project, the standard forms used are based on the standard forms of contract known in the United Kingdom, such as the FIDIC (International Federation of Consulting Engineers) standard forms.

The most frequently used standard contract terms, however, are still the uniform administrative conditions for the execution of works 1989 (usually abbreviated as UAV 1989). These conditions apply to the more traditional type of contracts where the employer is responsible for the design and the contractor for the construction of the work. Thus, at the end of the previous century the need arose for a Dutch standard form of contract suitable for design-and-build-type contracts. This led to the introduction in 2000 of the UAV-GC 2000. A slightly modified version, the UAV-GC 2005, was published in 2005. Although based on the UAV 1989, the UAV-GC 2005 provides for a standard form of contract suitable for a more traditional allocation of risks and responsibilities. It is primarily intended, however, for more innovative forms of contract in which the responsibility for design and construction rests with the constructor.

Finally, it should be noted, that the Dutch government has prepared its own DBFM contract, which is frequently used as a starting point for design-and-build construction projects initiated by the government. Earlier this year a task force of the Dutch Directorate-General for Public Works and Water Management (a department of the Ministry of Transport and Public Works) prepared a revised version of this DBFM contract.

9 Price escalations

In typical construction contracts, who assumes the risk of material price escalation and shortages?

In principle it is the contractor who bears the risk of price escalation and shortages. However, section 7(753) of the Dutch Civil Code stipulates that if after signing the contract, cost increases occur that cannot be attributed to the contractor in all fairness, a civil court can adjust the contract sum in whole or in part by the amount of such escalation. A request for adjustment will only be granted if the contractor could not in all fairness have foreseen these circumstances when determining its contract price. Furthermore, a claim will only be awarded if the contractor has notified the employer of these circumstances and the consequences thereof as soon as possible, ena-

bling the employer to exercise its right to simplify the works if so desired. As normal price escalations are foreseeable, this clause is only applicable in the event of extraordinary escalations and shortages, as a rule. In many construction contracts, special provisions are made with respect to price increases. The standard forms of contract such as the UAV 1989 and the UAV-GC 2005 contain provisions also deal with this issue. In the past years claims for extra payment due to the staggering steel prices have been awarded.

10 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

Dutch law does not provide any advantage to domestic contractors in competition with foreign contractors. Being a member of the EU, the Netherlands has to comply with the EU directives on public procurement. These directives are intended to stimulate competition, even between competitors from different EU member states. As such, these directives do not allow any discrimination of foreign competitors. Although strictly speaking these directives only have to be taken into consideration if the contract value of a construction contract exceeds a certain threshold, it should be noted that based on case law of the European Court of Justice, the general principles of procurement law such as non-discrimination, transparency and objectivity also apply to procurements for projects with a contract value below the applicable threshold. In recent years a new law on public procurement has been drawn up in which these principles were to be incorporated. Earlier this year, however, this bill was rejected by the Dutch parliament.

11 PPP and PFI

In certain forms of construction such as PPP and PFI, where the contractor is responsible for long-term quality control and maintenance, how is the risk of additional future costs considered and mitigated?

This type of contract is normally drawn up for a very specific situation. Therefore, it is difficult to give a specific answer to this question respectively to give general comments on this issue. As a rule, parties to a PPP/PFI contract first try to get an overall picture of all possible risks and then will try to include provisions in the contract to tackle these risks. As a consequence, a PPP/PFI contract will usually contain more provisions for all kinds of risks than a normal construction contract in the Netherlands. Of course, the allocation of risks is subject to contract negotiations. However, the award of public contracts is subject to public procurement law, and usually there will not be much room left for negotiations. It is not unusual in PPP/PFI contracts that the contractor agrees to more risks than in a normal Dutch construction contract – even more than the contractor can foresee in all fairness. As in most cases contractual arrangements will prevail over the rule of law – with the exception of mandatory rules of law – the consequences will normally be dealt with in the contract. In PPP/PFI contracts it is not unusual that the contractor bears more risks than in other construction contracts.

12 Payment of fees

How may a contractor secure payment of its fees from an owner? May the contractor place liens on the property?

As in most other jurisdictions, construction contracts in the Netherlands provide for payment schedules. In general, such schedules follow the progress of the works or define certain moments in time at which interim payments have to be made. In the event that the employer is in breach of its payment obligation, the contractor can secure payment in several ways.

If, after being summoned to pay, the employer still fails to pay, the contractor is entitled to postpone its work and eventually to terminate its contract. The contractor may also use its right of retention. This allows it to take possession of the work until payment is made. As a result, the employer is denied access to the work, nor is it allowed to make use of it. Furthermore, it is relatively easy under Dutch law to attach assets of the employer after prior approval by the president of the district courts. It should be noted, however, that said approval is conditional to the initiation of legal proceedings within a short period of time after the attachment. Another mechanism to ensure payment is the obligation to pay a high interest rate over the amount due. Certain standard forms of contract, such as the UAV 1989, provide for the opportunity to demand adequate security for the payment, for example by means of a bank guarantee.

13 Tort claims and indemnity

Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even when the general contractor is negligent?

In principle limitations of liability are permitted under Dutch law. Thus it is up to parties to negotiate a limitation of liability. However, gross negligence and/or wilful misconduct cannot be contractually excluded.

14 Insurance

Do local laws require the maintenance of any specific type of insurance on construction projects?

Local laws do not require the maintenance of insurance on construction projects. It is common practice, however, to take out 'construction all-risk' (CAR) insurance for construction projects. Such CAR insurance covers the liability of all parties involved in the construction project as well as any material damage to the works constructed. It depends on the contract whether it is the employer or the contractor who maintains this insurance. Most construction companies, especially larger ones, have a general CAR insurance in place that can cover individual projects. Furthermore, it is common practice for construction companies to have insurance that covers liability for torts (AVB) as well as insurance for rolling stock.

15 Insolvency and bankruptcy

If a contractor files for insolvency, or is declared insolvent, may its contract be terminated for default and a new contractor retained to prevent delay on the project?

In general, bankruptcies have no impact on contracts. However, most contracts provide for termination clauses in case of bankruptcy. In that event the contract is terminated and the employer is free to contract another contractor. If no termination clause is agreed as such, the employer must ask the trustee in bankruptcy if it is prepared to comply with the obligations under the contract. If so, it must give security for these obligations. In most cases, however, trustees in bankruptcy are not prepared or able to give these securities, which may result in termination of the contract.

16 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

If a government agency acts as employer, it cannot assert sovereign immunity as a defence to a contractor's claim. This may apply to individual officers of the government.

17 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable?

Please see question 19. A contract obtained by bribery is not null and void by law. However, such contracts may be challenged in court by competitors, for example on the grounds stipulated in section 3(44) of the Dutch Civil Code. According to this section, a juridical act may be annulled when it has been entered into as a result of threat, fraud or abuse of circumstances. In projects awarded through public procurement, it is common practice that the CEO of the applicant has to sign a statement in which he or she declares that no illicit acts have been performed in relation to the application. If such statement proves inaccurate, it may lead to personal liability for the CEO, as well as from exclusion of the company from further public contracts.

18 Arbitration

Can a government agency agree to arbitrate disputes privately rather than go to court?

In the Netherlands it is common practice that construction disputes are solved by means of arbitration. There is a special arbitration institute for construction matters, the Court of Arbitration for Construction. Arbitration proceedings are also held before the Netherlands Arbitration Institute (NAI). As a consequence of alleged cartel agreements and bribery of construction companies, most government agencies have turned away from arbitration and choose to resolve disputes before courts. There are indications, however, that the government will return to arbitration. For example, in the new draft DBFM standard by the Rijkswaterstaat, the choice is made to settle disputes by means of arbitration. In public procurement matters disputes are settled by civil courts.

19 Foreign corruption

Do local laws prohibit illegal actions in foreign jurisdictions?

Since February 2001, Dutch legislation in the area of bribery of civil servants has been modified considerably. An important consequence of the law amendments is the expansion of the Dutch jurisdiction with respect to corruption committed abroad.

Everyone who bribes a Dutch civil servant in the Netherlands or abroad can be prosecuted in the Netherlands; this is called active bribery. The same applies to a resident of the Netherlands who bribes a foreign civil servant in the Netherlands or abroad.

It is possible for a legal entity to be prosecuted by Dutch authorities when this legal entity has been established under Dutch law or has its registered office in the Netherlands. The principal place of business bears no relevance whatsoever to the criminal liability of a legal entity.

Not only providing gifts but also making promises and providing services are considered corrupt acts. Active bribery is punishable in two different scenarios. The first scenario is when a gift, promise or service is made with the intention of inducing the public servant to commit certain acts. The second scenario is when a gift, promise of service is made after the public servant has committed the acts. There are several reference points to verify whether or not an act can be regarded as corrupt. The value of the gift, the intention of the gift and whether it took place in secret, can be important factors.

Bribery of a non-public foreign servant by a Dutch citizen in a foreign country is only punishable in the Netherlands if penalised by the country where it has been committed.

20 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

Under Dutch contract law, a party is only liable for damages if a breach of contract is attributable to such party. This means that either a party is to blame for such breach of contract, or it has assumed the risk for such breach. If this is not the case, a failure to perform will not lead to liability. If force majeure and/or acts of God can also be considered as unforeseen circumstances, they may give grounds for a claim to change the contract. Under Dutch law, the nature of a contract is not solely based on the wording of the contract. A contract is also interpreted in accordance with the law, customs and the principles of reasonableness and fairness.

21 Dispute resolution mechanisms

What dispute resolution procedures are successfully used to solve construction disputes?

As mentioned earlier, most construction disputes are solved by arbitration. The vast majority of construction cases is brought before the Court of Arbitration for Construction. Other arbitration proceedings may be handled by the NAI or via private arbitration. There are special arbitration institutes for engineers (Court of Arbitration for Engineers) and architects (the Arbitration Institute for Architectural issues). In the most recent standard contract for engineers and architects, the DNR 2005, the Court of Arbitration for Construction is appointed as arbitration institute. The UAV-GC 2005 provides for the possibility of solving disputes by means of a permanent board of experts, just as other contracts based on international standards. It is worth mentioning that the rules of the Court of Arbitration for Construction make it possible to appeal against final decisions by arbitrators. Parties may agree, however, to exclude the possibility of appeal in their contracts.

22 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

Please refer to question 21. Worth mentioning are the Court of Arbitration for Construction, the Court of Arbitration for Engineers and the Arbitration Institute for Architectural issues.

23 Dispute review boards

Are dispute review boards (DRBs) used?

Yes, as mentioned in question 21, dispute review boards are used, mainly in major construction projects.

24 Mediation

How is mediation defined? And is it commonly used to resolve project disputes?

Mediation has no legal definition in the Dutch Civil Code. It is a way of solving disputes on a voluntary basis. A party cannot be forced to cooperate. Parties agree in trying to solve their dispute via intervention of a mediator rather than an arbitrator or judge. If mediation is unsuccessful, parties may still solve their dispute via arbitration or the civil court. If mediation leads to success, a settlement agreement is often made. Such settlement constitutes a binding settlement agreement under section 7(900) of the Dutch Civil Code. The most reputable mediation institute in the Netherlands is the Netherlands Mediation Institute. There is a tendency in Dutch courts to stimulate parties to solve their dispute via mediation. Even so, mediation is still rarely used.

25 Confidentiality in mediation

Are statements made in mediation confidential?

One of the main principles of mediation is confidentiality. As mediation has no legal basis and has to be regarded as a voluntary way of settling disputes, confidentiality is based on a mediation agreement between parties. Breach of this confidentiality thus constitutes a breach of the mediation agreement. Please note, however, that information acquired through a breach of a confidentiality agreement is acceptable as evidence in legal proceedings, in principle.

26 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

When it comes to acknowledgement and enforceability of foreign arbitral awards in the Netherlands, two situations must be distinguished. First, an arbitral award may be given in a country that is party to a treaty on acknowledgement and enforceability to which the Netherlands is also a party. The Netherlands is a signatory to the Treaty of New York (10 June 1958). In order to enforce a foreign arbitral award, an exequatur by the district court is needed. In principle such exequatur will be issued, unless fundamental formalities were violated. Thus, no full review of the case takes place, in principle. If an arbitral award is given in a country that is no party to a treaty, an exequatur may still be issued. However, there are more possibilities to challenge the arbitral award in the Netherlands.

27 Governing law and arbitration provider

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

If Dutch companies and/or legal practitioners have to choose an international arbitration institute, a preference exists for ICC arbitration since this is widely known. Companies and/or practitioners are less familiar with institutes such as the London Court of International Arbitration or the European Court of Arbitration. To the best of our knowledge, there is no specific resistance to hearings in a particular jurisdiction, although there may be a preference for jurisdiction with a legal system based on the French Civil Code rather than anglo-saxon systems. If there is a resistance to international arbitration, this is due to the high costs often involved with such arbitration.

28 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

Dutch environmental law is quite complex and comprehensive. Many provisions are based on EU environmental law. Where the Stockholm Declaration is merely a general statement, the EU directives directly influence construction projects. For example the Environment Protection Act is based upon the Habitat Directive 92/43/EC. Also the Air Quality Framework Directive 96/62/EC is relevant, which forms the basis for the Air Quality Act dated 15 November 2007. Air quality issues have proved to be a major hampering factor for projects, since there is a direct link between building projects and air quality. Because of this direct link many desired projects (recently one of the most important motorways in Holland) were blocked due to violation of air quality standards. The (relatively) new Air Quality Act makes it possible that projects violating the current air quality standards to a limited degree can still take place on strict terms. Worth mentioning

Update and trends

Since the new bill on public procurement failed to pass parliament earlier this year, it is fair to expect that new legislation will be proposed.

As for contract law, further developments of DBFM standards are expected. A good example is the new DBFM standard by the Rijkswaterstaat.

In public procurement it is noted that contracts based on the

UAV-GC 2005 are becoming more and more common. This means a greater freedom and responsibility for the constructor when preparing a design, as these contracts are more output- and results-driven.

As per 1 July 2008, the new Spatial Planning Act has taken effect. It has the intention of speeding up spatial planning and building permit procedures.

is the new Spatial Planning Act that has taken effect as of 1 July 2008. This new Act has the intention of speeding up the spatial planning and building permit procedures by reducing the powers of higher governmental bodies. Furthermore, the Environmental Management Act provides regulations that are relevant for the execution of works given that these works have an impact on the environment.

29 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business?

The Netherlands is, of course, a member of the EU. If a foreign contractor is already active elsewhere in the EU, or will acquire a dominant market position, European rules may apply. Also, international treaties or rules on foreign trade or investments from foreign countries deemed to be hostile to the interest of the western countries may be applicable.

30 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

The Netherlands is not signatory to any investment agreements protecting investments of foreign entities in construction and infrastructure projects. However, international treaties or rules on investments by foreign countries that are deemed hostile may apply.

31 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Our jurisdiction has not entered into any double taxation treaties under which a contractor is prevented from being taxed under various

jurisdictions. In the Netherlands this kind of legal action specifically refers to tax advisors and not tax lawyers or tax litigators.

32 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

There are no specific currency controls that make it difficult or impossible to change currencies. As the Netherlands is part of the Euro-zone, European currency rules may apply. In this respect please note, however, that under Dutch law lawyers and civil law notaries are obliged to report certain cash transactions to the authorities.

33 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

The shareholders' meeting allocates the profits made in the preceding financial year when adopting the annual accounts. The shareholders' meeting has the power to create reserves, unless the articles of association grant such power to another corporate body, which has the power to allocate profits and consequently to determine the dividends to be distributed. All shareholders share in the profits in proportion to the value of their shares in the capital stock, unless otherwise provided in the articles. Dividends may be paid either in cash or in kind. Dividends can only be paid insofar as the company has sufficient profits and no negative free distributable reserves. However, under case law, the board of a company must consent to any distribution based on its knowledge or expectation that the liquidity of the BV shall remain sufficient to pay its due payables. This liquidity test will become a statutory requirement when the law on simplified and flexible BVs enters into force. This is not anticipated to be earlier than 2010.

A company may also distribute interim dividends if permitted by the articles of association, declared and paid before the annual accounts are adopted, provided that the equity preservation test can be



JPFW van Eijck
MA Wintgens

jvaneijck@akd.nl
mwintgens@akd.nl

PO Box 666
5600 AR Eindhoven
The Netherlands

Tel: +31 88 253 5753
Fax: +31 88 253 5630
www.akd.nl

met at that time. For a NV, the equity preservation test must be met as of a date not earlier than the first day of the third month prior to the month in which the payment of an interim dividend is announced. In addition, the management board of a NV must prepare a statement of assets and liabilities as of the date of the test, to be signed by each managing director and filed with the Commercial Register.

To the extent that, upon their subsequent adoption, the annual accounts indicate a failure to meet the equity preservation test, any regular or interim dividends previously paid in that financial year must be repaid to the company. The NV's the right to rescind dividend payments is limited to dividend recipients who knew or should have known that the distribution of the dividend was illegal.

Other distributions, like distributions from retained earnings, distributions to the debit of the share premium reserve, repurchases of shares,

etc, can only be made insofar as the company has free distributable reserves. Repurchase may only be effected if the annual accounts were adopted in time and show these sufficient free distributable reserves.

34 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

There is no specific contractual matrix for large projects, as each project requires tailor-made solutions. In DBFM-type contracts, special purpose vehicles are common practice. In PPP projects, the government may participate by means of a limited liability company and/or a limited partnership.