THE USE OF ARBITRATION AND BINDING OPINIONS IN INSURANCE PRACTICE FROM THE PERSPECTIVE OF THE PARTIES*

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1. Introduction

Arbitration clauses can be found - these days in 2014 - in almost every conceivable type of contract. In some sectors, arbitration has long been used as an alternative and in particular a satisfactory form of dispute resolution. Thus, in the construction industry arbitration is a thoroughly well established concept, thanks to arbitration institutions such as the Council of Arbitration for Construction and the Arbitration Institute of Architecture. The world of trading commodities and raw materials also makes extensive use of arbitration as a form of dispute resolution, with its own arbitration institutions, such as NOFOTA (Netherlands Oils, Fats and Oilseeds Trade Association) and the Royal Committee of Grain Traders. There is also a specific arbitration institution for resolving ICT disputes, called SGOA (Foundation for the Settlement of Automation Disputes). A major advantage of arbitration compared to litigation through the courts which is constantly mentioned is access to a pool of experts, so that the presence of specific knowledge of the industry and the subject matter is ensured. [2] Another major advantage is deemed to be the efficiency and speed with which cases are settled.[3]

Given these undeniable benefits, it would be reasonable to expect that the focus would be on arbitration in resolving insurance disputes. Yet there appears to be no particular interest in arbitration within the insurance industry in the Netherlands. In Dutch policy conditions, it is still unusual to find an arbitration clause. This means that companies in the Netherlands are out of step with developments in this area in other countries where the arbitration clause has really taken off in insurance agreements. This is especially true for America, England and Germany (countries with major players in the insurance market, not to mention the reinsurance market), where arbitration has long been embraced by insurers[4].

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[2] We avoid the term "ordinary" courts, because it might perhaps favour the suggestion that the arbitrator is "unusual". That would not fit with the basic principle that arbitration is a completely adequate alternative to proceedings before the regular courts.

[3] In particular in America control of the (legal) costs is also seen as a major advantage. That is why the AIA (American Insurance Association) is a big supporter of mandatory arbitration. As early as 2003 the Insurance Journal quoted Stephen Zielezienski (AIA assistant general counsel) is saying: "AIA strongly believes that arbitration plays an important role in holding down the skyrocketing costs of the U.S. tort system.", www.insurancejournal.com/news.

[4] We do not have specific figures, but from many publications it is clear that insurance policies in America increasingly contain an arbitration clause. See for example Joshua Gold in his article "Insurance Policy Arbitration Clauses: perils and considerations for policyholders" in The Corporate Counsel, December 2007: "More and more insurance policies contain arbitration clauses, calling for the policyholder to arbitrate (rather than litigate in court) any dispute over insurance coverage." See also Peter Halprin who reported through the Financial Insurance Law Blog of Anderson Kill on 25 July 2013 that: "Many insurance

In America, the sharply rising popularity of arbitration clauses in insurance agreements can be explained against the background of the jury system. By including (comprehensive) arbitration clauses in insurance agreements, U.S. insurers deny policyholders the possibility of submitting questions about the applicability of the policy and the coverage under the policy to a judge and jury and are trying to prevent the jury classifying the settlement of claims under the policy by insurers as *bad faith* (with the risk that the jury will award an amount of damages for non-contractual liability).[5] Of course, this consideration does not play a role in Dutch law, but it might be thought at first glance that the above-mentioned advantages of arbitration would lead the parties to an insurance dispute to prefer arbitrators to the regular courts.

The fact that this is not (increasingly) happening could perhaps be explained by the pitfalls and obstacles that may arise if the parties wish to submit their dispute to arbitrators, seen both from the position of the insurer and from that of the insured.

For example, what about a complex insurance dispute, involving not only the insurer and the insured, but also other parties, such as the broker, the injured party, the third-party beneficiary or one or more other third parties? If the insurance policy includes an arbitration clause, who is or are bound by it in that case? Only the insurer and the insured or also other parties? How to avoid partial settlement of disputes ("piecemeal resolution of disputes") and conflicting judgments?[6]

And does not the argument that the dispute will be settled by one or more arbitrators with knowledge of the industry and the subject matter evaporate if the insured person himself has no affinity with the (insurance) industry and is perhaps afraid of high "insider" content? This is an issue that directly affects the impartiality of arbitrators (already a sensitive subject).

These - and other - pitfalls we will address in this paper, without wanting to aspire to completeness. In addition, we will briefly discuss alternative dispute resolution procedures in the form of proposals from an ad hoc binding advisor. Other alternatives - especially disputes through mediation and the KiFiD - are discussed by other authors in this volume.[7]

2. The arbitration agreement

2.1 The requirement of a "written document"

Insurer and insured may agree that disputes between them, to the extent arising from the insurance agreement, shall be subject to arbitration.

Arbitration is only possible if it is based on a valid arbitration agreement. The requirement that the arbitration agreement is confirmed by a written document (Art. 1021 of the Dutch Act on

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policies include an arbitration clause requiring coverage disputes to be settled by arbitration, often in a venue of the insurance company's choice."

[5] See E.M. Kneisel and R.E. Dolder, "Arbitration Clauses in Insurance Policies, a primer for the construction professional", 2004 Construction Law Update, p. 228.

[6] A question which is of course also relevant to disputes to be settled through the involvement of various national courts.

[7] See the contributions of A. Hammerstein, N. Van Tiggele-Van der Velde and M. Pereira in this collection.

Civil Procedure, “DACP”) is not an existential or procedural requirement and is only relevant if the creation or existence of the arbitration agreement is disputed.[8]

Art. 1021 DACP requires that the document is expressly or implicitly accepted by or on behalf of the other party. It should either be a document which provides for arbitration or a document that refers to conditions that provide for arbitration. For parties who wish to ensure at the conclusion of an agreement that any future disputes will be subject to arbitration it is important that the arbitration clause meets this evidential requirement. That way the inevitable discussion about the competence of the arbitrators may be avoided, if it comes to a dispute.

A specific feature of insurance law is that an insurance agreement is in principle free in form. The insurer is required after the conclusion of the insurance agreement to ensure that as soon as possible a policy ("deed") is issued confirming the agreement (Art. 7:932 section 1 of the Dutch Civil Code, “DCC”). That deed is the written evidence of the existence of the insurance agreement.

Such a deed usually involves in practice a schedule with the details of the parties, sum assured, premium, applicable specific and general clauses etc. It is accompanied with the clause sheet with special conditions and the applicable general policy conditions. Coverage confirmation, the contract note or "cover note" do not constitute a deed (and are generally not issued by the insurer, but the broker) and do not provide compelling evidence of the existence of the insurance agreement.[9]

The policy meets the requirement of a written document referred to in Article. 1021 DACP. This document is explicitly or implicitly accepted by the insurer and the policyholder. Acceptance by the insurer is usually explicit: in many cases, the policy document is signed by or on behalf of the insurer. Acceptance may be assumed if the policyholder retains the policy and the policyholder - obviously tacitly - has accepted it as a correct record of the insurance agreement. Although the retention of a document without protest is in itself insufficient for tacit acceptance, the situation is different, in our view, with the issue of a policy. The legislature clearly assumes this procedure, in which a signature of the insured on the policy is not required and the policy itself qualifies as a deed.

So the policy is a document by which the arbitration agreement can be confirmed. Art. 1021 DACP insists, however, that the document provides for arbitration or refers to conditions that provide for arbitration. As a rule, the policy itself does not contain an arbitration clause.

The question is whether an arbitration clause contained in the special or general policy conditions leads to (confirmation of) an arbitration agreement between the parties.
General policy conditions are standardised conditions that often are unilaterally drawn up by the insurer. In principle, they therefore fall within the scope of Section 6.5.3 DCC. However,

[8] G.J. Meijer, *De arbitrageovereenkomst*, diss. Rotterdam, Deventer 2011, p. 398-399. Incidentally, under Art. 1021 DACP the arbitration agreement can be confirmed in two ways: with a document and with electronic data. Because we only encounter paper policy documents in our practice, we will limit ourselves in this contribution to confirmation by document.
[9] J.G.C. Kamphuisen, "De polis is een akte. Waarvan akte!", *AV&S* 2005, 33.

Section 6.5.3 DCC does not apply to "clauses that specify the core of the performance" (Article. 6:231 DCC).[10]

Many terms of an insurance agreement form such core terms: in the policy conditions, the extent of the coverage is described in often extensive lists of risks covered and excluded.[11] This calls into question whether the inclusion of an arbitration clause in general policy conditions meets the requirement that there must be a document which refers to conditions in which an arbitration clause is provided for under Art. 1021 DACP. However, we believe that Art. 1021 DACP should not be so strictly interpreted that the arbitration clause must be "surrounded" by only general conditions as specified in Section 6.5.3 DCC. It would be sufficient in our view that there is an arbitration clause which forms part of a document in which standardised conditions are laid down, whether these are general conditions under which a protection regime applies or not. If the general policy conditions include an arbitration clause, reference may be made to these general policy conditions in a document and this meets the requirement of proof under Art. 1021 DACP. Art. 1021 DACP does not require that the document (the policy schedule) expressly refers to the arbitration clause in the general conditions, but only to the conditions themselves.

In our view the situation is in no way different if an arbitration clause is included in the schedule that contains separately agreed special clauses. Most special clauses are the result of negotiations, but the text of the most special clauses is standardised. And the most special clauses are used in multiple insurance agreements. However, it would be preferable not to include an arbitration clause in the policy schedule to avoid discussions down the road. If the parties wish to agree in advance on arbitration and if an arbitration clause is not standardly included in the general policy conditions, the insurer would have to include the arbitration clause in the policy or the parties would have to sign a separate arbitration agreement.

2.2 Wording of the arbitration clause

A constant source of debate is the wording of the arbitration clause. It is therefore important to submit an arbitration agreement or an arbitration clause to detailed study because the multitude of wordings used for such clauses can cause confusion and uncertainty.

The specific elements of the arbitration clause will ultimately determine whether an (insurance) dispute is subject to arbitration or not, what the proceedings will be like and what topics or disputes will be covered by an award, etc.. To the extent that arbitration clauses are included in insurance agreements, they vary from a limited provision in a fire or theft policy when the insurer admits liability in principle and the arbitration only determines the value of the damaged or lost property to a comprehensive provision whereby all disputes arising out of or relating to the insurance agreement shall be subject to arbitration, including but not limited to disputes about the coverage under the policy[12]. Not only are there significant differences to be

[10] Dutch Civil Code Explanatory Notes ("PG") Book 6 (Introduction 3, 5 and 6), p. 1521. See also HR 19 September 1997, NJ 1998, 6 and HR 21 February 2003, NJ 2004, 567.
[11] PG Book 6 (Introduction 3, 5 and 6), p. 1527. This does not apply to all policy conditions. There are also conditions which are not core terms, such as provisions on the duration of the insurance agreement or a provision on the deadline for reporting. See, eg, Asser-Wansink-Van Tiggele 7-IX, no. 179 M.L. Hendrikse, *Eigen schuld, bereddingsplicht en medewerkingsplicht in het schadeverzekeringsrecht*, diss. Amsterdam, 2001 and M.L. Hendrikse, "*Verzekeringsrecht en algemene voorwaarden*" in NTHR 2005, p. 194.
[12] Compare Art. 1020 section 4 DACP.

observed in the scope of the arbitration clause, it is also striking that some arbitration clauses are very extensively formulated (with detailed descriptions of the number of arbitrators, the appointment procedure, the qualifications of the arbitrators, the particulars of the arbitration procedure, including the number of written and oral statements, etc.), while other arbitration clauses are so short that it almost seems as if at the last moment, almost nonchalantly, they have just been tacked on to the insurance conditions.[13]

The importance of awareness on the part of the insured about the specific elements of an arbitration clause in an insurance agreement is obvious. It makes the policyholder better able to understand the arbitration clause and to know what he can get from it. This awareness can also be used in an attempt to negotiate the arbitration clause so that it is more favourable for the insured than the original text which the insurer proposes and in fact a "level playing field" is created.

A number of factors should be considered by the insured in this context (and the following list is certainly not exhaustive):

1) The fact that arbitration has a definitive nature, and that an arbitral award is, in principle, not open to appeal.

2) The insured should realise that he is waiving the (constitutional) right to approach the regular courts.

3) The costs of arbitration can really add up, not least because arbitrators have to be paid on an hourly basis. It is not easy to say anything about the cost of arbitration in general. Even complex proceedings in regular courts can really run up the numbers.

4) Traditionally it has been argued that arbitrations involve short lead times and that - especially now that appeal is mostly excluded - the matter is rapidly brought to an end. Our experience is that arbitration is not always as fast as we would like. A possible explanation could be that arbitrators often lead the speed be determined by the parties themselves and, for example, are willing to agree to postpone the award. At the same time it happens that some arbitrators are so popular that they can only schedule the issue of an oral hearing and the examination witnesses after a number of months (or sometimes even longer) or for the same reason take months to reach an arbitral award.[14] In addition the regular courts have made great advances in recent years precisely in this area. At the time of the amendment the procedural law for civil matters on 1 January 2002 and also thereafter numerous measures have been taken by the legislature to shorten the duration of proceedings before the regular courts and to avoid unnecessary delays. The advantage of arbitration over ordinary state law because of the time factor is certainly not as obvious as it was previously.

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[13] Anyone looking for inspiration for an adequately formulated arbitration clause should consult P.J.M. Drion, "Samenstelling van het arbitrale college", included in the Wansink volume *Van Draden en Daden*, Deventer 2006, p. 202.

[14] This is equivalent to the situation that an arbitral tribunal has appointed a secretary, who prepares a draft arbitral award and one or more arbitrators have no opportunity to assess the draft arbitral award in the foreseeable future.

5) It is not possible in arbitration to settle a mass claim along the lines of the Collective Settlement of Mass Damage Act ("WCAM"). The WCAM provides for its own procedure in the Court of Amsterdam for declaring an agreement on collective claims binding, which cannot be replaced by an arbitration. If there is an arbitration clause in an insurance agreement with an insurer involved in a mass claim, then it must strictly speaking be expressly waived by the parties if they want a collective settlement of the mass claim through the Amsterdam Court.

6) In an international context (in particular with major interests to ensure or in reinsurance), the insured will be very well aware of the choice of law in the general insurance policy. Often it will be the law of the state where the insurer has his principal place of business. Needless to say, this will not often work in favour of the insured (the policyholder).[15]

7) The insured will have to look carefully at where the arbitration will take place in an international context. The risk is not insignificant that the insured will have to incur high travel and accommodation costs to attend the arbitration (and that also goes for any possible witnesses or experts on behalf of the insured).[16]

8) Furthermore, in an international arbitration, the applicable rules can lead to costs that are significantly higher than in national arbitration or proceedings in the regular courts (for example, by application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, which rules can lead to relatively extensive discovery and witness hearings).

3. Parties to the arbitration and third parties

3.1 Introduction. Outline of the problem

The fact that arbitration is often not standardly agreed in the insurance agreement is, perhaps, partly due to the number of parties that can play a role in an insurance dispute. Particularly in complex insurance cases, not only are the insurer and the insured person in dispute, but also other parties, such as brokers, agents, co-insured, victims/claimants and other third parties. In the introduction to Chapter 1 we have already seen that questions may arise on which not all parties involved in the insurance dispute are bound to an arbitration agreement.

An imaginary (or perhaps not so imaginary) case clearly shows how complicated the problem can be: imagine that, as part of the construction of a new factory, an installation has to be delivered and a serious incident occurs during the "testing and commissioning" phase. This results in significant damage to the equipment, fire, explosion or other disaster, making the project grind to a halt. The delay that occurs in connection with the investigation into the cause, repairing the damage and restarting the test phase, quite apart from the question of who paid the repair costs, will almost certainly lead to all sorts of disputes on the question to whom the

[15] It is interesting to note in this respect that in America there are three states where laws are enforced which restrict the use of arbitration clauses in insurance agreements, seven states where legislation or the courts have restricted the use of arbitration clauses and as many as 16 states where laws prohibit the enforcement of arbitral awards by insurers. It seems as if "in the land of the free" arbitration has not in all respects been equated with regular law or is indeed considered inferior to it.
[16] This is in any event the same in cases where a foreign court has jurisdiction.

cause of the injurious event is attributable and whether that party has thereby also become liable for damages. In addition, claims in connection with resulting damage will also be lodged, inter alia, in connection with the fact that the factory can only be commissioned later as a result of the accident. The accident may have been caused by a design error, poor workmanship, negligence during the "testing and commissioning" phase or a cause as yet unknown or difficult to determine which is not related to the design or two negligence on the part of the supplier, which were the initial suppositions. The matter is further complicated when the damage is not immediately visible and only comes to light after partial or final acceptance of the project.

Who is liable in that case? Is there coverage under an insurance policy for a portion or all of the damage? Which policy covers the damage? Under the CAR insurance, which normally ends on the completion of the works? The general liability insurance which the owner of the factory has concluded, which normally begins at the moment of completion of the work or commissioning of the factory? The professional liability of the designer of the facility? Or the general liability or professional liability policy of the contractor/installer who received the order for the delivery of the installation and under whose responsibility the "testing and commissioning" phase was conducted? And what if one or more insurers refuse cover under the policy? Or the underlying reinsurers? Who should - subject to the follow-clause - be involved in proceedings? Has a broker involved perhaps made a mistake in the conclusion of the(re)insurance?

Given the complexity of these questions, the chances are that there will be a need to litigate about one or more issues either in arbitration or through the regular courts.

That risk is even greater in a case with international aspects. Since arbitration in insurance transactions abroad is more popular than in the Netherlands, the possibility is not inconceivable that a dispute with mainly Dutch parties would still have to deal with (international) arbitration because of the arbitration clause in the reinsurance agreement. This leads to the strange and undesirable situation that a dispute over insurance coverage is not decided by a single instance.[17]

It is therefore not inconceivable in insurance practice that a situation would arise in which only part of the conflict is resolved by arbitration. If other parts of the conflict (should) be referred to the regular court, there is a considerable risk that inconsistent verdicts will be obtained, with all its consequences.

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[17] In America the reverse situation occurs: an arbitration clause in the primary policy, but not in the reinsurance agreement. Several parties, who clearly did not like the arbitration clause, have argued that the so-called "service or suit" clauses in reinsurance agreements void the arbitration clause in the insurance agreement, or at least that arbitrators should decline jurisdiction. These "service or suit" clauses usually read as follows: *"In the event of the failure of the reinsurer to pay any amount claimed to be due hereunder, the reinsurer, at the request of the [ceding] company, will submit to the jurisdiction or any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder will be determined in accordance with the law and practice of such court."* Various U.S. courts have considered this question of law. In all cases, the courts have ruled that the "service or suit" clause is not incompatible with an arbitration clause and that the arbitration clause need not automatically be adjusted in this respect, still less that it represents a waiver of the right to arbitration. See E.J. Zulkey, "Arbitration in insurance disputes", from the volume "Litigating insurance disputes" (Rel. 6-2009), 14-10 and 14.11 and the sources listed there.

Under the Federal Arbitration Act (FAA), "an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement". There is no similar provision in the Netherlands in the Arbitration Act, [18] but the result should, in our view, be identical in the Netherlands (but it is not, see below).

When we review the procedural aspects of the battlefield, it must first be determined whether and, if so, between which parties, an arbitration agreement has been concluded.

3.2 A party to the insurance agreement is not automatically a party to the arbitration agreement

An arbitration agreement is in principle only between the contracting parties, who have renounced their (constitutional) right of access to the regular courts and have agreed that a dispute between them shall be settled by arbitration. Thus arbitrations are "private affairs". Third parties who are not parties to the (arbitration) agreement, but who are directly involved in the dispute, cannot be involved in the arbitration - and certainly not involuntarily. [19]

3.2.1 Co-insured thirdparties

An interesting question is whether an arbitration clause agreed between the insurer and the policyholder - for example, an arbitration clause contained in the general policy conditions - also has effect in relation to a co-insured. We are inclined to answer this question in the negative, however undesirable the outcome may be. We will explain.

In the legal literature, the appointment of a third party as a co-insured on the policy is considered a third-party condition within the meaning of Art. 6:253 DCC: the agreement creates for the third party a receivable under the insurance agreement, if the third party accepts the third-party condition in the insurance agreement.[20] If and when the third party accepts this appointment, he becomes a party to the insurance agreement, assuming that such acceptance can take place by claiming a benefit under the insurance agreement.[21] It can be argued that the acceptance has already happened: indeed Art 6:253 section 4 DCC stipulates that a clause that is final and not introduced against the third party is already considered accepted if it has come to the attention of the third party and the third party has not rejected it immediately.

No distinction is made between third parties who know that they are listed as co-insured on the policy and others who are unfamiliar with the appointment (or even the existence of the insurance). [22] Precisely for that reason, we consider that it cannot be assumed that a co-insured

[18] Unless Art. 1022 section 1 DACP should be construed to that effect. However, it says nothing about the relationship with third parties.
[19] The reverse is the case, as we will see in the discussion of the subject of exemption.
[20] Asser-Wansink Van Tiggele 7-IX No. 383, F.R. Salomons, *Verzekering ten behoeve van een derde*, diss. Amsterdam, 1996.
[21] And it could be argued that the acceptance has already taken place. Indeed, Art. 6:253 section 4 Civil Code stipulates that a clause that is irrevocable and not introduced against the third party is considered accepted if it has come to the attention of the third party and the third party has not rejected the clause immediately.
[22] Thus it is, for example, that in a construction project, the main contractor concludes a CAR policy in which the principal and subcontractors are co-insured, while one of the other parties involved appears to have an ongoing CAR policy in which the same parties are included asinsured.

third party is familiar with the arbitration clause in the policy conditions and certainly not that he has accepted, expressly or implicitly, the arbitration agreement through the acceptance of the appointment of the third clause. [23] The pain here is in particular that the co-insured third party that is seeking cover under the insurance agreement would be faced with an arbitration agreement that he did not know in advance and did not want. Especially if the appointment of the third-party as co-insured is not considered a third-party clause, it cannot indeed be sustained that this is not contrary to the right of access to regular courts included in the provisions of Art. 6 section 1 ECHR. It would indeed mean that the co-insured third party, as soon as he is familiar with the insurance agreement and the arbitration clause contained in it, would have to immediately reject the third-party clause. In addition, he then immediately be without insurance coverage; a result that is hardly desirable.

The above leads us to consider that the co-insured is not bound by the arbitration agreement, unless he explicitly accepts it.

The fact that a policyholder when taking out the insurance has a disclosure obligation that extends to facts that a conscientious third party, on the conclusion of the insurance, knows or ought to know and on which, whether he knows or should know it, the decision of the insurer depends or should depend, does not alter the situation. The duty to provide relevant information to the third party when entering into the insurance agreement[24] does not justify the assertion that the third party therefore agrees to the arbitration clause. And that is a requirement.

What can indeed be argued, in some cases, is that the co-insured third party is represented in the sense that that the third party has granted the policyholder an (implied) proxy to conclude an insurance agreement and to include the third-party in it as co-insured (Art. 3:62 DCC). Such a construction is not inconceivable in cases where a holding company concludes an insurance agreement on behalf of all the companies that are part of the group. Such proxy is not bound to a specific form, but as the case may be it could be a point of discussion whether a general, form-free proxy has given the holder the power to bind the issuers to arbitration and thus refuse the right of access to regular courts. [25] None of this alters the fact that the principal (the third party co-insured) must endorse the act authorised and accept the arbitration agreement. For a third party co-insured, which the insurer wants to engage in arbitration, there is therefore not much going on. Problems arise in the opposite case, if the insurer wants to submit a dispute with the policyholder and the insured to the arbitrators. The insurer will have to prove that the insured has accepted the arbitration clause. If the insurance company wants in advance to make sure that he can involve third parties in an arbitration, he must therefore insist that third parties are recognised as policyholders.

3.2.2 Co-insurance

There can also be a "third party" on the side of insurers, namely in the case of co-insurance. The insurance on the stock exchange is closed, in principle, through e-ABS (Electronic Insurance

[23] In general, however, it is often just assumed that a third party who accepts a third clause is also bound by the arbitration clause in the main agreement. For the many subtle distinctions to be made here, see Meijer, The arbitration agreement, loc cit., par. 9.2.4. and in particular par. 9.2.4.5.
[24] See Art. 7:928 Civil Code.
[25] See on this Meijer, *De arbitrageovereenkomst*, loc cit, p. 482-483.

Exchange System) by an authorised agent who as appropriate signs on behalf of co-insurers. [26] In that case it could be that co-insurers included in the policy conditions have accepted an arbitration clause. This is clearly a case of accepting a document on behalf of the other party.[27]

However, it is another interesting question whether the co-insurers are also bound, if the arbitration clause is not in the policy conditions on the conclusion of the agreement, but an arbitration agreement is concluded at a later stage between the policyholder and the leading insurer. The prevailing "to follow" clause suggests that the co-insurers must in that case "tag along":

"The other insurers undertake to follow all clauses, to accept conditions and changes which may be approved by the leading insurers, to submit completely to the claims settlement of these leading insurers and undertake their share of all refunds on all claims (including leniency payments), as determined by the leading insurer (however that determination may have been reached)."[28]

In our view, however, it is rather a case of incidental authority if the co-insurers are not explicitly involved as a party to the arbitration agreement. Above all in a situation in which the arbitration agreement is concluded later, it is better to be safe than sorry.

3.3 The arbitration agreement and third parties[29]

3.3.1 Collateral effect of the arbitration clause?

As illustrated by cases provided in the introduction to this chapter, various parties play a role in more complex disputes. Not all parties are covered by the arbitration agreement and, as we have indicated previously, there is also a question as to whether all of the parties in an insurance contract can even be considered to have accepted the arbitration clause contained herein. So, could there be a collateral effect in relation to an arbitration clause that has been included within a policy document?

The law that governs the collateral effect of arbitration clauses on other legal areas demonstrates that there is little freedom for dealing with these in a flexible manner. In general, there is no immediate assumption that an arbitration clause has a collateral effect. In 2012, at least three rulings were issued on this topic, one in arbitration, another by the Dutch courts; in all three cases, the collateral effect was not accepted.

The arbitrator thus decided, in a procedure involving the Council of Arbitration for Construction in an incidental judgment on 12 January 2012, that the general terms and conditions provided

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[26] See D. van Velzen, "I. Inleiding: “verzekering ter beurze”. Wat, hoe en waarom?" In *Verzekering ter beurze. Coassurantie in theorie en praktijk*, 2011.
[27] Assuming that representation can take place not only on behalf of the other party, but also for the person who prepares the document. See G.J. Meijer, *De arbitrageovereenkomst*, loc cit., p. 481-482.
[28] Asser-Wansink-Van Tiggele 7-IX No. 192.
[29] In this section, we do not pay any attention to the situation in which the arbitration clause has not been agreed between insurer and insured person, but between insured person and his contractual counter-party. In this situation, the insurer is the third party; this raises the issue of whether the insurer is bound to the arbitration clause if, after payment, he is subrogated in the rights of the insured person. The contribution from Meijer in this volume focuses on this topic.

by a subcontractor to the sister-company of the main contractor and not to the main contractor itself, were not applicable to the main contractor.[30] Unity of management thus makes no difference according to the arbitrator. In concrete terms, this concerned the General Steel Construction Sales and Delivery Conditions in which an arbitration clause had been included. These were thus not applicable in terms of the relationship with the main contractor. Subsequently, the arbitrator had to declare himself incompetent, in the procedure that had been brought by the subcontractor against the main contractor, in relation to the incident raised by the main contractor.

In the next case, which was brought before the Court of 's-Gravenhage, the collateral effect was even less relevant. It had been established that the Slovakian company Kinex Bearings A/S was not bound to a contract from 1997 as an original contracted party. The subsequent issue was whether Kinex Bearings had taken over the contract from party Kinex. There were certain other issues in relation to private international law but we shall exclude these here for the sake of simplicity. The court assumed that Dutch law was applicable and that, on the basis of art. 6:145 of the Dutch Civil Code, a deed is required for a contract take-over; there was no suggestion or evidence that this requirement had been fulfilled. The court thus concluded that there had been no legally binding contract transfer. The respondent argued that Kinex Bearings had taken on the execution of the agreement. The court understood the position of the respondent, i.e. that they could reasonably have assumed that Kinex Bearings would be considered bound vis a vis them to the content of the original contract from 1997 or, in other words, that a new contract had been created between the respondent and Kinex Bearings with the same content as the contract from 1997. The court found the respondent to be correct on that point but this quickly turned out to be a hollow victory:

'if Kinex Bearings had wanted to make other agreements, they should have made this clear along the way, once they had appeared as a 'new player' on the field. This conclusion is of no benefit [to the respondent] with respect to the issue of competence, now that an exception must be made for the arbitration clause. On the grounds of article 1021 Dutch Act on Civil Procedure, an arbitration agreement must be proven by means of a document. This requirement has not been fulfilled.[31]

The judgment also indirectly dealt with the option of assigning the claims. A deed of assignment is required for a lawful assignment. This could be a private or an authentic deed. The assignment must then be reported by the debtor to the third party. The judgment from the court means that an assumption must be made that, in the event of a lack of a deed of assignment, there is no case of collateral effect: no legal assignment had taken place and no arbitration agreement had been created because the requirement to have a document (explicitly or tacitly agreed) was not fulfilled.

Finally, the Court of Almelo, in the judgment of 19 September 2012[32], made it crystal clear that, in principle, there is no collateral effect with respect to an arbitration clause. The case involved a dispute between Thuiszorg B.V. and Woonzorg B.V. on one side, and Thuiszorg B.V. and X B.V. on the other. Evidently, there had been a contract between Thuiszorg B.V. and X B.V. which contained an arbitration clause. X had brought a case before the courts against Thuiszorg and Woonzorg but had not stated that Woonzorg was a party to the agreement that X had drawn up

[30] See Raad van Arbitrage voor de Bouw 12 January 2012, nr. 33.375, *TvA* 2012, 33.
[31] See Hof 's-Gravenhage 28 August 2012, nr. 200.096.977/01, LJN BX7242, *TvA* 2013, 9.
[32] See Rechtbank Almelo 19 September 2012, nr. 127739 / HA ZA 12-114, LJN BX9241, *TvA* 2013, 13.

with Thuiszorg. X also failed to state that the parties had intended to also bind Woonzorg to the arbitration clause. The court ruled that the simple fact that Woonzorg and Thuiszorg have the same director/shareholder does not justify an exception being made to the principle that the arbitration clause has no collateral effect. The allegation by Thuiszorg and Woonzorg that a declaration of incompetence with respect to Thuiszorg would lead to the same dispute arising between two other bodies and that this would be undesirable with regard to considerations of case economics, did not lead the court to any other conclusion. The court added that case economic considerations were insufficient to justify breaching an arbitration clause.

This and other cases have shown that, in principle, third parties are not bound to an arbitration agreement if they contest this restriction.

The above examples in any case clarify that insurers which include an arbitration clause in their general insurance conditions must be aware of the fact that not all parties that are directly or indirectly involved in the insurance dispute can also be involved in the arbitration. Insurers that include an arbitration clause must also accept that disputes will only be partially resolved and that conflicting judgments may be issued.

The problem outlined can be overcome if the third parties that are involved in the insurance dispute agree with the other party, after the conflict has arisen, that their conflict should be resolved by means of arbitration. These parties will then enter into an arbitration agreement.

Another method for avoiding the problem of conflicting judgments involves the parties, who have entered into an arbitration agreement, nevertheless deciding to reject arbitration. It must be assumed that the parties that are authorised to enter into an arbitration agreement are also authorised, with the benefit of further insight, to refuse to do so and collectively decide to put their disputes before the Dutch courts. The right to arbitration is a so-called 'waiveable right', i.e. a right which can be waived.[33]

The fact that, in principle, third parties cannot simply be involved in the procedure is, in our opinion, the reason that it is not usual in Dutch insurance practices to include an arbitration clause in the policy conditions. In the event of a dispute arising, whereby parties would like to turn to arbitrators, they may always decide to enter into an arbitration agreement. And this occurs in practice with some regularity.

If the parties involved in an arbitration agreement actually end up in an arbitration process, this does not necessarily mean that third parties will have no role to play therein. There are various conceivable constructions within which third parties could function as a party in arbitral proceedings.

3.3.2 Joining and intervening (art. 1036 and art. 1045 Dutch Act on Civil Procedure)

Art. 1045 DCC governs the related legal concepts 'joining' and 'intervening'. Above, we talked about a perfectly feasible situation within the insurance branch whereby a third party is not a party within an arbitration agreement but does have an interest in the outcome of the

[33] Make sure, in that case, that *all* disputes, both those *before* and *after* the modification that rejected the arbitration clause, will be settled by the Dutch courts. Otherwise there may be fragmented dispute settlement, a situation that occurred in the case of *Lufthansa/Aero Groundservices*, see footnote 48 below.

procedure. In the complex world of insurance disputes, it is quite possible that an arbitration procedure involves a topic that concerns a third party. This third party can then, in order to defend his own interests, apply in writing to join the arbitration in an ongoing procedure on the side of one of the parties or intervene between both parties.[34][35]

If the interests of one party tally with the interests of the third party, this third party can join the procedure on his side to support him. If the third party's interests are served by being positioned between the allegations of both parties, he may intervene. If he intervenes, he also submits his own claim. Joining or intervening can only be permitted by the court of arbitration if the third party is admitted to the arbitration agreement by means of a written agreement with the parties.[36] If the request is granted, the third party becomes a party in the ongoing procedure, in both cases. The court of arbitration then oversees the further progress of the proceedings unless the parties have provided for this within the agreement.[37]

Cases such as HR 15 November 1996 (Multivision/Nederlandse Antillen)[38] and HR 8 December 2000 (Scob/Apeldoorn)[39] demonstrate that the requirements are now less strict.

Less strict requirements have been set in relation to joining and intervening in a range of arbitration regulations.[40] These regulations endeavour to avoid the procedure being delayed by joining/intervening as far as is possible. Where there is a threat of an unreasonable delay, the request will be turned down by the court of arbitration. The consideration of interests that takes place in this context depends on the circumstances of the case.

A case involving the Council of Arbitration for Construction played out as follows. The parties in the case were a municipality and a bank. The bank alleged (this was uncontested) that it was the pledgee of claims that a contractor was making in relation to the municipality. The municipality had been informed of this right of distraint. On the grounds thereof, the bank was of the opinion that it was entitled to the claim submitted by the contractor and was thus also entitled to and had an interest in intervening in the case. The municipality opposed the requested intervention. In the meantime, the contractor had gone bankrupt; the case was suspended at the request of the municipality and the receiver then indicated that he would not continue with the proceeding. The municipality argued that all case procedures had become null and void as a result of the suspension, including the bank's request for intervention.

Nevertheless, the arbitrators established that the request by the bank had arrived with the morning post on 15 February 2010 and that the receiver's notification that the case would not

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[34] See art. 1045 section 1 DACP.
[35] It is not the qualification that the intervening party gives its own capacity in the proceedings, it is the judge who on the basis of the position in the procedure that determines the capacity in the proceedings of the third party (joining or intervening). See Hoge Raad 22 June 2012, LJN BW9067 (*N.V. Zeedijk/Heineken Nederland B.V.)*, *NJ* 2012, 606.
[36] See art. 1045 section 3 DACP.
[37] See art. 1045 section 4 DACP.
[38] *NJ* 1997, 482 (m.nt. G.A.I. Schuijt).
[39] *NJ* 2001, 55.
[40] In a dispute put before the Council for Arbitration for Construction on the grounds of art. 15 section 4 of the Arbitration Regulation RvA, it is sufficient that an arbitration agreement exists between the third party and one of the parties in the ongoing dispute. In this context see also art. 41 section 4 of the NAI-arbitration regulations 2010, where it is even sufficient for a third party to simply have an interest in an arbitral case.

continue had only been received in the afternoon. The arbitrators thus referred to art. 1036 DACP, which sets out that arbitration is subject to the rules of book IV DACP and any rules set by the parties' agreement or by arbitrators. The definitions of books I, II and III DACP are therefore not, or not directly, applicable to the arbitration case. Parties or arbitrators can take on these legal definitions in arbitration if they are required. The arbitrators therefore accepted the intervention under reference to article 225 DACP.[41]

The Bill to Review Arbitration Law 2012 does not bring about significant changes herein. Art. 1045c of the Bill clarifies that third party joining or intervening may only be considered if the same arbitration agreement applies or is in force between the parties and the third party as was the case between the original parties.[42]

As opposed to what is now the case, the Bill to Review Arbitration Law 2012 included the concept that arbitrators should hear both the parties and the third parties before they make a decision on the request for joining or intervening, except in the case that the arbitrators grant the third party's request for joining or intervening. It is clear that, in this case, it is not useful or desirable to grant a hearing to the third party.

3.3.3 Third party proceedings (art. 1045 Dutch Act on Civil Procedure)

Third party proceedings in arbitration are also regulated in art. 1045 DACP. One party can call a third party into a third party proceeding. Third party proceedings can only be permitted by the court of arbitration if the third party is admitted to the arbitration agreement by means of a written agreement with the parties.

Even though the legal definitions in relation to arbitration permit third party proceedings, over the past few years there have been a few surprising rulings regarding third party proceedings in arbitration cases. In 2011, a court ruled twice that an appeal to incompetence, despite the reference to a (valid) arbitration agreement, should be rejected on the grounds of fairness and reasonableness.[43] This is notable, at the very least. If the parties in arbitration are agreed and have thus waived their (legal) rights to approach the Dutch courts, the Dutch courts must declare themselves incompetent if one of the parties in defiance of the arbitration agreement turns to the Dutch courts.[44] The legal, case regime seems clear.

The 'escape' in both cases was found via the application of the legal correction of art. 6:248 section 2 DCC: the courts considered, in the concrete circumstances of the case according to the measures of reasonableness and fairness, that it was unacceptable that one of the parties called upon the arbitration clause in the agreement between the parties. The situation in both third party cases was that the main case had already been put before the court and that the essential elements of the main case were very closely linked to the third party procedure.

We recognise that this rule is, in principle, also valid for arbitration agreements and/or arbitration clauses in agreements, as governed by Dutch law.

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[41] See Raad van Arbitrage voor de Bouw 31 March 2010, nr. 31130, *TvA* 2011, 20.
[42] See H.J. Snijders, 'Analyse van het Conceptwetsvoorstel Herziening arbitragerecht 2012, Piet Sanders en *zijn* Arbitragewet *revisited*', *TvA* 2012, 54.
[43] See Rechtbank Utrecht 25 May 2011, *TvA* 2012, 46 and Rechtbank Middelburg 9 February 2011, *TvA* 2012, 83 m.nt. J.J. van Haersolte-van Hof.
[44] See art. 1022 section DACP.

At the same time, previous case law, whereby the implementation of an arbitration clause fails on the basis of the inadmissibility of art. 6:248 section 2 DCC, is very limited. Only in very exceptional circumstances has an appeal to the arbitration clause been turned down on these grounds.[45] Meijer refers, in this context, to the category that encompasses the risk of conflicting rulings.[46] The Supreme Court's most far-reaching ruling in this category was a (limited) exception to art. 1022 DACP issued in the ruling concerning *Van Kloof/CSU II,* whereby the Supreme Court accepted that the Dutch courts could include 'subordinated' cases that, strictly speaking, should be subject to arbitration, in their judgments.[47] In another case – *Lufthansa/Aero Groundservices*[48] - the court accepted that disputes that were essentially subject to arbitration could be settled by the Dutch courts. This was the direct consequence of the fact that the parties themselves had made a mess of the procedure and had introduced a fragmented dispute settlement regime when they had decided to do away with the arbitration clause in their agreement on the basis of cost considerations. The court of Haarlem thus agreed that disputes from the later period and disputes from the period during which the arbitration clause still applied, could be put before the Dutch courts.

The rulings from the court of Utrecht and the court of Middelburg also fall into the category that encompasses the risk of conflicting rulings, however these seem to go further than previous case law. In the interests of case economics, the preference is given to the main case and the third party proceedings being handled by the Dutch courts; the interests of the party that is calling upon the arbitration clause are, however, overruled. The issue is whether this is correct.

Certainly in cases where parties, as a result of an absence of specific expertise (whether that is expertise in relation to the insurance or any other branch), opt for arbitration, we would like to argue with Van Haersolte-van Hof[49] that the Dutch courts do not rush to unify everything on the basis of case economics. Preventing conflicting rulings is preferable however this end does not justify all means and must be considered against the interests of a good and efficient decision. In so doing, the Dutch courts must also consider the principle of party autonomy, which we regard as a significant component.

Also with respect to the third party case, the Bill to Review Arbitration Law 2012 contains several clarifications. The panel hears both the parties and the third party. The criteria for accessing third party proceedings, reference art. 1045a section 4, subsection C of the Bill, reads as follows:

'4. The court of arbitration shall not permit third party proceedings if the court of arbitration considers it implausible, in advance, that the third party will be obligated to bear the detrimental consequences of any ruling involving the interested party or is of the opinion that third party proceedings will more than likely impose an unreasonable or unnecessary delay on the case.'

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[45] Snijders argued that, when testing the arbitration agreements, it must concern extreme cases, see H.J. Snijders, 'Nederlands Arbitragerecht', Deventer: Kluwer 2011, p. 124.
[46] See G.J. Meijer, 'Overeenkomst tot arbitrage', Deventer: Kluwer 2011, par. 10.4.5.3.
[47] See Hoge Raad 27 April 1990, *NJ* 1991, 123 (HJS).
[48] See Rechtbank Haarlem 11 May 1993, *NJ* 1995, 71.
[49] See J.J. Van Haersolte-van Hof, loc cit.

3.3.4 Consolidation (art. 1046 Dutch Code of Civil Procedure)

The consolidation of arbitration clauses is regulated in art. 1046 DACP. This definition provides the provisional judge at the court of Amsterdam the authority, on request by the plaintiff, to order consolidation, in pending Dutch arbitration cases covering related topics. Parties will thereby be obliged to nominate the arbitrators in the consolidated cases and then to establish the case rules to be applied. It is perfectly conceivable that the parties cannot agree this and this has also been covered by the legislator: in that case the provisional judge (again from the court of Amsterdam) can make a decision on these issues. Unless the parties have made other arrangements in this regard.

As a result of the consolidation, not all of the arbitration cases will be unified into one arbitration case whereby all of the parties that were involved in the original cases form a party in this one too. The consolidated cases remain separate cases with the understanding that the same arbitrators will be nominated and that the same arbitration rules will apply to all cases.

This does not detract from the fact that the consolidation of arbitration cases can have a significant impact on a party involved in such a case. It is also possible that a party, on the grounds of a ruling by the provisional judge in Amsterdam, suddenly (and against his will) is confronted with an amendment to the arbitration agreement (or an arbitration case) and sees his dispute settled by another arbitration institute via the application of a different arbitration rule.[50]

In general, it is assumed that the introduction of legal rules relating to consolidation in 1986 targeted the needs that could arise within the building world. The idea – as a result of developments in America – was that legislation that enabled 'consolidation' could also be used to avoid more than one case concerning essentially the same facts being played out within more than one arbitration institute. Here, we can once again see parallels with complex insurance cases. However, in practice, (even in the building world) applications for consolidation are very few and far between. Clearly, the need is less evident than was expected at the time or the advantages of consolidation are less appealing than was hoped.

Despite this, the consolidation rule is found within the draft Bill to Review Arbitration Law 2012.[51] As a result, with respect to the consolidation of arbitration cases, this represents an important new point of law: not only the provisional judge at the court of Amsterdam, but also a third party appointed by the parties concerned (in practice, often the arbitration institute appointed by the parties) can order consolidation, unless agreed otherwise by the parties. The criteria for consolidation are set forth in art. 1046c of the Bill for Review.

'2. Consolidation can be ordered insofar as there will be no unreasonable delay to the pending cases, given the position they are at and that between the arbitration cases there are close connections such that the efficient administration of justice demands simultaneous processing and judgments in order to avoid separate judgments for the cases leading to conflicting decisions.'

[50] See J.W. Bitter, 'Samenvoeging van arbitrale gedingen in Nederland volgens art. 1046 DACP nut en noodzaak; *opting in* of *opting out*', *TvA* 2012, 55. The question raised by Bitter as to whether we really want a regulation whereby legal interference leads to an arbitration procedure progressing fundamentally differently than was agreed by the parties, is an interesting one.
[51] See H.J. Snijders, loc cit., footnote 53.

4. Consumers; general terms and conditions

4.1 Arbitration clause in insurance agreements with consumers

This section focuses on the position of the consumer. For some time now, in case law and literature, a question has been raised as to whether arbitration clauses in agreements with consumers are unreasonably onerous in the sense of art. 6:233 DCC or unfair clauses in the sense of art. 3 Directive 93/13/EC. This becomes an even more pertinent issue if an arbitration clause is included in general terms and conditions (i.e. the 'small-print').

The Supreme Court recently provided further clarity in this discussion.[52] The Supreme Court has made it clear that arbitration clauses in general terms and conditions should not always be regarded as unreasonably onerous or unfair. The national court must evaluate a specific clause on the basis of the concrete circumstances in the case and must investigate whether an arbitration clause in a concrete situation is unreasonably onerous or unfair.

But what did this involve? The case concerned an order to carry out renovation work. The contracting party was a consumer. The contractor, in the order confirmation, had stated that the General Terms and Conditions for Contracting within Construction 1992 (AVA 1992) should apply. Art. 21 of the AVA 1992 states that all disputes that arise as a result of the agreement, or any agreements that should subsequently arise, should be settled via 'arbitration corresponding to the rules set forth in the Articles of Association for the Arbitration Council for Construction Companies in the Netherlands'. Only in the case of disputes that corresponded to the magistrate's authority, would parties have a choice as to whether the case was put to arbitrators or to the magistrate.

The contracting party was of the opinion that the renovation work carried out by the contractor was substandard. The contracting party had thus summonsed the contractor to appear before the court of Leeuwarden. The contractor raised a competency incident and argued that the Council of Arbitration for Construction rather than the court was competent in terms of handling the dispute.

The Court of Leeuwarden rejected the claim in the incident.[53] The contractor then appealed to a higher court but the Court enforced the ruling by the lower court in terms of the incident.[54] The higher court noted that the arbitration clause of art. 21 AVA 1992 was unreasonably onerous in the sense of art. 6:233, introduction and under A of the Dutch Civil Code. The higher court stated in this regard:

'An arbitration clause that is included in the general conditions of an agreement is not necessarily regarded, on the grounds of art. 6:236 DCC or presumed, on the grounds of art. 6:237 DCC, to be unreasonably onerous. It must therefore be tested against the open norm of art. 6:233, introduction and under A of the Dutch Civil Code. The interpretation of this norm

[52] Hoge Raad 21 September 2012, ECLI:NL:HR:2012:BW6135, *RvdW* 2012, 1132, *NJB* 2012, 2038, *JBPr* 2012, 69 (m.nt. P.E. Ernste).
[53] Rechtbank Leeuwarden 15 July 2009, ECLI:NL:RBLEE:2009:BJ2957
[54] Hof Leeuwarden 5 July 2011,ECLI:NL:GHLEE:2011:BR2500, *NJF* 2011, 382.

must correspond with Directive 93/13/EC of 5 April 1993 regarding unfair clauses in consumer agreements.'

Upon evaluation on the basis of this criterion, the higher court concluded:

'The arbitration clause at hand is a clause as set forth in the annex of the Directive under q) because in the case of a dispute that does not correspond to the authority of the magistrate, the consumer may exclusively turn to arbitration. The consumer is thus prevented from using the court provided to him in law, without him consciously realising this at the time of entering into the agreement and without this topic having been raised during negotiations. (…) All these circumstances together, bring the court to the conclusion that the arbitration clause of art. 21 AVA 1992 is unfair in the sense of the Directive and unreasonably onerous in the sense of art. 6:233, introduction and under A of the Dutch Civil Code.'

The contractor went to the court of cassation and thereafter the Supreme Court ruled the following on 21 September 2012:

'3.4 (…) has provided the court with an evaluation that does not rest upon the exceptional circumstances of the case at hand but on a general argument that applies to every use of arbitration clauses included within general terms and conditions such as the case at hand that form part of an agreement between a user and a natural person that does not exercise a profession or function as a company (i.e. a consumer). The judgment of the court comes back to the notion that arbitration clauses in general terms and conditions are always unfair in the sense of the Directive and unreasonably onerous in the sense of art. 6:233, introduction and under A of the Civil Code. The sections 1, 3 and 4 correctly oppose this. An arbitration clause that occurs in general terms and conditions, as the court recognised in section 3.5 of the disputed ruling, will not necessarily be considered as unreasonably onerous on the grounds of art. 6:236 DCC, and will not be assumed to be unreasonably onerous on the grounds of art 6:237 DCC. This does not however rule out, as also recognised by the court, the fact that the judge could find such a clause to be unreasonably onerous and on the grounds of art. 6:233 DCC consider it to be reversible, however such a judgment must then – aside from the case set forth in art. 6:233, introduction and under B of the Dutch Civil Code – rest on a specific justification which encompasses the nature and the other content of the agreement, the way in which the conditions were drawn up, the mutual interests of the parties and the other circumstances of the case, while the obligation to furnish the facts of the case, in principle, lies with the consumer. The disputed judgment of the court does not rest on an evaluation of the concrete circumstances of the case but places, as it were, the arbitral clause on the blacklist of art. 6:236 DCC and thus demonstrates an incorrect legal conception.'

In terms of an arbitration clause in an insurance agreement with consumers, therefore, it must be assumed that this will not be regarded in advance as unreasonably onerous in the sense of art. 6:233 DCC, or as an unfair clause in the sense of the Directive. This does not detract from the fact that the national court, in a specific case, depending on the concrete circumstances of the case, could rule that an arbitration clause may be quashed. Insurers must take this possibility seriously. This is even more important now that the Bill to Review Arbitration Law has placed the arbitration clause on a blacklist.

4.2 Consumers involved in insurance agreements between company and insurer

If there is a case of an arbitration clause in corporate liability insurance, and a private individual who has been harmed by injury addresses the insurer directly on the grounds of art. 7:954 DCC, it cannot be assumed that the arbitration clause can be invoked vis a vis the consumer. Even though, strictly speaking, the consumer is not exercising his own rights in relation to the insurer and is actually only taking over the claim of the insured party against the insurer, a consumer in such a case must not be prevented from addressing the Dutch courts.

5. Ad hoc arbitration

The many aspects that correspond to including an arbitration clause in an insurance agreement mean that parties will often only enter into an arbitration agreement once a dispute has arisen. In the Netherlands, this ad hoc arbitration is frequently initiated in the case of a coverage dispute, i.e. arbitration without use of an arbitration institute such as the Dutch Arbitration Institute or the Council of Arbitration for Construction.

But why is this? The most obvious reason is the limited number of suitable arbitrators in the Netherlands that have a good understanding of insurance law. In the case of a policy dispute, however, in-depth knowledge of the underlying technical damage is not necessarily required. Arbitrators must often primarily tackle the explanation of a policy condition or policy conditions that are interrelated. The corresponding person must therefore primarily have an insurance background. And most lawyers with knowledge of insurance law are aware of the ins and outs of liability law, should that end up playing a role in the case. If the parties, however, know which arbitrator(s) they have to address, it would seem easier to be able to do so directly rather than going via the NAI.

If it concerns a coverage dispute with respect to a construction issue, the Council of Arbitration for Construction will be approached. The Council of Arbitration for Construction has a list of arbitrators which includes lawyers, alongside those with a construction background, who are familiar with issues that can correspond to a CAR policy. Presenting a policy dispute to the Council of Arbitration for Construction is only preferable, however, if the (technical/factual) evaluation of the damage is important in terms of the evaluation of the coverage dispute. Of the three appointed arbitrators, there is generally only one lawyer.

In the event of ad hoc arbitration, parties can appoint expert arbitrators with insurance law expertise themselves; in general both parties each appoint one party-arbitrator who, in turn, decide who should function as the chairman of the arbitral board. The fact that this procedure is not regulated, however, is an immediate pitfall. Unfortunately, it may well be that parties cannot reach agreement between themselves regarding the appointment of arbitrators or that the two party-arbitrators cannot reach agreement over the appointment of a chairman. Without the intervention of an arbitration institute which is familiar with this type of situation, the arbitration will fail before it's even begun.

Another problem lies in the fact that the arbitral procedure is not set out within a regulation. This can lead to all sorts of discussions regarding the periods of time given to the parties to submit their documents, the admissibility of more detailed memories and the delivery and evaluation of the evidence by parties. In such cases, arbitrators are required with experience and the authority to put the parties back on track. Unfortunately, there have also been instances where substantial delays have been incurred because arbitrators have failed to deliver

their (provisional) decisions or instructions. Precisely because of the fact that sought-after arbitrators are often found within a small circle of experienced and expert lawyers, it concerns very busy people who – without external pressure - are sometimes too easily tempted to postpone their judgments. The parties involved in such a situation can often exercise little pressure on the arbitrators as a result of an absence of underlying regulations.

These difficulties are eliminated if the arbitration is agreed with, for example, the Dutch Arbitration Institute (NAI). The appointment of arbitrators usually takes place within the NAI using a list procedure, however this is not obligatory. Parties can also appoint their own arbitrators.[55] The oft-heard problem with NAI arbitration – namely that parties do not know which arbitrators are on the list and whether these arbitrators have sufficient expertise in terms of insurance law – is thus eliminated. The advantage is that the administrator of the NAI can move to appoint if the parties cannot reach an agreement. The risk that the arbitration will not even get off the ground is therefore substantially reduced. Another advantage of arbitration via the NAI is that the procedure is regulated. In principle, the applicable time limits are fixed, as are the methods for supplying and evaluating the evidence. Compliance herewith is supervised by the NAI. The NAI also organises remuneration for the arbitrators and the payment by parties of an advance for the costs of arbitration. NAI arbitration does correspond to certain administration costs. Parties will have to weigh up the costs against the advantages.

If parties prefer to engage in ad hoc arbitration, we would advise them – before starting to appoint arbitrators – to make agreements about the appointment procedure, in particular if the appointment process grinds to a halt. We would also recommend setting out procedural regulations with the arbitrators, once they have been appointed, with which the parties and the arbitrators must abide. These regulations do not have to include all time limits but should at least indicate the rules about the number and content of memories, the delivery and evaluation of evidence and the payment of advances for the costs of arbitration.

6. Impartiality ofarbitrators

Everyone who is involved in arbitration (arbitrators, parties, council members) must fully endorse the independence and impartiality of the arbitrators. Over the past few years, various prominent persons from the Dutch arbitration circle have stressed the usefulness of and need for independent and impartial arbitrators.[56] Luckily, in the Netherlands, we apply the Guideline of judge impartiality[57] and the IBA Guidelines on Conflicts of Interests in International Arbitration.[58]

Sometimes, at the beginning of the case, it is clear that there is a conflict of interests. In this case, the arbitrator cannot accept this appointment.[59] If there are any doubts, the arbitrator in

[55] See F.D. von Hombracht-Brinkman, "Het NAI en zijn arbiters: van kaartenbak tot geautomatiseerd bestand of: hoe simpel was het leven vroeger" in *TvA* 2012/68.
[56] See (among other things) H.J. Snijders, 'Arbitrale onafhankelijkheid en onpartijdigheid, complex en actueel', *TvA* 2008, 1; F.J.M. de Ly, 'Internationale arbitrage: Recente ontwikkelingen inzake belangenconflicten', *TvA* 2008, 12; O.L.O. de Witt Wijnen, 'Belangenconflict in arbitrage', *TvA* 2008, 29.
[57] The most recent version can be found on www.rechtspraak.nl/Procedures/Landelijke-regelingen/Algemeen/Pages/Leidraad-onpartijdigheid-van-de-rechter.aspx
[58] The version of 22 May 2004 can be found on www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx
[59] See art. 1034 DACP.

question must explain his position to the parties, i.e. *disclose* his interests. It is then up to the parties – each one independently – to decide whether the arbitrator can or cannot be accepted.[60]

Nevertheless, problems may occur in practice. Without wanting to cast aspersions on the good faith of arbitrators, (possible) conflicting interests regularly come to light during the course of arbitral procedures. The arbitrator must then *disclose* his interests and if one or both parties decide that the arbitrator is no longer acceptable, this will unavoidably lead to a not insubstantial delay in proceedings.

Otherwise, it does not concern *actual* independence or impartiality. In the ruling *N/Willems c.s.*[61] the Supreme Court again confirmed that the appearance of insufficient independence or impartiality can be enough for a challenge.

By coincidence, the case of *N/Willems c.s.* concerned arbitration for a pension and mortgage insurance case. The arbitration was put before the NAI and it involved a panel of three arbitrators: one lawyer (who functioned as chairman) and two medical arbitrators. Party N had challenged the two medical arbitrators because they were functioning as experts in their own case. After the challenge had been initially rejected by the NAI's executive committee in proceedings on the basis of art. 19 of the NAI arbitration regulations, the Rotterdam provisional judge permitted the request and found the challenge to be grounded. A review of this ruling was initiated in the interests of law. One of the most important considerations (and – if you like – principles for the arbitrator) is that arbitrators may not gather evidence separately to the parties. They must leave the evidence to the parties and must then evaluate this. The Supreme Court considers that evidence gathering by the arbitrator can put him in a position whereby he disrupts the balance between the parties and thus loses his impartiality.

But does this not put the arbitrator, who was appointed as a result of his expertise with the branch and/or the subject matter, in an impossible quandary? How can the arbitrator 'set aside' his expertise in an attempt to eliminate any semblance of insufficient independence or impartiality?[62]

The question that Snijders raised in this context – namely whether the position of arbitrators here is not identical to those for other decisions that they take on their own initiative and where one of the parties can and will raise questions as a result of being displeased – is practically rhetorical.[63] With Snijders, we are of the opinion that it is not clear in advance that arbitral evidence gathering will put the independence and impartiality of the arbitrator is question.

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[60] Parties must realise that if, after disclosure, they do not contest the appointment of the arbitrator, they are forfeiting the chance to challenge the arbitrator on this basis or to overturn an arbitral ruling on these grounds (see art. 1033 lid 2 DACP or art. 1065 section 1 under b jo. art. 1052 lid 3 DACP). It is therefore a risky strategy to keep your cards close to your chest!

[61] See HR 29 June 2007, *VR* 2006, 63, *RvdW* 2007, 630, *NJ* 2008, 177 (m.nt. HJS en J. Legemaate), *BR* 2007, 214 (m.nt. T.F.E. Tjong Tjin Tai), *NJB* 2007, 1591, and previously in the ruling *Nordström c.s./Nigoco*, see HR 8 February 1994, *NJ* 1994, 765 (m.nt. HJS) .

[62] See also Drion in the Wansink-bundle (see footnote 13).

[63] See H.J. Snijders, 'Arbitrale onafhankelijkheid en onpartijdigheid, complex en actueel', *TvA* 2008,1

Alongside the problem of the arbitrator/expert and the limits that must be implemented herein, there has been another –both national and international – development that could pose a threat to the independence and impartiality of the arbitrators. We would like to refer to this development as the 'professional arbitrator'. Herein there are at least two problems.[64]

1) With the increase in the number of arbitrations, there is an increasing number of individuals that function as arbitrator with some regularity. This development is not only occurring in the Netherlands, but also in other countries too (consider, for example, the popularity of some ICC arbitrators). In American literature, there are various suggestions that these professional arbitrators have a substantial interest in 'repeat business'.[65] In conflicts between two parties within the insurance branch, this could result in compromise verdicts. The underlying train of thought herein is that the arbitrators prefer not to completely accept or reject the claims of either party because this would inhibit a possible subsequent appointment. For the same reasons, there is also a suggestion that insured parties are disadvantage by this system because arbitrators are not keen to offend insurers (as they are the 'bosses' or 'frequent users of the system').[66] In America, this has led to damages awarded in arbitral rulings being a fraction of the damages awarded in proceedings that have been allocated to the national courts and a jury.

2) In America, arbitration agreements often contain the provision that the board of arbitration must be made up of independent representatives of insurance companies or re-insurance companies, whether these are in active service or in retirement. This therefore increasingly concerns 'industry insiders' and thus relates to an increased chance of biased arbitrators and arbitrators with conflicts of interests.[67] Some American writers even believe that parties that choose arbitration are foregoing the independence of the national courts for the branch expertise and professional knowledge of the arbitrators. We would certainly not wish to go so far in the Dutch situation, but the insurance branch is quite small in the Netherlands and it could be difficult to find arbitrators who *do* have the required expertise and experience, but have *no* links (and have never had links) to insurers or re-insurers (or to other parties with an interest in the outcome of the dispute).

The fact that arbitration is informal and has a confidential nature means that there is an increased risk that arbitrators are insufficiently independent and impartial.[68] This could turn out to be detrimental to both the insured party and the insurer as an appeal to a higher court is ruled out in many cases.[69],[70] Assuming that the insurer has, to a certain degree, included this

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[64] These problems are possible in theory in the Dutch context but, certainly in international cases – consider the large re-insurance arbitrations cases – they do occur.
[65] See for example E.J. Zulkey, 'Arbitration in insurance disputes', included in the bundle 'Litigating insurance disputes', Rel. 6-2009, p. 14-2.
[66] See P.S.L. Hartman, 'Arbitration clauses in insurance contracts: the urgent need for reform', http://www.citizen.org/congress/article_redirect.cfm
[67] See for example footnote 11: "In drafting a policy favoring arbitration over litigation, the parties have opted to trade expertise by the arbitrator in insurance disputes for the total impartiality of the courts, who generally have less expertise in complex insurance matters."
[68] In this context, it is interesting to note the rule that the Court of Arbitration for Sport (CAS) introduced in 2006 in order to avoid the appearance of insufficient independence and impartiality. This rule states that an arbitrator on the CAS list, in the period when he is processing a CAS arbitration case, may not function as a lawyer in another CAS procedure. So, irrespective of whether he/she actually has a conflict of interests. See, in this context, O.L.O. de Witt Wijnen, 'Belangenconflict in arbitrage', *TvA* 2008, 29.
[69] The chances of having a ruling quashed are generally very small, given the strict benchmark that has been in place since the ruling of the Supreme Court regarding *Nordström c.s./Van Nievelt Goudriaan* with

risk within his calculations in relation to including an arbitration clause in the general insurance conditions, there is every reason for the insured party to take a critical position in relation to arbitration clauses, particularly when it comes to the qualifications of arbitrators and the procedure surrounding the appointment thereof.[71]

Simultaneously, we must of course be careful not to throw the baby out with the bath water. In a ruling, mentioned by De Ly, from the Federal Court of Justice of the fifth jurisdiction *(Positive Software Solutions Inc. v. New Century Mortgage Corporation, 476 F.3d 278 (2007))* the following was considered:

'Arbitration would lose the benefit of specialized knowledge, because the best lawyers and professionals, who normally have the longest list of potential connections to disclose, have no need to risk blemishes on their reputations from post-arbitration law suits attacking them as biased.'[72]

7. Binding advice

It does not always pay to have a dispute between an insurer and an insured party settled by the Dutch courts or arbitration. This not only concerns the costs associated with the proceedings, the corresponding period of time can also stand in the way of a dynamic method for settling disputes. A solution for this can be found by putting part of the dispute before a binding adviser or, perhaps, a committee of binding advisers.[73] The method of seeking a (partial) dispute solution via a binding adviser is generally less formal and therefore often quicker and cheaper. The fact that a dispute is rarely put before a binding adviser in practice (or perhaps this goes on behind the scenes) could seem surprising. The reason may well lie in the fact that putting a dispute to a binding adviser is not included as a standard in policy conditions and, once the dispute has arisen, the parties are insufficiently cooperative to work towards a practical solution together.

What is often included in many policy conditions, however, is the route to the KiFiD (the financial complaint institute). So, in practice, the entire dispute is generally put before the dispute commission. What we have in mind, is allowing a ruling on part of the dispute to be made by one or more binding advisers. After a ruling (which may or may not be fundamental), the parties can meet again in an attempt to come to a conclusion amicably.

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respect to annulment due to doubts about the independence and impartiality of the arbitrator, on the basis of art. 1065 DACP (we also note that the introduction of the draft Bill to Review Arbitration Law 2012 only leaves the route to the Supreme Court open). See Hoge Raad 18 February 1994, *TvA* 1994, 3, p. 187, m.nt. P. Sanders; *NJ* 1994/765, m.nt. H. J. Snijders. This ruling was recently – in light of the Bill to Review Arbitration Law 2012 – discussed by B.C. Punt, 'Een effectief functionerende arbitrale rechtspraak in balans', *TvA* 2012, 63.

[70] In many arbitration regulations, higher appeals are expressly ruled out and many parties see 'finality' as an important advantage of arbitration above the national courts. The arbitration regulation of NOFOTA and the Committe of Grain Processors form an exception and do permit appeals to a higher court.

[71] See B.D. Douglas, 'Insurance policy arbitration clauses: know what you are bargaining for', Haynes and Boone LLP, 2011, www.haynesboone.com

[72] For a more thorough review of the American ruling, see the contribution from De Ly, noted in footnote 12.

[73] A dissertation on this topic was written by P.E. Ernste, 'Bindend advies', diss. Nijmegen 2012.

Such a partial dispute could, for example, relate to a fundamental difference of opinion regarding the explanation of a policy condition whereby the outcome is 'all or nothing': is party X co-insured under the policy? Was the claim or situation reported promptly?[74] Once a decision has been made regarding this type of fundamental issue, it is certainly possible that the other issues that are contested between the parties are such that these can be agreed between the parties themselves. The advantage of binding advice with respect to arbitration is the informal nature thereof: binding advice is regulated by law (section 7.15 DCC) but the *procedure* for binding advice is not. This informal nature can mean a quicker procedure and can also prevent the dispute between the parties worsening.

Binding advice can also play a role in cases where the insurer and insured party hold discussions regarding the treatment of a case (e.g. the settlement method used for a third party claim, whereby the insurer has taken over the defence of the insured person). The insurer and insured party may have different interests, which could lead to a conflict particularly in cases which involve a high excess or damages that (far) exceed the insured sum. Different interests are, however, also feasible in cases in which one party prefers a fundamental ruling because he is often involved with these types of issue, whereas the other party has a (commercial or practical) interest in a rapid and smooth settlement. The insurer and insured party can both engage a lawyer to represent their interests but this does not necessarily mean that parties will resolve a difference of opinion.

Most English (professional) liability insurance policies include the *Queen's Counsel clause*; this indicates that the insurer may only take on the defence on behalf of the insured party against a third party if a Queen's Counsel (an experienced *barrister*) has stated that the defence has a reasonable chance of success.[75] Such a clause often leads to the insurer having to pay out:

'any such claim or claims which may arise without requiring the assured to dispute any claim, unless a Queen's Counsel (to be mutually agreed upon by the underwriters and assured) advises that the same could be successfully contested by the assured and the assured consents to such a claim being contested, but such consent not to be unreasonably withheld.'[76]

In some policies, this clause has a broader application, namely that the Queen's Counsel must provide an opinion on all policy disputes that are contested by parties. In these cases, there is in fact talk of an arbitration clause because the Queen's Counsel shall issue a ruling which can be *enforced*, even though the text of the clause is somewhat ambiguous regarding the precise nature of the dispute procedure.

Both parties may invoke the 'QC clause'. In order to avoid a chicken-and-egg discussion, there is an assumption that this involves coverage in order to enable the QC clause to be invoked. Once the Queen's Counsel has provided a ruling regarding the issue of whether the insured party must defend himself against a claim, the insurer may dispute the fact that this relates to coverage at all. If the insurer does not invoke the QC clause, there is a consequence that is very important in practice: if the insured party also fails to invoke the QC clause and decides to settle with the other party, the insurer may not state thereafter that he has thus prejudiced his interests. The insurer can no longer take the standpoint that the insured party should have

[74] Examples are also provided by Ernste in her dissertation, see footnote 73.
[75] See also A.L. Krenning en N. Vloemans in "Rechtsbijstand door de aansprakelijkheidsverzekeraar en het eigen belang van de verzekerde" in *NTHR* 2007-6, p. 241-242.
[76] Malcolm A. Clarke, *Law of Liability Insurance*, Abingdon, Oxon 2014, p. 134.

defended himself and that, by settling, has forfeited his right to (full) cover. If the insurer is of the opinion that contesting the case could lead to a better outcome, he must immediately move towards defending and, if the insured party has a different view, seek the advice of the Queen's Counsel.

In the Netherlands, we are not familiar with the concept of *Queen's Counsel*, but in our opinion it could well be an option to appoint an adviser (which may or may not be binding) in the policy conditions, who makes a decision in the event of a difference of opinion with respect to the defence to be mounted. An arbitrator from the NAI list could be appointed as a binding adviser, as could the chairman of the KiFiD, or it could be left to an independent third party (such as the chairman of the KiFiD or the Financial Ombudsman) to appoint an expert adviser. In our opinion, there are clear advantages to having such a regulation. It could prevent unnecessary delays due to discussions between insurer and insured party regarding the way in which a claim is to be processed, particularly when it comes to the issue of whether the interests of an insurer are or will be damaged if an insured party wishes or decides to settle.

An important disadvantage of binding advice compared to an arbitral judgment or a ruling by a government body is that binding advice does not ascribe executorial title (whereby we note that the arbitral judgment can initially be put forward for execution by leave of the provisional judge, see art. 1062 DACP). The Dutch courts must be engaged in the event of non-compliance with the binding advice. The judge must test the binding advice against the benchmark of art. 7: 904 DCC .[77]

8. Conclusions

Dutch policy conditions rarely contain arbitration clauses and there is a reason for this. In cases which may involve multiple parties, an arbitration clause hinders the possibility of including all of the parties in one proceeding, right from the start.

This does not mean, however, that arbitration does not occur or is undesirable within insurance practice. Arbitration can always be agreed between parties once the dispute has arisen and can present significant advantages compared to the Dutch courts. If the nature of the dispute is known, consideration can be made of this when choosing the arbitrators and establishing the procedure to be followed.

Our preference would be for parties, once a dispute has arisen, to enter into an arbitration agreement and for the arbitration procedure to be executed under the supervision of an arbitration institute. This could alleviate a great deal of frustration and discussion when appointing arbitrators, estimating costs and determining the rules with which the parties must abide. It is important that the arbitration institute that is required has a list of possible arbitrators that have sufficient expertise in insurance law or, more specifically policy law, if the dispute involves a policy dispute.

Furthermore, we believe that in practice the option to appoint a binding adviser is used too infrequently. This is a particularly good alternative for arbitration or the Dutch courts in situations where, for example, agreement must be reached between the insurer and the

[77] See also P.E. Ernste, 'De rol van bindend advies naast arbitrage', *TvA* 2012, 72.

insured party regarding the defence to be brought against a third party. Moreover, a binding adviser can help parties through an impasse by, for example, issuing a ruling about the explanation of a policy condition, just like an independent expert can rule on the extent of damage. Because of the fact that parties do not tend to seek a binding adviser, it is recommended that a binding advice procedure is included in policy conditions.

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