Report ESCL Conference Copenhagen 2023

Liability Standards in Construction Contracts – an international perspective

- Presentations of the speakers can be found here -

On Friday October 6th 2023, the annual conference of the European Society of Construction Law took place in Copenhagen. The topic of this well-attended and instructive conference was *Liability in standard terms and conditions of construction contracts - an international perspective*.

The 180 visitors were welcomed by Niklas Korsgaard Christensen (Partner at Plesner Law Firm, General Secretary of the Danish Construction Law Association) after which Ole Hansen (Professor dr. jur., The University of Copenhagen, Faculty of Law, Centre for Private Governance (CEPRI), Chairman of the Board of The Danish Society for Construction Law) kicked off the conference with an introduction to the topic.

Introduction: The challenges of liability standards in international construction contracts

Prof. Hansen spoke about the challenges of liability standards in international construction contracts. To explain these challenges, firstly, he discussed some characteristics of construction law: it is inherently national and has experienced a lot of industrialisation. There is also immobility of performance, meaning that it's not possible to move the works to certain areas, as is possible with sales of goods. Clients are often the ones who draft the contract, based on national law. So, you often see employers' terms. Moreover, there is internationalisation. After WWII, we saw an export of construction projects between countries and increased mobility because of the opening of the EU market. In recent decades, the internet has become an increasingly important contributor to the ability to transport knowledge and details very quickly. Prof. Hansen also discussed the relevance of comparative law in the field of construction law, the differences in risk allocations and liabilities and the complexity of advising in an international practice, while working with different legal systems. This becomes even more complex when elements from different contracts are combined in a format a client chooses, while the law applicable to the contract is from a foreign country. Among other things, this leads to difficult questions of interpretation, as evidenced by case law. The aim of this conference was to shed light on different liability clauses and regimes.

After the opening of the conference, different aspects of this comprehensive topic were discussed by 2-4 speakers per section.

Section 1: Common standards of contractors and technical adviser's liability

Richard Bailey (Partner at Druces LLP) discussed the basic principles of common law and set out how contractual and civil liability is approached in common law countries. He also discussed the new Building Safety Act 2022 and the liability terms set out therein.

Renaud Simar (Partner at Schoups and co-president of the Belgian Society for Construction Law) spoke on Belgian law and covered civil liability, elements of extra-contractual liability, and elements of contractual liability.

Christian Johansen (Partner at Bruun Hjejle) spoke on the Nordic approach to standard form contracts and the fundamentals of the Danish AB system.

Section 2: Fitness for purpose and risks related to technology developments

Here, Roberto Panetta (Partner at Panetta Law Firm, FPF) talked about risks related to technological developments. He discussed the possibilities of digitalisation and BIM, and legal aspects, especially the liabilities when working with BIM.

Afterwards, Klint Klingberg-Jensen (Partner at Poul Schmith Law Firm) and Sara Due Ilsøe (Attorney-at-Law, manager at Poul SchmithLaw Firm) talked about Fit for purpose under Danish law. Interestingly, Fit for purpose does not really exist in Danish law. In a previously published article, the speakers outlined possibilities for including this concept in Danish law. Contractor liability in Denmark is based on negligence. If the contractor has applied reasonable skill and care, he is not liable. To explain this, they discussed the Robin Rigg case. In this case, in a nutshell, the contract required the contractor to produce a detailed design and a design for the foundation. The Supreme Court held that the express obligation to ensure the lifetime of the foundation for 20 years trumped the obligation to use J101.

Next, Anthony Lavers (Professor of Law, Kings College, London and Consultant to Crown Office Chambers, Inner Temple) and Rebecca Shorter (Partner at White and Case, Paris) talked about a contractor's duty to warn when a design does not meet relevant technical standards. They drew a comparison between English law and the civil law approach.

The basic premise of common law in the past was that the contractor did as he was told: he got a design and built it. In the 1980s, however, a limited duty to warn grew. The current state of affairs is

that a duty to warn partly lies in express terms, but also implied terms (*'the contractor should know'*) and tort liability (it is possible (under circumstances) to have a duty to warn towards a third party outside of any contract).

The civil law perspective was given with an explanation of French law, among others. In France, article 1231-1 CC requires contractors to share 'all useful recommendations' and 'necessary warnings' with their employers. There is also an influence of good faith, via art. 1104 CC. Finally, there is a pre-contractual duty to warn. The duty to warn is wide-reaching, as the contractor is considered an expert in his field, with an obligation of result. There are possible limitations on the duty to warn, for example when the client has expertise or knowledge himself, or when he deliberately withholds information.

The speakers concluded with a general comparison between civil law and common law. In civil law jurisdictions, the contractor has expert status, but under common law, design expertise of the contractor is only implicitly included. In standard contracts, both jurisdictions provide for a duty to warn. The duty of good faith is an important element in both jurisdictions, but no such general duty exists in common law contracts.

Section 3: Limitation of liability

Sylvie Cécile Cavaleri (Associate Professor, PhD., at the University of Copenhagen, Faculty of Law, Centre for Private Governance (CEPRI)) discussed the limitation of liability under Nordic law and the Knock-for-Knock regime. K4K is a Scandinavian agreement on the allocation of liability under which each party bears its own losses, regardless of who caused them. It allocates liability objectively and does not take fault into account.

It has three main elements: 1) each party agrees to bear its own losses, 2) there is a mutual indemnity clause and 3) each party takes out insurance covering the assets for which that party is responsible according to the K4K agreement, and the insurer agrees to waive recourses against the party that caused the loss.

Advantages are that it is clear and simple (which is especially useful in structures with multiple parties and contracts) and there are insurance savings. Also, it enlarges access to the market/projects for smaller actors. Disadvantages are that there may be no incentive to act carefully and doubts about the validity of K4K clauses.

Next, Hubert Stöckli (Prof. Dr. iur., Universität Freiburg) provided some observations into contractors' liability under Swiss law.

To start with some general remarks, Swiss law is written hugely in favour of the contractor. It contains a framework for construction works that has not changed much in 150 years.

The limitation of liability for contractors is fairly similar between the Civil Code and standard contracts. That means: anything goes, and there is almost no limit. Two provisions allow you to exclude liability completely, but one of them does not allow you to limit it for personal negligence.

Unfortunately, no empirical data are available as to whether parties take advantage of this. Consumer contracts use combined contracts, and we know that the contractor limits his liability to zero. He combines this with absolute liability for his sub-contractor. Contractors can do this because they have a good bargaining position now that there is limited choice for consumers. A draft bill is in parliament, which may change this.

Evelien Bruggeman (director Instituut voor Bouwrecht and professor of construction law TU Delft) and Chris Jansen (professor of private law VU Amsterdam) talked about the liability of contractors for defects visible before, during or after delivery.
Art. 7:758 (3) DCC states that the contractor is released from liability for defects, which the principal should reasonably have discovered at the time of completion. The specific rule imposes a duty upon the principal to inspect prior to completion. No deconstruction is required however: normal inspection suffices. During the execution stage, however, there is no duty to inspect.
This system will change after 1 January 2024. The principal has a duty to inspect during the inspection and approval stage. This is derived from art. 7:758 (3) DCC. A new sub (4) will be added. This is added to deal with building contracts/works (‘bouwwerken’, which is known for interpretation difficulties). Liability for the contractor after completion will apply for defects not found by the principal. So, the duty to inspect will disappear under the new law. The principal must still notify defects he has found. The purpose is to give the principal a better position, and to improve quality of construction in the Netherlands. This explains the (semi-)mandatory nature of the revision. Interestingly, the Dutch law will become more in line with other judicial systems (see for example art. 3:106 (2) DCFR).

<u>Section 4: Direct claims (fundamental principles and contractual regulation)</u>

Here, Vibe Ulfbeck (professor, dr. Jur, The University of Copenhagen, Faculty of Law, Centre for Private Governance (CEPRI)) spoke on the regulation of direct claims in standard terms and conditions.

Tim Maurenbrecher (Rechtsanwalt, Partner in Maurenbrecher Legal Services, Krefeld and Pürgen), then spoke on direct claims under German construction contract law.

Section 5: Enforcement of and liability for sustainability (ESG) provisions

Maria Edith Lindholm Gausdal (Assistant Professor of Private Law and Sustainability (CEPRI)) talked about contractual management of sustainability (and its challenges and prospects) and gave a brief introduction on the regulation of sustainability. In practice, it shows that sustainability clauses often appear to be vague, yet an increasing specification of standards is visible. The complexity of social, service and commodity-related factors leads to standardisation of those clauses. We see (for example) consideration of the commercial chain of transactions, good faith, and cooperation and sustainability clauses that are deemed to be equal to 'normal' commercial terms. Specifically, Co2 emission has some inherent difficulties, mainly that it affects everyone, everywhere. But, as was seen in the famous Shell case, this need not be seen as a reason to deflect individual responsibility.

Stine Kalsmose Jakobsen (Partner at Holst Law) talked about ESG provisions and Danish standard contracts, especially the E (environmental) part of ESG. The main line is that (inter)national legislation, ESG regulations and life cycle-regulations are guiding. If no penalty has been agreed upon, a breach of an ESG-provision may not cause any loss, which means that there will be no compensation obtainable under Danish law. A question that can then be asked is what the consequences are if the regulations are not complied with. The answer to this question depends on the contract. The speaker mentions a point of hope: the Dutch Shell case may be the beginning of a new era.

Section 6: FIDIC-based liability and national law

Victoria Penkova (Managing Partner at Penkova & Partners Law Firm) and Boyana Milcheva (Partner at DPC Law Firm) talked about the applicability and enforceability of the FIDIC liability regime under Bulgarian law and the potential problems.

Ovidiu Ioan Dumitru (conf. univ. dr.) speaks on Liability Standards in Romania and compares FIDIC with the new Romanian National Construction Contract, coined NCC.

There were several reasons for the creation of the NCC. The Romanian government issued two annexes with general and special conditions for construction and D&B projects funded by the government. Basically, these are contract models (in a different form) corresponding to the red and

yellow FIDIC conditions. They were not intended to be FIDIC conditions, although they are similar in structure.

Alena Bányaiová (Bányaiová Vožehová law office) talks about liability for constructive defects and compensation and gives a comprehensive comparison between FIDIC and Czech law.

Jorens Jaunozols (Partner & Co-Head of the Real Estate & Construction Practice at Sorainen Latvia) was the last speaker and spoke on 'Risk allocation in FIDIC contracts - lessons from Latvia'.

Conclusion

The conference discussed liability in standard terms and conditions of construction contracts from different perspectives and legal systems. This showed that besides differences there are also similarities and pointed out where the different participating countries can learn from each other and build on (shared) experiences.

The 2024 ESCL conference will take place in Antwerp. Information on this conference will soon appear on the ESCL website (www.ESCL.org). This promises to be another instructive conference.