



Subject : Explanation of PELSC regarding EFC 2018

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## **1. Introduction**

- 1.1 In (the concept of) the EFC 2018, it is established in article 1 that the Principles of European Law on Service Contracts (PELSC) are applicable to agreements to which the EFC 2018 have been declared applicable. That choice requires an explanation. In this memo it is clarified, therefore, what the value and support of the PELSC are (paragraph 2), which chapters of the PELSC are applicable in case of the contracting of foundation works (paragraph 3) and what consequences this has for the contractual relationships (paragraph 4). In conclusion, it is discussed what steps need to be taken, if the need arises, to fine-tune the relationship between the EFC 2018 and the PELSC at a later stage.
- 1.2 The PELSC (the relevant parts) have been attached to this memo as an appendix.

## **2. Meaning of PELSC**

- 2.1 The (PELSC) were developed within a broad partnership of European legal experts. The set contains rules which can serve as a model for contractual relationships which are entered into within the European Union between clients and service providers in the broadest sense of the term. The set has come about because within the European Union there exists no general coherent legislation for the provision of services.
- 2.2 The PELSC were published in January 2007 and have come to enjoy broad support throughout the entire European Union. The set contains balanced arrangements for both clients and contractors.
- 2.3 The PELSC are composed of 7 chapters which can be declared applicable as a modular system.

### **3. Relevant chapters PELSC**

3.1 The PELSC is composed of the following chapters:

Chapter 1	: General Provisions
Chapter 2	: Construction
Chapter 3	: Processing
Chapter 4	: Storage
Chapter 5	: Design
Chapter 6	: Information
Chapter 7	: Treatment

3.2 Per chapter, the first provision stipulates in what cases the relevant chapter is applicable. For example, article 2:101 states: *This Chapter applies to contracts whereby one party, the constructor, is to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client.*

3.3 For the EFC 2018, the chapters 1 (General Provisions), 2 (Construction), and 5 (Design) are relevant. Chapter 1 and 2 are applicable to every agreement in which foundation works are contracted, chapter 5 exclusively if and to the extent the design of the foundations is made by the foundation contractor. Thus, the gap pertaining by not adhering to the UAV 2012 (the Netherlands constructions regulation) or Netherlands legislation is being covered. In that sense, PELSC functions as a 'safety net'.

### **4. Consequences for the EFC 2018**

4.1 In the EFC 2018, the PELSC are declared applicable, under the provision that the EFC 2018 prevail each time in case of conflict with the PELSC. This means concretely that the PELSC are exclusively applicable to the extent the EFC 2018 do not stipulate a deviating arrangement.

4.2 Subjects which have not been (differently) arranged for in the EFC 2018, and which therefore are governed by the PELSC, are for example (not exhaustively):

**Warning duties** : in art. 1:103 and 1:110 PELSC it is stipulated that the contractor and the client are obligated to warn each other (already before the start of the agreement) for risks which the other party is not aware of or should know;

**Sub-contracting** : in art. 1:106 PELSC it is stipulated that the contractor has the right to outsource the work to a sub-contractor, on condition the latter is adequately able to complete the work;

<b>Quality</b>	: in art. 1:107 PELSC it is stipulated that the contractor carries out his activities with the diligence and skills which may be expected from a reasonably competent contractor, unless the contractor declares to apply a higher quality standard;
<b>Indications real estate</b>	: in art. 1:109 PELSC it is stipulated under what conditions the contractor must follow indications of the client;
<b>Modifications</b>	: in art. 1:111 PELSC the conditions are stipulated for an intermediate modification of the agreement;
<b>Rescission</b>	: in art. 1:112 PELSC it is stipulated (amongst other things) that the client may rescind the agreement in case the contractor falls short to such an extent that correct compliance will not follow;
<b>Duty of complaint</b>	: in art. 1:113 PELSC the duty of the client is stipulated to timely complain about defects he identifies in the work;
<b>Cancellation</b>	: in art. 1:115 PELSC it is stipulated under what conditions the client can cancel the agreement (against compensation of incurred losses and loss of profit);
<b>Commissioning</b>	: in art. 2:106 PELSC it is arranged when the (partial) commissioning must take place, and that the contractor is <i>not</i> relieved from liability after commissioning;
<b>Remedies for malpractice</b>	: in art. 2:109 PELSC it is stipulated that the client is entitled to fulfilment of the agreement (specific performance) in case of malpractice. Compensation of damage only becomes pertinent if the contractor does not (completely) correct the defects;

## 5. Conclusion/continuation

- 5.1 The PELSC function as a safety net: if a certain situation has not been arranged for in the EFC 2018, the arrangement in the PELSC applies. The PELSC are accepted in Europe, have support, and offer a good instrument at the level of construction law to assure the interests of partners in the construction process. The EFC 2018 can therefore also be considered – reasoning in the opposite direction – as the specific arrangement for the foundation contractor within the wider European framework of construction legislation, the PELSC.
- 5.2 Because the PELSC comprise a balanced set, it must be considered whether the EFC 2018 should not include concrete deviations with regard to the PELSC, chapters 1, 2, and 5. If therein subjects are stipulated too much to the advantage of the client, and these subjects are not deviated from in the EFC 2018, deviation is necessary in second instance. For the moment, I see no grounds to anticipate this. The less so, because also

the UAV 2012 is a balanced document, to which the AVAF 2016 (general conditions for foundation works) represents the specific arrangement. This only serves to increase support and renders the set usable and acceptable vis-a-vis clients/market operators. At a later stage, however, within the work group Contractual Relationships of the EFC the question may be addressed whether further fine-tuning is required; implying, therefore, the risk of impairing the acceptability of the set.

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