Defects under Dutch law*

Dutch construction law as an example of the civil law approach

List of Abbreviations

AGB	Allgemeine Geschäfts-Bedingungen (standard forms)
AR	Algemene Regeling voor de honorering van de architect (General rules for the relation employer-architect)
AVKA	Algemene Voorwaarden uitvoering Kleine Aannemingen in het bouwbedrijf (General Conditions minor constructions)
AVTI	Algemene Voorwaarden Technische Installaties (General Conditions technical installations)
BR	Bouwrecht (periodical)
BW	Burgerlijk Wetboek (civil code)
CC	Code Civil
FIDIC	Fédération Internationale des Ingénieurs-Conseils
GIW	Garantie-Instituut Woningbouw (Institute for the warranty of housing-construction)
HL	House of Lords
HR	Hoge Raad (Dutch Supreme Court)
JCT	Joint Contracts Tribunal
NJ	Nederlandse Jurisprudentie (Law reports)
NJB	Nederlands Juristenblad (periodical)
NJW	Neue Juristische Wochenschrift (periodical)
RvA	Raad van Arbitrage voor de Bouwbedrijven in Nederland (Court of Arbitration for Building Companies)
UAV	Uniforme Administratieve Voorwaarden (Uniform Administrative Conditions)
VOB	Verdingungsordnung für Bauleistungen (German Uniform Conditions for Construction)

Table of Contents

* In: *Selected Problems of Construction Law: International Approach*, Switserland, Fribourg: University Press 1983, p. 121-143.

6. The contractor's liability for defects and the supervision, inspection and approval by the employer
7. The contractor's duty to warn
8. The principle of good faith; some applications (exemption clauses)
9. The responsibility for defects after completion of the work

1. Introduction

Before going into the subject of defects I would like to make a few remarks on the scope of this working paper. I will treat the subject according to Dutch law, realizing though, that the law of a small country as The Netherlands is of relative unimportance to lawyers of other countries. As a consequence, I will not discuss the Dutch law on defects in too great detail on the one hand, and will make comparisons with the law in neighbouring civil law and common law countries on the other hand. Concerning the last point, I immediately have to make a *caveat*, as my interest in comparative law in this field is stronger than the knowledge of it, not to speak of the time available. Given these restrictions, perhaps even due to these restrictions, I hope to given an illustrative example of the civil law approach to this part of Construction Law. As will become clear later, the code based countries of Western Europe have much in common, and several developments take place unhindered by geographical boundaries. This brings me to the *causa* of this paper, the formulation of theses for the conference discussion. I trust the Dutch Connection will render enough problems, and solutions as well, for this purpose.

2. Construction Law and the code-system

The structure of Construction Law in civil law countries is basically the same. The Civil Code contains a section on the construction or building contract and a variety of standard forms has come into existence which are being followed in practice. The co-existence of two bodies of rules may give rise to some complications as to applicable law. In countries like The Netherlands and Belgium, where after the French rule at the beginning of the nineteenth century the French Civil Code has been accepted, and France, law [123] with regard to construction contracts is identical, that is, before the important law reform in France of 1978, the Loi Spinetta. This statement is misleading though, as the identical text of the crucial code-articles in this field has not proven to be a guarantee over the years for an identical interpretation by the judge in The Netherlands, Belgium and France. Sometimes the opposite is true, as we will see later.

The sections referred to are the articles 1640-1652 Dutch Civil Code (of which art. 1645-1646 deal with the construction of buildings only), which correspond with art. 1787-1799 Belgian and French Civil Code (art. 1792-1793 on buildings). The Civil Code of Western Germany also has a section on the building contract, art. 631-651. The concepts of Construction Law in these codes are clearly out of date, which gave rise to the regulation by standard forms. Standard building contracts have a long history in The Netherlands; the oldest contract dates from 1839, one year after the introduction of the Dutch version of the Civil Code. This contract, issued by the Ministry of Waterways, has gone through a number of modifications. The 1938 edition, by the name of 'Algemene Voorwaarden' (General Conditions), underwent a major change in 1968. This reform led to the 'Uniforme Administratieve Voorwaarden', UAV (Uniform Administra-

tive Conditions). The change concerned the procedure of drafting and also the content of the new conditions. For the first time there has been an ample consultation of interest groups, especially the organization of construction companies, thus no longer the description of 'adhesion contract' was appropriate. The law reform itself was partially based on new developments in case-law. In the treatment of these UAV-rules in this paper, a comparison will be made with the German VOB-conditions, which in many respects show a striking similarity.

The UAV-conditions are traditionally written for the government building contract; by another tradition they are widely used in civil contracts of importance. It is generally assumed that these conditions are standard indeed; a recent study, however, indicates that they are not as commonly applied as thought thus far, and moreover, that in a considerable percentage of cases the employer dictates clauses departing from the UAV-rules.[1]

There are several other standard forms used in construction law. Of these the following should be mentioned: the AV Burgerwerk (civil construction) used for minor construction contracts (1972), the AVTI 1970 (technical [124] installations), the 1974 Model koop-/aannemingsovereenkomst (model sale/construction contract, residence building), and the Stichting Garantie Instituut Woningbouw (Institute for the warranty of housing-construction, 1974).

In 1979 the first mentioned conditions were reformed and published as the AVKA 1979; also the AVTI-1978 replaced the 1970-edition. Due to the development of Consumer Law, a characteristic of the conditions which appeared since 1974 is the consultation of consumer interest groups and legal organizations, with as a result a greater sophistication in the weighing of interests. For instance, harsh exemption clauses favouring the contractor in the 1972 AV Burgerwerk were struck in the AVKA 1979.

This variety of standard forms has led to the institution of a study group, recruited from a range of interest groups, in 1978. The group's report appeared in 1981 and is subject of discussion at the moment[2]. In the Draft New Civil Code, which also contains a new section on the construction contract, no attempt is made to bring standard forms under the code[3, 4]. In the Dutch New Civil Code the regulations on standard form contracts are part of the section on consumer sale (art. 1.1.1.4).

Legal disputes in construction law in The Netherlands, as a rule, are settled by arbitration. Unlike the situation in other countries, Dutch civil courts have a minor influence on the development of this part of the law. An exception should be made though, for leading cases of the Hoge Raad (Supreme Court) dealing with the Law of Obligations in general or with the interpretation of the articles of the

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[1] A study in the Rotterdam region of 1975 among 25 building companies revealed that 24% worked on UAV-conditions; in 52% of the remaining cases the employer had made alterations to the UAV-conditions. The importance of these alterations is unclear; minor changes are common. Compare for the study: *Bouwbelangen*, 5th March 1976; A.R. Bloembergen, *BR* 1978, 246.

[2] *Harmonisatie van Standaardvoorwaarden in de bouw*, Rapport van de Werkgroep Standaardregelingen in de Bouw, Bouwrecht Monografieën Geschrift nr. 5 1981.

[3] Book 7 Draft New Civil Code, title 12.

[4] In German law the enactment of the AGB-Gesetz, the Standard Forms Act, in 1976, was of little importance for the VOB-conditions: the latter regard contracts between commercial partners as outside the sphere of the Act (compare § 23 sub 2 nr. 5 AGB-Gesetz). Only a minor adaptation has taken place in § 6 sub 6 VOB/B.

Civil Code relating to construction contracts. Thus the bulk of litigation comes before courts of arbitration, the most important of which is the Raad van Arbitrage voor de Bouwbedrijven, abb. RvA (Court of Arbitration for Building Companies). Arbitrators sit in panels of three, or single in petty cases; important cases are published in the review for Construction Law, Bouwrecht, whereas minor cases appear in the yearly report, in an abridged form[5]. Case-law has a strong influence on Construction [125] Law as a whole. As remarked earlier, it was the basis for the reform which led to the UAV of 1968, and for later conditions as well. The position of case-law in this field has a definite common law flavour, which is, incidentally, a general trend in an increasing range of fields in civil law, not unlike its counterpart, the increasing importance of legislation in common law countries. Returning to the role of the arbitrator and the judge in Construction Law, their activities have been most remarkable in the use of the principle of good faith in its several shapes[6]. In the field of Defects too, as we will see shortly, examples abound.

3. Defects and the Construction Law system

In this paragraph I would like to give an outline of the place taken by Defects in the system of Construction Law, before and after completion of the work.

According to § 5 sub 2 UAV the employer is responsible for the design, plans and drawings furnished by him or on his behalf, including the influence of sub-surface conditions, and also for orders and instructions given to the contractor by him or on his behalf. The employer is also responsible for damages caused by defects in materials and equipment placed at the contractor's disposal by the employer (sub 3). As for the obligations of the contractor, all materials used by him have to be of good quality and fit for the purpose, § 17 sub 1 UAV. All materials have to be inspected and approved by the employer's 'directie', his supervisor (architect/engineer) (sub 2). Defects in materials found after approval by the supervisor may be replaced at the employer's costs; in the case of latent defects liability rests with the contractor when the defect was caused by his default, or his supplier's, his subcontractor's or his personnel's default (sub 3). Good workmanship in the use of the materials is the subject of § 6 sub 1, where in general terms it is stated that the contractor has to work with all proper skill and care. This is done in the form of a reference to art. 1375 BW (Dutch CC), laying down the rule that a contract should be carried out according to the obligations derived from statute, good faith and custom, with the addition of the obligation of the proper use of materials. A warranty of fitness for purpose is not found explicitly in the UAV; in the literature, however, such a warranty is generally accepted. Usually this is seen as an obligation to achieve a certain result, in contrast to an obligation to exercise a proper standard of care. The importance [126] of this distinction derived from the Law of Obligations, is questioned in the last decades; most authors, nowadays, see it as a matter of principle only, subject to exceptions based on the surrounding

[5] The reports appear from 1907. Recently cases are also brought before the director of the GIW, the Institute for the warranty of housing-construction, who gives a binding legal opinion. This procedure is informal and inexpensive; decisions are being published in *Bouwrecht*.

[6] In the 75-year existence of the Raad van Arbitrage one of the corner stones of its case-law has been the just solution in the specific case, compare D.H. Smit, *Tijdschrift voor Arbitrage*, 1982, 30.

circumstances[7] of the case. The distinction has been introduced formerly, mainly as a tool for the adjudication of the burden of proof in a breach of contract action; in the law of construction, however, the law of evidence is of very little importance, as the arbitrators are construction specialists themselves and rely on their own judgment at the construction site without any need for further evidence.

The obligations of the contractor are elaborated in the subsections 2-29 of § 6 UAV. The most important one for our subject is § 6 sub 14: the duty to warn. Here we find an obligation of good faith to warn the employer's supervisor in the case of defects found in the design, plans and drawings, orders and instructions, or in materials and equipment furnished by the employer. This rule, developed by the Court of Arbitration over the years, is also known in the German VOB: § 4 sub 3 VOB/B. In both countries it is a common cause for litigation, raising many legal questions. We will go into this field below, § 7. One of the issues is the delicate relation to the duty to supervise exercised by the employer's supervisor (§ 3 sub 5 UAV).

The completion of the work is of importance for the contractor's liability for defects. The main rule, according to § 12 UAV, is that after completion, followed by inspection and approval by the employer by notice in writing, the contractor no longer carries the liability for defects. Two important exceptions are given in § 12 sub 2 UAV: the case wherein art. 1645 BW is applicable, the liability for buildings according to the Civil Code, and secondly, the case of latent defects, caused by the default of the contractor, of his supplier, sub-contractor or personnel. In the last case the employer should give notice of the defect within a reasonable period after discovery; his action expires after five years from the date of completion or from the expiry date of the period of maintenance. A defect is considered latent when it could not have been discovered after reasonable inspection by the employer's supervisor (sub 3). Although the text of § 12 suggests a fault-liability for the contractor, in the same wording as used in § 17, *supra*, most authors accept a strict-liability or no-fault-liability. We will return to the latent defects later, including the regulations in other standard forms, which usually have a shorter expiry term for an action on defect (*infra*, § 9).

The reference made to art. 1645 BW is rather controversial, as is the article itself. This article holds, that if a building collapses by a defect in the construction, [127] the contractor is held responsible for a period of ten years after completion. The interpretation of this article has led to several theories; in the leading theory, based on the standpoint of the Hoge Raad (Supreme Court) and Court of Arbitration as well, the action against the contractor lies for 30 years, the normal term for legal actions, whereas the ten-year period of art. 1645 BW only indicates a reversal of the burden of proof, to the disadvantage of the contractor. When we will go deeper into this matter, we will notice that this same article of the Code is interpreted differently by Belgian and French Courts (*infra*, § 9).

A much debated issue in the field of defects is the question whether the contractor is still liable for latent defects even though the employer may have chosen the materials or nominated the supplier and there has been no lack of care and skill on the part of the contractor. This question, and the related question on the contractor's liability for a sub-contractor nominated by the employer, are asking our attention (*infra*, §§ 4 and 5).

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[7] Compare Asser, *Bijzondere Overeenkomsten III*, by Thunnissen, 1977, 227 (cited as Asser-Thunnissen).

4. The liability for defects caused by materials chosen by the employer

In the case of defective materials chosen by the employer or obtained from a supplier nominated by him, the legal question arising has to do with a collision of two basic rules of law. The first one being that the contractor warrants that the materials he will use are reasonably fit for the purpose for which they will be used and of good quality, and the second one, as a principle of the Law of Obligations, that the employer by choosing the materials (or the supplier) is shifting the risk for insufficient fitness for purpose or quality of the materials to his side. The Hoge Raad in a leading case, the *HIM*-case or *Moffenkit*-case (1966), chose for the last mentioned rule, which gave rise to a still continuing discussion[8]. This rule was implied in another landmark decision, the *Cadix*-case (1968), laying down the general rule that in the case of an obligation to achieve a certain result, the debtor warrants the fitness for purpose of materials used, our first mentioned rule, with the important addition: if the type of contract, the common understanding concerning the transaction involved, or equity are not indicating otherwise[9].

[128] The UAV of 1968 left the matter unsolved, in contrast with the German VOB-conditions: § 13 sub 3 VOB/B clearly states that in the present case responsibility rests with the employer, on the same footing as when materials have been furnished by him[10]. There seems to be no discussion with regard to this subject in Western Germany as opposed to the situation in Holland. In the Dutch literature the controversy has to do with the interpretation of the holding in the *Moffenkit*-case on the one hand, and with the need for differentiation in the rule on the other hand. To start with the first question, in the case at hand the contractor had to lay concrete sewage pipes below water level. The employer, the municipality of Heemskerk, advised by an architect, had prescribed adhesive material for connecting the pipes, produced by the HIM-factory, named 'Moffenkit'. This gluton proved to be not waterproof, and repair work was necessary. The Hoge Raad ruled that for the action in breach of contract or in tort it makes no difference whether the material manufactured and distributed by HIM was 'defective in general', or only 'the quantity supplied for the specific work was defective'. In the comments the distinction has been made between the so-called '*functional defects*' and '*specific defects*'. The former concept designates materials unfit for the purpose in general or for the particular purpose; the latter concept is regarding materials which are defective due to a fault in the production process which only affected a certain number of products. In this category the materials supplied and used form an exceptional defective quantity of an otherwise good product. The distinction 'functional' – 'specific' defects seems to run parallel with the distinction 'fitness for purpose' – 'good quality' in the common law[11].

Some authors are of the opinion that only in the case of functional defects

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[8] HR 25th March 1966, *NJ* 279; the case will be discussed *infra*.

[9] HR 13th Dec. 1968, *NJ* 1969, 174. In this case a cleansing material by the name of Polyclens was used in a factory with disasterous effects to goods stored in the factory.

[10] Compare Ingenstau/Korbion, *VOB Kommentar*, 9th ed. 1980 (at § 13,3 nr. 59); M. Schmalzl, *Die Haftung des Architekten und des Bauunternehmers*, 4th ed. 1980, 164; H. Locher, *Das Private Baurecht*, 2nd ed. 1978, 74.

[11] Compare D. Keating, *Building Contracts*, 4th ed. 1978, 39.

the responsibility for the defects shifts with the choice of materials made by the employer, whereas in the case of specific defects the responsibility stays with the contractor, as a consequence of the basic rule[12]. To put it differently, in this line of thought only in exceptional cases one should deviate from the principle that liability for defective materials rests with the contractor, and only when functional defects are involved the prescription of materials by the employer is making up for an exception to the rule. This standpoint, contrary to the decision of the Hoge Raad in the *Moffenkit*-case, is also taken in the draft New Civil Code, and in a 1977 decision of the Court of Arbitration, [129] the *Monoliet*-case[13]. There is a strong indication that the Court is going over to the opposite view, in a decision in 1981[14].

Several other authors though, including the present author, took the opposite view and chose the side of the Hoge Raad. In their opinion the risk-shifting aspect prevails over the contractor's basic responsibility for materials used. Before going deeper into the argument a short exposé of the *Monoliet*-case may serve as an illustration of the matter. In this case the employer nominated a supplier and prescribed the use of concrete floor-elements produced by the Monoliet factory. The defects which occurred in the floor-elements were not caused by an incidental fault in the manufacture. A new manufacturing process had been started; to speed up production calciumchloride was added to the concrete. Only after inspection and application of the materials it was found that the addition of calciumchloride had caused corrosion of the reinforcement iron, and replacement of some of the elements was necessary. After this discovery Monoliet changed the manufacturing process. The Court of Arbitration with reference to the §§ 5 and 17 UAV, held that in this case there is no question of functional defects, but of specific defects. It is also said that functional defects are in essence defects in design, which are the employers responsibility. The present defects in the floor-elements are seen by the arbitrators as incidental, as the Monoliet-floor-elements are generally of good quality and fit for the purpose. Thus the defects were qualified as 'specific defects', regarding the quality of the quantity delivered by the contractor's supplier, which defects according to § 17 sub 3 UAV are the responsibility of the contractor. The nomination of the supplier by the employer was of no significance for the Court.

In his annotation on this decision Thunnissen points out that in this case it is hard to make a clear distinction between functional (fit for purpose) and specific (quality) defects, as all products of this manufacturer proved defective during a certain period, and unfit for the general and the particular purposes alike. In borderline cases in his opinion the decision should be at the cost of the party which chose the material. Thunnissen also disagrees with the Court in regard of the nomination of the supplier and its consequence: he favours the shifting of the risk to the side of the employer[15].

Let us return now to the controversy and have a closer look at the arguments for the Hoge Raad approach. There seem to be two views in dealing with this problem: to treat the problem as a part of the contractual relation between

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[12] For a survey, J.M. van Dunné, *BR* 1978, 262, and recently, H.C. Wesseling, *BR* 1981, 465.

[13] RvA 10th Nov. 1977, *BR* 1978, 72, with an annotation by Thunnissen.

[14] RvA 31st March 1981, *BR* 649, with an annotation by Thunnissen, in an *obiter dictum*.

[15] Compare also Asser-Thunnissen, 236.

contractor and employer, and, secondly, to handle it as a problem of [130] products liability at large. Remembering the maxim that all roads lead to Rome, it seems appropriate to make a preliminary statement at this stage. The Roman concept which still plays a crucial role in the Law of Contract, is the principle of good faith. In its modern application this means that the interpretation or construction of contract, the imputation of risks in the case of frustration or of defective materials and equipment, etc., should be done according to the standard of good faith. For the present subject as a consequence the risk-shifting problem should be solved, in the formulation of the Hoge Raad, on the basis of the type of contract (which also means: the position of the parties, and their experience, skill, expertise, economic power, etc.), the common understanding in business circles, and last but not least equity. In the light of this philosophy, for instance, the Hoge Raad held in the *Fokker-airplanewing*-case (1968) that the fact of insurance of a certain risk by one party may be an indication that there is a common understanding that the risk should lie on its side. In this case also was considered of importance the fact that the small company executing the contract was paid a very low per hour price, and that the break-down of the hoisting crane was caused by an invisible defect in one bolt, while the amount of damages stood in no relation to the remuneration for the work done. This case illustrates at what length the Hoge Raad is prepared to go to place the contract in its socio-economic context. Another development which should be noticed, is that in modern law the once clear dividing lines between contract and tort are getting blurred. In recent times it is very hard to distinguish duties of care in contract from those in tort. It is not only that in one situation between two persons both actions, in contract and in tort, may lie, as a matter of civil procedure; the duty in question may be formulated either as a contractual duty or as one of tort. The consequences of this union, which in many jurisdictions in fact is a re-union, are hardly thought through in our time[16]. It seems worth while to take this development into account when dealing with our subject. It gives a justification to stress the social setting of the construction contract and to weigh the social consequences of the different solutions.

There are several reasons, it is submitted, for shifting the risk of defective materials to the nominating or prescribing employer. Often the employer may nominate a supplier or producer to obtain a special price, with the risk that the cheaper products will prove to be inferior. The contractor is left out in this transaction; he also will have no influence on the conditions of the [131] contract negotiated with the supplier/producer, of which the exemption clauses are the most important. It is inequitable, in my judgment, to put the contractor up with the risk for defective materials in this situation. So far for the functional defects (of purpose), but how about the incidental, specific defects? Is it reasonable to place the risk for these defects, which always may occur with any supplier or producer, on the side of the employer who happened to prescribe the supplier/producer? A positive answer may be based on a general principle of the imputation of risks in the Law of Obligations. A stronger argument, it seems, is one of a more practical nature, in combination with the aspect of principle. In practice it is often very hard to decide whether the defect in question is of a functional or of a specific nature: sometimes it will not be clear whether the defect is an inherent quality of the material or

[16] An interesting phenomenon is that the development in Dutch law (and in German law too) is running parallel with that in England and America. For a survey, compare my article in *NJB* 1980, 668 (with a discussion of the views of Atiyah, Gilmore, *et al.*).

caused by the application of a good product, however unfit for the particular purpose. Compare the *Moffenkit*-case, where the exact nature of the defect never became clear, and the *Monoliet*-case, where it is hard to define fitness for purpose of the product in general. To cut off these problem-cases, it is attractive to place the risk solely on the nominating employer. In defense the employer may plead the ill-application by the contractor of materials of good quality and fit for the purpose, for instance in disregard of the producer's instructions. The burden of proof will be considerable, but this seems reasonable when taking into account the supervision executed by the employer, in combination with instructions given on his behalf. This last aspect, incidentally, illustrates that the assumption underlying my point of view is that the employer is a professional employer, relying on his own expertise with the choice of materials, and having supervision on the work. In the case of a non-professional employer the outcome may be different, for instance when the defect is functional and the contractor did not perform his duty to warn the employer, or did not inspect the materials properly.

At this stage it may be instructive to discuss two English cases dealing with this matter, which also may serve as an introduction to the products liability aspects. The cases are: *Young and Marten Ltd. v. McManus Childs Ltd.* (1968) 2 *All E.R.* 1169 (HL) and *Gloucesterhire County Council v. Richardson*, *idem* 1911 (HL). Starting-point for the House of Lords in both decisions is that under English Law of Construction two warranties are implied, the warranty of fitness for purpose and that of good quality[17]. These warranties [132] correspond substantially with the warranties implied by section 14 of the Sale of Goods Act 1893, as amended by the Supply of Goods (Implied Terms) Act 1973. Both warranties may be excluded, which depends on the terms of the contract or on the surrounding circumstances. The latter situation is the more interesting one and both decisions are very illustrative in this respect. If the employer in the selection of the materials in question placed no reliance on the contractor's skill and judgment, the warranty of fitness for purpose is considered to be excluded. It remains the question then, whether the warranty of good quality is also excluded. In the *Young and Martin* case, the answer was in the negative. Here the agent of the employer[18], a highly skilled and experienced person, relied on his own skill and judgment in the choice of 'Somerset 13' tiles to be used for the roofing of dwelling-houses. *Nomen est omen*: owing to some fault in the manufacture the nr. 13 tiles had a latent defect, not apparent on inspection, but which became apparent after they were fixed by the contractor and exposed to weather. There was only one manufacturer of these tiles. It was held that although the warranty of fitness for purpose was excluded the warranty of quality was not, and the contractor was liable. The fact that the tiles were obtainable only from one manufacturer was considered insufficient to negative the implication of the warranty. Lord Pearce made an interesting remark: if it is known to both parties that the manufacturer gives no warranty to the contractor, that fact is a strong indication that no warranty is being given by the contractor, as is the case when the contractor advises against a particular material.

[17] Compare for this subject and these cases Keating, o.c. 39; 3 *Halsbury's Laws*, 4th ed. §§ 1159, 1164. See also *Independant Broadcasting Authority v. BICC Construction Ltd.* (1980) 130 *NLJ* 603 (H.L.), where it was established that in a building contract for work and material there was an implied term that the main contractor accepted responsibility for materials provided by the nominated sub-contractor (collapsing television mast).

[18] For the sake of discussion, in fact the main contractor was contracting with his sub-contractor.

This illustrates that the general rule, implying warranties given by the contractor, is based on the assumption that he will have redress for his losses by suing his supplier, a chain leading ultimately to the manufacturer. In the present case, however, the statute of limitation prevented the recourse to the manufacturer, which was considered to be an unfortunate coincidence only.

In *Gloucestershire County Council v. Richardson* this last aspect of manufacturer's disclaimers is placed at a central spot. Here the employer nominated the suppliers for concrete columns at a price and upon terms which had been fixed by the employer. The columns had defects which were undetectable when they were supplied, but which appeared after some columns had been used in construction. The terms included a term limiting liability for defective goods to free replacement and excluded liability for consequential loss of damage. The House of Lords held that the terms of the contract and the circumstances showed an intention that the contractor should not be [133] liable for latent defects due to bad manufacture. The circumstances which influenced the House were the design, materials, specification, quality and price of the columns were fixed without reference to the contractor, and that under the form of contract used (RIBA 1939 ed.) there was no right to object to the nomination or to insist on an indemnity. Thus any warranty by the contractor of the quality or fitness of the columns supplied by the suppliers was excluded.

Both cases illustrate very well the relevance of the products liability issue, especially the consequences of manufacturer's disclaimers[19]. In Dutch law, the situation is not very clear. In the *Moffenkit*-case the employer sued the manufacturer of the gluton, HIM, in tort. The defence by the HIM-factory, based on the disclaimer clause in the contract with the contractor, was not accepted by the Hoge Raad, with the argument that privity of contract was lacking. The fact that the clause was of common knowledge and therefore binding on the employer, as alleged by the factory, was considered irrelevant by the court. In the light of more recent cases the position at law is uncertain at the moment. These cases, however, although important, are outside the field of construction law. In the *gassed onions*-case (1969), where somebody acted an behalf of the owner of a party of onions in his own name, the owner was held bound by the disclaimer clause, although not party to the contract[20]. Incidentally, the clause did not protect the defendant party in this case (who undertook to gas the onions, a treatment against onion-moth), due to the gross negligence involved in the breach of contract and the tort in respect of the owner, as a rule of good faith. The onions were lost, caused by an overdose of gas. In a recent decision, the *Securicor*-case (1979), the Hoge Raad went deeper into the problem, although not giving final answers[21]. Here we have transport contract, where the third party tries to evade the exemption clause of the transport company. The third party, Makro, is the owner of money transported on a daily basis by Securicor, who was contracted to do so by Makro's bank, with the consent of Makro. Due to gross negligence the money was stolen during a particular transport. The Hoge Raad held that it is reasonable to consider Makro as bound by Securicor's disclaimer clause, with the exception of the situation where the

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[19] Compare also *infra*, § 8.

[20] HR 7th March 1969, *NJ* 249. The company undertaking the gassing of the onions was the municipal cleansing-department of the city of Rotterdam, which had no experience in this field, and sought to rely on the exclusion clause.

[21] HR 12th Jan. 1972 *NJ* 362.

type of disclaimer could not have been expected by Makro, or where Makro under [134] the given circumstances could trust that the clause would not be binding on her[22].

Much is left open still, but is seems that in the case of a common disclaimer the third party is bound by it in principle, if good faith and the surrounding circumstances do not indicate contrariwise. Thus the rule of the *Moffenkit*-case seems to be reversed, as a rule of principle, subject to exceptions. For our topic, the case of the nominated supplier or prescribed materials, this means that as a rule, the employer is bound by the exemption clause agreed to in the contract between contractor and supplier. Two situations may be distinguished: when the contractor himself fixed the price of the materials and the terms of the contract without interference of the nominating employer, then, it is submitted, the employer will be bound by the disclaimer if this is a standard clause, or otherwise a clause known to the employer. Secondly, when the terms of contract have been fixed by the employer without reference to the contractor, the employer is *a fortiori* bound by the supplier's disclaimer. It is open to discussion though, which circumstances influence the operation of this general rule; one may think of the skill and expertise of the employer, and of the contractor as well (which may lead to a duty to warn in advance, and to inspect the materials when supplied), the professionality of the nominating employer, the fact which party is best equipped to insure the risk, or to bear the consequences[23]. In the field of products liability, but in many other parts of contract and tort law as well, the weighing of circumstances like the ones mentioned is a familiar phenomenon.

The prescription of material is a very common feature in the building world. For an impression, the following figures of research carried out in 1978 are instructive:[24] [135]

Measure of co-operation in the choice of materials:
(in %)

Concerning:	Employers	Advisors	Main contractors	Sub-contractors	Installers
Main-construction	59	69	52	30	51
Finishing/outside	63	50	53	28	36
Finishing/inside	64	48	54	38	56
Installations	52	45	28	2	86
Electrical plan	44	41	23	-	48
Furnishing	44	20	19	-	27

[22] One may think of the circumstances which the Hoge Raad considered relevant in the *Fokker*-case, e.g. the contract price and the insurance aspects.

[23] The example given by Lord Pearce in the *Young and Marten* case is convincing in itself, but, in all respect, seems to be out of place as an argument in that case, the private employer encouraged by the builder to choose from the wholesaler's display rooms a bath or sanitary fitting. "It would, I think, surprise the average householder if it were suggested that simply by exercising a choice he lost all right of recourse in respect of the quality of the fittings against the builder who normally has a better knowledge of these matters" (at p. 1175).

[24] Report *Beslissingsstructurenonderzoek Bouwnijverheid* 1978, Ten Hagen BV; vgl. *Cobouw Magazine* 10th Nov. 1978, 8; J. Rozemond, *BR* 1979, 187.

Influence on the choice of materials (average of 26 articles):
(in %)

	Employer	Architect	Main contractor
Formally decisive	32	38	12
Co-decisive	41	33	24
Advisory	15	24	32
None	12	5	32
Total	100	100	100

5. The nominated sub-contractor and defects

The treatment of this topic can be much shorter than the foregoing one. Firstly, there is a great similarity in the legal questions related to the consequences of the choice of materials or suppliers by the employer on the one hand, and the nomination of sub-contractors by the employer on the other hand. Furthermore, sub-contracting is the main subject of other working papers.

The basic position at law in both situations is the same. The UAV 1968 holds the contractor responsible for the work of the sub-contractor, and leaves the matter of the influence of nomination unsettled (§ 6 sub 26). Most authors accept a risk-shifting in favour of the contractor, as a consequence of the nomination of the sub-contractor by the employer[25]. The same view is taken in some standard forms, such as the AV Burgerwerk (civil construction), and the AVTI 1970. The recent revision of the AVKA forms, in 1979, is in the same line.

The position of the main contractor, however, is not that he is completely out of the sphere of liability in the present situation. The following scheme has found general approval in the literature. The skill and expertise of the [136] main contractor should be compared with that of the sub-contractor. If the specialist skills are far greater on the side of the sub-contractor, the duties of the main contractor are restricted to the well timing and co-ordination of the construction process. If the main contractor is not unfamiliar with the subcontractor's speciality, or if this may be assumed to be so, the first party has to exercise some supervision and has to report gross faults, detectable after superficial inspection, to the employer. If, finally, the work done by the sub-contractor is of a normal character and the nomination has taken place on personal grounds only, the responsibility of the main contractor is increased[26].

In the AVTI 1970, art. 55 sub 5, this view is put in the form of a general clause, containing the exclusion of liability of the main installer of equipment for defective work done by a nominated sub-installer, if he is able to prove that he has done all that is reasonably required for a good execution of the work (the same holds for the nominated supplier).

In sub-section 6 of this article the main installer's duty to warn in the case of apparent defects and faults in the work of sub-installers is dealt with.

Under some international standard forms the main contractor may exercise the right of objection of a nominated sub-contractor, or insist on an indemnity. An interesting solution is found in Clause 59 sub 2, of the FIDIC-conditions (3rd ed.

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[25] Van Dunné, o.c; Wesseling, o.c.

[26] This scheme, developed by Donders, was accepted by Thunnissen, and others; compare Van Dunné, o.c. 267. Compare also RvA 24th Nov. 1978 *BR* 1979, 228.

1977), concerning the shifting of risk from the contractor to the sub-contractor through an indemnifying clause[27]. [137]

6. The contractor's liability for defects and the supervision, inspection and approval by the employer

A common outcome of litigation in the field of defects is the dividing of the liability for damages and consequential losses between the contractor and the employer, based on lacking or poor supervision carried out by the 'directie' on behalf of the employer. In the decisions of this kind of the Court of Arbitration in the last decade the employer's share variates between 50, 33, 25 or 20 %, depending on the quality of the supervision exercised, compared with the nature of the contractor's breach of contract. The measure of supervision, also depending on the position of the employer, private or professional, is of importance here. If the employer carries no supervision to save costs, he has to accept minor deviations from plans and drawings. The inspection on the site by a private employer, without experience or skill, out of sheer interest, cannot be taken as supervision of the work[28]. In several decisions the incidental character of a supervision, for instance by an architect, is taken into consideration, at the advantage of the employer[29]. In the case of project-building of dwelling-houses, where the private employer could not exercise free choice in the appointment of the supervisor, this works in his favour when the supervision was defective[30]. If the supervisor is not functioning properly, it may be in the interest of the contractor to do something about it. The Hoge Raad once decided that the contractor under circumstances, as a rule of good faith, may demand replacement of the supervisor by the employer[31]. Sometimes it is required from the contractor to contact the employer in regard of the problems in the in-

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[27] Cited by J. Rozemond, *BR* 1979, 187. Compare also the JCT-forms, *infra* § 8.
Clause 59 sub 2 FIDIC-conditions states:
"(2) The Contractor shall not be required by the Employer or the Engineer to be deemed to be under any obligation to employ any nominated Sub-Contractor against whom the Contractor may raise reasonable objection, or who shall decline to enter into a sub-contract with the Contractor containing provisions:
that in respect of the work, goods, materials or services the subject of the sub-contract, the nominated Sub-Contractor will undertake towards the Contractor the like obligations and liabilities as are imposed on the Contract towards the Employer by the terms of the Contract and will save harmless and indemnify the Contractor from and against the same and from all claims, proceedings, damages, costs, charges and expenses whatsoever arising out of or in connection therewith, or arising out of or in connection with any failure to perform such obligations or to fulfil such liabilities, and
that the nominated Sub-Contractor will save harmless and indemnify the Contractor from and against any negligence by the nominated Sub-Contractor, his agents, workmen and servants and from and against any misuse by him or them of any Constructional Plant or Temporary Works provided by the Contractor for the purpose of the Contract and from all claims as aforesaid."

[28] RvA 27th April 1972 *BR* 464.

[29] RvA 28th Jan. 1980 *BR* 400; 7th Jan. 1980 *BR* 195. For earlier cases, see Van Wijngaarden, *BR* 1978, 276.

[30] RvA 24th Sept. 1980 *BR* 1081, 65.

[31] HR 4th Dec. 1970 *NJ* 1971, 204; compare also Thunnissen in his annotation under RvA 29th Jan. 1981 *BR* 528.

spection of materials, or the lacking of proper supervision in general[32].

Thus far the inspection of materials is seen as a part of the supervising activities. Some litigation is concerned with the approval of a particular construction or design, presented to the employer or his supervisor (architect) by the contractor. In several cases the Court of Arbitration takes the view that approval of the construction or design by the employer or his architect does not shift the risk for fitness for purpose or quality to the employer[33, 34]. [138]

7. The contractor's duty to warn

As described above, in § 3, the rule developed by the Court of Arbitration as a requirement of good faith, the contractor's duty to warn when detecting defects in materials, construction or design, has been accepted in the 1968 edition of the UAV, §6 sub 14. Some recent decisions in this field are noteworthy. The obligation to warn or inform the employer exists in several variations: it may be required in regard of the nomination of suppliers or sub-contractors, when the contractor has knowledge of the bad reputation of the nominated firms, or in regard of the choice of materials, for similar reasons[35]. There is also the situation of a failing supervision and finally, the phase of the execution of contract, when plans and drawings, construction or design are found defective or unsuitable for the purpose intended.

On occasion the contractor may, by not fulfilling his duty to warn, shift the liability for certain damages to himself. A good example is the case where the construction has been prescribed by the employer: in a 1975 case the Court of Arbitration even held the silent contractor solely responsible for the damage caused by a defective foundation of a farmhouse[36]. In another case the defective tiles had been prescribed by the employer; the contractor, who designed the construction, received warnings from his sub-contractor, but failed to warn the employer[37].

The warning may be given orally. According to § 4 sub 3 of the German VOB/B the warning should be in writing. However, the German courts are willing to help in the case of an oral warning, the contractor may plead contributory negligence of the architect (the warning may be directed to the architect, if it is apparent that he is taking the warning seriously). Only recently the next step has been taken, and an oral warning has been accepted directly by the court[38].

The contractor may also have the obligation to warn when the defective work or construction is not his responsibility, but for instance that of another constructor, if the defects are consequential for his own work[39]. German courts take

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[32] RvA 3rd April 1981 *BR* 652, see annotation by Thunnissen.

[33] RvA 18th Jan. 1978 *BR* 1979, 227; RvA 28th Feb. 1979 *BR* 730; RvA 25th Nov. 1980 *BR* 1981, 260.

[34] Compare for German law, in the same sense, Locher, o.c. 145; Schmalzl, o.c. 54.

[35] In a recent case the Court of Arbitration held that the contractor had a duty to warn that the costs were exceding the contract price, RvA 15th May 1981, *BR* 732.

[36] RvA 14th May 1975 *BR* 142.

[37] RvA 6th Feb. 1979 *BR* 436.

[38] OLG Frankfurt, *BauR* 1979, 326.

[39] Hof Arnhem 28th Jan. 1975 *BR* 140.

the same view[40].

The Dutch Court of Arbitration is sometimes very lenient in the qualification of a notice or warning; it may be inferred from conduct. In one case, [139] where a dam-wall collapsed due to a defective construction based on bracing-poles which proved too short, the (sub-) contractor had taken the initiative to obtain poles longer than the ones prescribed in the plan. But on inspection these were rejected by the employer, and the shorter ones had been used. Here the conduct of the contractor was qualified by the Court - in an *obiter dictum* - as a warning directed to the employer: he should have noticed that the contractor considered the poles prescribed too short for the purpose[41].

Sometimes the Court is unwilling to accept only a duty to warn on the side of the contractor: he may under circumstances also have a duty to declare that his responsibility for the execution of the contract as demanded by the employer is excluded. If the employer or his supervisor insists on the original construction, the contractor does not have to refuse the execution of contract[42]. In a recent decision the German Bundesgerichtshof (Supreme Court), however, ruled that there may be an obligation on the contractor to refuse the execution of contract, if he considers the construction defective and dangerous[43].

Needless to say, that in all these cases the court will have to consider the skill and expertise of the contractor and to compare it with that of the employer or his supervisor. The more know-how on the side of the employer, the less chance that the contractor is facing a duty to warn. At times the terms of the contract may prevent the existence of such a duty, when inspection and tests are to be carried out by the employer or his advisors[44].

To my impression the duty to warn is not a common feature in English building law. Keating refers to a Canadian case only, where the employer relied on the contractor's experience, judgment and skill to supervise the construction, and the contractor was held liable for failing to warn the employer of obvious defects in the plans which resulted in defects[45]. When discussing design obligations, especially clauses 1 (2) and 4 (1) (b) JCT, 1977 Revision, dealing with the contractor's duties to bring under the architect's attention any discrepancy in or divergence between the documents there set out, and any divergence between statutory requirements and design documents, Keating states that the clauses do not impose a positive duty to search for errors on the contractor. However, the author suggests that a [140] contractor who negligently fails to observe errors cannot take advantage of such failure, in the form of protection by clause 4 (1) (e)[46].

8. The principle of good faith; some applications (exemption

[40] Ingenstau/Korbion (1977) § 4, 3, nr. 100.

[41] RvA 4th Nov. 1975 *BR* 1976 nr. 38.

[42] RvA 13th June 1974 *BR* nr. 142.

[43] BGH 4th July 1980 *NJW* 1981, 50.

[44] G. Kaiser, Die Prüfungs- und Anzeigepflichten des Auftragnehmers nach § 4 VOB, *BauR* 1981, 311, at 315.

[45] Keating, o.c. 41; *Brunswick Construction v. Nowlan* (1974) 49 *D.L.R.* (3d), Supreme Court of Canada.

[46] O.c. 290; 304. At the conference Mr. Keating made the remark that according to recent developments in English law in the last mentioned situation the contractor can be held liable in tort, irrespective of the fact that no contractual obligation to warn exists.

clauses)

In Dutch law the question whether a party can rely on an exemption clause is considered to be a matter of construction, in the light of the principle of good faith and the surrounding circumstances[47]. In German law the position is the same. So it all depends on the measure of negligence of the party seeking reliance on the clause; he will not succeed, according to Dutch law, in the case of gross negligence or wilful breach of contract. In a leading case it was held by the Hoge Raad that circumstances which should be taken into consideration in the case of an exclusion clause in a standard form contract, are: the measure of fault in relation to the interests of the parties, the type of contract and its terms, the position of the parties in society and their relation to each other, the way the clause had been negotiated, the measure in which the other party was conscious of the meaning of the clause[48].

The decisions of the Court of Arbitration are in line with this approach. Often the Court has to deal with an architect relying on clause 34 AR, which excludes his liability to a maximum of 50% of his fee.

Some developments in German and English law are worth to be mentioned. It is standing law of the Bundesgerichtshof, that the 'Bauträger', who sells newly built dwelling-houses with the assignment of rights against third parties can exclude his liability, but this liability revives if the party buying the house does not succeed in finding redress for his claim elsewhere[49]. This approach is comparable to legislative action taken in France with the Loi Spinetta (*infra*). In English law the construction of contract - view on the exemption clause - question was reestablished by the House of Lords in the *Securicor*-case in 1980, overruling Lord Denning's substantive law-solution of the *Harbutt's Plasticine*-case, as a deviation from the *Suisse Atlantique*-case[50]. [141] But this all is not very shocking in continental eyes. More interesting, at least for our subject, is clause 28 *d* of the JCT Standard form of Building Contract, 1977 revision, the successor of the RIBA-conditions[51].

This clause deals with the position of the contractor in regard of exclusion clauses made by a nominated supplier. The contractor, being liable for latent defects, can require the architect specifically to approve the clause in writing; in consequence, the contractor is protected by having the benefit of the exclusion clause. On the architect's refusal to give the approval the contractor can reject the nomination.

The principle of good faith also is applied in the case of fraudulent concealment of defects in Dutch law: reliance by the contractor on the expiry of the term for an action on defects is considered to be against good faith. Standing law of the Court of Arbitration[52], it appears in revisions of standard forms and in the

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47 HR 20th Feb. 1976 *NJ* 486, *Pseudo-birdpest* case.

48 HR 19th May 1967 *NJ* 261, *Saladin v. HBU*.

49 Compare W. Jagenburg, Die Entwicklung des Architekten- und Baubetreuungsrechts 1979/1980, *NJW* 1981, 2394. See also F. Schmidt, § 13 VOB/B im Bauträgervertrag, *BauR* 1981, 119, for the working of the AGB-Gesetz.

50 Compare Keating, o.c. 140, for the law before the *Securicor*-case, and the textbooks on the Law of Contract.

51 Keating, o.c. 381; 142. Compare, in the same sense, the JCT, 1980 Revision, which was not at this author's disposal.

52 Compare M.A. van Wijngaarden, *Aanneming van bouwwerken en architectenovereen-*

New Civil Code[53]. In English law the same position is taken[54].

9. The responsibility for defects after completion of the work

In our earlier description of the liability of the contractor for defects after completion of the work in the system of Dutch (or continental) construction law (§ 3), we noticed the combination of statute law and standard forms. It is not my intention to give a thorough discussion of the legal questions abundant in this section of the law. I will only make a sketch of the characteristic features of the law, with some comparative notes on the interpretation of the Code in Belgium and France, and then contrast the resulting traditional picture with the revolutionary law reform in France, by the enactment of the Loi Spinetta in 1978.

Art. 1645 BW (Dutch CC, corresponding with art. 1792 Belgian and French CC) deals with latent defects, affecting the solidity of a building, and holds the contractor liable for a period of 10 years. In the interpretation of the Dutch Supreme Court this means that the burden of proof rests on the contractor, to prove that the defects were not caused by faults on his part. The [142] same view was taken by the French courts, before 1978, in contrast with the Belgian courts which place the burden of proof on the employer[55]. Until recently, only Belgian courts also accepted patent defects for an action based on this article; in 1979 the Dutch Court of Arbitration decided in the same way[56]. The statutory requirement that the solidity of the building should be endangered was also interpreted liberally, in this case. Only in Belgian law the article is considered to be of public policy, so that the parties are not free to restrict or extend the liability of the contractor[57].

So the general trend in Dutch law is that the courts are treating art. 1645 BW in a more liberal way recently. In the traditional view though, the article only deals with serious, basic defects of a building, and the need for additional provisions was apparent. Most standard forms therefore, have special provisions for latent defects, which differ in several respects. Especially the liability period shows a great variety: in the UAV, § 12, it is 5 years, in the AVTI-1978 4 years, in the AVKA-1979 3 years, in the Benelux Draft 2 years. The German VOB has a period of 2 years, § 13 sub 3.

In many respects the Loi Spinetta[58] breaks with the traditional rules based on the code-system, which accounts for a revolutionary flavour of the law reform. The 10-year period of liability still is the starting-point for the French legislator, but an important distinction is made, an innovation by Spinetta, namely between elements of construction and elements of installation. Only in regard of the first

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komst, 1979 2nd ed. 59, and recently, RvA 18th May 1981, *BR* 803.

[53] Art. 47 sub 2 AVTI-1978; art. 7.12.12. New CC. Compare also the Report *Standaardvoorwaarden*, 1981, 129.

[54] Keating, o.c. 129; 166.

[55] Asser-Thunnissen, 283.

[56] RvA 28th Feb. 1979 *BR* 730.

[57] Frequently the 10-year period of liability is extended by the employer, compare Van Wijngaarden, *BR* 1978, 272.

[58] Compare for this Law, J.H. Herbots, *Rechtskundig Weekblad* 1978, 2685; also in *BR* 1978, 725. Recueil Dalloz & Sirey, 1979, *Chronique VII, La responsabilité des constructeurs d'après la loi du 4 janvier* 1978; Ph. Malinvaud and Ph. Jestaz, *Doctrine* (1978), 2900, 2923, 2947; *Textes* (1978), 46686.

mentioned elements the liability of the contractor runs for ten years; for installation elements his liability lasts 2 years, and for perfect finishing of the work, 1 year.

The 10-year liability period for the construction itself regards two kinds of damages: in relation to the construction as a whole, and to certain installation elements connected with the constructive elements (elements of comfort, foundation, shell, division, cover). As for the damage to the total construction, a distinction is made between defects endangering the building and defects making the building unfit for the purpose intended.

The 2-year liability period of the contractor for installation elements is based on the warranty of well functioning of the installation ('la garantie de bon fonctionnement').

[143] The new article 1792 CC confirms the standpoint of the French Cour de Cassation that the 10-year liability, though a contractual liability, also exists in regard of the successive owner of the building. Of extreme importance is the extension of persons liable under this article of the Code: besides the contractor, also the architect is held responsible, and further the vendor of newly built houses, the building promotor ('home builder'), who are liable on the same footing as the contractor[59].

But this is not all: another breathtaking step is the holding responsible of the manufacturer of building elements, belonging to the construction (e.g. pre-fab elements) or to the installations (or the importer of the products). On the manufacturer rests a vicarious liability, besides the contractor. The damages can be in relation to the element itself and the construction work as a whole. Also the technical bureau supervising the work, which in the French practice is done at the initiative of the Insurance companies, is brought under the scope of art. 1792 CC. As a matter of fact, this was already the case-law in France (and Belgium as well). Finally, another innovation is the obligation for the employer to insure his risks, in a combination of a 'first party' insurance of construction damages and a 'third party' insurance for the liability persons participating in the construction work[60]. The other persons held responsible under the new article also have the obligation to insure.

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[59] In Belgium the Breyne Act was passed in 1971 holding comparable provisions for the sale of planned houses. Cf. Herbots, 2703; Asser-Thunnissen, 281.

[60] In Dutch practice, the common CAR-insurance policy is not covering damage from latent defects, clause 4. Compare for the insurance aspects also the report of the Study group on *Standaardvoorwaarden*, 1981.