Answers to the Questionnaire

THEME 1: PRECONTRACTUAL DUTIES TO NOTIFY AND TO INVESTIGATE

The following answers were received:

Belgium:

Under Belgian common contracting law, an extensive obligation to provide information rests on both parties during the formation of an agreement. This obligation entails firstly that each party must gather all necessary information and, secondly that each of them must provide sufficient correct information to the other party . This information duty also applies in private construction contracts and public work contracts .

Contents of the information obligation
Firstly, an information duty rests on the contractor-tenderer as articulated in art. 98 of the Royal Decree of 8 January 1996 and art. 86 of the Royal Decree of 10 january 1996 . Pursuant to this regulation, the tenderer must inform the contracting authority of errors or lacunae in the specifications if, as a result thereof, it is impossible for him to calculate a price or in order to make a comparison of tenders possible. The Council of State has stated that a contractor may not blindly rely on the plans and specifications of the contracting authority. The contractor must thoroughly study the plans, using his accumulated knowledge and personal experience . The concretisation of the contractor´s information duty depends on a large number of factual criteria, such as the time which the contractor has received, the nature of the error by the government, etc .

There is no specific legal provision concerning the information duty of the government. The government´s information duty is often balanced against the means and the time at the government´s disposal prior to the award phase. For example, the Antwerp Court of Appeal ruled that the government must not only provide correct information, but also all useful information . Usually it is stated that the government is obliged to have had a careful study performed prior to the awarding of a public procurement contract .

Sanctioning in the event of non-fulfilment
The failure to fulfil precontractual information duties, the so-called culpa in contrahendo, is sanctioned in Belgium on the basis of art. 1382-1383 of the Civil Code so long as there is no agreement between the parties. The legal basis changes when there is an agreement between the parties.

In Belgium, the rights of parties are governed by the Algemene Aannemingsvoorwaarden voor de overheidsopdrachten voor aanneming van werken, leveringen en diensten en voor de concessies voor

openbare werken [hereafter referred to as the "AAV" - General Contracting Terms for public contracts for the procurement of works, supplies and services and for the concessions for public works], included in an annex to the Royal Decree dated 26 September 1996 , provided that the contract amount involved is equal to or higher than 22.000,00 EUR, and subject to departure therefrom in the specifications, as discussed below. These General Contracting Terms apply to DBFM contracts .

The contractor who suffers harm as a result of faulty information in the precontractual phase can file a claim based on art. 16, §1 and §2 AAV.

Under art. 16, §1 AAV, both the contractor and the contracting authority can invoke omissions or facts for which the counterparty is responsible in order to obtain revision or cancellation of the contract or, if applicable, damages .

If the government provides erroneous information, it might be held liable.

The situation is different when the government does not provide certain information which the contractor could nevertheless have obtained through his own research. The government´s failure to fulfil its information duty may not serve as an effective defence for a negligent contractor . The contractor´s own error prior to tendering can lead to the situation where the contractor alone is liable for the extra costs . In a number of cases the courts have been inclined to weigh the information duty of the government against, on the one hand, the time and the means which were at the government´s disposal prior to the tendering, and the time and means of the tenderers .

Under article 16, §2 AAV, the contractor is entitled to an extension of the period or revision/cancellation of his contract when he suffered significant harm, if he can demonstrate circumstances which he could not reasonably have anticipated at the time of submitting his tender or the awarding of the contract, which he could not reasonably avoid and whose consequences he could not remedy, although he did everything possible to achieve this.

On the basis of article 3 of the Royal Decree dated 26 September 1996, the government can depart from provisions of the General Contracting Terms in so far as the special requirements of the contract under consideration make this necessary, a list of the departures appear at the beginning of the specifications, and the departure for certain articles is justified in the specifications. Belgian PPP contracts will often depart from article 16 A.A.V. and a separate regulation will be adopted. Given that in Belgium no general DBFM models apply in PPP structures, in each project a separate regulation will be adopted for article 16 A.A.V.

Comparison with the Dutch model agreements

Article 2.1 (c) DBFM 2.0 contains the rule that the contractor, regardless of the circumstances, is not entitled to a compensation, apart from what is provided for in the Agreement or in public law. In article 9.3 follows the reference to a Compensation Event, which is further elaborated in Schedule 1 Definitions. The reference sub (a) a Contracting Authority Default corresponds to article 16 §1 AAV. Damage due to unforeseen circumstances is only covered in letter (g) when it involves damage to the Infrastructure owing to an Incident or Incident Management. This is much more restrictive than the Belgian article 16 § 2 AVV.

Clause 44-1 UAV-GC 2005 displays similarities with the art. 16 AVV applicable in Belgium. Para b) of this clause refers to article 16 §1 AAV. Article c) of the clause corresponds to art. 16, §2 AAV.

Germany

With regard to the above issue, German A-Model contracts generally provide for an approach which is similar to that of DBFM 2.0. Comparable to Clause 2.1 (c) of DBFM 2.0, Clause 3.2 of the German A-Model contract also states that the contractor is liable for any risk which may result from the duty to plan, build, maintain and operate the specific part of the motorway unless the contract explicitly provides for a different risk allocation. As in DBMF 2.0 the general allocation of risks to the contractor deviates where the contractor can rely on "supervening events" such as "Force Majeure Events", "Compensation Events" and "Delay Events".
In the context of the above topic, i.e. pre-contractual duties to investigate and notify, indeed the risk allocation under the German A-Model contracts as described above may well depend on the contractor complying with its duties to pre-contractually investigate certain circumstances.
In particular, German A-Model contracts require the contractor to familiarize himself with the specific conditions of the "object of the concession" (Konzessionsgegenstand) – mainly the site –, i.e. with ground conditions, utilities etc. during the tender process. In this context the tender documentation contains specific material and additionally the contractor may also ask for the possibility to perform his own testing (see Clause 10 A-Models).
As a consequence and to refer to the example of utilities the contractor may only claim a delay or compensation event in this respect – may it relate to the existence of newly discovered utilities or the removal of existing utilities – if these circumstance could not have reasonably been foreseen from the documentation provided by the contracting authority during the tender phases (Clause 17.6.1 A-Models).
According to the German A-Model contracts (see Clause 13.3) there is also an explicit duty to investigate the preliminary design which has been provided by the contracting authority (this has been taken as an illustration for the above theme). It is one of the obligations of contractor to render the design for the project. In general, the contractor is free to make use of the preliminary design or provide for a new one. In both cases, the contractor is clearly responsible for the result.

Hence, with regard to the illustration to this theme 1 under an A-Model contract the contractor would not prevail with his argumentation because by virtue of Clause 13.3 A-Models contract the contractor had the explicit duty to investigate the preliminary design provided. The illustrated case indicates that the contractor has failed to carry out such pre-contractual investigations, but simply relied on the design provided.

Pre-contractual matters concerning public procurement tender processes are dealt with in German law exclusively in Part A of the VOB. Part A is mandatory only for public authorities in public procurement tender processes. Notwithstanding any contractual subordination, VOB/A is mandatory law and therefore will prevail over any contractual provisions to the contrary. In contrast to Dutch law in the VOB/A there is a definite and prior obligation for the public authority to give the bidder or potential contractor clear and full details of the project by means of the tender documents and contract specifications. Pursuant to § 7 (1) VOB/A no unusual risk shall be imposed on the bidder or potential contractor such as the assumption of the liability for the risks of design and planning . Furthermore, the bill of quantities is to be described most accurately and depletively by the public authority. Thus, the client has to give detailed information on the material circumstances of the project as well as on the relevant soil and water conditions etc. Hence, under the provisions of the VOB/A the bidders may assume whilst preparing the calculation for the tender that the public authority will not impose any unusual risks on them. On the other hand it is also understood that the contractor shall raise questions concerning the understanding of – in his opinion - unclear technical or contractual matters ("objection") before he submits the bid . Once the contract is awarded, there is only very limited opportunity for the contractor to make a claim in connection with matters he has failed to address during the tender process since § 7 (1) VOB/A certainly does not prevent the bidder from taking identified risks imposed on him by means of the bidding.

However, in such an event as the one illustrated a contractor under a A-Model contract would not be able to rely on § 7 (1) VOB/A. Due to the fact that he apparently accepted a comprehensive obligation to investigate the preliminary design he may then not rely on § 7 (1) VOB/A since he was well aware of the fact that said risk should rest on him .

Switzerland

I. Additional Assumptions

The principal is inviting tenders for a complete project, including both the design and the construction. The tenderer for such complete services is generally referred to in Switzerland as a "Total Services contractor." Nevertheless, the principal does provide him with a "preliminary design," as mentioned in the case at hand.

The agreement provides for the payment of a fixed price, and not for remuneration calculated on the basis of the contractor's expenses. This is significant, as the contractor would otherwise have no reason not to charge extra for the additional expense involved in pumping the water from the site.

II. The Case

SIA 118 assumes a contractor being commissioned for the construction of a project for which the design has largely been completed. It contains no special provisions for total services agreements, which call for the contractor to develop the design for major parts of the project, which he then carries out. No other trade association in Switzerland has issued any exhaustive recommendations for rules to govern total services agreements, either. In practice, such agreements are often concluded on the basis of the SIA 118 rules, with additional special agreements to cover the design phase. This being the case, it is relatively difficult to make any generalizations with regard to the allocation of duties and risks in Swiss total services agreements.

At issue in Case 1 are preconctractual duties to notify and to investigate. Under Swiss law the contractor has no statutory or other duty to investigate the site conditions prior to execution of the agreement. Rather, the contractor may rely on the information provided by the principal with regard to the site, unless he is actually aware that the information is inaccurate or otherwise faulty. The providing of inaccurate information with regard to the site is imputed as a fault to the principal, with the consequence that the contractor in such cases may be entitled to additional consideration and to an extension of the contractually agreed time limits. This rule is found in SIA 118 (art. 58). Where there has been no agreement by the parties to adopt SIA 118, art. 373 of the Swiss Code of Obligations (CO) applies. Pursuant to this statutory provision, additional consideration is due to the contractor only on condition, among other things, that he cannot in good faith be expected to bear the additional expense himself.

It is not rare for the invitation for bidding to contain a proviso that the contractor may not rely on the information concerning the site contained in the invitation documents, and that he must either verify the information or declare, in placing his signature to the agreement, that he considers the information to be free of deficiencies. By this means a certain degree of responsibility to verify the information concerning the site conditions is, as a rule, transferred to the contractor and, with it, a part of the site risk. The legal effects of such a proviso can be judged only on a case-by-case basis, since the decisive factor will be the wording of the actual clause in question and its sense within the given context. What may be stated, however, is that these effects will not normally go so far as to allocate the entire site risk to the contractor. Rather, it will be necessary to take into account, among other things, the amount of time that was allowed to the contractor (in keeping with the terms of the invitation) for conducting his own site investigations and, in view thereof, whether it was indeed the intent of the parties to assign to the contractor risks, the existence of which he could not have been aware and whose consequences it was not possible to assess within the time available. An additional factor to be considered is whether the information provided by the principal was prepared by a person with the requisite professional expertise.

In the case before us, the information concerning the pumping installation was provided by an engineer employed by the client, who must be considered as a person with the requisite expertise. It

is to be noted that the information in question does not actually concern the site itself, but rather the nature of the pumping installation. This nevertheless relates to the site conditions, in the sense that it assumes a given amount of water to be pumped. The information concerning the pumping installation is a direct consequence of the assessment of the site conditions. Since both the type of installation and its capacity are a function of the site assessment, the information provided by the client in this regard is, in effect, simply an element of the site risk assessment expressed in technical terms. With this in mind, we presume that, insofar as concerns the assumption that the pumping installation, as described in the invitation, would be sufficient for the purpose, the contractor could, in principle, invoke the rules that apply to site information provided by a principal. Pursuant thereto, the client is liable, in principle, for the technical information provided in the invitation documents, so that the contractor may rely on that information in the preparation of his tender with no obligation to verify its accuracy.

What has not yet been considered, however, is the fact that the contractor has contracted not only for the construction, but also for the design of the project. In such a case, it is necessary to examine the scope of the design mandate. It may, for example, be the case, that the contract obliges the contractor expressly to provide design services that include a detailed investigation of the site (with regard, specifically, to the anticipated occurrence of water). It is also possible, however, that this is only implicit in the terms of the contract. This may be the case, for example, where the contractor receives the preliminary design at a stage in the design process, at which it is customary professional practice to conduct further, more detailed site studies before finalizing the design. Accordingly, there are cases in which a contract may include design services that encompass a duty on the part of the contractor to conduct his own detailed investigation of the site. In such cases, the contractor will have difficulty in asserting a deficiency in the site information as inferred from the preliminary design, since he himself undertook in the contract to conduct of further investigations of the site conditions. The sole claim that he would, under these circumstances, possibly be able to derive from a deficiency in the preliminary design would be for damages incurred as a result of that deficiency, but not connected with his own contractual obligations with regard to investigation of the site. It is conceivable, for example, that he was entitled to rely on the information provided by the client as a basis for the conduct of his own further investigations, without first verifying for himself the accuracy of the information provided.

III. Relevant clauses in SIA 118

Invitations for Tender in general

Preparation

Art. 5, par. 2 SIA 118:

"Prior to issuing the invitation to tender, the principal investigates the local conditions, in particular the characteristics of the site, insofar as relates to the work to be carried out; he describes the findings, in detail, in the tender invitation documents (art. 7), indicating any applicable regulations or risks that have come to light. On the contractor's duty of investigation, see art. 25, par. 3."

Obligation to Notify and Duty to Warn

Art. 25, par. 3 SIA 118:

"The contractor has a duty to reexamine the design delivered to him and the proposed construction site only in the event that the client is not represented by a construction supervisor, is not himself a professional, or has not been advised by a professional consultant. The contractor shall, nevertheless, provide immediate notification of any incongruities or other defects that come to his attention in the course of the performance of his tasks, pursuant to par. 1 and 2, and advise the [owner's] construction supervisor of the detrimental effects thereof (duty to warn)."

Extraordinary Circumstances

In General

Art. 58, par. 2 SIA 118:

"Where the principal is at fault, the contractor is entitled to additional remuneration, to be determined in accordance with the provisions of arts. 86 – 91, applied analogously. The principal is to be considered at fault, in particular, where the site information contained in the tender invitation documents was deficient, on condition that the principal was represented by a construction engineer, is himself a professional, or was advised by a professional consultant."

Denmark

If the insuitability for the actual use was obvious from the declaration for the material, the main person to hold responsible will still be the Contractor, who was also responsible for the design. However, I would not exclude a part of the responsibility in this situation would be attributed to the expert who on behalf of the Employer inspected the design. If he was an expert he should have seen the problem and informed the Employer and Contractor accordingly and thereby avoided the problem. However, there is surely more than one opinion on this subject, and it could maybe be solved by a specific clause in the contract as described below.

Under Danish law the rule is mainly the same. ABT(GA) 93, Chapter G. Defects, § 30 – states as follows:

The concept of defects

§ 30. If the work has not been performed in accordance with the contract, with due professional care and skill or in accordance with any instructions given by the employer under § 15, it shall be deemed to be defective. The same shall apply whenever the Contractor has failed to provide other services agreed upon in relation to the work..

… …

Subs. 3. The work must be in any case possess such properties as are guaranteed by the contract.

The Employer must at the take-over notify the Contractor in writing of any defect in the work, that is reasonably visible/apparent. In case a visible/apparent defect is not notified at the take-over, the Employer is barred from claiming any compensation at a later time.
In case a defect is hidden at take-over, the Employer must according to ABT 93 § 32 notify the Contractor
"within a reasonable period of time when the defects were or ought to have been, discovered.".
The Contractor has always, cf. ABT93 § 31 (at take over) an obligation and a right to rectify.
§ 31. The Contractor shall be bound to rectify any defects discovered during handing-over.
Subs. 2. The employer must stipulate in writing a time limit for the rectification of defects are discovered. The duration of such limit shall be fixed on the basis of the nature and extent of the defects and the circumstances in general. The Contractor shall notify the employer in writing when rectification has taken place.
A similar rule applies after take-over, cf. ABT 93 § 32.
A special rule applies in case the Employer performs the remedy work himself, or by another Contractor. In this case he cannot claim higher compensation than what the Contractor saved by being released from his obligation, i.e. without VAT or overhead.
Another special rule is ABT 93 § 33:
"The Contractor's obligation to rectify and the employer's access to effecting rectification at the expense of the Contractor, cf. §31 og 32 shall elapse if the costs of rectification are disproportionately large. In the assessment thereof consideration must be given to the employer's interest in fulfillment of the contract. However, the employer shall in any case preserve his right to reduction cf. §34. "
This has always been the rule under Danish law, but now it has been adopted in a standard contract.
The responsibility of the Contractor ceases 5 years after take-over, ABT 93 § 36, unless in case of gross recklessness, § 6 Subs. 2. (3).
In PPP contracts the Employer will often have made some preliminary investigations/reports to be sure it is possible - technically and economically - to carry out the project. He will often with his invitation to bid provide the Contractors with this information. Hereby the Contractors will save money to prepare the same investigations, thereby saving time and money, which at the end should be reflected in the bid.
Furthermore, if the Contractors can rely on the information given, they will all have the same basis for the calculation of their bid, which should lead to more competitive bids.
If the cost to perform exact information on the volume of the water is high, the Employer might chose to save this cost, as the amount of water will be disclosed at the time of construction, and the Employer should in my opinion always pay for pumping away the actual volume.
Transferring risk for unforeseeable events will always lead to higher bids, and maybe big differences in the bids, due to the different evaluation of the risk.
Who shall bear the risk if the actual conditions on the site deviate from the report provided by the Employer, which often will be the case in PPP.

In this case it is easy to decide who shall bear the risk, if UAV or DBFM is adopted, it depends on the contract.
Under UAV-GC2005, in my opinion the risk lies with the Employer according to Clause 44.1 (c), if no specific clauses in the contract dealt with the subject. I would not find the opposite result in accordance with "The standards of good faith", as stipulated in the clause.
Under DBFM, it is the other way around. According to Clause 2.1 (c) the risk lies with the Contractor, since no specific clause in the contract dealt with the subject. I do not find this in conflict with "Public Law".
Only in case, the Employer can substantiate the Contractor had knowledge of the actual volume, the Contractor will be barred from claiming time extension and additional cost.
Under Danish law exists the same obligation between Employer and Contractor, as according to UAV-GC2005, Clause 44.1 (c), "The standards of good faith", if it is not specified in the contact.

Slovakia

In the context of the given theme it is obvious that obligatory definition of rights and duties according to cogent legal regulations is decisive also in Dutch legal system, and model contract conditions have complementary character.
Of course, exceptions form this legal systems can also exist, however we think that „prediction" of factual circumstances has a relative character and ultimately the evidence of particular parties will be ultimately decisive in practical or applicable law practise.
Within the Slovak jurisdiction, the possibility of any contract party to access the whole trail (including the annual accounts) in the phase of pre-contractual preparation of contract relation is a new to Slovakia after becoming EU Member, and the trail is submitted obligatory to Collection of Documents that is part of Business Register. Legal regulation regulates procedure of contract parties' negotiations and basic content of contract. However, the way of defining the content of the contract is at most liberal. Rights and duties are determined at first by economic position of contract parties and possibility to include lawyers in the contract process. That implies that within the pre-contractual relations the content of the contract depends on the property and wealth conditions of contract parties. We can state the conflicts of pre-contractual parties are usually related to the price for work, maturity date of this price and time limits of warranty. Within the pre-contractual relation a futures contract is used very often and sets the agreed contract conditions and sanctions /usually contract penalties/ in case of not concluding the contract. General business conditions, that economically stronger legal entities have, do not usually mention conditions of pre-contractual relations. These general business conditions are inseparable part of contract and have priority status over the contract.
Duty to inform the counter party implies from particular clauses of Commercial Code. However it has only sense in case of concluding the contract and relates to provide trail, project, and information on important circumstances.

Contractor is obliged without any delay to give a notice to client on impropriety character of equipment taken from the client or instructions from client with regard to execution of work. If such impropriety equipment or instructions restrain the adequate execution of work, contractor is obliged to stop the works to the necessary extent and the time period of not execution the work prolongs the date determined for completion of work. It is necessary to mention that in realizing the construction contracts and executing the construction works the concurrence of both contracting parties is inevitably necessary, as it implies form the Commercial Code.
However, we assume that it is not possible to apply liability for not giving notice on important information in case the contractual relation has not yet begun. Of course, different situation may arise in case of public procurement. Public procurement is governed by particular act in the legal order of the Slovak Republic that is in accordance with the European directives on public procurement. Rules are very strict and the whole process must be in accordance with them.

Czech Republic

According to Czech law, everyone is obliged to act so as to avoid damages. The duty of damage prevention is stated in civil law and it is applicable generally, therefore also to parties entering into construction contact. Professional literature concludes that the duty is complied with in case of usual cautiousness. Standard of usual cautiousness shall be determined separately and objectively for each situation. One may assume that the level of usual cautiousness shall be higher for professionals who (usually) enter into construction contracts, such as DBM or DBFM. Therefore, one may assume that the duty of damage prevention may, with regards to each specific situation, comprise also the duty to notify the other party as well as the duty of a party to investigate.

Commercial law governing construction contracts (contracts on work) is non-mandatory, the parties may agree on different rules. The risks to be borne by each party are often determined in the contract. Such agreed determination shall prevail.

Act on Public Contracts states that the client is responsible for correctness and completeness of the tender documentation. According to Act on Concession Contracts , risks shall be distributed between the client and the contractor in the concession contract . Further, the concession contract shall be governed by commercial law. In a paper on risk management in PPP projects , the Ministry of Finance of the Czech Republic recommends that risks resulting for example from project documentation or situation on the place (site) of performance shall be borne by the contractor. In case of DBFM construction contracts, which will often be concluded according to Act on Concession Contracts (in case public contracting authority is involved), one may assume that the risks might be allocated according to the ministry recommendation.

The Czech Commercial Code states that (in case there is no different agreement of the parties) the contractor has to inform the client on unsuitable nature of a thing or instruction given by the client, if the contractor was able to discover such unsuitability when acting professionally. In such case, the contractor in not liable for defects of the works or for impossibility to perform the works and may interrupt performance of the works. Further, in case the contractor discovers hidden obstacles regarding the place (site) of performance of the works, which unables performance of the works in the agreed manner, the contractor shall inform the client thereabout and the parties shall agree on change of the contract. In case of no agreement on change of the contract in reasonable time period, each party may withdraw from the contract. In such case the contractor is entitled to payment for works performed until the time when the obstacle could have been discovered if acting with professional care and no party is entitled to payment of damages, however that all only in case the contractor has not breached its duty to discover the obstacles before work commencement. According to professional literature, such duty might be stated in the contract.

Further, if there is a need to perform works which were unforeseeable at the time of contract conclusion and in case the price of the works is set based on a budget, which is not complete according to the contract, the contractor may ask for reasonable increase of price for unforeseeable works which were not included in the budget. In case such increase of price is higher than 10 % of the price, the client may withdraw from the contract. Then the contractor is entitled to payment for the so far performed works.

ILLUSTRATION:

In the said case, the contract shall be examined first. In case the contract does not give an answer how to solve the situation, the contractor should be entitled or to extra payment, in case of incomplete budget, or to change of the contract. In some cases, such situation may lead also to termination of the contract by withdrawal. However, based on experience, it can be expected, that most probably the parties would agree on a solution amicably, often to disadvantage of the contractor, who often hopes in obtaining new commissions.

On one hand Dutch conditions may be evaluated as more transparent than Czech conditions. On the other hand direct allocation of risks to the contractor might increase the price of works, as the contractor has to take such risks into consideration. Czech conditions require careful consideration of all risks and their allocation, but theoretically as the result they may lead to achievement of a lower offered price.

Spain

In our opinion, the Dutch system is more efficient for the client because, in general rule, the risk is of the contractor: the contractor could and should have seen the problem in advance and should have given notice to the client of the risk. In the Spanish system, as constructor is not responsible of the design and structure, the result is usually an increase of the price or a delay of the construction.

THEME 2: LIABILITY FOR DEFECTS NOT NOTICED BY THE CLIENT AT THE TIME OF TAKE-OVER

Answers were received from:

Belgium

In Belgium, it remains common practice – the Civil Code does not require it – to split the acceptance of the works in a provisional and final acceptance. The acceptance implies acceptance of the work with its visible defects, except those for which written reservation is made at the time of the acceptance (assuming they are not serious enough to refuse the acceptance of the works) and except those that are covered by the so-called decennial liability.

The provisional acceptance is the start of the so-called warranty period during which the contractor is under an obligation to repair all defects that appear. This warranty period is usually one year but the parties are free to agree on a shorter or longer period depending on the size and complexity of the works. The final acceptance is granted if at the end of the warranty period all the visible defects about which a reservation was made at the provisional acceptance, as well as all hidden defects which appeared during the warranty period, have been redressed.

Unless the parties agree otherwise, the provisional acceptance is also the starting point of the period during which the contractor is liable for hidden defects and of the decennial liability period. Except in public work contracts, the parties can also agree that the decennial liability will run as from the final acceptance only. For defects about which a reservation was made at the acceptance, the (post-contract) liability periods do not start to run until they have been redressed.

The contractor is liable for minor hidden defects during maximum ten years following the acceptance (article 2262bis of the Civil Code). However, the employer must lodge his action for minor hidden defects within a short period following their discovery (Supreme Court, 15 September 1994). This 10 years liability for minor hidden defects is a maximum period (actually, statute of limitation). Contractors tend to negotiate shorter terms or event to exclude such liability.

Finally, in Belgian law (as in French law), the contractor (and the architect) is specifically liable for the stability of the construction works during ten years (articles 1792 and 2270 of the Civil Code, i.e. the so-called "decennial liability") following the acceptance. In public works contracts, this period mandatorily starts at the time of the provisional acceptance. In private construction contracts, the parties may agree that it commences on the date of the provisional or definitive acceptance either. This specific liability, which exists for defects affecting the stability of the works, is a statutory liability that cannot be shortened or extended by the parties. Any clause that limits the contractor's contractual liability for defects that affect the stability of the building, i.e. the decennial liability, is

void. During the decennial liability period, the employer can sue up till the last day of the term, no matter when he discovered the defect affecting the stability (subject of course to problems of evidence if the defect exists since a long time).

2. UAV-GC 2005 compared to Belgian law

The Dutch UAV-GC 2005 provide, in article 28-1, that "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 the actual date of completion and acceptance". The action is inadmissible if it is filled after the expiry of five years after the date of completion and acceptance, or ten years after this date if the works is about to collapse or is about to become unfit for the purpose for which it is intended (article 28-2). In other words, if the public authority did notice or could reasonably have noticed any defects at the time of completion and acceptance but failed to invoke the contractor's liability thereupon, the defects are considered to be apparent and the contractor will not be liable.

Under Belgian law, this situation is typically the same as the one organised in article 28-1 of the Dutch UAV-GC 2005. However, time limits for filing the claims are not fully the same. Indeed, as explained above, after completion, the contractor is liable for minor hidden defects during maximum ten years following the acceptance, with a possibility to negotiate shorter terms. The "hidden" character of a defect will depend (i) on the qualification of the employer himself (professional or layman) and (ii) on the circumstance that a surveyor (or an architect) assists the employer during the acceptance procedures. Hence, if the employer could reasonably have noticed the defects at the time of completion, but failed to invoke the contractor's liability thereupon, the defects are considered to be apparent. This rule is consistent with the Dutch UAV-GC 2005. However, it is important to bear in mind that such rule does not apply in the case of defects covered by the "decennial liability". For these defects, the absence of any notice by the employer at the time of acceptance does not prevent him to hold the contractor liable – even if employer should reasonably have noticed these defects –.

Finally, it is worth observing that the general rule in Belgian public works contracts is that the contractor is no longer liable for any defects in the works – save the defects covered by the "decennial liability" – that become apparent after the final acceptance (see the Belgian rules regulating the performance of public works ("Cahier Général des Charges"/"Algemene Aannemingsvoorwaarden", adopted by a Royal Decree of 26 September 1996)).

3. Dutch DBFM 2.0 Model contract (July 2009) compared to usual DBFM contracts in Belgium

Firstly, it is reminded that there is no standard DBFM contract as such under Belgian law. Each different project involves a new contract drafted in order to cope with the specific features of the said project. It is worth observing however that the Flemish PPP Knowledge Center is currently developing standard DBFM contracts that should be ready by the end of the year 2010. As a first step, the issues typically encountered in PPPs and their accompanying contracts (as currently used) are being listed. The standard contracts will then be drafted on that basis. The draft contracts will then be submitted by the Flemish PPP Knowledge Centrum to public consultation and tested on existing PPP projects before being finalised.

Regarding the liability issue, the DBFM contracts usually contain an explicit deviation from the general rules of Belgian construction law. Indeed, as a matter of principle, the rules regulating the performance of public works ("Cahier Général des Charges"/ "Algemene Aannemingsvoorwaarden") are automatically applicable on any public work project with a value of more than 22.000,00 EUR. However, the typical features of a DBFM project are not adapted to the rules contained in the "Cahier Général des Charges". For this reason, any DBFM contract usually takes the opportunity, provided by article 3 of the "Cahier Général des Charges", to deviate from these rules, with an adequate motivation.

For instance, it is generally accepted, in private works as well as in public works governed by the "Cahier Général des Charges", that the risk of availability passes on the public authority as from the time of the provisional acceptance of the works. The situation is different in usual DBFM contracts, where the risk of availability remains on the private partner for the duration of the contract. Similarly, it is generally deviated from the rule contained in articles 19 and 39 of the "Cahier Général des Charges". These provisions hold the contractor liable during the period between the provisional and the final acceptance (usually one or two years) for any kind of defect attributable to the contractor; after the final acceptance, the contractor remains liable for the stability of the construction works only, during ten years (articles 1792 and 2270 of the Civil Code). Here also, the delivery of the availability certificate in a DBFM contract differs from the usual effects of the provisional acceptance – even if it sometimes provided that the delivery of the availability certificate equals the acceptance of the works – : indeed, the availability certificate is not only the starting point of the payment mechanism by the public authority, but is also the starting point of the maintenance duty of the private partner. This maintenance duty is a duty of result, which means that the contractor bears the onus of the proof that the default in the maintenance is not attributable to him. The private partner's standard of care is also placed higher than in general construction law. Because of the private partner' s duty to keep the infrastructure available for public service for the total duration of the project, the private partner bears the risks linked with this duty. The private partner remains liable towards the public authority for the total duration of the project (usually 20 to 30 years) for the maintenance, the repair, the replacement, the rebuilding, etc., that would be necessary to keep the project available, in order to meet the

contractual maintenance requirements; in other words, being in charge of the maintenance of the works, the private partner is in fact liable for any defects attributable to him until the expiry date, even when these defects were not noticed by the client at the time of the availability date. This explains why the difference made between the "decennial liability" and the liability for minor hidden defects is not applicable as such within the frame of DBFM contracts. Of course, the DBFM contracts generally impose on the private partner a duty to take on a "decennial liability" insurance.

In fact, compared to traditional public works contracts, the system of the liabilities in DBFM contracts is linked with the specific risk allocation set up in such contracts. The risk allocation in DBFM contracts is usually relatively favourable towards the public authority, in so far the public authority only pays for the service if and to the extent that the service actually works. Hence, the public authority usually agrees to retain several risks, such as, among others: the risks for the private partner not obtaining all necessary permits other than for reasons attributable to the private partner; the risks of change in the law; access to the site; force majeure events, etc. On the other hand, the private partner retains the risks that are not expressly attributed to the public authority.

As a conclusion, the liability system in use in Belgium in most DBFM contracts is apparently roughly the same as the one provided in the Dutch Model DBFM Agreement Standard 2.0 of 30 July 2009, with a system of milestone and certificates: through the maintenance duty, the contractor is in fact liable for any defects attributable to him until the expiry date, even when such defects were not noticed by the client at the time of the availability date.

Germany

As described below in more detail according to German contract law the „formal acceptance" (Abnahme) has a considerable influence on the relationship between the employer and the contractor: the contractor has complied with his duties, his claim for remuneration is valid and any responsibility on his part for any defects has to be proven by the employer.
Indeed, under PPP projects such a release of the contractor from overwhelming parts of his duties upon completion of the building works and subsequent formal acceptance by the client would not be appropriate. The obligation to construct a certain objective, i.e. parts of a motorway, is only one – and at least time-wise a minor – part of the concession and it is followed by the additional and important obligation of the contractor to operate and maintain the objective for a much longer period (approx. 24 years). Failure to comply with this duty triggers a loss of income because the income of the contractor (toll revenues, availability payments by the contracting authority as the case may be) is dependent on the motorway being available for traffic.
German A-Model contracts reflect this typical situation of PPP projects. They explicitly exclude that the completion of the construction works and the subsequent verification by the contracting authority ("hand-over") constitutes a regular "formal take over" (Clause 30.7 A-Models). In the context of

German A-Models a "formal acceptance" takes place only at the end of the concession period when not only the contractor's obligation to construct but also his duties to run and operate the project expire (Clause 42 A-Models).
It appears that the substantive German law is quite different from the Dutch law. Unlike in Dutch law there is no such general rule in German construction law of non-liability for defects in the works after acceptance by the client, neither in the BGB nor in the VOB/B. In fact, the contractor will be liable for any defects in the works that occur or become apparent within a legally defined or contractually fixed period of time after the acceptance of the works.
There is just one exception which is similar to Dutch law: the client shall put forward any reservations in respect of known or visible defects not later than the closure of the acceptance procedure (§ 12 (5) Nr. 3 VOB/B). If he fails to do so the legal consequence will be that he is deprived of his rights concerning defects in the works as well as of his right of (financial) retention relating to the contractual remuneration, see also § 640 (2) BGB. Thus, the client will only be entitled to claim compensation under the requirements of the law for such defects in the works. In this context, contrary to Dutch law, it will not be possible for the contractor to argue that the client could have reasonably noticed any defects at the time of acceptance by a more diligent or thorough check before or at take-over. It should be noted that according to German jurisprudence positive knowledge of the client is required in order to make a claim pursuant to § 640 (2) BGB. Such positive knowledge is to be assumed in the event that the client is able to fully comprehend and assess the relevance and the implication of the defect in the works at the take-over; the respective burden of proof lies with contractor .
Hence, in the illustrated case under German law the contractor would most likely have not succeeded.

Switzerland

I. Additional Assumptions

The asphalt supplied by the contractor does not possess the degree of durability required of it by the terms of the contract. The asphalt is thus defective.
The contractor had not been instructed by the client to use this particular asphalt, so that the contractor is, in principle, liable for the defect. Had the contractor been instructed to use the asphalt, this would have raised the question as to whether the contractor would have had a duty to caution the client as to the unsuitability of the asphalt.
In view of the fact that the road is no longer fully usable after a period of only two weeks, the contractor's argument that the asphalt he chose "does not affect the quality of the road" strikes us as very audacious.

II. The Case

In situations such as that in the case at hand, it is necessary to distinguish between three potential variants: (i) The client's engineer noticed that the asphalt was defective while inspecting the completed road, but approved take-over of the project anyway. In this case the contractor is not liable

for the defect. (ii) Despite the fact that the client's engineer failed to notice it, the defect in the asphalt was manifest. In this case as well, the contractor is not liable. Rather, there exists an irrefutable presumption that the client has waived his right to assert the presence of a defect. Exception is made for cases in which the contractor fraudulently conceals the defect, in which cases the presumption does not apply. (iii) The engineer failed to discover the defect and the defect was also not manifest. In this case, the contractor is liable, that is, he can derive no rights from the fact that the road was inspected on the client's behalf by an engineer. A crucial point in all of these cases, under Swiss construction contract rules (both statutory and as contained in SIA 118), is the fact that the take-over of a project can discharge the contractor from liability for defects only to the extent that the defects in question are not of such nature that it would not yet have been possible for the client, using reasonable efforts, to have noticed them at the time of take-over. By contrast, the take-over has no effect on the contractor's liability for concealed defects.

To the extent that the contractor is liable for the defect, the client is entitled primarily to repair of the defect. Repair is not owed in cases where it would occasion costs to the contractor in an amount that seems disproportionately high as compared to the benefit to be derived (from the repair) by the client (high costs for a benefit that is too low). It is, however, of no consequence whether the costs in question are too high for the contractor from his subjective point of view. Equally irrelevant is the ratio of the repair costs to the value of the work performed or to the total amount of the contractor agreement. Where the contractor fails to fulfill a legitimate demand for repair of the defect, the client may either have the defect repaired by a third party at the expense and risk of the contractor, or waive repair and unilaterally reduce the consideration paid to the contractor. These rights do not presuppose any fault on the part of the contractor. They may be asserted even where the contractor has consistently showed due care and, without proviso, even where the defect was caused by work performed by sub-contractors engaged by the contractor. The situation differs with regard to indemnification for any financial losses that may arise out of the defect (in particular, loss of operating revenue due to late completion or closure for repairs). For losses of this nature, the contractor is liable for indemnification only where he is at fault or where he is held liable for the fault of a third party (such as a sub-contractor, for example). Fault on the part of the contractor is, however, presumed, so that the contractor bears the burden of proof that no fault has been committed.

III. Relevant clauses in the SIA 118

Take-over with Waiver of Defect Claims

Art. 163, par. 1 SIA 118:

"Where the [owner's] construction supervisor, on the occasion of the mutual inspection, discovers a defect, but expressly or implicitly expresses intent not to assert any claim on the basis thereof, the project (or a part thereof) is deemed to have been accepted. Under no circumstances may the defect in question hinder fixation of the time of take-over as at the close of the inspection; contractor is discharged from liability for the defect to the extent that the defect was discovered by the [owner's] construction supervisor."

Art. 163, par. 2 SIA 118:
"A tacit waiver of claims on defects discovered, but not noted in writing, is presumed in the event that an inspection report was prepared (art. 158 par. 3); the same presumption applies with regard to defects that were manifest at the mutual inspection, but for which no claim was asserted. In the latter case, the presumption is irrefutable."

Guarantee Period (Limitation Period for Complaints)
Contractor Liability
Art. 174, par. 1 SIA 118:
"The contractor is liable for all defects (art. 166) for which the client lodges complaint during the guarantee period (limitation period for complaints) (art. 173). Excluded from liability are only those defects in respect of which the project (or part thereof) is deemed to have been accepted pursuant to art. 163."

Slovakia

According to our opinion the subject in a given material is taken out of the context of particular case, as it is mentioned in the text at the end. In this particular case, form the viewpoint of our legal order, or usual practice within the procedure of handing over the work, this version can occur in case that the client stated and confirmed ain a written form that defects had not occurred. This is an inconsistent approach at the phase of taking over the work. Legal regulation of defects of work and claims from defects of work is exhaustively governed by Commercial Code. Contract parties can in their contract exceed regulation by Act and modify also claims on compensation for the damage or contract penalty. In this regard it is evident that client always has a tendency to include institutes of damage compensation and contract penalties in the contract as well as the liability for defects. Particular formulations included in general business terms and conditions relating to taking over the work and executing the examinations on work is taken from the legal text of Commercial Code, although they can contain particularities related to execution of work.
Commercial Code in the legal order of the Slovak Republic does not differentiate explicitly obvious and hidden defects. However it implies from the diction of the act. Obvious defects are those that can be found at the time of take-over and make a claim immediately. Hidden defects can be found later and liability and claim can be made until the last date of the warranty time limit that are agreed in the contract (act does not specify them.)

Czech Republic

In Czech legal order, the defect liability regarding contracts on works governed by commercial law is regulated in Commercial Code. Legal regulation of contract on work according to Czech commercial law is non – mandatory, therefore the parties may deviated from these rules upon agreement.

According to Czech commercial law, the object of work is defective, if its execution does not meet requirements specified in the contract. The contractor is liable only for defects of works at the time it is being handed over, the liability is objective. This however does not apply, if defects arise after the object of work has been handed over, if such defects are caused by breach of contractor's obligations. This liability is not objective as the burden of proof lies with the employer.

According to the Commercial Code, the employer is obliged to inspect the works as soon as possible after its hand – over. During the inspection, the employer should reveal all apparent defects of the works. The Commercial Code further specifies time periods, in which the defects should be notified to the contractor, and that (i) without undue delay after the employer has ascertained the defects, (ii) without undue delay after the employer should have ascertained the defects when exercising due care during inspection at the hand – over of the works, (iii) without undue delay after the defects could have been ascertained if exercising due care, i.e. within two year or, as the case may be, five years in regards to constructions, this last case will be used for hidden defects. In case the above periods are not kept by the employer, the court does not have to grant to the employer rights from defect liability, in case the contractor raises objection in this sense. However this does not apply if defects are results of facts which the constructor knew or had to know at the time of hand-over of works, when the employer may be granted rights from defect liability even if the above time periods are not kept.

In practice, the parties very often agree in the contract on checking of the works during its performance. Even if the employer does not find defects of works during such check, the contractor remains liable for defects ascertained at and after the hand-over of the works and the employer remains entitled from its rights connected with defect liability. Often it is agreed that the contractor is obliged to test and examine the works. Attention is paid also to the agreement on hand-over process, mainly in case of bigger projects such process is long-lasting.

Contract on works often contains agreement on quality guarantee. According to the Commercial Code, provision of quality guarantee is not obligatory. The quality guarantee may be established by agreement or by contractor's declaration. The quality guarantee must be always established in writing. The quality guarantee may be granted in regards to defects of works also in larger extent than provided in the statutory regulation of defects liability. By providing the quality guarantee, the contractor obliged itself that, for certain period of time, the works will be able to be used for the agreed, otherwise usual, usage and that it will retain agreed, otherwise usual, qualities. Usually, the guaranty period starts at the hand-over of the works.

Czech law also contains provisions imposing on the employer an obligation to act with due care, to ascertains and notify defects of works to the contractor. The position of the contractor is more secure due to limitation of time in which the employer has to notify the defects. On the other hand, in some

cases the law prolongs the defect liability of the contractor also regarding defects of works notified after the object of work has been handed-over to the employer, that based on the character of the defect.

The Ministry of Finance of the Czech Republic has prepared sample concession contract, which may serve as inspiration in case of DBFM projects. This sample contract regulates more phases of checks, and that during performance of the works, at its completion before putting the works into use, during use of the works or at return of the works to the employer after termination of usage of the works by the contractor including agreement on state in which the works should be returned to the employer. Different control mechanisms and remedy of defects and imperfections apply in each phase. In order to specify, whether provisions of defect liability apply to certain defect, or whether the situation shall be evaluated as other breach of contractual obligations, it is necessary to examine each situation separately also in the context of the content of the contract.

ILLUSTRATION:

The evaluation of the situation specified in the illustration depends on the fact whether the contractor breached the contract by selection and usage of the respective material (asphalt) or not. Only after it will be possible to determine whether there is defect on the works and whether defect liability of the contractor applies. In case we come to the conclusion that there is a defect of the works (performance of the works will have to be examined in this context as well, mainly in order to specify whether the employer gave instruction to the contractor to use such type of asphalt or not, whether the contractor could have ascertained its unsuitability when exercising due care), liability of the contractor may arise. Further, it will be necessary to examine whether the employer notified the contractor about the defect within time periods specified in the Commercial Code or, as the case may be, agreed in the contract, or whether such defect is or is not covered by quality guarantee. In case parties do not agree on solution of the situation, it is presumable that professional (expert) evaluation of the defect and its character, i.e. when the employer could have notified the contractor thereabout, will be necessary. Examination of the contract will be needed as well in order to determine whether the parties have not agreed differently.

Spain

In this point, the Dutch system seems to be more positive for the constructor. The client has the "duty" to notice defects before the take-over. That is why, to ensure that the contractor has met the prerequisites, five certificates are used in the DBFM-contract.

THEME 3: PAYMENT SCHEDULES

Answers were received from:

Belgium

1. Basis for payment

Payment may only be made in respect of works that have been performed (art. 8 Public Contracts Law).

In principle advance payments are not permitted. Only in the event the particular conditions of contract so provide in respect of projects that require preliminary substantial investments, an advance payment may be made (art. 5 General Performance Rules).

The contract price is paid, either at once after completion, either by way of progress payments according to the terms and conditions set out in the particular conditions (art. 4 General Performance Rules). In practice jobs that are small or with a limited duration are paid at once following complete performance. Progress payment is the standard for most works contracts.

2. Payment procedure

The payment procedure is set out in art. 15§1 of the General Performance Rules. As well in the progress payment scenario as in case of the final account or of a full contract sum, the contractor is obliged to enter a statement that is based on the bill of quantities of the works and that in his opinion justifies the payment that is being requested.
The authority controls the statement and, in the event, performs corrections thereof. Thereupon the authority without delay shall issue an official certificate in which it sets out the amount that it actually deems due. The authority is under duty to notify in writing the contractor the value of the works that it thus accepts for payment. By the same token it shall invite the contractor to enter its invoice for the amount that it has accepted – in the event following corrections.

The rule as per article 4 of the General Performance Rules according to which any payment is only an advance that is to be set off or is to reduce the total debt, does not allow the authority at its discretion to dispute previously approved and paid for items (Court of Appeal Antwerp, 11 September 2000, T.Aann., 2001, 144). Payments following approval of statements are considered as

acknowledgments of debts by the authority. It has the burden of proof that any payment made was not due.

3. Payment term

Article 15 of the General Contracting Conditions sets out the mandatory payment terms. They may never be extended in the particular conditions. Any particular provision that provides for longer payment terms is deemed null and void (art. 3 General Performance Rules).

The payment term is 60 calendar days. The term commences upon the day that the tender authority has received the notice of debt by the contractor; not the day when such notice has been sent out.

With respect to the final payment or the sole payment (when the contract is paid at once), the 60 days periods only starts to run as from the end of the 30 calendar days term that is allocated to the authority to perform the control and correction of such statement. By consequence this means a term of 90 applies for any sole or final statement.

In the event that the contractor does not enter its invoice within 5 days from the authority's invitation so to do, the 60 days' payment term is accordingly extended by the number of days that said term is exceeded (Court of Appeals of Ghent, 4 May 2007, NjW 2007, 851)

4. Interest in case of late payment (article 15 § 4 General Contracting Conditions)

In the event that the afore mentioned payment terms is exceeded, by law and without need for any summons the contractor is entitled to payment of delay interest. The submission of the duly made out invoice is by the same token deemed to constitute claim for payment of interest.

In respect of public works contract that have been awarded after 8 August 2002, the interest rate as per the Law on the Payment Delays of 2 August 2002 applies.

In the event payments are not sufficient to cover the original sum and interests, the contractor is allowed to allocate such payments first unto the accrued interests and only thereafter on the principal sum (art. 1254 of the Civil Code). Subject to service of judiciary summons, accrued interest may be compounded on a yearly basis (art. 1154 of the Civil Code).

5. Reduction of the performance pace or suspension of the works in case of late payment (art. 15 § 6 of the General Contracting Conditions)

In the event that for reason of the authority's default no payment has occurred within 30 from the end of the mandatory payment term, the contractor is allowed to reduce his performance pace or suspend the works. Provided always that the payment that is in delay is sufficiently substantial to justify such measure. In the event the outstanding debt is small such action is not justified.

Also, the contractor shall notify at least 15 calendar days in advance its decision to proceed with a reduced speed or in effect to suspend.

In the event that the contractor indeed proceeds to a reduction of its pace or to the suspension of his works, he is entitled to damages provided he enter his claim within 90 calendar days from the date of the notification of the taking over certificate. As damages qualify the costs that need to be determined as having actually been incurred by the contractor as a consequence of the extended time for the performance of the contract (i.a. extended site organisation expenses, extended availability of personnel and equipment, disruption of the planning)(Court of Appeals of Ghent, 21 March 2003, NjW 2003, 1079)

6. Loss of claim (art. 18 General Contracting Conditions)

Any summons in court at the request of the contractor must be notified to the tender authority latest 2 years following the date of the notification of the performance certificate or 2 years following informal definitive acceptance of the works (Court of Appeals of Ghent, 22 December 2006, T.Aann., 2008, 234). Otherwise the claim has become null and void. The authority may waive its right to invoke loss of right for reason of the expiry of the term to claim.

Germany

The payment schedule relating to German A-model contracts is rather different from the payment schedule under DBMF 2.0. DBMF 2.0 provides for a so-called "availability scheme" where payment of the contractor is merely dependent on the availability of the object of concession.
Under the German A-Model contracts the contractor does not receive payments for the mere availability of for instance the road but he is furthermore dependent on the size of the traffic flow. The contractor receives income from funds which the contracting authority generates by e.g. imposing toll fees on trucks.
Notwithstanding these differences concerning the specific criteria of the payment schedules it is true that obviously also the payment schedule as it has been determined for the German A-Models materially suffers from a "non-performance" of the contractor. This has been also stressed throughout the illustration of theme 3. Any considerable non-performance of the contractor will have an immediate impact on the traffic flow and hence on the ability to generate income from toll revenues.

However, this risk which a contractor undertakes under DBFM/PPP schemes is inherent to all such projects. In contrast to conventional building contracts where the contractor has to render a certain performance in due time and is then possibly liable during the defects liability period. In contrast, DBFM/PPP projects are evaluated from the so-called "life cyle" perspective. Obviously, a contractor who subsequently operates the concession object for up to say thirty years may approach the construction works differently than in the above mentioned traditional cases. Supporters of DBFM/PPP schemes rely exactly on this "life cycle" concept which may for example trigger innovations and may turn out to be more economic than traditional delivery schemes.
Under the rules of the VOB/B the contractor is entitled to ask the client for payments on account which shall be allowed to the value of the work verifiably executed at the time in accordance with the contract. Such payments shall be effected at the shortest intervals practicable (§ 16 (1) Nr. 1 VOB/B). The contractor is entitled to request such payments within 18 working days following the receipt of the interim payment certificate. It is also stated for clarifying reasons that such payments on account do not count as acceptance of parts of the works. If the client fails to make any due payment the contractor may terminate the contract according to § 9 (1) Nr. 1 lit. b) VOB/B. On the other hand, the parties to the contract may also agree in advance on a fixed payment schedule corresponding to the value of the work executed at specific stages of the works process. Such a payment schedule will replace or substantiate the right of payments on account given to the contractor by the VOB/B. Just like in Dutch law the parties of the contract will under the rules of the VOB/B in most cases agree on penalties payable for in advance defined cases of non-performance or time-delays concerning special set terms for the execution of the works (e. g. observance of a time limit for completion). If penalties have been agreed under the rules of the VOB/B Sections 339 to 345 of the BGB shall apply. The main legal requirement under said provisions is that agreements on penalty payments shall be dependent on the cause of the contractor. For example, if a penalty has been agreed in the event that contractor fails to complete within the term set for execution of work, the penalty shall become payable when the contractor is in default due to his delayed performance .
Bonus payments are very rarely agreed on in public procurement contracts due to the fact that the public authority usually does not have a special cause justifying a bonus payment to the public interest such as an early termination would be considerably beneficial to the public (§ 9 (5) sentence 2 VOB/A).

Switzerland

I. Remarks

Pursuant to art. 372 of the Swiss Code of Obligations, the payment of consideration falls due only upon completion and delivery of the project specified in the agreement. The consequence of this is that the contractor must, in theory, advance the construction costs while work is in progress. This rule is, in many cases, not suited to the circumstances and, in the case of large-scale construction projects, quite simply unrealistic. For this reason, SIA 118 provides that the principal must make

regular installment payments to the contractor (normally on a monthly basis), the amount depending on the actual progress made in construction. Accordingly, it is incumbent upon the contractor to document the work that has been completed in the course of the preceding month and invoice the principal for the corresponding installment. In the case of lump sum contracts, however, it is customary for the parties to agree on a payment schedule, establishing in advance certain payment dates and amounts, or specific construction milestones, at which the payment of the corresponding installments falls due. This system is, of course, not specific to SIA 118, but merely reflects the standard practice in numerous countries.

The parties may also agree that the contractor is to receive an advance payment on account, prior to commencing construction. In Switzerland, this practice is not particularly common in the construction industry, but is widely used in other areas (such as the steelworks industry, for example). Nevertheless, according to the provisions of SIA 118, the contractor is at least entitled to payment of an installment once the site is equipped, even if the actual construction work has not yet begun (payment amount is, as a rule, equivalent to 80% of the agreed price for the installations in question). Framed in this way, such agreements occasionally lead to a situation in which the contractor can not only cover his costs for preparing the site, but, in effect, also receive payment in advance for a part of the actual construction – which would otherwise not be due until a later stage in the project. On the other hand, the proposal of such a payment schedule – at least in the case of public procurement invitations – may be taken as grounds for eliminating a tender from the bidding. For the rest, the variety of possible contractual arrangements in this domain is too large to permit any further generalizations. As an indication, however, we list here the provisions of SIA 118 on installment payments to contractors:

II. Relevant clauses in SIA 118

Installment Payments

Unit Price Contracts

Art. 144, par. 1 SIA 118:

"Unless otherwise provided by the contractor agreement, the contractor is entitled to monthly installment payments (payments on account). He asserts his claim in the form of a demand for payment."

Art. 144, par. 2 SIA 118:

"Each demand for payment indicates the amount of the requested installment. It is accompanied by a verifiable statement of all services performed by the contractor from the commencement of work up to the end of the accounting period; for unit price services, indication is to be provided of the estimated total quantity; for site installations paid on an overall or fixed price basis, indication of the stage reached pursuant to art. 146; for other services paid on an overall or fixed price basis, indication of the stage reached expressed as a percentage of their estimated total volume."

Installment Payments

Lump Sum Contracts

Art. 147:

"In the case of lump sum contracts (art. 42, par. 2), the installments due are to be fixed in a payment schedule that forms a part of the contactor agreement […]"

Denmark

The Danish ABT 93 is very short on this important issue. § 40 only states:

> *The employer's right to determine the contract*
> *§ 40. Following the submission to the Contractor of a written notice thereof, the employer may determine the contract*
> *(1) if, without entitling him to an extension of time limits, the Contractor is the cause of material delay in the performance of the work, and where such a delay in the performance of the work, and where such delay causes considerable inconvenience to the employer, or*
> *(2) if the Contractor is otherwise the cause of material delay in respect of matters of decisive importance to the employer, unless the interests of the latter have been sufficiently safeguarded in another way, e.g. by the possibility of discontinuing payments or by the provision of security, or*
> *(3) if the quality of the work performed is such that the employer has reason to believe that the Contractor will not be able to complete the work without material defects.*

This definitely leaves a large margin for the Courts or Arbitrators to determine when the termination conditions are fulfilled.

The AB92 that deals with the Contractor and the performance – and its predecessors AB 72 and AB 51 - has similar rules.

Fortunately, a large number of decisions are available, since ABT93 as well as former and other standard construction contracts includes a very widely used arbitration Clause at a specific arbitration institute, "The Building and Construction Arbitration Court in Copenhagen" cf. ABT 93 § 47. See theme 10 below. Its decisions are published, names of the parties are not disclosed. Thereby, they are made available for lawyers and authors.

In my opinion these decisions constitute a legal situation, which is similar to the situation in The Netherlands.

In the case presented I find the defect is of a minor character. It is easy to remedy by another Contractor. Termination will have huge economical consequence for the Contractor. Therefore, it is relevant to consider if termination is a justified remedy in the situation.
In PPP contracts I have dealt with in Denmark, this situation is foreseen. You have a classification of any kind of defect. This leads to percentage of default. This might lead to a reduction in the monthly payment. If it is not remedied, and other defects occurs it can lead to termination of the contract if

the total percentage is beyond a certain number. Under this clause, the lack of cutting the grass could not lead to termination. However, in case of major default it could justify termination after a notification procedure.

If no such clause is entered, it must be decided if it seems justified to terminate taken into consideration the economical consequences for the Contractor. Another relevant issue is the fact that the Contractor fails persistently to cure the situation and fulfil his clear obligation to remedy. This demonstrates a personal attitude that is unacceptable. Under these circumstances I find – with some reservation that I would share with the client - he is in a breach of contract that under Danish law justifies the Employer to terminate, and claim compensation.

Accordingly, the situation will in some situations be more friendly to the Contractor under Dutch law than under Danish law.

Under Danish law the compensation would cover the cost to bring the road in a state as agreed upon, and lost profit, until the defect was remedied.

Slovakia

As it is obvious form both model contract conditions, payment conditions form their inseparable part. We assess these circumstances positively because our legal regulations there are no rules relating to payment conditions and invoicing the price. As this is important practical side of rights and duties of client and contractor, contracting parties govern their rights and duties in particular contract or by general terms and conditions that include these rules.
Slovak Commercial Code leaves the payment schedules on contracting parties which agree in their contract on the payment schedule as well as property sanctions in case of not fulfilling their duties (usually – 0.1; 0.01; 0.05 %). More detailed rules are included in the general terms and conditions of particular company.
System in the DBFM contract is obviously more complex especially because banks play important role in case of ensuring solvency and of such circumstance that contractor will act in accordance with the regulation.
Bonus system is very interesting as it is not known to our Commercial Code or general terms and conditions known by us. It is advantageous if parties agree that the client will tak over the delivery of construction works prematurely before agreed maturity date.

Czech Republic

Similarly as in UAV-GC 2005, according to Czech law the time and manner of payment for the works depend on the previous agreement of the parties.

Regarding the moment of establishment of contractor's claim for payment of price of work, the agreement of the parties is decisive. In case (even though, if improbable) absence of such agreement, the non –mandatory provisions contained in the Commercial Code applies, according to which the claim for payment of price of works is established at the execution of the works, which means by its due performance (without defects) and hand-over of the object of works to the employer.

It is of course possible to agree on advance payments, which is more or less a rule in case of contracts on construction. The Commercial Code codifies neither right of contractor to advance payments nor obligation of the employer to provide them. The advance payments might be provided e.g. in some time intervals, or depending on completed phases or as combination of both.

In this context it should be mentioned that even though the contract on works always requires payment for works performance, it might be concluded without agreement on price. In order for such contract to be valid, the will of the parties to conclude the contract also without such agreement on price must be revealed. In such case the employer is obliged to pay price, which is usually paid for comparable works at the time of conclusion of the contract under similar business conditions. Conclusion of contract on works without agreement on price is, mainly regarding larger projects, less likely. This provision might be used e.g. in case when the contractual provision on price is invalid for any reason, but the contract on work remains valid.

DBFM projects in the Czech Republic may often be regulated by the Concession Act (in case contracting entity from public sector is party to the contract). According to it, the contracting entity (employer) shall allow the concessionaire (contractor) to enjoy benefits resulting from the provision of such services or from the exploitation of the executed work, or, if appropriate, together with partial payment.

Sample concession contract prepared by the Ministry of Finance of the Czech Republic provides for monthly payments, which shall be made generally after completion/opening the works and shall last until termination of usage/operation of the works by the contractor.

ILLUSTRATION:

It ensues from the Concession Act and from the wording of the sample concession contract, that in case of DBFM project, the economical risks should remain with the contractor, similarly as in Netherlands. These risks might be (partially) compensated by provision of part of fulfilment in money. The time of provision of such payment will depend on agreement of the parties. Therefore, the consideration to be provided by the employer is not (at least partially) monetary and risks connected with project financing and its consequent profitablity are allocated to the private sector.

In case of payments according to sample concession agreement, the contracting entity (employer) has bigger variety to affect the concessionaire (contractor) for non – fulfilment of duties, which, according to specific agreement of the parties, may consist in defect performance, following poor maintenance, low-quality operation etc.

In case a regular contract on works is concluded, the subject of which is construction, then at the time of completion of the works, great part of the price of works will already be paid in advance to the contractor. The possibility of the employer to raise and mainly enforce its claims from defect liability, from breach of contract obligations (e.g. contractual penalties, if agreed) towards the contractor, will be aggravated, that at least by the need to enforce its claims, as the case may be, with the intervention of the court. For these cases the employer demands security from the contractor in the form of bank guarantee or other.
In any case, agreement of the parties will be decisive in each respective situation.

Spain

In the DBFM regime (design, build, finance and maintain), the Dutch constructor is quite "oppressed" compared to the Spanish system. In the DBFM agreement at the time of completion, the contractor has prefinanced all works carried out (minus the one off payments) and the remaining lifetime of the contract is required to pay debt service and to carry out the operation and maintenance services. (....)The Spanish system is very good for the designer and for the constructor. They receive money as their work is done. They do not have to finance, as they receive money from the very beginning. On the contrary the Spanish system is not good for the client, the Administration, and for the public funds. The initial budget is usually not respected, and it grows up every month, because in such a complex process, any defect can appear and, at the end, no one is responsible, and if there is someone responsible, he has already been paid and then the client has to claim at the Courts.

THEME 4: EARLY TERMINATION BY THE CLIENT IN THE EVENT OF CONTRACTOR'S NON-PERFORMANCE

Answers were received from:

Belgium

The termination of a Construction contract for reason of default or negligence by the contractor is based on article 1184 of the Belgian Civil Code. This applies all agreements that provide vice versa obligations.

Indeed article 1184 provides: In mutual agreements the terminating condition is always silently encompassed in the event one of the parties does not comply with its obligation. In such case the contract is not automatically by itself dissolved. The party that is the creditor of such obligation has the option either to force the defaulting party to perform the contract, when performance is possible,either to demand dissolution together with damages. The dissolution must be claimed before the tribunal and the defendant may be allowed an extension, according to the circumstance.

In 1977 the Cour de Cassation (Pas. 1977, I, 836) has decided the discussion on the issue whether this provision applies to a construction contract. As a result, whenever one of the parties does not live up to a duty that it has undertaken in a construction contract, the other of them may demand dissolution in court.

In order to enter such claim certain conditions have to be fulfilled. First, summons must be served unto the defaulting contract party. Furthermore he must be allowed a reasonable term to cure the default before the matter is brought before the tribunal.

Such summons is not necessary in the event it is useless e.g. in case:

- anyhow performance of the duty by the contract party has become impossible;
- the client has no more interest at all by such performance;
- there is no longer trust as between the parties (e.g. in case of fraudulent practices by the service provider).

Dissolution needs to be demanded in the tribunal.
However, it is permitted as from the start to provide a clause in the contract that declares that 'in case of non-performance, the agreement shall be deemed automatically and without summons to be terminated'.
Still the fact of the matter remains that only the judge may declare the contract to be dissolved for reason of the faulty non-performance of the contract, in which case he at its discretion determines if

the disputed behaviour indeed qualifies in order to justify the dissolution of the construction contract. If not he will, when so requested, determine damages that are payable to the contractor.
The judge may also allow the contractor that is charged for default an additional delay within which he is still to fulfil his obligations while waiting for the decision on the dissolution of the contract or he may issue a dissolution decision with retro-active effect.

The principles and procedures that we have discussed here before are burdensome and not very adequate to allow the client to react to a situatio where the shortcomings by the contractor are such as to threaten to disrupt the whole construction process. Therefore nowadays the courts and doctrine agree that in case of emergency the client is entitled unilaterally to terminate the construction contract and to have substituted the contractor, awaiting later dissolution of the contract, ultimately by the judge.

In order to prevent abuses, some pre-conditions are set to the exercise of this right : the default needs to be serious (even flagrant), the situation must be urgent and require an immediate solution, previous summons is necessary, findings need to be recorded on a mutual basis, etc.

Whenever the contractor is substituted, this needs to be accomplished as soon as possible following expiry of the term that has been allowed to make good on the defaults without these actually having been cured by him and the defaulting contractor shall receive notification thereof.

In order to permit an even swifter reaction to a default by the contractor, most agreements provide for an express termination clause that provides that : 'in the event one or more obligation that have been undertaken by the contractor are not being implemented, the contract shall be deemed terminated by law'. To play safe the shortcomings that may justify such measure are explicitly enumerated in the agreement. Thus, in later proceedings, the judge can only control anymore if all the conditions for the termination have been fulfilled.

Taking into consideration the principles that have been discussed hereto before, specific rules have been set in respect of public works contracts where the contractor commits defaults. In particular art. 21 §4 of the General Contracting Conditions (Annex to the Royal Decree of 26 September 1996) provides:
1. unilateral termination of the contract : in such case the tender authority is awarded by law the whole of the performance security as lump sum liquidated damages; application of delay penalties in respect of the part of the works that is being terminated is thereby exclude;
2. performance by itself of the whole or of part of the project that has not been executed ;
3. the conclusion of one or more contract for account of the terminated contractor with one or more third parties for the whole or part of the project that still needs to be completed.
The measures as per 2° and 3° are executed for account and for risk of the defaulting contractor.

The article considers some scenarios when the contractor is deemed in default and that justify termination by the employer. By the same token the rules are set out according to which debts shall be settled. The practical regulation of the termination is described in articles 47 and 20§6 of the General Contracting Conditions. Article 47 requires a prior summons by way of a certificate to which the contractor may react within a delay of 15 days. If he fails so to do or if his reaction is considered impertinent, the client may terminate the contract (art 20§6 1°).
Other alternative sanctions that are provided in this article are:
Art 20§6 2° performance by itself by the employer
Art 20§6 3° the conclusion of one or more contract for risk and account of the terminated contractor
Upon termination of the contract by reference to art 20§6 1° the employer receives by law as lump sum liquidated damages the proceeds of the performance security that has been issued by the defaulting contractor.

In DBFM agreements the different reasons that justify the early termination of the contract are as well (contractually) set out, together with the regulations with respect to the damages that are set out in annex to the agreement.
Evidently termination options in one and the other way are limited to the most serious circumstances in the interest of the employer and the project financiers.

The agreements in most instances provide as well in :

- grounds for immediate termination for which a exhaustive list is written down . The basic consideration here is that circumstances or defaults need to be present that are substantial up to such degree that instant termination is the only solution (i.a. bankruptcy of the contractor).
The gradual accumulation of limited facts for which penalty points are provided may lead to the immediate termination of the contract when the maximum number of penalty point has been reached and it is explicitly provided in the DBFM contract that termination may then ensue. In the event the agreement is terminated without any remediation period.
- an option to terminate for reason of the contractor's default. This considers the situation where certain defaults by the contractor have occurred in respect of one or more of its obligations and it becomes apparent that he can no longer complete his contract: in those circumstances the employer needs to allow the contractor a reasonable remediation period. If this is not sufficiently exploited, one may still proceed to termination.

The DBFM Handbook published by the Vlaams Kenniscentrum PPS correctly observes that, for reason of the long term relationship between the different public and private parties, one needs to be very cautious when defining the scenarios when early termination may occur.

Germany:

It is typical for all contracts dealing with PPP or DBFM projects that in cases of material breaches by the contractor which may lead to the termination of the contract the main focus is not on the interest of the employer respectively the contractor but the lenders. Lenders typically play an imminent role in all DBFM project as they finance the overwhelming part of the costs. In order for a DBFM contract to be "bankable" it needs to give lenders sufficient relief in the most critical case, i.e. the pending termination of the contract due to contractor's default.

What lenders clearly require is the conclusion of a so-called "Direct Agreement" between the client and the contractor on the one hand and the lenders on the other hand. Such a Direct Agreement secures the lenders the right to step into a concession agreement instead of the contractor before the client is entitled to terminate the contract. By this mechanism the lenders have the possibility to secure their investment by rectifying the defects of the (former) contractor and to continue the project (usually by instructing a new contractor).

What lenders additionally require is a sufficient compensation in cases where the above mechanism (Direct Agreement) does not appear to be appropriate; hence, the contract is indeed terminated by the client. Technically, the client does not pay such compensation directly to the lenders but to the contractor. However, according to the finance agreements the lenders typically have comprehensive access to all funds received by the contractor until all their debts have been fully repaid.

Ideally, the lenders expect that the compensation payment by the client covers 100% of their outstanding debt. In such scenario lenders have the guaranty that they will not incur any losses resulting from DBFM project. Moreover, considering all fees (including up-front fees) which accrued until the termination they will have made some profit even if not to the extent they had originally envisaged.

Generally, one can broadly say that within the international DBFM/PPP market such compensation payments vary between 60% and 100% of the outstanding debt. The exact determination very much depends on the details of any single case.

According to the German A-Models (Clause 56.1.2) the approach is as follows:

a) Generally, the contractor is entitled to receive a maximum compensation in the amount of 60% of the outstanding debt

b) If the earning capacity value (Ertragswert) of the concession is lower than such 60% then the compensation is limited to the latter amount.

With regard to the determination of the earning capacity value (Ertragswert) also the German A-Models (as with many other jurisdictions) adopt the same approach as the Dutch DBFM 2.0 provides for under Schedule 4, Clause 1.2 (a) (B) "Valuation". It is the result of a comparison of the net present value of all payments which would have been received by the contractor up until the end of the concession (if such would not have been terminated) with the net present value of all costs which would have to be incurred by the contractor in such a case.

German A-Models do not provide for the possibility to calculate the compensation on the basis of the price which can be received in the course of re-tendering the outstanding works (after termination of the contract).
According to what has been said, broadly speaking the Dutch and German DBFM practice has adopted a similar approach concerning the above topic. From a lender's perspective it does not appear to be very "generous". Details will have to be negotiated with lenders on a case-by-case basis.
Under German construction law the client and the contractor are both entitled to terminate the contract for various reasons and with different legal consequences. § 8 VOB/B in conjunction with the BGB relates to termination by the contractor, § 9 VOB/B relates to a termination vice versa. Under the VOB/B-rules there is no legal distinction in wording – in any case the VOB/B refers to the termination of the contract. Whereas the possibilities for the contractor to terminate the contract are limited to cases of a failure by the client to make payment of due amounts or a failure of the client to perform an action incumbent on the contractor and thereby making it impossible for the contractor to further execute the work (creditor's delay within the meaning of Sections 293 et. seq. of BGB), the possibilities for the client to terminate the contract are numerous. First of all, the client may terminate the contract at any time before completion of work. In such cases the contractor will be entitled to receive the agreed remuneration under the regime of § 649 BGB. However, the contractor has to accept that his savings on outgoings, due to the contract being cancelled, be set off, as also the sums which he may earn from the alternative deployment of his workforce and business operations or which he willfully neglects to earn. The client may also terminate the contract in any cases related to contractor's bankruptcy proceedings. Most importantly, the client may terminate the contract if, in the case referred to in § 4 (7) and (8) and § 5 (4) VOB/B, the term set has expired without effect (withdrawal of contract) or the executed work is found defective whilst execution is still in progress. The latter cases of defective or improper works during the process of execution may lead to a withdrawal, if the contractor fails to replace such works by proper works at the contractor's expense. If the contractor delays the start of works or does not complete them on time, the rules pursuant to § 8 VOB/B will apply. After withdrawal of the contract the client is entitled to have the uncompleted part of works executed by a third party and to claim damages for non-fulfillment.

Switzerland

I. The Case

Under Swiss law, the contract at issue in this case is not classed as a construction agreement, but as a "contract of duration," under which the contractor undertakes to carry out maintenance service. Such a contract may be terminated at any time by the principal for just cause. As just cause is considered any circumstance, in the presence of which the principal cannot in good faith be reasonably expected to continue in the agreement. A breach of the contract may constitute just cause, although this is not always the case.

In the case at hand, the contractor fails to carry out the work to which the contract obliges him, and this in spite of the fact that the client has granted him a reasonable grace period for doing so. Under these circumstances, the client is already entitled to terminate the contract pursuant to the rules of default. Just cause – that is, unreasonableness of continuation in the agreement – is not required for termination of the contract in this case. It is possible that the contractor may even be held liable for any damages incurred by the client. At the same time, the client is also entitled to order performance of the maintenance work by a third party at the expense of the contractor. This right to substitute performance represents an alternative to that of simply terminating the agreement.

As concerns the termination of contractor agreements, both the Swiss Code of Obligations and SIA 118 provide that the principal may terminate the agreement unilaterally at any time. The right of termination is unconditional and not subject to any notice period or fixed term requirements. No termination grounds need be given and termination may take immediate effect. Nevertheless, these same provisions foresee that a principal who terminates the agreement in this way must remunerate the contractor for services already performed and indemnify him for the positive contractual interest, that is, the contractor must be placed in the same financial situation as he would have been if the contract had not been terminated. This means, specifically, that the contractor is, as a rule, entitled to indemnification for loss of profit. There is, however, an important exception: where the contractor is in serious breach of contract, such that the principal could not reasonably have been expected to continue in the agreement, the latter's liability for damages to the contractor ceases to exist.

Denmark

The rules in UAV Clause 10, 16 and 43 and DBFM 10.2 and 10.7 deals very specifically with the conditions for the Employers termination of the contract. I find the rules reflects a reasonable split between the Employer and the Contractor of the risks in performing the contract but at the end leaves it with the Courts or Arbitrators to determine if the facts in the actual situation fulfilled the conditions for termination.

The Danish ABT 93 is very short on this important issue. § 40 only states:

The employer's right to determine the contract
§ 40. Following the submission to the Contractor of a written notice thereof, the employer may determine the contract
(1) if, without entitling him to an extension of time limits, the Contractor is the cause of material delay in the performance of the work, and where such a delay in the performance of the work, and where such delay causes considerable inconvenience to the employer, or

(2) if the Contractor is otherwise the cause of material delay in respect of matters of decisive importance to the employer, unless the interests of the latter have been sufficiently safeguarded in another way, e.g. by the possibility of discontinuing payments or by the provision of security, or
(3) if the quality of the work performed is such that the employer has reason to believe that the Contractor will not be able to complete the work without material defects.

This definitely leaves a large margin for the Courts or Arbitrators to determine when the termination conditions are fulfilled.

The AB92 that deals with the Contractor and the performance – and its predecessors AB 72 and AB 51 - has similar rules.

Fortunately, a large number of decisions are available, since ABT93 as well as former and other standard construction contracts includes a very widely used arbitration Clause at a specific arbitration institute, "The Building and Construction Arbitration Court in Copenhagen" cf. ABT 93 § 47. See theme 10 below. Its decisions are published, names of the parties are not disclosed. Thereby, they are made available for lawyers and authors.

Slovakia

Given extracts of rights and duties from both contract conditions clearly outline that the termination of the contract relation is always in correlation with reasons that can be brought by such consequences. It is the same in our legal regulation; only with such difference that cogent legal clause is governed by legal regulations that can be used depending up whether it is of civic or commercial legal matter. Civic Code or Commercial Code governed the basics of termination of legal relation, while some particular agreements may be governed directly in the contract of general terms and conditions that are inseparable part of this contract.
Legal regulation of construction contracts by Commercial Code requires cooperation between contracting parties. Client, in terms of law, has a right to control the execution of work. Execution or non execution of controls does not have an influence on the liability of contractor for the defects of work. The extent of control executed by client can be agreed in the contract.
Client can back out of the contract only in case of fulfilling three conditions:
a) Violating the duties of contractor during the execution of work
b) Void expiry of adequate time limit provided for the duly execution
c) Infelicitous way of execution of work will result to significant breach of contract.

General terms and conditions may specify what can be understood as a breach of duties, e.g.:

a) Delay of contractor (he/she did not take over the building site, he/she was late with the beginning of works)
b) In case contractor stopped the realization of work according to the contract, and, even after the notice of client he/she does not continue in realization
c) Does not execute works in required quality.
In case of significant breach of contract it is possible to agree on the contract penalty.
In the particular illustration of theme we think that the client is has also obligation to honour the control schedules that were agreed in the contract. However this would not be taken as such breach that would be the reason to terminate the contract.

Czech Republic

The term "withdrawal from a contract" is used in the Czech law for the described way of early termination of a contract called „termination", i.e. in the event that the contractor is in breach.

As regards the withdrawal from a contract concluded based on the Czech Commercial Code (i.e. if contractual obligations between the state, or a self-governing territorial entity, and entrepreneurs in the course of their business activities involve provision of public supplies), in particular the general regulation of withdrawal from a contract in the Czech Commercial Code applies, according to which it is possible to withdraw from a contract only in cases agreed in the contract or stated in the Commercial Code. Whereas, it is important to say that the Czech Commercial Code is based on the liberty-of-a-contract principle, and that is why only some of its provisions are mandatory and the contracting parties are entitled to agree differently from its non-mandatory provisions and to adjust the contractual contents to their needs; the same applies for withdrawal from a contract as well.

Within the context of the Commercial Code the default regulation applies for withdrawal from a contract, which allows both of the parties to withdraw from a contract if the other party is in default. There are different approaches if the default constitutes an essential breach of contract and if the default constitutes a non-essential (non-fundamental) breach of a contract. Upon withdrawal from the contract, the contract is discharged with effects ex nunc (i.e. effects of the withdrawal are not retroactive, but the withdrawal takes effect at the moment when notification of the withdrawal is delivered to the party in default).

It is also possible that the contract is withdrawn if, following conclusion of the contract, its basic purpose, as specifically stipulated in it, is frustrated due to a substantial change in the circumstances under which the contract was concluded. A change in the financial position of either contracting party, or a change in the economic or market conditions, is not deemed to be a change in circumstances. A party which has withdrawn from a contract shall pay compensation to the other party for any damage caused to the latter by such withdrawal.

The Czech Commercial Code governs certain possibilities when the employer may withdraw from a contract for work for reasons of contractor's non-performance:

The employer is entitled to withdraw from a contract, if the contractor fails to eliminate the defects resulting from deficient workmanship within a reasonable time limit granted to the contractor for this purpose by the employer, and if the contractor does not execute the work properly, whereas the contractor's conduct would indisputably lead to a substantial breach of the contract.

The employer is entitled to withdraw from a contract if the contractor provides faulty performance, if the contract is breached in a substantial way due to such faulty performance.

A breach is considered as essential (fundamental) when the party breaching the contract knew, or could have reasonably predicted, at the time of its conclusion, taking into account the purpose of the contract as evident from its contents, or the circumstances under which it was concluded, that the other party would not be interested in performance of the obligation in the event of such a breach of contract. Where there is doubt, it is presumed that a breach of contract is not essential (fundamental). An essential (fundamental) breach of a contract is in particular such faulty performance, which was described as an essential (fundamental) breach in the contract by employer or when negotiating the contract.

The employer is entitled to withdraw from a contract, provided that it notifies the contractor of the withdrawal in a timely notification of defects or without undue delay after such notification of defects. Once the employer withdraws from the contract, it cannot change its choice of settlement of rights which ensued from liability for defects without contractor's consent.

The employer is also entitled to withdraw from a contract, if it demanded the elimination of defects and the contractor fails to eliminate the defects within a reasonable additional time-limit granted by the employer, or the contractor advises the employer prior to expiry of this time-limit that it will not eliminate the defects. Until the time-limit for elimination of defects is not granted to the employer by the contractor, the contractor may inform the employer that it eliminates the defects within a certain time-limit. If the employer fails to inform the contractor without undue delay after such notification that it does not agree with such time-limit, such time-limit is deemed to be granted. The employer has to notify the contractor, when granting the reasonable additional time-limit or within a reasonable time-limit before withdrawal from the contract, that it intends to withdraw from the contract.

The employer is bound to pay to the contractor the amount by which the client enriched itself from the contractor's performance if the employer holds ownership title to the thing being made and, due to its nature, the thing cannot be returned or handed over to the contractor (typically constructions on

the client's land). If the contractor has ownership title to the thing being made, and the employer withdraws from the contract, the employer is entitled to demand payment of the price for the things taken over from it by the contractor which the contractor processed in executing the work, or which cannot be returned. The employer's right to damages is not thereby affected.

As for special laws, e.g. the Act on Public Contracts or the Concession Ac t, there is no different regulation on withdrawal from a contract. The Concession Act states only that a concession contract shall set out (i) the grounds on the basis of which the contract may be terminated prior to the expiry of its term, and (ii) delimitation of the legal relations of the contractual parties concerning the assets designed for the performance of a concession contract, including the rules for arrangements between them in the case of early termination of the contract. The concession contract shall, in addition, be governed by relevant provisions of the Commercial Code.

ILLUSTRATION:

In the present case it is necessary to investigate first, if the parties agreed otherwise. If not, the employer would be entitled to withdraw from the contract for reason of contractor's default being (possibly) a non-essential breach of the contract, if such breach has not been remedied within a reasonable additional time-limit granted by the employer.

Spain

The rule under Dutch Civil Code is that the client is always entitled to cancel the construction contract for reasons other than the contractor being in breach. In Spain, as well, the client can also cancel ("desistir del contrato") just because he doesn't want to go on. The construction contact is one of the few contracts in Spain that can be cancelled by the only will of one contractual part (art. 1.595 of the Spanish Civil Code). (...)In the Dutch system if the client wants to terminate the contract because of a constructor failure, the constructor can defend himself by saying: the client has no right to intervene with this work other that the agreed upon moments of control.

This defense would not be possible in Spain, as the Administration, the client, is always entitled to check and to control the construction works.

THEME 5: PUBLIC LAW RISKS (PERMITS, CHANGE IN LEGISLATION, ETC.)

Answers were received from:

Belgium

Under traditional Belgian (private) construction law, the client takes care of the permits required for the permanent construction works and the contractor for the permits required for the temporary works.
If the client cannot obtain the necessary permits, the contractor has a right of compensation for his expenses, his work and everything he could have gained from the contract.

Article 25 §1 of the Belgian General Contracting Conditions regarding public works contracts, public supply contracts and public service contracts (GCC) confirms that "only the fundamental permits required for the realization of the assignment must be delivered by the contracting government. The acquisition of the required permits for the execution of the works and all other submitted activities and obligations is the responsibility of the contractor".

If the client does not obtain the required permits timely, he is liable towards the contractor. In that case, the contractor has the choice either to ask for the termination or annulment of the contract, or to demand compensation for the loss he suffered due to the delay, regardless of the reasons of that delay.

In our opinion, these rules are fully applicable to DBM-contracts.

The distinction between "primary permits" and "secondary permits" is often made in DBFM-contracts as well.

Primary permits, such as environmental and building permits, are prepared by the contractor, but submitted by the client. In principle, the client has the responsibility to check, prior to the tender proceedings, whether the project is compatible with the applicable regulations, such as the urbanism en environmental regulations.
The risk of not obtaining a permit, the risk of obtaining it too late, and the risk of an annulment after a successful legal challenge, lie with the client.
The risks related to secondary permits, being permits related to the activities of the contractor (such as a permit for a temporary mobile construction site), lie with the contractor.

However, precisely because of the significant risks related to primary permits, a practice has grown by which a DBFM-contract is either not concluded as long as the required permits are not obtained, or is concluded under the suspending condition of obtaining these permits. This results in the preferred

bidder applying for the permits. A compensation can be granted to the preferred bidder if the necessary permits are not obtained.

The Flemish PPP Knowledge Center even suggests that DBFM-contracts are to be preceded by a formal "precontract" in which the parties make arrangements about the permit trajectory and its outcome.

In a recently presented (draft of) "Indicative Tasks-Risks Allocation Matrix DBFM" , the contractor not only takes care of the drafting of the permit applications, but also applies for the permits.
If not all of the necessary permits are being obtained, the availability date is suspended. The contractor has a right to claim compensation if his damages cannot be avoided and exceed the agreed level. If the suspension lasts more than a year, the DBFM-contract is not only terminated, but the contractor has also a right to claim compensation for the costs related to the financing of the project and for the expenses of the subcontractors, insofar they exceed the agreed level.
A similar arrangement is proposed if a permit imposes unforeseen changes in the design of the project or if a permit is cancelled or suspended during the availability phase, meaning after the building phase.
Again - and only if his damages exceed the agreed level - the contractor has a right to compensation in case of an unforeseen change of the regulation relevant to the project, including the change of fiscal regulations.
In conclusion: the Belgian (Flemish) DBFM-practice is almost identical to the Dutch DBFM-practice.

Germany

The size and complexity of the projects which are dealt with by the German A-Model contracts, i.e. construction of federal motorways, require that the overwhelming part of the required public law permits have been issued already before a contractor enters into a concession agreement with the client. According to German administrative law (§§ 72 et. seqq. VwVfG) clearance of certain projects which would otherwise typically affect a wide variety of different public authorities – construction permission, environmental authorities and others – is granted through a particular procedure, the so-called "Planfeststellungsverfahren". According to the "Bundesfernstraßengesetz" (Federal Motorways Act) also the construction of federal motorways requires such a procedure.
An update on these proceedings is usually indicated by the client throughout the tender procedure. Typically, one can expect that the required public law permits are valid and available for the execution upon execution of the concession agreement.
Compared to the approach of German A-Models where the general planning normally is the client's liability it appears that the DBFM approach considerably deviates therefrom. Generally, only few permits such as those according to the Flora and Fauna Act appear to be rendered by the client. On the other hand it is noteworthy that according to the risk matrix under theme 11 a "delay in

planological procedures" is at the client's risk. Apparently, also the "Dutch community" is well aware that at least with regard to a tender for a comprehensive project, e.g. referring to a motorway, the client has to provide considerably more permits than those presently reflected in the DBFM.
In contrast to the UAV-GC 2005 VOB/B stipulates that the client has the full obligation to procure any necessary permits or licenses under public law (e.g. building and road traffic legislation, water regulations and trade law), see § 4 (1) VOB/B . In standard construction contracts the client shall also provide the planning and building permission, § 3 (1) VOB/B. Furthermore, the client will have to deliver – free of charge and in good time - the detailed design and any other documents pertaining to the execution of the work. In addition, § 3 (3) VOB/B requires that the surveys of the site and its demarcation shall also be provided by the client.
Pursuant to § 4 (2) VOB/B the contractor is liable to execute the works in compliance with the recognized rules of sound engineering practice and the relevant statutory and official provisions. Moreover, the contractor is solely accountable for the discharge of his liabilities towards his employees arising from statutory, official and employers' liability insurance provisions, as the contractor is in authority to execute the works in accordance with the contract under his own responsibility.
Although VOB/B provides for a clear and reasonable allocation of public law risks between the parties to a civil works contract practice shows that the above mentioned principles are more than once set aside and a completely different allocation is made, mostly to the detriment of the contractor. Amongst others it will be up to the contractor to provide the necessary permits under public law which may include the risk of potential law suits involving neighbors or wildlife-activists. Furthermore, the contractor is frequently requested to waive any claims for delay or compensation due to such events.

Switzerland

I. Commentary

The system outlined in the case description is essentially the same as that found in Swiss contract practice, as far as we can see. It is worth noting, however, that SIA 118 does not contain any detailed provisions in this regard. It is nevertheless clear that it is incumbent upon the client – and not upon the contractor – to obtain the necessary construction permits. At the same time, it is, of course, also possible for the client to entrust the contractor with the task of seeking the permits required for a project that has been planned by the client. In the event that the permits are denied, however, the contractor may be held liable only where he has failed to show due care in his efforts to obtain them. The situation differs where the agreement provides that the contractor is also responsible for the design of the project (total services agreement, cf. Theme 1). In such cases, the contractor undertakes to design a project for which authorization is obtainable (to the extent that the client's specifications do not render this impossible). In the event that the construction permit is then denied due to failure of the design to comply with statutory requirements, the contractor may be held liable for breach of contract. It is possible that he will be required to redesign the project without

remuneration and that he will be held liable for any resultant damages, such as those occasioned by a delay in the commencement of construction, for example.

United Kingdom

Contract Provisions:

Dutch Contract
Article 6 – Model Agreement of UAV-GC 2005
Clauses 9, 10 – General Conditions of UAV-GC 2005

DBFM 2.0 Delay in issue of permit could become Compensation Event (Clause 9.3) or Delay Event (Clause 9.2). If Delay Event is prolonged, Contract may be terminated (Clause 10.5 and Schedule 4 Clause 3).

JCT Design and Build Contract (DB 2005)
Clause 2.26.12 A Relevant Event may include "delay in receipt of any necessary permission or approval of any statutory body which the Contractor has taken all practicable steps to avoid or reduce".
Clause 2.26.12 A Relevant Event may include "the exercise after the Base Date by the United Kingdom Government of any statutory power which directly affects the execution of the Works".
The Relevant Events are to be notified by the Contractor for the purposes of extension of time under the Adjustment of Completion Date provisions.

Under the FIDIC forms of Contract, the Contractor is under an express obligation to comply with the applicable Laws.
Sub-Clause 1.13 (1.14 for the DBO Gold Book) provides that "The Contractor shall, in performing the Contract, comply with applicable Laws".

Comment Both Parties are obliged to comply with existing laws and that extends to any changes in the laws. The Contractor's general obligation is not restricted to Laws in Force at the time of conclusion of the Contract.
However, under Sub-Clause 13.7 (13.6 of the DBO Gold Book) the Contract Price is to be adjusted to take into account "any increase or decrease in Cost resulting from a change in the Laws of the Country" made after the Base Date, if those affect the Contractor's performance of his contractual obligations.

Changes to the Laws is particularly widely defined under the FIDIC Contracts to include not only the introduction of new laws but also changes in the "judicial or official governmental interpretation of such Laws."
Under 8.4, the Contractor would also get an Extension of Time in respect of any delay suffered by changes in the law suffered.
Note that Sub-Clause 13.6 of the DBO Gold Book includes a provision not found in the other Books to the effect that "Adjustments to the execution of the Works or provision of the Operation Service necessitated by a change in law shall be dealt with as a Variation."
Regarding licences and permissions, in all Books Sub-Clause 1.13 (1.14 of the DBO Gold Book) allocates responsibility between Employer and Contractor.
The Employer is responsible for "the planning, zoning or similar permission for the Permanent Works" (and any other permission specified in the Employer's Requirements).
The Contractor is responsible for "all permits, licences or approvals as required by the laws in relation to the design, execution and completion of the Works and the remedying of the defects".
The DBO Gold Book adds "Operation Service" to "the Works".

Three further points should be made:
First, although FIDIC attempts a proper allocation of responsibility for obtaining permits and equivalents between Employer and Contractor, there is scope for serious ambiguity with the use of the words "or similar permission" for the Permanent Works.
Second, under Yellow, Silver and Gold Books, where the Contractor has the principal design obligation, there is a requirement that the design and Works will "comply with the Country's technical standards, building construction and environmental Laws, Laws applicable to the product being produced from the Works, and other standards specified on the Employer's Requirements, applicable to the Works or defined by the applicable Laws".
Third, under the DBO Gold Book, the Contractor has an additional and very onerous obligation to "at all times and in all respects comply with, to give all notices under, and pay all fees required by any licence obtained by the Employer in respect of the Site or the Works or the Operation Service".
It may also be noted that by Sub-Clause 2.2 there is a somewhat diffuse obligation upon the Employer to "(where he is in a position to do so) provide reasonable assistance to the Contractor at the request of the Contractor: ….for the Contactor's applications for any permits, licences or approvals required by the Laws of the Country". The dilution in brackets and in the word 'reasonable' robs this obligation of much of its potential force.

Denmark

Let me start with compliments to the "listed risks procedure", which I have never seen before.

It secures that the responsibility for the subjects listed are defined. However, it still leaves open the discussion of the unforeseen, necessary permission. Is it reasonable to transfer this to the Contractor? After all the ownerership of the site and the final construction still remains with the Employer.

I find this factor is very important when discussing attempts to transfer risks to the Contractor.

With the wording of the clauses the (heave) burden of proof lies with the Contractor. It is the Contractor, who shall obtain all permits for the performance of the work and all cost related thereto.

This also includes additional cost, because the authorities request more expensive solutions during the performance than foreseen in the Contractors design.

But does this always constitute a "fair result"? Can the Employer transfer risks that are unforeseeable for as well the Employer as the Contractor?

Example from Denmark:

The fire authorities in Denmark will only discuss fire subjects and solutions with the Employer during the bidding period.

Therefore, the Employer has listed in the tender documents, which technical solution he - on basis on the discussions he had with the fire authorities - will accept. The Contractor enters the costs for this solution, since it is the best at the time of preparing the bid and he has no possibility to obtain better information from the authorities.

When the Contractor – often more than one year after calculation of his bid – send this design with his application to the fire authorities a new and much more safe technical solution has been invented and is required as a condition for permitting the construction. Of course it is also much more expensive than the foreseen solution.

In my opinion this additional kind of costs must be born by the Employer – he will be the Owner of the works at the end of the day.

What should be transferable is only the risk for cost for work the Contractor had a reasonably possibility to foresee at the time of the bid. Not for new law or other unforeseeable requirements concerning the construction as such, unless it has been specifically dealt with in the contract.

Slovakia

This theme is very interesting and complex enough due to the consequences that can occur to contract parties. Because rights and duties are assigned to contract parties by model contract conditions, each contract party has knowledge of the extent and consequences of their acting, or has knowledge of their rights and duties. Such clauses are missing in our legal system and it would be useful if they were included into basic legal regulations and implementing rules.
In general, according to our legal regulation, legal system of rights and duties concerning the provision of permits for construction depends on the agreement of contracting parties. The most used instrument included in the contracts is contract authorisation or commercial procuration /in the form of mandate contract/ for accomplishing the needed permits. In any case the consequences of legal act are primarily on the client, eventually the property owner or investor. Contractor is liable in case when this duty results form the contract, or if contractor somehow participates on this duty by his or her acting aor non-acting.
According to the act on public procurement the construction contracts shall have character defined in the Commercial Code. Particularities will be solved by the contracting authority at the time of the notice of competition terms and no problems should occur when concluding and realization of contract.
During the execution of work contractor is obliged to fulfil all the terms that imply form the zoning and planning decision and building permit. If damage occurs due to not fulfilling these terms, the damage is compensated by contractor in the whole extent. During the realisation of work the contractor is obliged to execute all necessary measures that will prevent from unwilling effects of construction on the surrounding environment and he or she is obliged to follow all terms implying from legal regulations that govern the matter of environmental impact of construction.

Czech Republic

Contracts on construction usually deal with performance of works by the contractor based on project documentation and official permits for construction secured by the employer in advance, i.e. works for whose performance the contractor is chosen by the employer based on already prepared project. Typical solution is that the employer is liable for acquiring permits necessary for performance of construction (mainly planning permit and building permit), most often these permits are acquired already before conclusion of the contract on works. Subsequently, the contractor is liable for acquisition of all temporary permits (e.g. regarding temporary infrastructure on the site) and for compliance with legal rules during the construction (e.g. safety, qualification of workers, fulfilment of provisions regulating performance of specific works), that in the extent agreed in the contract.

Commercial Code in connection with Civil Code regulates the so called institute of subsequent impossibility of performance, which leads to termination of the obligation of the debtor to perform. In

the commercial relations, it applies that the impossibility of performance arises also in case legal rules made after conclusion of the contract, the effectiveness of which is not limited in time, prohibit the debtor to perform according to the contract or demand official permit, which has been applied for by the debtor, however was not granted. In case of only partial termination of obligation to perform, the employer is entitled to withdraw from the rest of the performance, if such remaining performance looses its economical importance. Subsequently, provisions on remuneration of damages apply to the situation, as the contractor (debtor) is obliged to reimburse to the employer damages, unless the impediment, which caused the impossibility to perform, arose independently of the debtor's will, provided it is not reasonably possible to anticipate that the debtor could avert or overcome such obstacle.

The above specified legal regulation is non – mandatory and gives the parties possibility to agree differently.

The situation is similar with regards to contracts on construction with the contracting entity from the public sector on the side of the employer. Unless agreed otherwise in the agreement, the above mentioned legal regulation shall apply.

The Concession Act states, that the concessionaire shall bear a substantial proportion of risks attaching to the enjoyment of benefits from the provision of services or the exploitation of the executed work, the distribution of the other risks between the contracting entity and the concessionaire shall be stated in the concession contract. It is obvious that neither this provision gives specific answer to the question, which party shall bear which risks. The agreement of the parties is decisive.

The possible direction of risks division might be traces from the methodology of the Ministry of Finance of the Czech Republic "Management of Risks in PPP Projects" dated 11th September 2008 and its annexes, which deal with identification, evaluation, allocation, handling and control of risks in PPP projects.

The methodology of the Ministry of Finance mentions as the basic principle the principle of allocation of risk to such party which is better able to control such risk and which is more probably able to minimize incurred costs, while the fact that allocation of risks to private sector will show in the project price and will influence total costs to be borne by the contracting entity (employer), has to be taken into account. It is necessary to consider whether the additional fee of the contractor for take – over of the risks is not higher than the costs, for which the employer itself would be able to manage the said risk.

The methodology allocates the risks as follows. In case official permits shall be granted after conclusion of the agreement, the risk connected with its issuance shall be allocated to the contractor, or, as the case may be, shall be shared by the parties. The risk of supplementary permits shall be allocated to the contractor. Some special risks, connected e.g. with construction in protected area or dealing with constructions protected as cultural landmark, shall be born by the employer. Legislative risks and tax risks shall be divided according to their features, as the methodology recommends. The risks of general changes of legal rules, which shall influence the whole private sector, shall be born by the contractor, as he shall bear these risks also in case he would perform its activity only within the private sector. On the other hand risks consisting in changes of legal rules which shall touch only the contractor of the said project, shall be born by the public sector, thus the employer. However, the agreement of the parties will be decisive.

Spain

The system is very similar in Spain.

THEME 6: SUBSOIL CONDITIONS

Answers were received from:

Belgium

When a contractor is confronted with deficiencies in the subsoil (e.g. unanticipated composition, unanticipated pollution, archaeological finds, etc.), this can lead to enormous extra costs and/or a delay of the works. Below we will explore how this problematic is approached in Belgian DBFM contracts. We will also make a comparison with the regulation from the Dutch model agreements.

Legal regulation under Belgian law

When a contractor in Belgium is confronted with soil deficiencies, he can initially call upon two provisions, specifically art. 16, § 1 and art. 16, § 2 AAV .

If the contractor can prove an error on the part of the government, it is possible to invoke art. 16, §1 AAV. Pursuant to this regulation, the contractor will for example be entitled to a compensation of the extra costs if it can be demonstrated that the government neglected to provide (correct) information relating to the soil conditions .

In addition, under art. 16, §2 AAV the contractor can also demand an extension of the deadline or revision of his contract, without having to prove an error on the part of the government. For application of this provision, however, the contractor must demonstrate that circumstances were involved which he could not reasonably have anticipated at the time of submitting his tender, which he could not avoid and whose consequences he could not remedy . For article 16 §2 AAV, no failure on the part of the government has to be proven.

Finally, it must be repeated that in accordance with art. 3 AAV it is possible to depart from the General Contracting Terms in the specifications of the DBFM contract, something which occurs frequently .

Contractual regulation: the risk-allocation matrix

If, in the specifications, the government departs from art. 16 AAV, it will provide in the contract itself for a regulation regarding force majeure and unforeseen circumstances.

In the first place the parties will provide their own regulation for force majeure. It is striking that these regulations are often more restrictive than the regulation of art. 16, §2 AAV. For example, in DBFM contracts the parties will usually provide a limitative list of the cases of force majeure . In addition, the parties will also mutually regulate the contractual consequences of force majeure.

Along with the regulation for force majeure, a risk-allocation matrix is generally included in the DBFM contract. In such a matrix the various potential risks are distributed between the principal and the

tenderer, whether or not coupled with a lump-sum compensation or franchise. In preparing the matrix, the parties will explore (taking the concrete circumstances into account) which party is the most appropriate to bear a particular risk, and this party will then assume the risk in question. For example, one will often include in this matrix which party must bear the risk for unforeseen circumstances relating to the soil composition, at what price and under what conditions .

Comparison with the Dutch model agreements
In the Dutch UAV-GC 2005 there are two provisions which contain a regulation for soil deficiencies. Firstly there is Clause 44-1, c), which to a great extent corresponds to our art. 16, §2 AAV. We also find in this Dutch model agreement a provision which focuses specifically on soil composition, namely clause 13. However, the result that is attained with this Clause is virtually the same as by application of art. 16, §2 AAV.

In the DBFM 2.0 contract, soil deficiencies can give rise to compensation or deadline extension, in so far these deficiencies can be qualified as a ´compensation event´ (Clause 9.3), which nevertheless is limited.

Germany

With regard to "Subsoil Conditions" the German A-Models provide for a balanced approach which is in principle comparable to UAV-GC 2005.
Generally, as it has already been mentioned under theme 1 the German A-Models provide for wide risk allocation on behalf of the contractor according to Clause 3.2 A-Model contracts. At first, this also applies for the liability concerning "subsoil conditions". Clause 10 A-Model contracts explicitly require the contractor to familiarize himself with the specific conditions of the "object of the concession" (Konzessionsgegenstand) during the tender process which includes – if it is deemed necessary – to perform respective explorations. This principle is confirmed in paragraph 1 of Clause 29 A-Model contracts which explicitly deals with "ground risks"
However, Clause 29 A-Model contracts contains several exceptions to this general rule. To a certain extent the client takes responsibility for specific surveys and documents which the client has released during the tender process, i.e. with regard to contaminated materials or archaeological remains. This means that the contractor may claim "time & money" if it turns out that the actual circumstances encountered deviate from those which could have been expected from the tender documents. With regard to the criteria "which could have been expected" also the German A-Models (comparably to UAV GC 2005) apply an objective test, i.e. reference is made to the infamous "prudent contractor". However, with regard to the illustration given under the German A-Model regime a contractor would have good arguments to claim "time & money" if the archaeological remains were located more than 100 kilometers from where the tender documents had indicated them. Such a difference would also go well beyond what a "prudent contractor" is required to anticipate.

Unlike under the Dutch regime it is a main principle in German law that subsoil conditions and the risks that arise in that context solely rest with the client. Nonetheless, it is common practice of clients to attempt to shift those risks to the contractor which is a frequent matter for subsequent litigation. The German principle of allocating these risks may be derived from §§ 642, 644 and 645 BGB , although the wording and definition of subsoil condition risks are not expressly defined in German law. In fact, the general rule in this context is that the client shall perform necessary or needed actions (including providing a development-ripe building site) in order to enable the contractor to begin or proceed with the work. If the client delays such actions or if he completely fails to do so the contractor will be able to claim compensation on basis of the contractual remuneration pursuant to § 642 BGB, as illustrated above.
The VOB/B complements this main principle by single rules reflecting the needs of the building process. For instance, pursuant to § 4 (9) VOB/B the client will reimburse the contractor for any extra costs incurred by the discovery of objects of archaeological or scientific value on the work site during execution of the works. The contractor will report the findings in question to the client before proceeding with any further excavation or disturbance of the site. Furthermore, § 6 (2) Nr. 1 lit. a) VOB/B gives the contractor the right to claim for an extension of the terms set for the execution of work if the obstruction is caused by circumstances concerning risks allocated to the client. But only if one party to the contract is answerable for the cause of the obstruction, then the other party shall also be entitled to indemnification for any damages which have demonstrably been sustained. However, indemnification for loss of profit will only be claimable in the case of intent or gross negligence. As already stated above, concerning public authorities there are mandatory regulations and obligations for the client on this topic like for example in § 7 (1) Nr. 6 VOB/A (proper description of the essential circumstances of the building site).

Switzerland

I. Additional Assumptions

☐ The precise location of the Roman stronghold was known to neither the client nor the contractor, neither when the tender invitation was issued nor when the agreement was executed.

II. The Case

Under Swiss law, site risk lies with the principal unless otherwise agreed by the parties. (cf. art. 58 par. 2 SIA 118). The basic regime has already been described above, in connection with Theme 1. It is incumbent upon the principal to investigate the site qualities in advance and to include a statement of the findings in the invitation documents. There remains, however, an obligation on the part of the contractor to verify the findings in cases in which neither the principal nor the principal's designers have the necessary professional qualifications to judge the site conditions. Given the nature of the project at issue in the case at hand, however, it may be assumed that the client had the requisite professional qualifications. The contractor is thus entitled to additional consideration and to an extension of the agreed completion dates, insofar as this is necessary.

As concerns the client's argument with regard to the degree of imprecision inherent in all predictions, it is true that predictions, particularly with regard to geological or archeological conditions, cannot be expected to be entirely accurate. Where the client has investigated the planned site with all due care and, on that basis, formulated a prediction, which he then makes available to the contractor for use in the preparation of his tender, it is indeed correct to say that the contractor may not rely on the supposition that the prediction will prove to be 100% accurate. Rather, given the natural uncertainty inherent in predictions, he must assume that the reality may turn out to be different to a certain (slight) degree. The case is completely different, however, where the client's prediction was not prepared with the requisite care, so that the contractor was not, or was not sufficiently, informed as the likelihood of a given risk being realized. The situation is also different in cases in which the prediction was prepared as required by the state of the art, but the actual facts nevertheless diverge from what was predicted to a larger degree than is usual for predictions. In both of these cases, the defense that it is in the nature of predictions and estimates not to be 100% accurate is not open to the client. However, where the prediction was prepared with the requisite care and the reality does not diverge from it to a degree larger than what is usual for predictions, the client is indeed clearly entitled to raise this defense.

III. Relevant clauses in SIA 118

Invitations for Tender in general

Preparation

Art. 5, par. 2 SIA 118:

"Prior to issuing the invitation to tender, the principal investigates the local conditions, in particular the characteristics of the site, insofar as relates to the work to be carried out; he describes the findings, in detail, in the tender invitation documents (art. 7), indicating any applicable regulations or risks that have come to light. On the contractor's duty of investigation, see art. 25, par. 3."

Obligation to Notify and Duty to Warn

Art. 25, par. 3 SIA 118:

"The contractor has a duty to reexamine the design delivered to him and the proposed construction site only in the event that the client is not represented by a construction supervisor, is not himself a professional, or has not been advised by a professional consultant. The contractor shall, nevertheless, provide immediate notification of any incongruities or other defects that come to his attention in the course of the performance of his tasks, pursuant to par. 1 and 2, and advise the [owner's] construction supervisor of the detrimental effects thereof (duty to warn)."

Extraordinary Circumstances

In General

Art. 58, par. 1 SIA 118:

"Where the performance of construction services undertaken on a fixed price basis is hindered by extraordinary circumstances arising or appearing only subsequent to execution of the agreement, with no fault imputable to the client, the contractor shall nevertheless perform the services due at the agreed price with no entitlement to additional remuneration. Excepted are the special cases set forth in arts. 59 – 61."

Art. 58, par. 2 SIA 118:
"Where the principal is at fault, the contractor is entitled to additional remuneration, to be determined in accordance with the provisions of arts. 86 – 91, applied analogously. The principal is to be considered at fault, in particular, where the site information contained in the tender invitation documents was deficient, on condition that the principal was represented by a construction engineer, is himself a professional, or was advised by a professional consultant."

Extraordinary Circumstances
Special Cases
Art. 59, par. 1 SIA 118:
"The contractor is entitled to additional remuneration where extraordinary circumstances that could not be foreseen or of which the possibility was excluded, based on the assumptions held by both parties, prevent or unreasonably hinder completion. Such circumstances may include: ingress of water, earthquakes, storms, seepage of gas, high underground temperatures, radiation, severe official restrictions, labor-related disturbances.

Adjustment of Time Limits
Art. 90 SIA 118
"Where a change of instructions renders necessary an adjustment of the contractual time limits (art. 92), the contractor is entitled to the fixing of appropriate new time limits. The contracting parties fix the new time limits contractually."

Denmark

Here we revert to one of the main issues already dealt with in Theme 1.

Which investigations should the Employer carry out? Which should every bidder carry out?

Again the outset is, the Employer wishes to know the exact price of the construction he is about to have build. He will exclude any unforeseen risk to the Contractor. Again what should be foreseen and is it reasonable to transfer the risk to the contactor seen in the light that the Employer expects competitive bids?

I would not exclude it could be in the interest of an Employer to have a "guaranty" that no extra cost shall be paid, i.e. if any additional costs will lead to bankruptcy for the Employer or some similar situation. In this case it must be dealt with in details and specified, that no matter the reason for the unforeseen cost it must be born by the Contractor.

I would recommend a special "risks" sum is allocated to such clause. It should reflect what a prudent Employer would set aside for unforeseen cost. If nothing occurs the Contractor will have the benefit.

One additional reason for this clause could also be, it will prevent (almost) litigation afterwards concerning the justification of the work being additional, the technical solution and maybe more often seen, the price to be paid. Furthermore, the parties would save cost for lawyers, experts and arbitrators.

Now, what is the answer to the question in this case. Is it reasonable for a bidder to foresee an old Roman military stronghold, that was expected to be 100 kilometers away.

My answer is NO.

The UAV Clause 13 and 44 reflects this opinion. The Pro Rail amendments do not cover this special situation, and make no difference to the answer. DBFM would neither change the result.

Therefore the Employer must pay the additional cost to remove the stronghold and the cost for the delay incurred.

Slovakia

Although this subject is quite particular, this subject, in the view of with our jurisdiction, is actually about the question of defects liability exclusions when contractor is not liable for damages occurred due to inadequate instructions given by the client in case the contractor gave notice to client on the inadequacy of these instructions and the client insisted upon them or contractor could not detect such inadequacy. In practice, this can be affected also by cohesion with the application of particular legal regulations, as it is in the case of construction works on dangerous subsoil. In the given case the basic legal regulation is in cogency with Commercial Code and contracting parties cannot agree on different rights and duties neither in their contract nor in the general terms and conditions.
Risks that are stated in theme 6 and their evaluation will depend on particular case and we consider whether can be foreseen by the standard. Stoppage of the works can be considered as a "force majeur" being solved in the contract as a liberalisation of contractor.
According to the Slovak legal order, in this particular case the work would have to stop until the decision of particular state authority, e.g. Monuments Board of the Slovak Republic in accordance with

valid legal regulations. If contractor discovers archaeological findings during the execution of works, he is obliged to interrupt the works and give a written notice to client and all state authorities concerned. Client is obliged to decide upon the next steps in a written form immediately as soon as he received this notice from contractor.

Czech Republic

The question of subsoil conditions is an example of a typical conflict between a due fulfillment of private-law obligations and observance of public-law duties (e.g. in case of archeological discovery), eventually between the will of the contractor to perform the construction contract duly and objective circumstances disabling such due performance (e.g. in case of unsuitable geological conditions, high level of underground water etc.).

In the Czech Republic, there is no equivalent to General Commercial Terms like UAV-GC 2005 or DBFM 2.0. The construction realization is in principal subject to the Czech Commercial Code . Due to the fact that the basic principle of the private law in the Czech Republic is represented by the principle of liberty-of-a-contract, the allocation of possible risks is at discretion of the parties. Only in case the question is not subject of the agreement between the employer and the contractor, the rules stated in the Commercial Code shall apply.

The issue of hidden obstacles is subject to the Commercial Code according to which in case the contractor, while performing the work, discovers hidden obstacles regarding the place (site) of performance of the works, which unable performance of the work in the agreed manner, the contractor shall inform the employer thereabout without undue delay together with his proposal for a change in the work.

Until agreement is reached regarding a change in the work, the contractor may suspend performance of the work. If in a reasonable time period, the parties fail to agree on amending the contract, either of the parties may withdraw from the contract. If the contractor has not breached his duty to discover the obstacles before work commencement, no party is entitled to payment of damages. The contractor is entitled to payment for that part of the performed work, which was completed until the time, when he was able to discover the obstacles, if acting professionally.

As for projects in public sector, a methodology issued by the Ministry of Finance of the Czech Republic "Risk management in PPP projects" dated 11th September 2008 might be used as inspiration. This methodology tends to transfer the risks related with archeological heritage to the employer, while it recommends to transfer the risks related to unsuitable situation of the place (e.g. the above mentioned unsuitable geological conditions) to the contractor.

Each risk must be solved individually, according to the agreement of the parties included in the contract, which may depend not only on costs related with risk born by one or the other party but also on the fact, who is obliged to conduct landscape survey etc.

ILLUSTRATION:

In the said case (archeological discovered more than 100 km far away possible digs), the breach of the contractor's duties does not seem to have occurred. However, the question, if the contractor has breached his duty to discover the obstacles, must be clarified in each individual case. In such case, the law gives priority to the parties' agreement. If there is no agreement, the contract may be withdrawn by the employer and the contractor as well. In case of withdrawal from the contract by the contractor, he would be entitled to the price for the part of the performed work until the time the obstacle could have been discovered if acting professionaly. This applies in case there has not been another agreement between parties.

As for archeological discoveries, this question is governed by public-law regulations in the Czech Republic, namely by the National Monument Preservation Act and Building Act . According to them in case of any construction realizations in the area with archeological discoveries, the builders shall inform the respective state authority on this intention as of the day of construction preparation and enable a rescue archeological survey. The discovery, which has not been performed when taking archeological surveys, must be noticed. The building authority may impose measurements for public interests, may order necessary land modifications, it is even possible to order expropriation of land, or to modify or reverse the building permission. In such case, subsequent impossibility of performance may occur, which would cause the termination of the obligation to perform (see theme 5).

Spain

Subsoil conditions contain a large risk for construction works. In the Netherlands, the UAV-GC 2005 and the DBFM 2.0 imposes the risk on the contractor.

On the contrary in Spain the contractor has not the risk of the subsoil conditions. As the constructor has not made the initial project, he is not the designer, he is not responsible of the subsoil. The constructor is only responsible of the execution of the project, and if there are problems with the subsoil he can claim for extra money or time. Normally in Spanish public contracts there is a specific clause to regulate this point.

THEME 7: EXTENT OF THE LIABILITY, LIABILITY TO THIRD PARTIES

Answers were received from:

Belgium

Belgium is a civil law based country. In principle, according to civil law, the liability of a contractor towards its client as well as third parties is unlimited, subject to the general principles of causation and mitigation.

As between the contractor and the client limitations or waivers of liability(ies) may lawfully be agreed. Already traditionally in Belgian construction contracts one will read clauses providing for delay damages. But nowadays increasingly one detects more general responsibility exoneration clauses as well as provisions introducing kinds of caps on the liability of the parties as between each other. These provisions are heavily inspired by the Anglo-Saxon tradition. They introduce legal concepts such as indirect and/or consequential damages that until some decennia ago were unknown. Still today the implications and limitations of these new notions are in the course of being explored in the court rooms.

Belgian DBFM contracts, as they are inspired by examples from i.a. the United Kingdom, contain as well provisions limiting or waiving liability from one party towards the other. A cap on the overall responsibility of the contractor towards the employer expressed by way of a percentage of the value of the project is not uncommon. By way of alternative it may be said that the amount of the damages that are payable is capped by the cover that is provided by the different insurance policies that are taken out for purposes of the project– with the deductibles still for account of the contractor.

Towards third parties there are many issues that may cause the contractor and/or the client to become liable. DBFM agreements will address as much as possible such issues, almost always as a rule of thumb declaring that the contractor shall indemnify the principal in respect thereof.

Thus, all in line with ordinary construction contracts, it will be provided that the contractor carries the risk of damages to third persons and their property or goods resulting from his activities i.e. the design, the construction, the operation and the maintenance of the works.

Also it will be provided that the contractor carries the risk of interferences etc. which are the unavoidable result of the construction of the Works. Such provision is a permitted deviation from long standing case law - that is endorsed by the Cour de Cassation (see i.a. Cass., 6 April 1960, Pas., 1960, I, 915; Cass., 28 January 1965, Pas., 1965, I, 521) – according to which damages without fault are owner's risk by reference to article 544 of the Belgian Civil Code.

Furthermore the contractor will be deemed, at the time when he prepared his offer, to have taken into consideration the copyright, patent and other intellectual and/or industrial property rights of third parties. Consequently he shall be obliged to indemnify and hold harmless the client in respect of any

claims based on such rights – all as mentioned before, even in case a supposed infringement is the unavoidable result of the contractor's compliance with the employer's requirements.
Likewise in all instances the responsibility for damages to any type of utility lines will be shifted to the contractor.
Somewhat more elaborate text will be required to deal with claims by subcontractors. If and when and to the extent that certain risks in the main contract are allocated to the client, such claims will be entertained on a back-to-back basis. In case, according to the main contract, the risk lies with the main contractor, he will need to hold harmless the principal.

Finally as regards damages to third parties as well caps or waivers of liability may be introduced in DBFM contracts. In the event the liability will be taken over by the employer as applicable for all sums in excess of the limitation figure.

Germany

With regard to the above topic the German A-Model contracts differ from the provisions foreseen in Dutch DBFM contracts.
According to the German A-Model regime the contractor is liable to reimburse the client any damage whenever he fails to duly comply with the obligations he has undertaken according to the contract. This liability also comprises indemnification in case of the third-party claims which are addressed towards the client.
German A-Model contracts (Clause 24 A-Model contracts) do not provide for any limits of these liabilities. At the same time they require the contractor to conclude insurance policies which cover third-party claims which may arise in the context of constructing or operating and maintaining the concession object (Clause 57 A-Model contracts). These policies need to include the contractor as well as its sub-contractor(s) and must provide that a sum of € 10 Mio. is available twice a year for all incidents which require insurance cover.
Also, German A-Model contracts are familiar with the idea of limiting the contractor's liability within certain thresholds. Yet, as mentioned above, this does not refer to cases of a contractor's default but to cases of force majeure or third party's violence (Drittgewalt, see Clause 26 A-Models contracts), hence, circumstances beyond control of the contractor. In these cases Clause 26 A-Model contracts generally limits the liability to rectify defects or destruction of the concession object to € 5 Mio per incident (as long as no insurance policy applies) and to € 15 Mio. in total.
From an "outside perspective" and also considering what has been considered under theme 5 ("Abrahamson principle") it is not quite clear why the Dutch DBFM 2.0 model is rather "generous" in limiting the contractor's liability in cases of his own default. According to the rule that risks should be borne by the party that can best handle them we would tend to assume that German A-Model approach is a more appropriate one.

According to BGB the extent of the defects liability is the same as under Dutch law, i.e. generally unlimited . Limitations of liability by individual agreement of the parties are hardly common practice. However, under the VOB/B a few minor concessions to this general principle are made as incorporated in §§ 6 (6), 10 and 13 (7) VOB/B. In the context of defects liability according to § 13 (7) VOB/B the contractor shall be obliged to compensate the client for loss or damage to the structure, for the construction, maintenance, or alteration of which the work found to be defective was intended to serve. This rule will only apply if a serious defect which appreciably impairs the fitness for use is to be attributed to a fault of the contractor or his agent. However, he will only be obliged to compensate for loss or damage over and above this threshold if one of the criteria stated in lit. a) – lit. d) is fulfilled. For example, if the defect in question is the result of willful or gross negligence or the given defect is the result of a breach of the recognized rules of sound engineering practice or if the defect consists in the lack of a characteristic assured in the contract. Regardless of the above stated criteria, the liability of the contractor according to the law of tort is likewise unlimited. But under the rules of the VOB/B (see § 13) the parties to the contract actually may agree to a limitation or extension of liability – limited to special cases whenever such limiation is justified. In cases of obstruction or interruption each party pursuant to § 6 (6) VOB/B is entitled to claim indemnification for any damages which have demonstrably been sustained (only valid under the condition that the other party is answerable for the cause of the obstruction/interruption) . But the claiming party will only be entitled to claim indemnification for loss or profit in case of intent or gross negligence. Additionally, § 10 VOB/B amends the dispensation of liabilities of the contracting parties amongst each other on basis of BGB-principles. It includes for example the general concept that the contractor shall be solely liable for the loss or damage if he has insurance coverage for statutory liabilities or could have provided such cover by an insurance authorized to conduct business in Germany.

Switzerland:

I. The Case

The contractor is liable for all damages to the extent that he is at fault or that he bears liability for auxiliaries. Applicable in such cases are the ordinary statutory rules on liability, which are not modified by SIA 118.

At issue in the case described is not a question of liability for defects, but of liability for negligence in the performance of the construction. This distinction is of central importance under Swiss law. It is true that the contractor is liable in full for the damages even in cases where defect liability is involved; neither the Code of Obligations nor SIA 118 foresees any limitation based on the nature or exent of the damage. At the same time, however, where the issue is a construction defect – rather than negligence – the contractor nevertheless enjoys a certain level of protection in that, among other things, he can be held liable only on condition that the client discovers and lodges complaint about the defect in a timely manner. Where the client fails to make complaint about a defect within the

prescribed time limit, he forfeits all claims against the contractor with regard thereto and must bear any damages himself. Moreover, the statute of limitations on claims arising out of defects is shortened to only five years, as compared to the ordinary limitation period under Swiss law, which is of ten years. In addition, contractor liability may be further reduced by specific clauses in individual agreements. It may happen, in actual practice, that a contractor's liability will be limited to a certain maximum amount, or that the contract foresees an exemption from liability for loss of profits.

A few comments on the case: Under Swiss law, the contractor may be held liable for damages only to the extent that the client has actually suffered an injury. This goes without saying. Injury is suffered only where the losses for which the client claims damages were incurred by him involuntarily. Where the client performs a service voluntarily, he suffers no injury, so that the contractor's liability also ceases to exist. In other words, it would be necessary (from the contractor's point of view) to determine the reason for which the client felt forced to indemnify the inhabitants of Delft, that is, whether he did so voluntarily or whether it was because he could be held liable for the damages. There are two possible bases on which the client could be held liable to the inhabitants of Delft: contractual liability and tortious liability. A conceivable basis for contractual liability would be, for example, an energy supply contract between the client and the inhabitants of Delft. With regard to tortious liability, it must be kept in mind that under Swiss (and German) law, there are limits to the damages that may be claimed for so-called purely economic loss (loss that does not constitute direct injury to the person, life, health, or physical or intellectual property of the aggrieved party), as would most likely have been suffered by the inhabitants of Delft. The prerequisites for tortious liability are that there be injury to an absolute right recognized by law (such as property rights, for example), or that there be a violation of a specific statute for protection against economic loss of the kind suffered (such as a criminal statute aimed at assuring the uninterrupted supply of electric energy). This is not affected by any statutory liability on the part of the client in his capacity as the owner of the tunnel, since, firstly, the damage was not caused by the tunnel itself (but by the construction work performed by the contractor), and secondly, owner liability (as a form of tortious liability) may also only be asserted where there has been injury to a legally recognized absolute right or violation of a specific statute for protection against economic loss.

Given this legal situation, it is necessary to ask (under Swiss law) whether the client's payments to the inhabitants of Delft were legally required, and therefore involuntary. It is only if this was in fact the case that the client may claim to have suffered any injury in the legal sense, and that the contractor – insofar as the other conditions are also met – may be held liable. Liability of this nature, which stems from negligence in the performance of the construction work, is not contingent upon a timely complaint for defects, nor is it subject to the shorter, five-year statute of limitations. In this sense, the client is in a better position than in cases where the injury results from a defect in the quality of the actual installation constructed.

II. Relevant clauses in SIA 118

Further Rights Concerning Defects; Right to Compensation
Art. 171, par. 1 SIA 118
"Where a defect results in a loss (e.g., fire damage or loss due to interruption of operations), the client, in addition to and exclusive of his rights pursuant to art. 169, is entitled to damages as foreseen in arts. 368 and 97 et seq. OR. He is not entitled to assert a claim for damages pursuant to art. 97 et seq. in lieu of a claim for defects pursuant to art. 169."

Art. 171, par. 2 SIA 118
"The contractor is discharged from liability for damages if he proves that he is not at fault (art. 97 OR). For damages caused by his auxiliaries, he bears the same liability as he would if he had caused the damages himself (art. 101 OR). The extent of the liability is determined pursuant to art. 99 OR)."

United Kingdom

Contract Provisions:

Dutch Contract
Clause 28.3 - General Conditions of UAV-GC 2005
Clause 12.3 of DBFM 2.0 on indemnification of Client by Contractor

JCT Design and Build Contract (DB 2005)
Under Clause 6.1 the Contractor is "liable for and shall indemnify the Employer against, any expense, liability, loss, claim or proceedings whatsoever in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works". Under Clause 6.2 there is a similar indemnity for "any loss, injury or damage whatsoever to any property real or personal".
Clause 6 also includes obligations upon the Contractor to maintain insurance to cover its liability under Clauses 6.1 and 6.2.
Clause 7 of JCT DB deals with the control of the contractor's liability to third parties.
This is of two basic kinds:
Third Party Rights under the Contract.
By virtue of the Contracts Rights of Third Parties Act 1999 and the expressed intention of the parties, it is possible for the liability of the Contractor to be extended to benefit third parties. Thus there is provision for rights to be extended under 7A to Purchasers and Tenants and under 7B to Funders. Schedule 5 then sets out the nature of what the Contractor warrants to those respective categories of third party. The primary obligation to Purchasers/Tenants is that the Works have been carried out in accordance with the Contract. There is then provision for liability of the Contractor for the reasonable

costs of repair or reinstatement in the event of breach of this warranty, with a stated maximum amount.

The Contractor also gives warranties to the effect that no materials have been used which are not in accordance with published good practice. This liability lasts for 6 years in the case of a simple contract and 12 years if the contract is in the form of a deed.

The liabilities by the Contractor to a third party funder are somewhat different, although there is still the basic warranty that the Contractor "has complied with and will continue to comply with this Contract" (reflecting the fact that the funder may be stepping into a half-completed project) and that no materials were used which are not in accordance with published good practice. The duration of liabilities is the same.

The alternative version of the third party liability is by collateral warranty, either to Purchasers and Tenants under 7C or Funders under 7D. Collateral warranties are agreements affording rights against the Contractor in favour of the same parties as via the Contracts Rights Act. The main difference is that the Act relies on extending rights under the main contract to categories of third party, whereas a collateral warranty is a separate contract made in favour of a specified third party, although it may be capable of assignment unless this is specifically prohibited.

Under the FIDIC Contracts, Clause 17 deals with allocation of risk and responsibility as between Contractor and Employer.

Much of this is covered by the insurance provisions. However, Sub-Clause 17.1 contains the Contractor's indemnity to the Employer "against and from all claims, damages, losses and expenses … in respect of:

(a) "bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects …" and

(b) "damage to or loss of any property, real or personal".

The indemnities are wide-ranging. This is true both of the causes which trigger them and in terms of the fact that they are expressly not subject to the exclusion of liability for loss of profit, loss of contract or other indirect losses under Sub-Clause 17.6. They are also not subject to the limitation on the Contractor's total liability, although the DBO Gold Book is an exception to this.

Denmark

The Dutch civil Code and DBFM seems to reflect the same rules as under Danish law. There is no limitation for the compensation under Danish law. However, the standard contracts, i.e. ABT 93 §35. Subs.2 states:

"The Contractor shall not be liable for operational losses, loss of profit or other indirect losses."

However, this clause is not applicable in this situation, since it is a claim from a third-party. In other words, outside the contract.

According to the heading of UAV Clause 28, it only deals with "Defects liability after the actual date of completion and acceptance". Therefore, it is not applicable in the situation described. Dutch civil Code will be applicable.

According to DBFM 12.3 (a) (iii) the Contractor must indemnify the Employer for "third-party clams relating to a Contractor default ..". According to DBFM 12.3 (c) a maximum could have been agreed upon. No such information is entered in the contract.

With the information given, the accident was caused by the Contractors work. I expect the reason being he had not fulfilled his obligation to check the records of the Employer of the cable. By doing so he would have known exactly where the cable was situated. Since UAV clause 28 solely relates to situations after completion, he can not rely on that clause and thereby limit the amount.

Since no maximum was agreed upon according to DBFM 12.3 (c) it is not applicable.

The Contractors best defence is the Employers (unusual) refusal to submit the documentation for the damages paid to indemnify the inhabitants. This could under Danish law bar the Employer from any compensation. By hearing witnesses it could be possible for the Employer to substantiate the amount, and thereby be compensated for a part of what he had paid. He might need a good explanation why he would not disclose the information.

Let me add, if the cables were not recorded correctly on the drawings belonging to the Employer of the cable, it would under Danish law bar the Cable owner as well as the inhabitants from any compensation from neither the Employer nor the Contractor since they would not be at fault.

Slovakia

We understood form this theme that the extent of liability according to Dutch Civic Code is defined according to fault and other circumstances that were found out. As in regard to contractual relation, rules of general terms and conditions define the liability in the extent of 10 % from the price stated in the contract. We understand this clause as a property sanction that should refer only to damage and consequential liability according to the contractual relation. In a given illustration of theme 7 we assume that the liability should be deducted from the Civic Code and the fault should be investigated. As it is obvious from the model contract conditions, the extent of liability is subject to the extent of the overall costs for remedy the defects or the damage.

Diction stated in this theme is in our legal system with long tradition of splitting legal liability for defects and liability for damage more than atypical. However, with regard to particular case, given construction can be relevant and, in a certain manner, balanced in rights and obligations of client and contractor. In our legal practise we will apply two basic legal regulations, and that is Civic Code and Commercial Code, according to the character of the type of claim.

Czech Republic

The Czech law governs several types of private law liability, while liability for damages and defect liability belong to most important. Czech law makes clear division between these liabilities. The matter in which the liability arises makes the principal difference. While liability for damages originates so that the liable person breaches any of its legal obligations, which may ensue from law, court decision or contractual relation, thus i.e. breaches its legal obligation to prevent damages, which is governed by Civil Code , the defect liability is a specific liability which originates when performed works do not correspond with the result determined in the contract. It is necessary to state that most provisions of Czech Commercial Code on reimbursement of damages are non – mandatory and therefore different agreement of parties prevails.

According to Czech law, satisfaction which may be received based on defect liability may not be brought up based on other reason, thus e.g. based on the reason of reimbursement of damages. On the other hand, claim for reimbursement of damages caused in connection with defect is not suspended by raising claim from defect liability. In such case, other material detriment of the employer, which was caused by defective performance, would arise, even though an obligation was breached only in one case. The said illustration dealing with employer's costs for reimbursement of citizens in case of damage to infrastructure during construction of railway tunnel may serve as an example. Third parties may demand reimbursement of damages based on general provisions of Civil Code.

The defect liability is, from its nature, limited by the value of the object of the contract regarding the extent of damages, which the liable person is obliged to pay. In case of substantial breach of the contract, the employer may withdraw from the contract and demand return of already paid price of works as unjust enrichment. Even in such case, reimbursement of damages may be claimed as such claim is not suspended by withdrawal from the contract.

Contrary to the provisions of UAV – GC 2005 and DBFM, the liability for damages is not limited by a relatively clear limit in the Czech law. The Commercial Code states that real damage and lost profit shall be reimbursed. Real damage means decrease of the value of assets or decrease or loss of right to assets and further incurred costs, which otherwise would not be incurred. However there is a theoretical limit to the extent of damage reimbursement, thus the provision stating that damages

exceeding the amount which the obliged party envisaged as the possible result of a breach of its obligation at the time of conclusion of the contract or which could have been envisaged taking into account the facts, of which the obliged party was or should have been aware if due care was taken, shall not be reimbursed. The difficulty of this vaguely specified rule is obvious. The determination of the amount of the envisaged damage will have to be made in extreme cases by official body.

The possibility or impossibility to limit reimbursement of damages in the Czech law represents a widely discussed problematic. One of the mandatory provisions of the Commercial Code states that the claim for reimbursement of damages may not be waived before the respective obligation, which may cause damage, is breached. There is a question whether this provision applies only to cases where reimbursement of damages is excluded totally or also to cases where it is excluded only partially. The argument for the second possibility is that also partial waiver of right for reimbursement of damages actually means waiver of right in the extent which exceeds the agreed limit. The judicature is missing however the prevailing idea gives priority to the autonomy of will of the parties, which allows contractual limitation of damages (however to the extent of envisaged damage). The supporters of this idea argue that by excluding such limitation possibility, Czech law would be unique within Europe. Besides contractual limitation of damages decreases the price of performance, which is object of the contract, by eliminating the need to insure every possible risk. In practice, the following solution applies. The parties usually estimate beforehand the extent of damages, which is envisaged, and to such extend they limit the reimbursement of damages. It is, however, not known, how courts would rule on such matter.

ILLUSTRATION:

In the said case, it would be necessary to study the contract first. In case the contract does not deal with the situation, it seems that liability for damages caused by the contractor to the employer may arise. However the contractor could be liable to payment of damages only in the envisaged extent. Further, Czech commercial law regulates otherwise objective liability for damages by specification of circumstances excluding liability, which are obstacles which arose independently of the contractors will and which prevent it from performing its obligation, provided it is not reasonably possible to anticipate that the obliged party could avert or overcome such an obstacle or its consequences and further that occurrence of such obstacle was unpredictable at the time of conclusion of the contract. All the above features would have to be examined in this context.

Spain

Dutch general conditions on construction law limit the extent of the liability. In the UAV-GC 2005 the extent of the liability is limited to 10% of the price stated in the Agreement.

n Spain they follow the general rule of Civil Code and the extent of the defects liability is unlimited either in relation to the amount, or the subjects. However, in Spanish public construction practice, it is difficult to obtain it.

THEME 8: DEFECTS LIABILITY IN RELATIONSHIP TO THE CLIENT'S REQUIREMENTS ("FIT FOR PURPOSE")

Belgium

In a DBFM contract the authority does not for long purchase the works. It hires the contractor to finance by himself the project and, following commissioning, to make it available for the whole of the maintenance viz. the operation period. In other words: the authority buys availability instead of infrastructure.
Contrary to a classic construction contract the works are not taken over upon completion of the construction process. Instead it is – in a well considered manner - being phrased in any DBFM arrangement that the works at such time are made available. The risk is not transferred by the contractor unto the authority when it is certified that the construction phase is over. This is for reason that responsibility for the continued availability of the infrastructure remains with the party that has designed and built same. In evidence the certificate that, in the frame of a DBFM set-up, is issued at the end of the design and build phase is not called taking-over certificate. In Belgium such certificate is denominated availability certificate (in Dutch: "proces-verbaal van terbeschikkingstelling/ beschikbaarheidscertificaat"; in French "process-verbal/certificat de mise à disposition"). This term expresses very well that the liability of the contractor during the succeeding operational period is much larger and different than under a classic construction contract. It is to secure continued availability until the end of the maintenance period.

The availability of an infrastructure is assessed on the basis of the output specifications. These describe the objectives (purposes) of the project, contain the principles or instructions according to which the project shall be designed and performed and the services that the contractor needs to operate and warrant.
If really the client wishes the contractor to perform the design and be responsible for availability, he will express output specifications by way of project rather than product characteristics. Thus, under a DBFM project the employer's requirements, for a highway for example, will focus on such subjects as accessibility, safety, etc. On such project, the definition of the quality of the pavement and other product characteristics as a matter of principle belong to the scope of the contractor. In function of the period during which he is liable to secure availability of the infrastructure, it is logically up to him to decide the quality of the materials and workmanship to be used. See S. VAN GARSSE, J. De MUYTER, B. SCHUTYSER en A. VERLINDEN, DBFM handboek, Brussel, 2009, 18, nr. 022; S. VAN GARSSE, De standaardisering van DBFM-projecten, in C. DE KONINCK, P. FLAMEY, P. THIEL en B. DEMEULENAERE, Jaarboek Overheidsopdrachten 2009-2010, Brussel, 2010, 296, nr. 26.

If and when a project during the operation phase no longer complies with the output specifications, under a DBFM contract, it will be deemed that it is no longer available. Until such time as the

employers' requirements are met again, the party that is responsible to ascertain continued availability viz. the contractor shall be considered in default. In the circumstances the payments that he is to perceive for making the project available (called availability payments) will be suspended or diminished by the sums of any (liquidated) damages to which the employer is then entitled.

An exception to the precedent rule may have to do with the interference of the client in the definition of the specifications of the materials. If, as from the publication of his requirements, the client goes beyond the description of the mere purposes of the project, and also determines the type of materials that need to be used, he must assume the liability that ensues from such choice. Idem: FIDIC, Conditions of Contract for Design, Build and Operate Projects, Geneva, 2008, 9, cl. 1.10, cl. 17.1(b)(ii) and cl. 17.6. Contra: FIDIC, Conditions of Contract for EPC/Turnkey Projects, Geneva, 1999, cl. 5.1. The same observation goes in case he imposes the use of certain materials by way of a variation order – especially in circumstances where the contractor, following a quotation request prior to such order, in his variation proposal or otherwise has let know his reservation with regard to the suitability of such materials or, more in general, the adverse effect they may effect on the operation service. The liability for the subsequent defect viz. the client's preferred materials not being fit for purpose, then has shifted unto the employer.

Germany

Generally, one can say that a situation where a client issues detailed requirements with regard to the works to be undertaken contravenes the principles of DBFM/PPP projects. Usually, the client only requires the contractor to construct and maintain the concession object according to the principle "fit for purposes" (funktionale Leistungsbeschreibung). The way to achieve this – as already remarked not only throughout the defects liability period but also throughout the whole concession period – is then for the contractor, beginning with an appropriate design. One of the arguments supporting the DBFM/PPP compared to conventional models is that the comprehensive private involvement over the whole concession period ("life cycle") triggers innovative and creative solutions, also due to the competition with other bidders. Detailed requirements by the client appear not to be very helpful in this respect.
Accordingly, also the German A-Model contracts only require the concession object to be "fit for purpose" and do not contain particular specified client's requirements. In the unlikely event that under a German contract of this type a client would issue a variation as in the illustrated case the matter would be dealt with in accordance with the principles of VOB/B which (although subordinate) would apply.
According to VOB/B the contractor has to assure (not to guarantee!) that his work at the time of acceptance possesses the characteristics assured in the contract and that it is built in conformity with the recognized rules of sound engineering practice or otherwise that it is free from defects which would nullify or diminish its value or usefulness for normal purposes or for the purposes foreseen in

the contract, § 13 (1) VOB/B . Moreover, the client is entitled to claim that works which are found to be defective or improper while still in process of execution shall be replaced by proper works at the contractor's expense. If the contractor is answerable for the defect or for the contravention of the contract in question, then he shall also make good any consequential damage. If the contractor fails to meet his obligation to eliminate the defect, the client may withdraw from the contract after a procedure of setting a reasonable term for the rectification of defects and giving notice about the intended withdrawal of the contract.
It is settled case law of the German Federal High Court of Justice (BGH) that the contractor is under an obligation always to assure that his work fulfills its supposed function to the agreed standard according to the contract and furthermore, that his work is in accordance with the intended purpose agreed in the contract .
It seems noteworthy that concerning specific product requirements under the regime of the VOB/A the public authority is generally obligated not to use specific product requirements such as a single brand, a single manufacturer or supplier. In fact, the public authority is rather obliged to mandatorily use the additional specification "or equivalent" in the description of the performance in the contract provided that the special item cannot be described pin-pointed precisely and generally understandable. Otherwise the public authority will be guilty of a violation of § 7 (8) VOB/A and thus, the bidder may raise an objection to the court.Switzerland:

Where site information and design are concerned, it is of decisive importance whether the client is himself a professional or is at least represented by a professional and may therefore be expected to be cognizant of the consequences ensuing from the information he provides and instructions that he gives. When this is the case, the contractor is discharged from any duty to verify the site information or to reexamine the design. He may, accordingly, rely on the information and the design. Nevertheless, even in these cases, he has a duty to notify the client of any incongruities that actually come to his attention. There is some controversy as to whether these same rules apply to other instructions (not related to the site or the design). In general, it is admitted that it is incumbent upon the contractor to review other instructions, regardless of the client's professional qualifications (and not only when the client is not a professional), and, should he conclude that the instructions are faulty, to warn the client accordingly. Where he fails in this duty to warn, he must bear the negative consequences. In the present case, it may be assumed that the contractor knew or, in any case (as measured by what may be expected of any ordinary contractor in his branch of the industry), ought to have known that the use of Northern European woods, as instructed, would lead to a defect in the construction. If these assumptions are correct, it was incumbent upon the contractor to warn the client; that is, he had a duty to share this knowledge with the client before proceeding on the instructions. Had the client, in spite of having been warned, insisted on the use of wood from Northern European trees, the contractor would then bear no liability for the defects that resulted. Because the contractor failed to provide such warning, however, it is necessary to determine what precise consequences ensued from this breach of the duty to inform. The determination of these

consequences depends on what the client would have done if he had been duly warned: if he is able to prove that the client would have continued to insist on the use of the unsuitable wood even after having been warned of the risk, the contractor cannot be held liable even though he is in breach of the duty to inform. Conversely, if he is unable to produce such proof, he is liable for damages in an amount that places the client in the same situation as that in which the client would have found himself if he had been duly warned and reacted accordingly (either by ordering the use of different wood or by deciding not to proceed with the construction of that part of the project). At the same time, the client is liable to the contractor for remuneration of the additional expense that would in any case have arisen out of a change in the clients instructions (in reaction to the warning).

On the other hand, if the client merely requests that the contractor uses wood from trees from Northern Europe, and there exist on the market certain types Northern European wood that would be suitable for the construction of the bathhouse as planned – in such a case, the contractor would at all events be liable, since the choice of wood was entirely up to him and he would thus be in breach of a design obligation that had been assigned to him.

Switzerland

I. Additional Assumptions

The client is represented by a professional designer. This designer instructed the contractor not to use tropical wood, but wood from trees from Northern Europe.

There is no wood from trees from Northern Europe that has the degree of hardness and ability to resist moisture, and thus also the durability required for a building with very high levels of heat and humidity.

II. The Case

Where site information and design are concerned, it is of decisive importance whether the client is himself a professional or is at least represented by a professional and may therefore be expected to be cognizant of the consequences ensuing from the information he provides and instructions that he gives. When this is the case, the contractor is discharged from any duty to verify the site information or to reexamine the design. He may, accordingly, rely on the information and the design. Nevertheless, even in these cases, he has a duty to notify the client of any incongruities that actually come to his attention. There is some controversy as to whether these same rules apply to other instructions (not related to the site or the design). In general, it is admitted that it is incumbent upon the contractor to review other instructions, regardless of the client's professional qualifications (and not only when the client is not a professional), and, should he conclude that the instructions are faulty, to warn the client accordingly. Where he fails in this duty to warn, he must bear the negative consequences. In the present case, it may be assumed that the contractor knew or, in any case (as measured by what may be expected of any ordinary contractor in his branch of the industry), ought to have known that the use of Northern European woods, as instructed, would lead to a defect in the

construction. If these assumptions are correct, it was incumbent upon the contractor to warn the client; that is, he had a duty to share this knowledge with the client before proceeding on the instructions. Had the client, in spite of having been warned, insisted on the use of wood from Northern European trees, the contractor would then bear no liability for the defects that resulted. Because the contractor failed to provide such warning, however, it is necessary to determine what precise consequences ensued from this breach of the duty to inform. The determination of these consequences depends on what the client would have done if he had been duly warned: if he is able to prove that the client would have continued to insist on the use of the unsuitable wood even after having been warned of the risk, the contractor cannot be held liable even though he is in breach of the duty to inform. Conversely, if he is unable to produce such proof, he is liable for damages in an amount that places the client in the same situation as that in which the client would have found himself if he had been duly warned and reacted accordingly (either by ordering the use of different wood or by deciding not to proceed with the construction of that part of the project). At the same time, the client is liable to the contractor for remuneration of the additional expense that would in any case have arisen out of a change in the clients instructions (in reaction to the warning).

On the other hand, if the client merely requests that the contractor uses wood from trees from Northern Europe, and there exist on the market certain types Northern European wood that would be suitable for the construction of the bathhouse as planned – in such a case, the contractor would at all events be liable, since the choice of wood was entirely up to him and he would thus be in breach of a design obligation that had been assigned to him.

III. Relevant clauses in SIA 118

Art. 25, par. 3 SIA 118:

"The contractor has a duty to reexamine the design delivered to him and the proposed construction site only in the event that the client is not represented by a construction supervisor, is not himself a professional, or has not been advised by a professional consultant. The contractor shall, nevertheless, provide immediate notification of any incongruities or other defects that come to his attention in the course of the performance of his tasks, pursuant to par. 1 and 2, and advise the [owner's] construction supervisor of the detrimental effects thereof (duty to warn)."

United Kingdom

1.1 Contract Provisions

1.1.1 Dutch Contract

(a) UAV-GC 2005

☐ Articles 3.4, 3.5, 5 (Model Agreement)

☐ Clause 3 (particularly 3.3, 3.4, 3.5, 3.6 and 3.8) – General Conditions

☐ Clauses 4, 14, 28 – General Conditions

(b) DBFM 2.0

☐ Clause 13.1 – Contracting Authority Change (Variation)

1.1.2 English Contract

(a) JCT Design & Build Contract

☐ Clauses 2.1.1, 2.11, 2.15.1

☐ Clauses 3.5, 3.9, 5.1.1

1.1.3 International Contract

(a) FIDIC Yellow Book – Conditions of Contract for Plant and Design-Build

☐ Clauses 4.1, 5.1, 7.6 and 11.1

(b) FIDIC Silver Book – Conditions of Contract for EPC/Turnkey Projects

☐ Clauses 4.1, 5.1, 7.6 and 11.1

1.2 In your view, are the mutual interests of the parties to the contract sufficiently balanced, given the way the theme has been dealt with in the particular clause(s)?

1.2.1 As a preliminary point, "fit for purpose" under English law in basic terms means fit for the ordinary or intended purpose of the material or work for which they are to be used. The purpose can be either defined in the contract (as provided in the UAV-GC 2005 and FIDIC forms of contract) or otherwise implied as a matter of law or custom or business efficacy.

In the example given, without further information as to the contract terms, it seems entirely plausible that the wood used to build the swimming pool should be fit to withstand the high temperatures in the building without showing signs of cracks or peeling paint, and any failure in relation to this renders it unfit for purpose.

UAV-GC 2005

1.2.2 Under Articles 3.4 and 3.5 UAV-GC 2005 (Model Agreement), while the Employer is responsible for any conflicts between requirements in the Employer's Requirements, this does not affect the obligation of the Contractor to warn the Employer in the event of an apparent conflict.

1.2.3 Clauses 3.3 to 3.8 UAV-GC 2005 (General Conditions) elaborate this further:

(a) Clauses 3.3 and 3.4 - the Employer is responsible for the contents of:

(i) the Employer's Requirements which are changed under a Variation pursuant to clause 14.1; and

(ii) Variations ordered by him under clause 14.1.

Although not expressly stated, it is likely from the example given that the change from tropical wood to Northern European wood was made by way of a Variation under clause 14.1, which allows the Employer to order and obliges the Contractor to observe, inter alia:

(iii) variations in the Employer's Requirements; and

(iv) variations of choices made by the Contractor when carrying out Work, insofar as the Contractor was free to interpret the Employer's Requirements. This appears likely from the example given where it is suggested that the Contractor would have interpreted the Employer's Requirements for the swimming pool that tropical wood was suitable, but was then subsequently asked by the Employer to change it to Northern European wood.

(b) Clause 3.5 – the Employer is responsible for the goods prescribed in the Employer's Requirements if such goods are "functionally unfit" as a result of his requirements listed in the Employer's Requirements.

Clause 3.6 defines "functionally unfit" as being "inherently unsuitable for the purpose for which they are intended according to the Contract". This accords with the "fit for purpose" concept under English law as mentioned in paragraph 1.2.1 above. Consequently, the Northern European wood would be "functionally unfit" in the example given.

1.2.4 On the basis of clauses 3.3, 3.4 and 3.5, prima facie, it appears that the Employer is responsible for the design defect. However, clause 3.8 states that these provisions are subject to the Contractor's duty to warn under clause 4.7.

1.2.5 The duty to warn provisions are summarised below:

(a) Clause 4.7 obliges the Contractor to warn the Employer in writing without delay if, inter alia, the Employer's Requirements or any Variation ordered by the Employer under clause 14.1: "evidently contain or show such faults or defects that the contractor would be in breach of the requirements of good faith if he were to continue work without issuing any warning about such faults or defects."

(b) Clauses 4..5 and 4.6 supplement the provisions of clause 4.7 by obliging the Contractor to perform all duties as required by law, good faith or usage (clause 4.5), and in a manner that does not cause the Employer or third parties to suffer unnecessary hindrance and damage to persons, property or environment (clause 4.6). As a drafting point, we note that the words "shall be limited as far as possible" at the end of clause 4.6 do not flow properly with the rest of the sentence, and could be said to contradict them;

(c) Clause 4.8 continues that if the Contractor fails in his duty to warn under clause 4.7, he shall be liable for any damaging consequences caused by this failure.

1.2.6 The Contractor's duty to warn is entirely consistent with the underlying principle in English law governing this concept, as explained in paragraphs 1.3.1 and 1.3.2 below. However, the imposition of this duty is strictly circumscribed in that it only applies in cases of "evident" faults or defects such that continuing work without issuing a warning would amount to a breach of the requirements of good faith in clause 4.5. Our comments on this are as follows:

(a) the word "evidently" suggests that the fault or defect must be clear to a contractor and he would be acting in good faith if, being aware of such "clear" fault or defect, he issues a warning to the client. The inclusion of the word "evidently" could be construed as excluding circumstances where the contractor ought to have been aware of the fault or defect, so that his duty to warn arises only in respect of faults or defects which he is actually aware of by virtue of them being "evident" or "clear";

(b) the standard of skill imposed on the contractor is that of "good faith" performance. We do not know what this means under Dutch law but note that there is no legally recognised concept of "good faith" under English law. In practice, it is not uncommon in our experience to impose standards of a "reasonable and prudent contractor" or those of "good industry practice ".

1.2.7 Subject to our comments in paragraph 1.2.6, in our view, the position in the UAV-GC 2005 on this issue is fair and sufficiently balances the mutual interests of the parties.

1.2.8 Our suggestions are:

(a) Clause 4.6 (UAV-GC 2005 General Conditions) – the words at the end "shall be limited as far as possible" could be removed for the reasons given in paragraph 1.2.5(b);

(b) Clause 4.7 (UAV-GC 2005 General Conditions) – the word "evidently" could be removed for the reasons given in paragraph 1.2.5(a); and

(c) Clause 4.7 (UAV-GC 2005 General Conditions) – if there is any ambiguity on what "good faith" means under Dutch law, it may be worth defining it. Alternatively, a standard of "good industry practice" in relation to the Contractor's performance could be imposed.

DBFM 2.0

1.2.9 Clause 13.1 of the DBFM 2.0 was identified as a relevant clause on the basis that the change from tropical wood to Northern European wood constitutes a "Contracting Authority Change". However, we note that a "Contracting Authority Change" under clause 3.1 relates only to changes made to Payment Mechanism (Schedule 2), Management Plan (Schedule 8) and Programme of Requirements (Schedule 9), all of which do not appear relevant to the fitness for purpose question. On this basis, it is not immediately apparent to us that clause 13.1 is the relevant provision and accordingly, we make no comment on that provision.

1.2.10 The clauses which do appear potentially relevant are:

(a) the design and construction clauses 4.3 (RWS Infrastructure) and 5.2 (Third-Party Infrastructure) which obliges the Contractor to design and construct the relevant infrastructure to meet the "Completion requirements". However, Schedule 1 – Definitions defines "Completion requirements" narrowly to refer to the output specifications included in Schedule 9 Part 2, as applicable from the Completion Date to the Expiry Date (as defined);

(b) clause 8.5 which obliges the Contractor to remedy any damage to the Infrastructure as soon as possible, unless caused by a Force Majeure Event. This suggests that absent a Force Majeure Event, the Contractor is responsible for all damage to the Infrastructure, howsoever caused;

(c) clause 9.3 which obliges the client to indemnify the Contractor for a Compensation Event, none of which are defined in Schedule 1 (Definitions) to include a change to Employer Requirements or Variation as provided in the UAV-GC 2005 (see paragraph 1.2.3(a)).

1.2.11 The DBFM 2.0 does not contain comprehensive or clear provisions on the liability of the parties for issues relating to design and design changes, fitness for purpose and duty to warn, as compared to the UAV-GC 2005. Consequently, it is not clear whether the mutual interests of the

parties are sufficiently balanced on this theme. Our suggestion for the DBFM 2.0 is to consider including similar provisions found in the UAV-GC 2005 so as to deal with the issue more clearly.

1.3 Comparing the clauses with similar broadly used contract conditions in your jurisdiction: what suggestions do you have for the Dutch conditions and perhaps also: what – if anything at all – did you learn from the way this theme is being dealt with in the Dutch conditions?
JCT Contract

1.3.1 A key point is the Contractor's duty to warn. In English contracts generally, the contractor has a duty to warn the Employer if the amended design instructed by the Employer is not "fit for purpose", which is a reflection of the English common law position.
[For example, in J Murphy & Sons Limited v Johnston Prevast Limited [2008] EWHC 3024 (TCC), the court found that there is an implied term in supply contracts such that, if a supplier knows, or ought reasonably to know, that a certain material would, or might, create problems when used in conjunction with the supplier's product, they are obliged to warn the customer. This is the case even if they find out about the proposed use after the contract has been made.]
1.3.2 The underlying principle is that the Employer relies on the Contractor's skill and expertise, which the Contractor must exercise by assessing whether the Employer's amended design is fit for purpose. The Contractor would have discharged its duty to warn if, in the example given, it had properly assessed the suitability of using Northern European wood (which is more suitable for cooler climates) and advised the Employer that it should retain the original design of tropical wood (which is more suitable for the high temperature building). In other words, it would have given the Employer an opportunity to make an informed decision on the choice of wood.
1.3.3 If, notwithstanding the Contractor's advice, the Employer insists on use of the Northern European wood, he cannot then hold the Contractor liable for the defects (i.e. cracks and peeling paint) in the wood. In practice, the Contractor should also do well to record in writing the fact that the Employer's decision to use Northern European wood is against his advice.
1.3.4 The above is evidenced by the following JCT provisions:
(a) Clause 2.1.1
The Contractor has a general obligation to design the works, including selection of materials, in compliance with the Health and Safety Plan and Statutory Requirements.
"Statutory Requirements" is widely defined to include any law applicable to the works. Pursuant to section 13 of the Supply of Goods and Services Act 1982, in a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill. Selecting materials which are not fit for the purpose intended will not satisfy this requirement and the Contractor will be in breach of clause 2.1.1.

"Health and Safety Plan" is defined by reference to applicable Construction (Design and Management) Regulations ("CDM Regs"). If the defective wood causes a health and safety issue to arise, the Contractor will be in breach of clause 2.1.1.

(b) Clauses 2.11 and 2.15.1

Clause 2.11 provides that the Contractor shall not be responsible for the contents of the Employer's Requirements or for verifying the adequacy of any design contained within them subject to clause 2.15.

Clause 2.15.1 imposes an obligation on either the Contractor or the Employer to notify the other if it finds any divergence between the Employer's Requirements and the Statutory Requirements. The Contractor is then obliged to inform the Employer of his proposed amendment for removing the divergence and shall, entirely at his own cost, complete the design and construction of the works in accordance with the amendment. This clause is consistent with clause 2.1.1 which obliges the Contractor to exercise his skill and judgement in ensuring that his design, and any amendments to the design required by the Employer, complies with Statutory Requirements and, in effect (although without using these express words) is "fit for purpose".

(c) Clauses 3.5 and 3.9, and 5.1.1

Clause 3.5 requires the Contractor to forthwith comply with all instructions properly issued to him by the Employer under the contract.

Clause 3.9 empowers the Employer to issue instructions requiring a Change (defined in clause 5.1.1 to include a change in the Employer's Requirements which makes necessary the alteration of the design of the Works) but, in the case of alteration to the design of the Works, the Employer must obtain the consent of the Contractor (not to be unreasonably withheld or delayed). Again, this is consistent with the intent of clauses 2.1.1, 2.11 and 2.15.1 as an additional layer of Contractor approval is required for design amendments, thus requiring that the Contractor provides his input and exercises his skill and judgment.

1.3.5 In view of the above, the JCT provisions are not dissimilar to the UAV-GC 2005 provisions.

FIDIC Contracts

1.3.6 The provisions in both the Yellow Book and the Silver Book are similar, save for clause 5.1 where the differences are highlighted in footnote 2 below. In view of this, the reference to a numbered clause below refers to that found in both the Yellow Book and Silver Book.

1.3.7 Clause 4.1 requires the Contractor to design, execute and complete the Works in accordance with the contract, and to remedy any defects in the Works. Further, the Works when completed shall be fit for the purposes for which the Works are intended as defined in the contract.

1.3.8 From the above, we note that:

(a) the Contractor's obligation to design and complete the Works "in accordance with the contract" requires the Works to:

(i) comply with all applicable laws (clause 1.13) which, in this case, is the equivalent of compliance with the Statutory Requirements discussed above in relation to the JCT contract; and

(ii) be "fit for purpose" (clause 4.1).

1.3.9 Clause 5.1 requires the Contractor to be responsible for the design of the Works, and the Contractor further warrants that he has the experience and capability necessary for the design. It must follow that this extends to any amendments to the design required by the Employer. The Contractor is further obliged to notify the Employer, within an agreed time period, of any error or defect in the Employer's Requirements, exercising the due care of an experienced contractor. This is in effect the Contractor's duty to warn as discussed above. As mentioned, if, having warned the Employer of the unsuitability of Northern European wood, the Employer nonetheless decides to proceed with it, the Contractor should not be liable for the consequences of the Employer's decision (and may also be entitled to a Variation under clause 13).

1.3.10 If the Contractor has not fulfilled his duty to warn, then he is liable for the defect and the costs of rectification thereof under clauses 7.6 and 11.1 as follows:

(a) clause 7.6 – the Contractor is required to comply with any instruction of the Employer's engineer to remove or replace any Materials, and re-perform any Works, which are not in accordance with the contract at the Contractor's cost;

(b) clause 11.1 – the Contractor is required to execute all work to remedy defects or damage as notified by the Employer during the defects liability period at its cost if the work is attributable to(amongst others):

(i) the design of the Works; or

(ii) Materials not being in accordance with the contract. We note that (although this is not in the FIDIC contracts) it is not uncommon for practitioners to provide that all equipment, materials and supplies to be provided by a Contractor shall be of good quality, free from defects and fit for their intended purpose.

1.3.11 In principle, the FIDIC provisions are also not dissimilar to the UAV-GC 2005 provisions.

1.3.12 As to suggestions for the Dutch contracts, see paragraphs 1.2.8 and 1.2.11.

Denmark

UAV-GC 2005: Article 3.4, 3.5, 5 (Model Agreement); clause 3 (particularly 3.3, 3.4, 3.5, 3.6, 3.8), 4, 14, 28 (General Conditions)

DBFM 2.0: This will be a Contracting Authority Change (Variation): clause 13.1.

The Clauses in AUV and DBFM describes in my opinion a fare split of the risk concerning the design and are similar to the situation in Denmark, where ABT 93 § 1. Subs.2 states:

General Conditions

§ 1. The present general conditions for turnkey contracts shall apply to package contracts (also termed 'design and build contracts') within building and engineering.

Subs. 2. For the purpose of the present conditions, 'turnkey contracts' shall be defined as a contract covering the most important part of the design and planning process and most of the other services provided for the building or construction works.

Therefore, the responsibility for the design lies undisputable with the Contractor. It is not clear for me, if it was know at the time of the design that the wood couldn't be used for the construction (was in conflict with the state of the art) or if it was the first time it was discovered.

The Employer has always the authority, to intervene. It might lead to claims from the contractor maybe to terminate the contract, but the Employer is the Employer and the Contractor will normally be responsible for the design, if he includes proposals from the Employer in the design without reservation.

In Denmark ABT 93 Clause 17 (The Employers supervisors) deals with a similar problem from which you might be able to deduct an answer. They state:

The employer's supervisors

§ 17. The employer's supervisors represent the employer towards the contractor in relation to the performance of the work. The supervisors may deliver and receive information concerning the work and approve or reject materials or work.

I stated this was normally the situation. The reason being you always see exceptions, as in this case, where the owner has a special standing in the society.

He is known for his reputation as a 'green' client and insists in his requirements on all sorts of sustainable aspects of the building project. He intervenes in the design, when he notices that the contractor has decided to use tropical wood for the construction and he orders the contractor to alter his design and to use wood from trees from Northern Europe. The contractor follows the instruction of his client.

This leads to problems since the wood is not suitable for a building in which high temperatures are custom. The client holds the contractor liable, but he defends himself: this was not his design.

Since it is an "order" (and no reservation is taken from the Employer, stating the responsibility remains with the contractor) I find the Contractor has a good case, but he would of course have a better case if he had taken a reservation. However, this becomes only an obligation in case the error was obvious. But again if a designer who is supposed to be an expert has not seen the problem, why should a Contractor possibly have a better opinion on the matter.

In my opinion it is justified that the Contractor relies on the design from the Employers expert as being "state of the art", because he is a 'green' client. Therefore, his expert must be of the same

"standing", since he must have been the person who in the requirements for the design "had insisted on all sorts of sustainable aspects of the building project."

Under Danish law, I find the Contractor should be released and I don't see why it should not be the same result under the AVG or DBFM regime, since the Contractor was "ordered".

You could avoid this discussion by entering a clause like the following in the contract, as seen in Denmark:
"In case the design has been presented to the Employer or his experts for approval or he has made any comments or proposals for change of the design the full responsibility for the final design lies never the less still with the Contractor. The Contractor is neither in a position to hold responsible the Employer's experts.

In case the Contractor will not accept the full responsibility for the amendments proposed by the Employer, he must notify the Employer accordingly in writing in due time before he includes the proposal in the design. Hereafter must the Employer within 10 working days inform in writing if he upholds his request for the design or accept the Contractors design. If the Employer upholds his proposal, he will assume the responsibility for such design without any right to claim the Contractor."

The same rule applies, if the Employer inspects the performance of the work.

Slovakia

In particular case of theme 8 the contractor should not be liable for defects that occurred during the operation because there was no such solution in the project design provided that contractor gave a notice to client on inadequate material suggested by client. We presume that this way he would absolutely get off the liability for defects of works (liberation).
According to the Slovak Commercial Code contractor is obliged to give a notice immediately on inadequate character of things taken over from client or instructions given by client to contractor if contractor could find out about this inadequacy. Contractor will not be liable for defects or incompletion of work, if client insisted in a written form upon their usage.
We urge on differences between defects of work and agreed liability for damage, eventually peculiar type of legal liability for damage caused. Liability for defects of work is exclusively governed by the Commercial Code, while, as mentioned in the previous theme, liability for damage is applicable in case, if contracting parties agreed upon this liability for damage or there are included in inseparable part of contract. Cases of peculiar legal liability for damage are governed by Civic Code. It refers to, for instance, liability for damage caused by operation of vehicles or particularly dangerous operation. Real damage and related damage is being reimbursed.

In case the contracting parties agree on liability for damage in their contract /we do not mean now peculiar cases of legal liability for damage/, reference to particular clauses of Commercial Code in the contract is sufficient, as the legal regulation is exhaustive. Such procedure is usual in the legal practise.

Czech Republic

The issue of the liability of the contractor for defects caused by observance of the employer's instructions is subject to the Commercial Code and its part governing construction contracts. However, the regulations are non-mandatory, the parties may agree on different rules, which shall prevail. The contract shall be examined first, if there are answers for the questions. If this is not the case, the respective rules of the Commercial Code shall be applied.

According to Czech law, in performing the work, the contractor proceeds independently and is not bound to follow the employer's instructions concerning the method of performing the work, unless he expressly undertook to follow them. Therefore, in principal the contractor is free while performing the work and is not obliged to follow the employer's instructions, unless this duty has been stated in the contract.

If the contractor is obliged to follow the employer's instructions, he is still obliged to prove their suitability from the professional point of view and inform the employer on their eventual unsuitable nature. This duty arises out of the Commercial Code , which states that the contractor must inform the employer without undue delay on unsuitable nature of things or instructions given by the employer, if the contractor was able to discover such unsuitability when acting professionally.

If such unsuitable instructions obstruct proper performance of the work, the contractor must suspend performance of the work to the extent necessary until the unsuitable instructions are corrected, or until he receives a written notice that the employer insists on performing the work according to the given instructions. The employer's notice to insist on performing the work must be made in written. In case the notice is only oral, the contractor might be liable for eventual defects of the work or impossibility to finish the work.

In case the employer insists on performance of the work according to his instructions after all and due to this fact it will be impossible to finish the work or some defects will arise, the contractor is not liable for such impossibility to finish the work or for such defects. In such case, the contractor is according to Commercial law and the jurisprudence of the Supreme Court of the Czech Republic entitled to:

☐ the price of the work reduced by the amount not expended when performing the work, if the work has not been finished in agreed extent;

☐ the price of the work, if the work has been finished but any defects arises.

If the contractor does not inform the employer on unsuitable nature of his instructions, although he was able to discover such unsuitability when acting professionally and the work is impossible to finish due to this reason, the contractor is fully liable for the impossibility to finish the work. The same applies also in case of defects of the work due to unsuitable instructions.

The parties may agree different rules or exclude the above mentioned regulations. However, also in such case the general duty set by the Civil Code to act so as to avoid damages seems to apply. This liability is - in contrast to the liability under Commercial Code – subjective.

ILLUSTRATION:

In the said case, the contract shall be examined first. In case the contract does not give an answer how to solve the situation, the Commercial Code will apply. First, it is necessary to clarify, whether the contractor is obliged to follow the employer's instructions. Further, it must be answered, whether the contractor was able to discover the unsuitability of the employer's instructions when acting professionally and has informed the employer on unsuitability of his instructions, on unsuitability of the wood from trees from Northern Europe for performing the work and whether the employer insisted in writing on performance of the swimming pool using this wood. In case of breach any of any contractor's duty, the contractor is liable for the caused defects.

Spain

Dutch general conditions on construction law limit the extent of the liability. In the UAV-GC 2005 the extent of the liability is limited to 10% of the price stated in the Agreement.
In Spain they follow the general rule of Civil Code and the extent of the defects liability is unlimited either in relation to the amount, or the subjects. However, in Spanish public construction practice, it is difficult to obtain it.

THEME 9: QUALITY ASSURANCE, TESTING, DUTY TO NOTIFY

Answers were received from:

Germany:

Comparable to clause 8.3 ("Inspections") of the DBFM 2.0 model also German A-Model contracts provide that the client is entitled at any time during the contract validity – hence also during the ongoing construction works – to inspect whether the contractor is complying with his duties, see clause 25 A-Models contracts. In case the client detects that the contractor fails to perform his duties he may commission instructions to the contractor. Such instructions are binding on the contractor. Contrary to the regime under § 4 (7) VOB/B one-time failure to comply with such an instruction does not trigger a client's right to terminate the contract. Non-performance of the contractor with any of his duties (including expiration of a remedy period) only entitles the client to terminate the contract if such circumstances occur at least five times in a period of two years whereas such failures have to be qualified as material (clause 53.9.1 A-Models contracts). The commissioning of any instruction still during the ongoing construction works is without prejudice to the final hand-over procedure after completion of the construction works. Notwithstanding any prior instructions the concession object (i.e. motorway toll road) – once fully completed – has to meet all client's requirements in order to be handed over (which does not constitute a formal acceptance as this has been already remarked earlier, see theme 2 above).

However, in cases when the client of a contract under the rules of the VOB/B has issued binding requirements and specifications on certain aspects of the work or on certain products or components to be used, the liability of the contractor for defects has to be judged differently than shown in theme 8 above. The contractor being contractually bound by such specifications of the client has no other choice concerning those specifications as he is contractually obliged to proceed with his works under the given specifications. In the event the contractor has, pursuant to § 4 (3) VOB/B, raised doubts, e. g. regarding the proposed method of execution, the quality of the materials or the components supplied by the client, later on the client will be barred from claiming elimination of the defect or consequential damages. Thus, the legal consequence according to § 13 (3) VOB/B is that the contractor cannot be held liable for any defects caused by the specifications of the client.

In the context of the client's possibility to inspect and supervise the performance of the contractor whilst work is in progress VOB/B gives both parties the opportunity to act pursuant to § 4 (10) VOB/B. In this provision it is stipulated that on request of either of the parties the conditions of parts of the service shall be determined jointly by the client and the contractor. Mandatory (pre)condition for a procedure pursuant to § 4 (10) VOB/B is that parts of the service in question will - by further progress of the works - not longer be available for inspection and determination. The result of the joint inspection is to be recorded in writing. Such a procedure is neither supposed to legally count as a take-over by the client nor does it conclude in a passing over of the risks to the client. However, the

legal consequence of such a procedure will normally be limited to the mere verification of facts. Therefore, a shifting of the burden of proof may only apply in cases where the verification of facts in the aftermath will not be possible under just and reasonable terms . Hence, as a general rule the burden of proof will always rest on the party arguing that the declarations pursuant to § 4 (10) VOB/B differ from the effective level of performance.

Switzerland

I. The Case

Under Swiss law, there is no statutory or any other duty under SIA 118 for the principal to oversee the work of the contractor at any time. Even where the client commissions an architect or an engineer with such oversight, the contractor may derive no rights from that fact. Specifically, he cannot argue that the client, or the client's architect or engineer should have hindered him, by conducting inspections, by warning him of errors, or by any other such means, from defectively constructing the installation (in the highly unusual cases, in which such a defense is admitted, it must be expressly stipulated in the contractor agreement). In other words: under Swiss contract law, it is, in principle, always the contractor himself who bears the full and complete responsibility for the performance of his contractual obligations. Accordingly, he cannot rely on the attentiveness of the principal to prevent him (the contractor) from defectively performing.

By contrast, where the client or an agent of the client inspects the performance of certain interim stages in the construction and approves them (e.g., inspection of the reinforcement by the construction engineer prior to the pouring of the concrete), it may be presumed that defects resulting from the work that has been inspected and approved do not give rise to liability on the part of the contractor. Thus, where performance not conform with the agreement receives the approval of the client or his agent, the situation differs from what normally applies: the contractor is relieved of full responsibility. It should be recalled, however, that the fact that certain interim stages were taken over and approved by the client or his agents does not in any way imply that the contractor's liability for defects arising out of subsequent stages in the construction also ceases to exist. The take-over and approval of concrete reinforcement, in particular, can result in the contractor being freed from liability for defects caused by the deficient reinforcement. The contractor may nevertheless continue to be held liable for defects not caused by the reinforcement but resulting from the pouring of the concrete or from the quality of the concrete used.

II. Relevant clauses in SIA 118

Obligation to Notify and Duty to Warn

Art. 25, par. 1 SIA 118:

"The oversight exercised by the client through a construction supervisor does not relieve the contractor of his statutory duty (art. 365, par. 3 OR) to report without delay to the site supervisor any circumstances that threaten the correct or timely construction of the project. Where he is in breach of

this duty, liability for any negative consequences arising therefrom falls to him; exception is made for cases in which it can be shown that the construction supervisor was cognizant of the circumstances in question even without having received report thereof."

Site Supervision / Duties
Art. 34, par. 1 SIA 118:
"Insofar as the contractor agreement does not provide otherwise, the construction supervisor is responsible, in particular, for procurement of the design, oversight over performance of the work, verification of invoices, and inspection of the completed project."

Art. 34, par. 2 SIA 118:
"The construction supervisor is authorized to oversee the performance of all work performed by the contractor under the agreement, and this also at locations other than that of the construction site.

United Kingdom

2.1 Contract Provisions
2.1.1 Dutch Contract
(a) UAV-GC 2005
☐ Clause 19, 20, 21 – General Conditions

(b) DBFM 2.0
☐ Clause 8

2.1.2 English Contract
(a) JCT Design & Build Contract
☐ Clause 3.12

2.1.3 International Contract
(a) FIDIC Yellow Book
☐ Clause 4.9

(b) FIDIC Silver Book
☐ Clause 4.9

2.2 In your view, are the mutual interests of the parties to the contract sufficiently balanced, given the way the theme has been dealt with in the particular clause(s)?
UAV-GC 2005

2.2.1 Clause 19 obliges the Contractor to be responsible for both the quality control of al Work and the quality of the results of Work and Documents. The Contractor is also required to submit a quality plan to the Employer.

2.2.2 Clauses 20 provide for quality assurance testing by the Employer of the Design Work, subject to ensuring that he shall interfere with Work as little as possible when using his authority to test the Design Work. Clause 20.4 states that while the Employer is not under any obligation to use his authority to test the Work, the Employer must notify the Contractor in writing in due time if he actually discovers a failure by the Contractor. It is not clear what "in due time" means and this requires further clarification to avoid argument.

2.2.3 Clause 21 contains similar provisions to clause 20, save that it relates to Construction and Maintenance Work.

2.2.4 In our view, the provisions above are tilted in favour of the Contractor as not only does it oblige the Employer to police the Contractor's failure by making it compulsory to give notice of such failure, but could be interpreted as giving the Contractor a "get-out clause" if the Employer does not give notice. This is so even if the Contractor was in breach of contract by not complying with the client's requirements (as in the example given), which seems unfair.

2.2.5 This position is the reverse of what we would expect to see in English contracts, which generally maintain the Contractor's contractual responsibilities notwithstanding the existence of any quality plan or failure of the Employer to comment on or notify of a defect, and imposes a self-policing regime on the Contractor. This is consistent with the overriding principle that a contractor who is engaged to design and build a project should be responsible for own his acts or omissions, and it is not the Employer's duty to police them or be penalised for not doing so.

2.2.6 Consequently, we take the view that the mutual interests of the parties are not sufficiently balanced on this issue.

DBFM 2.0

2.2.7 Clause 8 of the DBFM 2.0 obliges the Contractor to prepare a Management System that applies to the Work in conformity with the requirements of ISO 15288:2008 or equivalent standard (as this is a technical standard outside our expertise, we make no comment on it).

2.2.8 Clause 8.2 obliges the Contractor to build the Performance Measurement System in accordance with the Measurement Specifications, and to maintain it in accordance with the Management Specifications. There is no obligation on the Employer to inform the Contractor in writing in due time or otherwise, if he discovers a failure by the Contractor. Pursuant to clause 8.4, an inspection by the Employer does not imply any approval of Work performance and the fact that the Employer tests or approves any document does not in any way mean that the Contractor is discharged of any responsibility he would otherwise bear. Further, under clause 8.5, the Contractor must remedy any damage to the Infrastructure as soon as possible and in any case no later than the Correction Deadline

2.2.9 The regime above is consistent with what we would expect to see as mentioned in paragraph 2.2.5 above. Consequently, we consider that the mutual interests of the parties are sufficiently balanced on this issue.

2.3 Comparing the clauses with similar broadly used contract conditions in your jurisdiction: what suggestions do you have for the Dutch conditions and perhaps also: what – if anything at all – did you learn from the way this theme is being dealt with in the Dutch conditions?
JCT Contract

2.3.1 There is no express obligation on the Contractor to implement a quality assurance ("QA") plan. Pursuant to clause 3.12, the Employer may require the Contractor to open up for inspection any work or materials and goods. The cost of such testing, is borne by the Employer, unless otherwise provided for in the Employer's Requirements or the Contractor's Proposals or the inspection shows that the materials, goods or work are not in accordance with the contract.
2.3.2 Unlike the UAV-GC 2005 and the DBFM 2.0, there is no provision enabling the Employer to test whether the QA of design work is in accordance with the QA plan, or any obligation on the Employer to inform the Contractor in writing in due time or otherwise, if he discovers a failure by the Contractor.
FIDIC Contracts

2.3.3 Clause 4.9 requires the Contractor to institute a QA system to demonstrate compliance with the contract requirements, and the QA system is open to audit by the Employer. The QA system should comply with the details stated in the contract and in practice, it is not uncommon to refer to the relevant ISO or equivalent standards. Details of all procedures and compliance documents are required to be submitted to the Employer for information before each design and execution stage is commenced.
2.3.4 Unlike the UAV-GC 2005, there is no duty on the Employer to inform the Contractor in writing in due time or otherwise, if he discovers a failure by the Contractor.
2.3.5 In a similar vein to the DBFM 2.0, the Contractor's contractual responsibilities are preserved: Clause 4.9 states that:
"Compliance with the quality assurance system shall not relieve the Contractor of any of his duties, obligations or responsibilities under the Contract."
2.3.6 In practice, it is not uncommon to expand this even further and provide that any comment or approval or notification, or failure thereof, by the Employer shall not relieve the Contractor from its obligations under the contract.
2.3.7 As mentioned in footnote 2 above, as regards design, clause 5.1 of the FIDIC Silver Book expressly attempts to absolve the Employer from any responsibility for the Contractor's design, which is tilted in favour of the Employer. In our experience, it is not uncommon for this clause to be negotiated down.

2.3.8 Our suggestion on this issue is that the UAV-GC 2005 provisions could be amended so that the Contractor's responsibilities under the contract are not diminished by any comment, approval or notification, or failure thereof, by the Employer on the design or QA matters (similar to the positions in the DBFM 2.0 and FIDIC contracts), which we consider to be a fairer result.

Denmark

This problem and the answers relates closely to theme 8, whereto I refer.

UAV Clause 19, 20 and 21, are very detailed, mainly stating, the Employer can test anything, but with due respect of the progress of the design and the construction. This seems fair to me.

Clause 20-4 is very similar to my proposed Clause in Theme 8, but it is my opinion, that the Employer would be in a better position, if part of my proposed subsection is added, namely:

"In case the Contractor will not accept the full responsibility for the amendments proposed by the Employer, he must notify the Employer accordingly in writing in due time before he includes the proposal in the design. Hereafter must the Employer within 10 working days inform in writing if he upholds his request for the design or accept the Contractors design. If the Employer upholds his proposal, he will assume the responsibility for such design without any right to claim the Contractor."

Let me repeat, also under Danish law, a party who has discovered an error without warning the Contractor must bear the cost for additional work and time. It is part of the already mentioned duty to act in "good faith". Besides by acting in accordance with this rule you will under all circumstances avoid a risk for delay, and you will also avoid unnecessary lawsuits or arbitration from the other party who might be so disappointed by your behaviour, that he raises a claim.

Slovakia

In the view of mutual duty to notify it is necessarily needed to allow controls to client. In the Slovak legal system the control of work by client is considered as practical especially in construction. Client has a right to control also during the execution of works by contractor. Contractor is obliged to call client upon control and take-over the work that is being covered by the subsequent work.
If a contract defines that the client has a right to check the work at a certain phase of its execution, contractor is obliged to invite client soon enough to execute this control. If client did not appear for this control, contractor has a right to continuo in execution of works. If he or she would follow his duty, contractor is obliged to allow client to have additional control and bear the related costs.

As it implies for the name as well as the content of this theme, this matter is exceptionally important in the legal relations between client and contractor of the design project or construction. It seems that the text stated in this theme is "provocative" in a certain way in order to raise discussion. Interests of each contracting party are given in advance and these standpoints are more or less determined in the rights and duties of contracting parties, if they consistently insisted upon their interests. In our legal jurisdiction take-over of work and execution of controls and examinations of work exhaustively regulated herewith the extent of rights and duties can be particularized in particular construction contract.

Czech Republic

In the Czech law, emphasis lies upon liberty-of-a-contract principle. Regulation of mutual rights and obligations is thus dependent on the will of the parties, in case of no special will non – mandatory provisions of the Commercial Code regulating contact on work shall apply.

Czech legal regulation gives several possibilities how the employer may intervene by controlling the performance of works. Unless the parties agree otherwise, the law entitles (not obliges) the employer to control the works during its performance. He may demand the contractor to remedy discovered defects which arise due to defective performance of the works and to perform the works duly. In case the contractor fails to provide remedy even within reasonable time rendered therefore and the approach of the contractor clearly leads to fundamental breach of contract, then the employer is entitled to withdraw from the contract. However should the employer not notify the defects to the contractor, the claim from defect liability at the time of hand – over of the works does not cease to exist. The liability of the contractor for the defects is not limited by the controls of the works performed by the employer in the course of performance of the works.

Further the contract may contain agreement that the employer is entitled to check the works at a specific level of its performance (e.g. before respective parts of the works are covered). In such case the contractor is obliged to invite the employer in time to perform the check. Despite these checks the contractor remains liable for the defects of the works.

It is also possible to agree that the due performance of the works shall be demonstrated by undertaking agreed examinations and tests. In such case the work is deemed to be completed only after such examinations and tests have been fulfilled.

The work is subject to regular checks from the side of the employer or its external experts, tests, examinations and measurements before it is handed – over to the employer. This applies mainly for larger project. In regards to projects in public sector, one may refer to the methodology of the Ministry of Finance of the Czech Republic "Risk Management in PPP Projects" dated 11th September

2008, which recommends that these types of risks connected with quality are allocated to the private sector, thus to the contractor.

ILLUSTRATION:
At first, it is necessary to find out whether the contract on works contains special agreement of the parties on handling the situation. In case no such agreement exists, provisions of Commercial Code apply.

As discussed closer in theme 8, the contractor is obliged, in case of instructions given to him by the employer, which may be also in the form be e.g. project documentation, act with professional care to discover possible unsuitability of such instructions and notify the same to the employer. Non – fulfilment of this duty leads to the contractor's liability for defects of the performed works caused by unsuitable instructions. On the other hand, in case the employer insists on its instructions in writing, the contractor is not liable for the impossibility to finish the works or for defects of the performed works caused by such unsuitable instructions. Similarly the contractor would not be liable in case he was not able to discover the unsuitability of the employer's instructions.

It would be necessary to examine whether the employer has instructed the contractor to use such type of wood, whether the employer was bound by such instruction, whether the contractor was able to discover unsuitability of the instruction when acting with professional care and whether the contractor notified the employer thereabout. Very important would be also possible reaction of the employer to such notification of the contractor.

Spain:

In Spain the designer prepares the project. It is normally a consulting of engineers. Once finished there is a supervision of the project by the Administration ("Oficina técnica de supervision de proyectos"). During the execution of the construction contract, the Administration is allowed to inspect and supervise

THEME 10: SETTLEMENT OF DISPUTES

Answers were received from:

Belgium

This note focuses on the resolution of disputes arising out of the performance of construction, supply and service contracts only. It doesn't deal with disputes in connection with the genesis or the award of such contracts.

1. The disputes that are hereby concerned may be submitted to ordinary tribunals (art. 566 of the Judicial Code). The justice of peace is competent with respect to demands that are valued less than € 1.860. His judgments may not be subjected to appeal in the event the claim is valued less then € 1.240 (art. 617 Judicial Code).
Appeal against judgements by the justice of peace is lodged with the tribunal of first instance or the business tribunal.
Demands that are valued in excess of € 1.860 are introduced with the tribunal of first instance or the business tribunal. The tribunal of first instance is competent with respect to any whatsoever claims, regardless of whether the parties are business entities or not.
The business tribunal is competent with respect to disputes between business entities only, that concern business acts and for which the justice of the peace is not competent as discussed supra (art. 573 Judicial Code).
Private and public construction, supply and service contracts that are entered into by a company whose principal or corollary object is normally to performance of such activities qualify as business acts (art. 1 and 2 of the Business Code).
The claimant who is not a business entity may sue a business entity before the business tribunal with respect to a dispute that involves a business act.
Appeal against first instance judgments by the tribunal of first instance or the business tribunal may be lodged with the court of appeal.
Finally the cour de cassation reviews the judgments in ultimate instance issued by the tribunals of first instance and the business courts as well as the decisions of the courts of appeals as to compliance with the laws and compliance with substantial or procedural requirements that are sanctioned by nullity and voidance (art. 608 and 609 Judicial Code).
The principal advantage of the public judicial system is that – not considering the attorney fees – it is reasonably cheap and the judges and magistrates are competent and experienced lawyers. The main disadvantage is that the judicial system suffers delays, especially the courts of appeals.
In the circumstances alternative dispute resolution formats have received less or more attention.

2. Arbitration as a means to resolve disputes is being dealt with in detail in the Judicial Code. The parties freely determine to submit to arbitration a dispute that has occurred or that may arise,

provided a legal compromise is allowed. Anyone who is capable or competent to conclude a compromise may submit an agreement to arbitration. In principle public persons are only entitled to submit a contract to arbitration in the event the dispute has as its object the conclusion or the performance of the agreement that is thereby concerned (disputes with respect to the interpretation of the agreement may not be made the subject of arbitration!).
The Judicial Code sets out in detail the procedure : the choice of the arbitrators, their number, challenges and substitution of arbitrators, the format of the arbitration agreement, procedural decisions, witness hearing, expert investigation, terms, formats of the arbitral award, annulment and execution.
For reason of the procure being complicated parties shall employ specialized attorneys. Arbitrators in almost all instances are also lawyers who are well acquainted with arbitration procedures. It shouldn't come as a surprise that procedural discussions by and times become more important than the resolution of the matter at hand.
Arbitration centres such as the Belgian Centre for Arbitration and Mediation have not been able to prevent this evolution.
At the same time as arbitration has become the playing field of specialized attorneys, increasingly by comparison to the past, expert witnesses are being called upon. All this implies extra time and money.
One will also consider that in case of multi-party agreements the consolidation of the arbitration procedure is an illusion.
In conclusion : arbitration is not always the best manner to resolve construction disputes. By consequence there is a movement to chose for ad hoc arbitration, once after the dispute has arisen, when the issues to be resolved and the parties have become known. It shouldn't come as a surprise then that mediation and other, more flexible, dispute resolution procedures such as DAB and DRB have become fashionable.

3. Mediation is also being dealt with in the Judicial Code (art. 1724 to 1737) that sets out the procedure – although in less detail than arbitration. Any dispute that may become the subject of a compromise may be submitted to mediation.
There are three forms of mediation : judicial mediation, voluntary mediation and free mediation (i.e. otherwise than in accordance with the provisions of the Judicial Code).

a) Judicial mediation : in any phase of any judicial process the judge before who the matter is pending may either at the request of the parties either at its own initiative but with their consent, appoint a mediator.
The parties agree on the identity of the mediator, de duration of the mediation and the date by which the mediator will submit its report; all of this is set out in an interim judgment.
In the event that the mediation, even only in part, leads to a settlement, this may be certified by the judge so that it receives the status of a judgment against which no appeal is possible unless the mediation agreement was reached by unlawful means.

b) Parties that are involved in a dispute are allowed, even when judicial proceedings are pending, to call on mediation.
The mediation rules and regulation must be noted down in a written "mediation protocol". Execution of this protocol suspends the prescription terms for the duration of the mediation. In the event that the mediator or any of the parties expresses in writing its desire to terminate the mediation, such suspension ends with effect as from one month following the service of the corresponding notice by registered letter. Any settlement that is reached through the mediation, may at the initiative of any of the parties by way of a signed request, be proposed for certification by the competent judge. The certification decision confers the settlement the status of a judgment.

As well for judicial as for voluntary mediation it is required to call on a certified mediator. The certification of the mediators is organised by the federal mediation commission that in turn is assisted by specialized sub-committees. IN this way there is special sub-committee for business matters.

c) Finally, there is no prohibition on the parties to organize an ad hoc or purely contractual mediation otherwise than within the legal framework (e.g. by calling on a mediator who is not a certified mediator). In such cased, the settlement following mediation will not be certified by any tribunal; such settlement shall only have the status of a compromise.

4. In real life practice an even greater number of procedures have been elaborated in view of promoting good faith, expertise and prompt action in respect of disputes. In the frame of important construction project, parties have a tendency to postpone the battle until completion of the works. In the event it would appear that at such time it is very hard still to establish the facts of the matter that lie at the basis of the dispute. To avoid this type of difficulty so-called dispute review boards (D.R.B.) or dispute adjudication boards are constituted as between the client and the contractor. Members are prominent experts who closely follow up the project. Through regular site visits and permant exchanges of information on the progress of the works, they are able quickly to issue a binding decision or an advice – depending on the powers which have been conferred upon them.
Usually these boards consist of three or more members, chosen in function of their specific expertise with the type of works concerned, their impartiality and independence.
Still it needs to be observed that this type of dispute resolution system in fact has been hardly ever applied in Belgium.

Germany

Also German A-Model contracts contain an alternative dispute resolution regime. According to clause 58 A-Models contracts the parties constitute an arbitration committee ("Schlichtungsausschuss") which comprises two representatives of each party as well as one chairman which is either agreed by the

parties or determined by a Higher Regional Court ("Oberlandesgericht"). Very often, such a chairman is a widely accepted presiding judge of a German Higher Regional Court. The arbitration committee can be addressed by either party and has to convene within two weeks after it has been addressed. Generally, disputes have to be resolved within three months after the arbitration committee has convened for the first time. Otherwise, the parties are free to involve ordinary courts.
With regard to matters merely relating to construction works the alternative dispute resolution mechanism additionally provides for an "interim decision" to be taken within 14 business days after the committee has been addressed. Such an interim decision becomes binding unless either issues a claim before an ordinary court within four weeks after the interim decision has been issued.
In German construction contracts one will observe the same tendencies as in construction contracts under Dutch law or under the UAV-GC 2005, i.e. certain alternative dispute resolution concepts . The intention of the parties of a contract under German construction law is to use as much as possible alternative mechanisms for settling disputes concerning legal or technical issues of the contract, in particular whilst the execution of work is in progress. The parties more often believe that their needs are not sufficiently taken care of by ordinary civil courts where law suits are usually very long lasting or handled by judges with insufficient qualification in construction matters. These might be the reasons why many law suits to the civil courts are frequently settled by mutual agreement of the parties. Thus, it is no surprise that under the VOB/B one will find several mechanisms to settle disputes. For example, if differences of opinion arise in connection with contracts concluded with government agencies or other official bodies, the contractor can appeal in the first instance to the immediate superiors of the office awarding the contract. These senior public officers shall give the contractor an opportunity to put forward his case in person. Wherever possible they shall give him written notification of their decision within two months drawing his attention to the legal consequences of the provision that the decision will be deemed accepted if the contractor does not file a written objection within three months after his receipt although the client has given him notice of the time period of exclusion. However, in § 18 (5) VOB/B it is stipulated that any such disputes shall not entitle the contractor to suspend the works. Furthermore, § 18 (5) VOB/B does not impair other rights of the contractor to refuse performance, pursuant to statutory law or according to other VOB/B provisions .
It appears that as in many jurisdictions also in the Netherlands there is a strong awareness that alternative dispute resolution is favorable to litigation in the ordinary court system. Indeed, practice shows that the features of alternative dispute resolution provide for a more suitable, expeditious and frequently more professional solution than a traditional law suit. It is certainly no surprise that also in Germany alternative dispute schemes haven been introducted such as for instance "Streitlösungsordnung für das Bauwesen", edited by Deutsche Gesellschaft für Baurecht in Frankfurt.

Switzerland:

Some general observations on the resolution of construction-related disputes

As a rule, construction professionals prefer not to deal with lawyers unless absolutely necessary. The arrival of a lawyer at a construction site, or a letter from a lawyer to the opposite party, is often seen as sign that any negotiations thus far conducted have broken down and, in some cases, as a downright "declaration of war." More specifically, contractors generally do not accept the idea that it can be a good investment to spend money for legal advice early on in a project. As a result, lawyers are seldom involved in the drafting stage of contractor agreements. Nevertheless, the quality of such contracts clearly matters. This becomes obvious whenever disputes arise – as they invariably do. Upon execution of the contracts, the balance of bargaining power tends to shift from the principal to the contractor. This explains, in part, why contractors often engage in full-blown price wars at the outset and start notifying claims as soon as the agreement goes into effect. It is often alleged that public procurement practice focuses too narrowly on price rather than quality. For some, this helps to explain why claims are put forward more systematically today than in the past. Another reason is the fact that cross-border competition has become more intense.

It would appear that where domestic disputes are involved, recourse to institutionalized arbitration is not particularly common. The court system – and the lawyers who keep it busy – still plays a dominant role in the resolution of conflicts in the construction industry. As a rule, court proceedings are time-consuming and absorb valuable management capacity. There are some who think that while justice matters, efficiency matters even more. The demand for alternative (and more efficient) methods of dispute resolution is thus on the rise. The future looks promising, but there is still much work to be done.

Increasingly, professional clients and their contractors agree to use dispute boards (DB), which are coming to be seen as a particularly effective way of dealing with construction disputes. Their success is due to a number of reasons, among which the most prominent is probably the fact that conflicts are addressed in a timely manner. As long as a project is still in progress, the parties usually have a strong incentive to cooperate with each other. It is as the project approaches completion that discussions tend to become increasingly confrontational.

Dispute Boards may be agreed on as part of a conflict resolution system that was developed by the VSS (Swiss Association of Road and Transport Experts) and published as a recommendation in 1998. The VSS model involves three stages. The first stage consists in discussions between the parties at the construction site. The last step of this first stage is the "Top Level Meeting" (Chefgespräch) in which the two highest ranking managers of the client and contractor companies participate. This "Top Level Meeting" is considered a threshold that must be crossed before the dispute can enter the next stage in the process: conciliation. At this second stage, the dispute is brought before a Dispute Board which is composed of a lawyer/chairman and two construction professionals, all of them neutral parties. The procedure to be followed before the Dispute Board can be freely agreed by the parties. If the parties accept the non-binding proposal brought forward by the Dispute Board, the case is settled. If one or both of the parties wishes to continue in the matter, they may take recourse to arbitration. This third stage may be entered only if the contractor agreement so provides. If the agreement does not foresee arbitration, the dispute must be litigated in court.

Denmark

AV-GC 2005: Article 18 (Model Agreement); clause 47 (general conditions)
DBFM: clause 21, with many references throughout the contract (3.5.(f), 8.5.(a), 9.1(e), 11.2(b), 20.1, Schedule 2, clause 5.4, etc.

The settlement and disputes clauses seem (not surprisingly) well balanced and reasonable.

Compared to Danish rules, the only differences worth mentioning are:

Comments on AVG 46:

In Denmark we don't use own expert witnesses to record the dispute. A neutral expert will always be appointed by the Courts or the Arbitrators. This means, only one neutral statement. However, the parties can of course hear their own witnesses on the subject, but it is hard to overrule, what the expert has recorded.

Comments on AVG Clause 47-3:

In Denmark there is no fixed short time limit (as for instance 3 or 6 months) to start proceedings, but he must notify the other party of the claim "within a reasonable period of time" after observing the problem according to ABT93 §32. This is also the rule under Danish law. However, the longer he is waiting, the more is the value of his proof of what actually happened weakened, since the recollection of the witnesses decreases.

Comments on DBFM 21.2 (g) (i) :

The time limit for the claimant to start legal proceedings takes its outset at the time of approval of the appointment of the Experts/the Committee. I do not see the reason for that. Why not let it start at the same time as the request of appointment of the arbitrators. In Denmark the Claimant must file his claim with the request for Arbitration (or litigation), and the opponent shall normally reply within four weeks. This will normally expedite the procedure, all though I admit, this time limit to respond is very often postponed in more complex cases, because the claimant has had the time he needed. He could even use more than the six month in Netherlands. In Denmark he will not be barred until the Prescription time expires after 3/5 years.

Comments on DBFM 21.2 (g) (iv):

In Denmark no draft for Expert-, arbitrator- or judge determination is issued. It is found to lead to additional arguments from the parties and new briefs to the Court. This could lead the arbitrators to seek and construe a new reason for their decision, which I don't find satisfying. However, I do understand it could lead to new grounds for the decision,that are better understood by the unsatisfied party.

In Denmark the Courts and the Arbitrators will often after hearing the case propose a settlement if the parties accept. They will highlight the proposal will be exactly the same by the decision, and no additional briefs from the parties will be admitted.

Under Danish law we have a special Clause in ABT 93 §46, that deals with a swift – temporary – procedure for the parties to call payment under the bond that is normally issued for fulfilment of the contract. It states:

Expert opinions on security provided, etc.
§ 46. At the request of a party the Arbitration Board may appoint an expert who shall be asked to give an opinion on the release of security provided, cf. § 6, subs. 7, and § 7, subs. 3, and on the justification of holding back payments or making set-offs in case of disagreements between the parties as described in § 22, subs. 14.
Subs. 2. Depending upon the nature of the dispute the Arbitration Board may decide that such opinion is to be given by several experts.
Subs. 3. The request must contain such information, etc., as is listed in § 45, subs. 2. A copy of the request shall at the same time be sent to the other party under the contract.Subs. 4. The Arbitration Board shall stipulate a short period within which the opponent may file a statement. Under special circumstances the expert may allow the parties to file one more statement within a short period fixed by the expert. Upon the expiry of such period the expert will as soon as possible and within 15 workdays decide to what extent the request for payment is seen to be justified and award costs, including the fee payable to the expert. The Arbitration Board shall fix the size of such fee.
Subs. 5. Under special circumstances it may be decided that payments to private employers and to Contractors are to be conditional upon the provision of security, in which case the expert shall stipulate the type and magnitude of such security as well as the conditions applying to payments under it or its cessation. In case of requests for payment under security provided by the employer the expert may under special circumstances also refer the Contractor to bring the matter before the Arbitration Court under § 47.
Subs. 6. Under very special circumstances the Arbitration Board may extend the time limits provided in subs. 4 by up to 10 workdays.
Subs. 7. The payment of amounts under the decision shall be effected within 3 workdays of the day when the parties and the guarantor receive notice in writing thereof.

Subs. 8. The procedure to be followed in cases on expert opinions shall follow the rules fixed by the Building and Construction Arbitration Board.
As can be seen, the expert must be very skilled as well in technical issues as in legal issues.

Therefore, his nickname has become "The clever man".

It is often used as well by Employers as Contractors and in my opinion with satisfactory result, since the parties – who after all have the best knowledge of the case in detail – to my understanding in many cases accept the decision as final.

Austria

Coming to a conclusion when comparing Dutch standard regulations on settlement of disputes to the Austrian ones: Dutch regulations are up-to date regulations apparently resulting from a long discussion taking into account all the well known problems of alternative dispute resolution. I might be helpful to monitor the development in the near future and to adjust the regulation if the desired effects do not occur.

Slovakia

This subject is similarly solved in Slovakia in accordance with the legal regulations. Clauses on settlement of disputes are being usually included in the construction contracts. In particular, if the dispute will be settled according to Slovak law, or if it is the case of foreign entity, according to the law of other country. If contracting parties do not settle their dispute by conciliation, mutual agreement, they can turn to arbiter (legal or natural person) whom they agreed upon to settle the dispute. Other possibility is to turn to tribunal while contracting parties agree in their contract the decision of the tribunal is binding. Mediation is lately being used; however it does not have so far strong credit in the legal practise.
In case it was not agreed differently in the contract disputes between contracting parties are being settled by general courts of the Slovak republic according to valid legal order.

Czech Republic

As we should deal with different kinds of dispute settlements arising in contractual relations mainly in construction area, which should be dealt with in other form than by common courts or by arbitration courts, already at the beginning it is necessary to state, that the Czech law does not recognise such kinds of dispute settlements.

At first we have to distinguish between authoritative dispute settlement, in which the dispute solution is vested in a decision, which is exercisable and enforceable, that possibly also with the help of state authority, on one side, and any dispute settlement, in which the dispute might be settled by a person different from the parties to the dispute, but the enforceability of which is dependent only on the will of both parties to the dispute, on the other hand.

The dispute settlement by common, thus state, courts belongs to the first group. Execution of such decisions might be carried out upon request and, based on preference of the party to the dispute, or by common court or by executor, who is a private person with vested state authority. Also dispute settlement performed by the arbitration courts belongs to this group. Based on the Czech law, property disputes might be decided by permanent arbitration courts or by ad hoc nominated arbitrators that based on the will of the parties to the contractual relationship. Arbitral awards issued within such arbitration proceedings are binding and enforceable, possibly also with the help of enforcements by state authority.

All other kinds of dispute settlement miss the obligatory nature of the decision issued in such proceedings. Such types of dispute settlement might, of course, be used in the practice, but due to the missing obligatory nature and enforceability, these kinds of dispute settlement are not often used. This type of dispute settlement might succeed mainly only in cases, when parties have good business relations and when the parties aim at amicable solution of a dispute and are willing to voluntarily comply with such solution. However, the possibility of the parties to turn to common court or arbitration court (in case the possibility of dispute solution at the arbitration court was agreed) remains untouched, that also in case such unofficial decision of other person in the same case exists.

These other kinds of dispute solutions are not regulated by the Czech law and thus may have different forms. There exist probably three most often used kinds of such dispute settlement (common names are mentioned): a) conciliation board, b) expert (expert interference), c) pre – arbitral proceedings before an arbiter.

Czech conciliation board or expert correspond, in regards to their conception of dispute settlement, to the dispute settlement by Committee of Experts (or, as the case might be, Committee of Experts formed by one person), as specified in clause 21 of DBFM. The Czech law does not regulate manner of decision making or proceedings of dispute settlement by conciliation board or by an expert. It is typical that the personal constitution of conciliation board is set already at the beginning of contractual relation, that this board meets regularly (e.g. at the site) and deals with not only legal, but also factual disputes. Also an expert is often nominated at the beginning of a relation, however he is usually not entitled to make decisions in legal disputes, he mostly deals with special (mainly technical) disputes. The conciliation board decisions are usually identified as recommendations, thus with only recommendatory character. Non – binding form of conciliation board decisions forms an important

difference in comparison to Dutch regulation. In case parties to the dispute do not obey this recommendation, then if the parties agree so, arbitration proceedings may follow, while it is possible that member of conciliation board were nominated as arbiters ad hoc. Third type, which is also not regulated by the Czech law, is pre – arbitral proceedings by the arbiter. It might be qualified as similar to preliminary ruling known by the common courts. The parties shall agree on arbiter or arbiters to issue such ruling. However, the issued ruling is again not enforceable by state authority.

Last and one of the most important kinds of dispute settlement is mediation. Mediation is regulated by the Czech law, however not for the area of property disputes. In case mediator is used for dispute settlement, it will be based on the will and agreement of the parties. The mediator aims to find amicable solution for the parties to the dispute, however he does not decide on the dispute, which makes his activity different from the above mentioned.

Spain

In Spain it would not be possible to insert provisions in construction public contracts that enable parties to use alternative mechanisms of dispute resolution (ADR). It is even not possible to solve the dispute by an arbitration process. If the client is the Administration it is considered a public contract ruled by the principle of public order which is considered incompatible with the arbitration. There is a project to modify the Arbitration Act, but, for the moment, it is not possible to use arbitration in public construction contracts.

THEME 11 RISK ALLOCATION: HIGHWAY A90

Answers were received from:

Belgium

In 2002 Flemish Government has established the Vlaams Kenniscentrum Publiek-Private Samenwerking. In the beginning of 2010 this organisation has set out to draw up indicative task-risk allocation matrices (TRAM) for three different DBFM project scenarios, including the scenario whereby the contractor is to obtain the construction permit. The draft TRAMs have been published per the end of April 2010 in order to collect comments, etc. from the general public. It is expected that they will be finalized by the end of 2010. At such time it will most probably be possible to consult these files on http://www2.vlaanderen.be/pps/.

The TRAMs substantially deviate in many ways from the principles that govern traditional public construction works in Belgium. In particular they abolish the rule as per article 16 §2 of the General

Contracting Conditions for public works that allow the contractor to an extension of time and/or a revision - read: extra compensation - or even the termination of the contract in the event of unforeseen conditions affecting performance. This is a general – catch-all types of circumstances – provision that allocates the risk of the unforeseen circumstances with the client.
The TRAMs adopt another approach. Here it is advised that the contractor undertakes all such unforeseen risks, except those that have explicitly been defined. In addition, in any such circumstances, a distinction is made as to whether such circumstance entitles to compensation and/or extension of time.
As regards compensation we observe that it still needs to be discussed by the TRAM editors if this is limited to costs or if in certain events profit may as well be claimed - a distinction that is already expressly made in anglo-saxon law inspired dbfm contracts. See e.g. the Fidic Conditions of Contract for Design, Build and operate Projects, the so-called Gold Book.

Delay events

Clearly , the first draft of the TRAMs that have been published in Flanders are still for the most part inspired by the DBFM agreement standards that have been published by the Directorate-General for Public Works and Water Management (RWS). That is how the following circumstance is equally being recognized as delay event(all references between brackets to the relevant columns in draft TRAM1):

- Construction permits that cannot be put in effect for reason that they are suspended, withdrawn or annulled (R2).

But there are more such conditions that qualify as delay events according to the Flemish draft TRAMs. E.g.:

- Construction permits that are not being issued (R1);
- Archaeological findings viz. fossils, coins, articles of antiquity and structures and other remains of archaeological interest found on the site (R6);
- Unforeseen pollution of the site (R8)
- Utilities in the site that were or could not be known by the contractor based on the data that have been made available to him (R10);
- No relocation of the utility lines by their owners or operators within a reasonable term (R11);
- Suspensions by order of the Client (R14);
- Protest actions close by the site (R16);

The reason why changes of law (R15) and the traditional force majeure and exceptional risk events, such as war, hostilities, radiation, earthquakes, etc. would not entitle to additional time for completion – like in the contracts of Rijkswaterstaat or in the Fidic Gold Book (clause 18.1) - is not clear.

Finally, it is observed that one can very well argue that the following also entitle the contractor to extensions of time:

- Discovery of valuable fauna or flora;
- Delays caused by third parties in general;
- Explosives, ordnance etc.;
- Other obstacles that were or could not known by the contractor based on the data that have been made available to him.

See also S. VAN GARSSE, J. De MUYTER, B. SCHUTYSER en A. VERLINDEN, DBFM handboek, Brussel, 2009, 102, nr. 296-297.

Compensation events

An important number of the circumstances that are being accepted as delay events would not entitle the contractor to compensation in the highway A90 case as submitted by the IBR for purposes of its 2010 congress. A contrario the proposed TRAMs by the Vlaams Kenniscentrum PPS would be agreeable to the payment of compensation in the following events:

- Construction permits that are not being issued (R1);
- Construction permits that cannot be put into effect for reason that they are suspended, withdrawn or annulled (R2);
- Additional conditions imposed by the permitting authorities (R3);
- Archaeological findings viz. fossils, coins, articles of antiquity as well as structures and other remains of archaeological interest discovered within the site (R6);
- Unforeseen pollution (R8)
- Utility lines in the site that were or could not be known by the contractor based on the data that have been made available to him (R10);
- No relocation of the utility lines by their owners or operators within a reasonable term (R11);
- Suspensions by order of the Client (R14);
- Protest actions close by the site (R16);
- Vandalism during the operation service period (R18);
- Variations upon the initiative of the employer (R37);
- Variations upon the initiative of the contractor that are approved by the client (R38).

In all these circumstances, according to the first draft of the TRAMs, compensation would only occur provided the damages that are suffered by the contractor exceed certain thresholds as defined in the particular contract. We would believe this principle cannot be upheld with respect to and for reason of certain financing costs that are anyhow billed by the project financiers and that ordinarily are for risk and account of the project promoter/developer.

In addition it may well be argued that the following circumstances also deserve to be qualified as compensation events:

- Discrepancies between the actual situation found on site and the information given by the client;
- Infringements of intellectual property rights for reason of express instructions by the client;
- Default by the client with respect to certain specific obligations undertaken by it.

See also S. VAN GARSSE, J. De MUYTER, B. SCHUTYSER en A. VERLINDEN, DBFM handboek, Brussel, 2009, 104, nr. 304. It will be observed that in the latter case these authors would not consider the contractoris entitled to en extension of time or compensation in case of payment delays. Considering the impact of a payment delay on the project credit finance, we would believe both time and money would be justified. Also this would be more in line with article 15§6 of the General Contracting Conditions that in principle apply to all public works.

Differing geotechnical (soil) conditions

A public client is a professional client or, if he is not, he may organize so as to be assisted by professional consultants including soil experts. He has the time to (have them) prepare the project, including to perform all geotechnical and other tests as required to prevent that still, unexpected ground conditions may substantially interfere with normal (read: financially sound) contract performance.
Presumably based on this line of thinking, the risk of different geotechnical ground conditions is allocated with the client in het virtual A90 case that IBR has submitted for purposes of its 2010 congress.

In Belgium, there is an opposite movement to allocate this risk with the contractor. Here the reasoning is that this element is part of the design. Therefore the risk thereof should be undertaken by the contractor.
It seems to us that this issue has not been practically thought through by the supporters of the contractor risk movement. Of the one hand, by reference to applicable legislation, it is declared that the client needs to investigate for polluted soils etc. See task 11 in the different TRAMs. Of the other hand, it is declared he wouldn't need to investigate by the same token the geotechnical conditions. This seems not logical. While a soil campaign is being undertaken, it can as well address the chemical characteristics as the stability e.a. such features. This saves time and money – as not all candidate contractors need to carry out the same costly investigations.

After all, a project is a practical process that is better served by practical solutions than insistent discussions on principles of risk allocation that disrupt the progress of the construction and operation of the works.

Germany

When assessing a contract a contractor will normally take not only the contractual provisions into consideration but, of course, primarily commercial and technical aspects. Nevertheless, in order to prevail in the construction business it is certainly prudent not to accept risks which are deemed incalculable. Other risks which the contractor believes he can handle may, if put into effect, have significant financial implications. Therefore, a prudent contractor will always make certain allowances in his estimate for all those risks he fears may realize throughout the execution of the project.
Having said that it appears that the appropriate approach for assessing the contract matrix provided is to analyze the risk allocations in the light of calculable or rather incalculable risks. In fact, those risks which are deemed to be incalculable may amount to potential deal breakers. Risks which the contractor is capable of assessing would have at least an impact on the price since respective risk allowances will be made.

a) Permit risk according to art. 18.3 DBFM 2.0

It has been described above (theme 5) that according to the German A-Model regime typically most public law permits are available due to the application of the so-called "Planfeststellungsverfahren". However, despite the occurrence of a "Planfeststellungsbeschluss" according to §§ 72 et. seqq. VwVfG there may be the need to apply for certain additional permits and in this respect the contractor bears the risk in connection with filing/obtaining the respective permits according to German A-Model contracts (clause 12 "Genehmigungen und Gestattungen"). Such a need to apply for additional permits may be for example triggered by a change to the reference design made by the contractor.
Assuming that the "Transport Infrastructure Planning Procedures Decree" (being excluded from the definition of "Permit") is a comparable procedure to the "Planfeststellungsverfahren" then the DBFM approach would be more favorable for the contractor. The German A-Model contracts do not provide for any "supervening event" (be it "delay event" or "compensation event") in case a permit is withdrawn/annulled despite the application meeting the required standard.
As far as we understand it the German A-Model approach is that the Client has to ensure that the project as such is generally able to be implemented from a public law perspective whereas – when it comes to the execution of the project in any detail, including the application for outstanding permits – it is the contractor's obligation to deal with the respective authorities as part of the contractor's "day-to-day" business.
Assuming our understanding of the "Transport Infrastructure Planning Procedures Decree" is correct and according to what has been said above we hold that the risk in obtaining the outstanding permits can be reasonably assessed (also money wise) and accordingly taken by the contractor. Hence, from a contractor's perspective taking this risk might be a possibility to enhance the competitiveness of his bid by pricing at a cheap level according the "Listed Risk"-procedure as described under theme 5.

b) Discrepancy between actual situation and the information given by RWS

Reference is made to themes 1 and 6 above. DBFM 2.0 contracts are usually concluded after the execution of comprehensive public procurement procedures during which a considerable amount of information is exchanged also on behalf of the Client. In that respect it would certainly not be appropriate to treat – as a general rule – any deviation from any information given on behalf of the

Client as a delay and/or compensation event (without further qualifying these events). Moreover, any deviation from information previously given by the Client has to be assessed on a case-by-case basis. There may well be sensitive cases where the contractor needs to be allowed to rely on the information given by the client. As it has been already described under theme 6 this also refers to the "geotechnical situation" respectively the "subsoil conditions" according to the German A-Model regime. This is appropriate because otherwise the contractor would have to perform separate explorations in addition to those already undertaken by the client which would not be a "value for money" approach. Summing up, this contract provision may not be treated as a deal breaker but should be considered by the contractor in his risk allocation.

c) Traffic growth beyond threshold

As already described above German A-Model contracts usually do not provide for an "availability scheme" but for revenues of the contractor being dependant on the traffic flow (i.e. to a considerable extent the latter bears the "traffic risk"). Accordingly, any growth of traffic beyond what has been expected does not have to be discussed as a "risk" because a possible increase of maintenance costs can be outweighed by an increase of income.

As DBFM 2.0 contracts adhere to the "availability scheme" indeed traffic growth may constitute a risk. Yet, also according to the rule that risks should be borne by the party that can best handle them ("Abrahamson") it appears not quite obvious that the client should necessarily take such a risk. Generally, it is rather difficult to predict how the traffic flow will develop in the future as this is to a considerable extent also dependant on the general business development of the national/international economy which is – naturally – also hard to predict. This applies to both the client as well the contractor in a comparable manner. Here again, it appears appropriate for the contractor – possibly also instructing "traffic advisor" – to take the respective risk thereby improving the competitiveness of his bid.

d) Archaeological artefacts/presence of pollution/non registered cables/pipelines

Again, reference is made to the remarks made under theme 1 and 6 and further also to the above section "Discrepancy between actual situation and the information given by RWS". As long as the above mentioned issues (archaeological artefacts/presence of pollution/non registered cables/pipelines) could not have been foreseen by the contractor (e.g. by verification of tender documentation), acting like a "prudent businessman", their occurrence should be treated as a "compensation event". Thus, it would seem appropriate to include the respective language in the contract. An unlimited risk for any type of ground risks is certainly not calculable and, thus, would potentially amount to a deal breaker.

e) Force Majeuere Events

The risk matrix as provided under theme 11 considers various single incidents as a Force Majeuere Event of which the vast majority is comparably treated as a Force Majeure Event also according to international best practice (see also Clause 19.1 FIDIC Silver Book). In contrast to DBFM 2.0 the German A-Model contracts provide for a slightly different approach as they define "Force Majeuere", i.e. "Höhere Gewalt", less detailed as "natural catastrophes, particularly triggered by earthquake, flood

and bad weather, as well as war and nuclear accidents. This approach may well turn out to be broader and to comprise more circumstances compared to the DBFM 2.0 approach, i.e. the final indication of single incidents. It may therefore be recommendable to include a further clause into DBFM roughly saying: "[…] or other similar events being out of control of either party and directly cause either party to be unable to meet its obligation under the Concession Agreement […]".
All the same, the proposed risk allocation is basically acceptable and, thus, should not give rise to a potential deal breaker.

f) Change in Law

According to the proposed contract matrix a „Relevant Change in Law" is a risk remaining with the client. According to the Dutch definition of the "Relevant Change in Law" it comprises on the one hand – and in accordance with international best practice – cases of a "Discriminatory" respectively "Specific Change in Law". However, according to the DBFM 2.0 definition a „Relevant Change in Law" also applies once the contractor needs to invest more capital, however subject to the additional requisite that it is normally written off in more than one year. Apart, DBFM 2.0 does not provide for any provision dealing with a "General Change in Law" this meaning that any consequences of such a usual change in legislation is at the contractor's risk. Considering the rather narrow definition of "Relevant Change in Law" this appears to be strict. Particularly, possible costs to be incurred as a consequence of a (non-discriminatory/specific) change in law during the maintenance period are likely not to be compensated according to DBFM 2.0. Not having detailed knowledge of Dutch accounting laws one may doubt that various well conceivable investments during maintenance – such as the increase of staffing – can be written off in more than one year.
So, the proposed contract allocation of the said risk for changes in law is associated with significant risks for the contractor which inevitably will require him to make respective risk allowances that will increase the overall price.

Conclusion:

It appears that there are many similarities between the German and Dutch approach for DBM / DBFM contracts notwithstanding the fact that differences in the applicable law like for instance the liability after take-over (theme 2) consistently result in different contract provisions. On the other hand the market conditions in the Netherlands seem to be different in some aspects, particularly with regard to liability issues (theme 7) which are apparently more favorable to the contractor. Furthermore, it seems that unlike in Germany where the risk allocation between client and contractor is largely predetermined by BGB and VOB in the Netherlands the parties have more freedom to agree on an individual risk allocation. Although one may assume that this leads to more customized contracts there is also the risk that fundamental principles of risk sharing are neglected, particularly if one party is in a stronger position.

Czech Republic

Required is to give personal view, what allocation of following not allocated risks preferable:

- A discrepancy between the actual situation and the information given by RWS
- Finding archaeological artefacts during execution of the work.
- Presence of pollution in the ground
- Presence of non-registered cables and Pipelines.

The above is a more-less business question connected also with pricing of the work.

Generally, it seems to be fair that the contracting authority/owner of land remains responsible for the documentation/information provided, based on which the contractor makes his pricing and accepts responsibility for time schedules (harmonograms) etc.
Also, based on the Czech Act No. 137/2006 Coll., On Public Contracts, as amended (Sec 44, para 1) the contracting authority is responsible for the accuracy and completeness of the tender documentation.
Should the above risks be allocated with the contractor although, it seems to me that the consequence would be at least a higher price offered be the contractor.

General remarks:

Spain

In conclusion we can say that the important differences between the Dutch and the Spanish system are based in the different structure of the contract. In the Netherlands, the construction contract includes the design, the finance and the maintenance. On the contrary, in Spain these are different and separate contracts: one with the designer and another one with the constructor.

Switzerland

Preliminary Remarks on Swiss Construction Law
We have been asked to describe how the hypothetical cases put to us by the Dutch Society would be treated in our respective jurisdictions. Since this is a question of domestic law, and not of comparative law, the following remarks will focus only on aspects of Swiss law. This being the case, it will be useful to begin with a few brief introductory comments on the way construction law in Switzerland is organized. This will provide us with some background for the more specific matters we will be dealing with in relation to the individual themes.

In practice, Swiss construction contracts are generally drawn up in compliance with a set of 190 recommended General Terms and Conditions for contractor agreements, published by the Swiss Society of Engineers and Architects (Schweizerischer Ingenieur- und Architektenverein, SIA) and commonly designated as SIA 118. As the SIA is a private body, with no government affiliation,

compliance with SIA 118 is not a legal requirement. Its provisions apply only if so agreed by the parties. The basic concept of SIA 118 foresees, as parties to construction projects, a principal, a general contractor, and an architect/engineer, who normally contracts (independently) with the principal. SIA 118 is most often taken as a basis for agreements between a principal and a general contractor, but is also used for subcontracting agreements. Important contractors with a sufficiently dominant market position regularly demand modifications of the recommended provisions, to their own advantage. Such modifications, which are at times quite substantial, can give rise to a complex legal situation when there are incompatibilities between the principal agreement and a subcontracting agreement. SIA 118 is widely used in the industry by both public and private clients. It contains provisions that can be applied to any kind of construction project, irrespective of its nature or cost. Two related observations are in order, however. First, for large infrastructure projects (tunnels and the like), there are additional recommended standard provisions available, which are more specific than those found in SIA 118. Secondly, in smaller projects, many of the issues addressed by SIA 118 may simply not arise.

One last remark: SIA 118 was originally issued in 1977 (with minor amendments made in 1991) and is currently under review. It is to be expected, however, that most provisions will remain unchanged and that, where modifications are made, they will be minor.

Slovakia

1. According to our opinion mutual interests of contracting parties are balanced enough. Of course we do not have a deep knowledge of Dutch legal system and many particular questions that are being solved by Dutch Civic Code. More detailed regulation by general terms and conditions assists business entities as it gives them certain legal assurance and contractual terms and conditions are not being dictated by the stronger partner on the market.
2. Given model contract conditions are inspirational background material for ESCL members as well as beneficial form of broadening knowledge of law form EU Member State. We believe that these model contract conditions are important because construction contracts (due to the particularity of construction) are much more complex and difficult than other contracts in economic sector and business practise.