FEATURE ARTICLE

Rotterdam city view at sunset with construction cranes. Credit: Kiev.Victor/Shutterstock

Common law-style contracts in a civil law world

Leendert van den Berg,
Severijn Hulshof, The Hague
l.berg@shadv.nl

The differences between common law and civil law are often highlighted and discussed from a civil law perspective, and more specifically a Dutch perspective. However, the term 'civil law' is too broad for a useful comparison with another legal system, as it covers so many jurisdictions that are not at all alike. What may be quite logical under Dutch law, for example, may be looked at quite differently in Chile or the United Arab Emirates, both civil law countries.

The one common denominator of civil law is the codification of core principles in legislation. Case law is most certainly of importance under civil law systems, but judges (and arbitrators) are basically required to apply (and interpret) the law. As for the law, it may vary quite considerably from one civil law country to another. That being said, one generalisation may be made: in civil law jurisdictions legislation will provide a set of rules for most (if not all) situations that may be experienced in daily life. When it comes to business transactions, the law generally will provide arrangements to determine whether a contract was concluded between two parties and which

general conditions apply. If a dispute arises, the law arranges which courts to go to and which procedures to follow. And generally, if a particular case is not specifically dealt with in legislation, the law will still provide general principles and oblige contracting parties to behave in a reasonable and equitable manner in their dealings.

This article addresses the phenomenon that increasingly in the construction industry, common law-style contracts are used in civil law jurisdictions. By common law-style contracts, the author refers to contracts arranging in great detail any and all procedural and other issues related to a specific construction project (preferably written in English).

This article speaks from a Dutch perspective. When it comes to construction, Dutch law contains a set of provisions specifically related to contracting, as well as a number of provisions related to the assignment of work (eg, to architects and engineers). Both subjects are included in Book 7 of the Civil Code. The provisions on contracting are given in 20 articles (7:750–7:769 of the Civil Code) and those related to the assignment of work in 14 articles (7:400–7:413 of the Civil Code).

increasingly in the construction industry, common law-style contracts are used in civil law jurisdictions

The legal arrangements for contracting provide the highlights of what one would expect to be relevant for a construction project. There are arrangements concerning the price to be paid to the contractor and addressing several common situations, such as how to deal with an indicative price or how to deal with the situation when no price was agreed. The law provides a basic arrangement for how to deal with changes, as well as with circumstances that may necessitate a higher price to be paid. Naturally, the delivery of the works is dealt with, as well as the situation that the work might collapse before delivery. Defects in the works before and after delivery are equally dealt with, along with how a contract may be cancelled. And there are still other arrangements. The point is that in a relatively limited number of articles, a lot is taken care of. It is very important to note that these provisions are only specific arrangements for contracting, which relate to a whole underlying system that sets out how commercial contracts should be dealt with. This system is embedded in the way in which commercial (and non-commercial) parties deal with each other. Parties know that there is always the law and the underpinning principles of the Dutch legal system of fairness and equitable behaviour.

When discussing legal questions and issues in an international context, one often has difficulty grasping what the problem seems to be, only to realise that the problem is dealt with in legislation in one's own jurisdiction. To be fair, such legislative solutions may be based upon a general approach and may not result in the best outcome for particular contracting parties in specific situations. That is precisely why contracting parties are to a great extent free to deviate from such solutions and to make their own arrangements.

That is where contracting comes in. A perfectly workable contract under Dutch law may consist of 20 to 30 pages, nowhere near the hundreds of pages that may be expected in common law-style contracts. The simple explanation for this is that a good contract under Dutch law should lay down the specific choices of the parties and leave the rest to the legal system already present.

Of course, in an international context, this may not be such a convenient system as most, if not all, Dutch legislation is written in the Dutch language. Although translations of the Civil Code are available on the internet, a translation may not provide a full and proper understanding of the underlying principles and regulations. The Civil Code is only one part of the legislation that may be relevant to the contracting parties. Furthermore, contract philosophies such as design, build, finance and maintain (DBFM), build–operate–transfer (BOT), build, own, operate and transfer (BOOT) and design and construct (D&C) generally originate from common law roots. As the popularity of such contracting philosophies rose, so did the use of rather extensive – common law-style – contracts. So these days, a lot of construction contracts in the Netherlands are either plain common law-style contracts, written in English or (Dutch) translations of such contracts.

The upshot of this trend is that contracts are easier to recognise internationally and do appear more familiar to parties from a common law background. In my opinion there is a (considerable) downside to this as well.

First, there is a language barrier. The contracts described are often drafted in English by non-native speakers. It is not uncommon that much boilerplate text is used, which is then copied from one project to another. Unsurprisingly, that does not necessarily lead to the best wording of contracts. Furthermore, it may lead to rather different interpretations of the same wording of a contract as the understanding of English legal terms by native speakers may differ considerably from that of a non-native speaker.

This is where the legal barrier comes in. If the wording of a contract is not entirely clear, interpretation may be necessary. Generally, construction contracts concerning projects in the Netherlands are contracted under Dutch law. This means that the interpretation of the contract will eventually have to be done through the application of Dutch law and legal principles. To avoid any such interpretation, contract drafters tend to include pages of definitions and contractual language. As aforementioned, often this drafting is copied and re-used for other projects that it was not originally written for, or it is used out of context. Instead of the initial intention of clarity and comprehensiveness, the outcome may be pages of language that is difficult to read and even more difficult to understand. Add again the language barrier between non-native speakers and native speakers and a need for interpretation may be born.

This is when the two legal cultures (civil law and common law) may meet in ways that surprise the contracting parties. One-sided contractual clauses, providing either the employer or the contractor with a preferred position, may turn out not to provide that party with the result it was aiming for. A simple example may be the (very common) contractual requirement that any and all change orders may only be issued in writing. Under Dutch law, such contractual provision may not be of much use to the employer if it is not applied consistently. If the contractor can show that the employer commonly issued oral change orders and paid for such orders as well, the employer may subsequently be considered to have waived the contractual requirement. One might think that adding several other provisions to this rather simple requirement (eg, changes may only be ordered by the engineer after a written notification by the contractor within 14 days after the event that they relate to) would lead to a better outcome, but the opposite may be true. The reasoning of a Dutch judge or arbitrator under Dutch law may well be that if the employer clearly put a lot of contractual emphasis on change order procedures but then completely failed to apply such procedures, this would only further underline that the employer waived its rights under such provisions.

As stated repeatedly, the author can only (and even then, only modestly) speak for his own jurisdiction. It is equally stated that the common law/civil law denomination does not do justice to the underlying differences between legal traditions and cultures within those two groups. It is a rather risky business to cross the divide by incorporating contractual provisions and mechanisms originating from the 'other side'. When using civil law-style contracts in a common law context, the 'parachute' of the law will be missing and the outcome will probably be even worse than when using common law-style contracts in a civil law context. When using common law-style contracts in a civil law context, it is important to realise to what extent the law may or will take over at some point. And it is important to make sure that the drafting of contracts is done in such a way that ambiguities are avoided. Copying boilerplate wording from a different legal system in a different language just does not do the trick.

Leendert van den Berg is a partner at Severijn Hulshof. He can be contacted at **l.berg@shadv.nl**.