Standard contracts and adhesion contracts according to Dutch law*

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II.A.4.

I. INTRODUCTION—HISTORICAL DEVELOPMENT—DEFINITIONS

1. Introduction

Dutch contract law at the present time is to a large extent governed by standard contracts. With standard contracts anyone gets in touch who travels by bus, train, ship or plane, who opens a bank account or takes an insurance, who buys a car or takes a shirt to the laundry, who has his house rebuilt or pledges it by a mortgage. In short: any normal person gets in touch with standard contracts.

In commerce standard contracts play an even larger role, especially in international commerce. The international sale of goods is hardly governed by national laws at all.[1] Even the settlement of disputes no longer is a task of the official judiciary system; it has been taken over by arbitral tribunals appointed by the branches of trade concerned. Insurance, transport and maritime law as well are largely governed by standard contracts.

The development of standard contracts has posed large problems to Dutch lawyers, or for that matter to lawyers all over the Western world. According to classical 19th century doctrine a contract comes into force after the parties have negotiated all terms. The second title of the third book of the Dutch Civil Code[2] is based upon this assumption. Standard contracts have disrupted classical theory. No longer are all contractual terms negotiated; long before a transaction takes place, they have been drafted, often by one party. Can the existing legal institutions and provisions of the B.W. deal adequately with the problems posed by these standard contracts?

Dutch lawyers usually have seen a menace in this development: a menace to

* Translation by the author, who expresses his apologies for his errors in the English language.

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[1] In future uniform international law may play a role. In September 1968 the Dutch government has proposed ratification of the Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale to the Parliament. Ratification by the Netherlands would raise the number of ratifications to four (five are necessary for their coming into force). See W.L.G.Lemaire, Volledig eenvormig internationaal kooprecht of niet?, 44 NJB 513-521 (1969).

[2] 'Of obligations which arise out of contract.'

freedom of contract, a menace to free enterprise, and a menace to the uniformity of law. A menace to freedom of contract since bus passenger, insured, bank client nor car buyer have any real opportunity to negotiate the terms of their contracts. A menace to free enterprise because of the cartelizing influence of standard contracts. And finally, a menace to uniformity of law, since next to the official codifications a number of private codes has appeared, without any control by Parliament or Supreme Court.[3]

2. Scope of this paper

In this paper I shall deal successively with applicability, interpretation and abuse of standard contracts, two chapters being devoted to the latter topic: the first on judicial, the second on government control. I shall conclude with a brief chapter on standard contracts and anti-trust law. Because of lack of space I have to refrain from discussing such topics as alteration of standard contracts and standard contracts and third parties.

Before settling to discuss the subjects mentioned above, I shall give a brief outline of the history of standard contracts, their treatment by Dutch case law, authors and legislature. In this introductory chapter I shall also try to give definitions of standard and adhesion contracts.

3. Historical development

Standard contracts can already be found in many primitive societies. The concluding of a contract, the transferral of property or the establishment of proprietary rights usually were sacred acts, where a priest had to be present. In the course of years the priest accumulated collections of the sacred words spoken at these occasions, which later were handed over to the lay notaries public. To the present time most notaries public have had at their disposal books of forms, in which most current legal acts have been standardized.

More important for the development of standard contracts is the appearance of model insurance policies in the 16th and 17th century.[4] Insurance in the 16th century was a rather new institution, unprovided for by Roman law and outside

[3] No doubt standard contracts have some very large economic advantages to negotiated contracts. Costly negotiations over the exact terms no longer are necessary; blank spaces in the law due to the rapid advance of technology are filled, so every party knows exactly where he stands; equal treatment of all consumers, regardless their status; etc. Since the economical and social advantages and disadvantages are not a specific Dutch topic, they will not be discussed to any length in this paper.

[4] Two instruments which were developed into standardized forms at an even earlier age —the cheque and the bill—will not be discussed in this paper. The issues which arise out of the use of these fairly simple documents are of too different a nature from the others treated in this paper.

the scope of the guilds. With the increase of the number of insurance contracts it became worth while to cover specific events which arise only rarely in the policies. Also the need is felt for standardized clauses, which are put together in model policies. More or less the same development may be discerned—though at a later time—in the field of (bulk) sale of goods and in other fields of trade.

A third development occurs in the late 18th and the 19th century. After the decline of the guilds, which were municipal agencies, labor law no longer is provided for. At this moment either the state steps in, as in France, or the manufacturers themselves fill the gap by proclaiming 'codes of factory discipline'. Since no trade unions are allowed, these codes tend to be very one-sided and often contain extremely onerous clauses. Whether or not to apply these clauses to a specific labourer was completely up to the manufacturer. This system proved to function so well, that it was also applied to other branches where one party had an economically superior position: sale of goods to consumers, railway transport, water, electricity and gas delivery, and many other services.

At present a large percentage of the contracts concluded in The Netherlands is governed by standard conditions. There is no reason to doubt that this trend will continue in the future. With the increasing importance of services (computers!) in the world—and services being a traditionally fertile field for standard contracts—standard conditions will play an even larger role in 2000 A.D. (provided no action is taken by legislators).

4. Standard contracts in Dutch case law, literature and legislation

In The Netherlands standard contracts have not been fully appreciated as a distinct legal institution until the present century. Of course, 19th century tribunals often had to deal with insurance or transport conditions, but only rarely did the courts show an insight into the specific problems, which arise out of the use of these conditions. The first author to cover the category of standard contracts as a whole[5] was *Jansma* in his 1913 thesis on 'Interpretation of contract'.[6] Ever since, the handbooks on contracts have devoted some attention to our subject.[7]

In the 1920's and '30's Dutch courts developed a large case law on standard

[5]Earlier books on standard contracts covered only standard conditions, which were applied to a specific contract, for instance the labor contract (see among others E.A.van Beresteijn, Arbeidsreglementen, diss. Utrecht, Amersfoort: Valkhoff 1903).

[6]K. Jansma, Uitlegging van overeenkomsten, diss. Amsterdam, Hoogeveen: Pet 1913.

[7]The two most widely used handbooks—Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Derde Deel—verbintenissenrecht, tweede stuk: de overeenkomst en de verbintenis uit de wet, 3rd edition by L.E.H.Rutten, Zwolle: Tjeenk Willink 1968 (in this paper cited as Asser-Rutten II) and L.C.Hofmann, Het Nederlands verbintenissenrecht, Eerste gedeelte (artt.1269-1387 B.W.), 8th edition by S.N.van Opstall, Groningen: Wolters 1959, unrevised reprint 1969 (in this paper cited as *Hofmann-Van Opstall*)—altogether do not devote more than 2 or 3 pages to standard contracts.

contracts and several law review articles commented on this development.[8] In 1948 the issues involved in the use of standard contract were the subject of discussion of the anual meeting of the *Nederlandse Juristen-Vereniging*. Two very interesting papers were delivered for this discussion by Jansma[9] and Zeylemaker.[10]

By this time standard contracts had attracted the attention of the legislator. In 1948 one of the discussion points of the Nederlandse Juristen-Vereniging meeting was: 'Should the Civil Code lay down general rules for standard contracts?' This interrogatory was answered negatively by a large majority.[11] The year before Professor Eduard M.Meijers, the most prominent Dutch lawyer of the first half of the 20th century, had been entrusted with the task of preparing a draft for a new Dutch Civil Code.[12] Before setting himself to writing the code, Meijers wanted to make certain that his draft would have Parliamentary approval. He therefore delivered 49 interrogatories, one of which was:

'Should the possibility be created—more than at the present time—of enactment of the law applicable to certain contracts not by the legislator but by the Crown or by another public corporation with the cooperation or after the consultation of the interested parties?' (interrogatory no.24).

Upon the recommendation of Meijers this point was answered affirmatively

[8]See for example A.J.Marx, Het euvel der ongeweten en onbegrepen bedingen, In: 14 NJB 423-430 and 447-453 (1939).

[9]The same who wrote the 1913 thesis on Interpretation of contract, see note 6.

[10]J.Zeylemaker Jzn. and K.Jansma, 'Is het wenselijk onze burgerlijke wetgeving aan te vullen met bepalingen omtrent "standaardcontracten" en zo ja, naar welke beginselen?', In 1 Handelingen der Nederlandse Juristen-Vereniging 1948, Zwolle: Tjeenk Willink 1948, p.67-124 and 125-164.

[11] 2 Handelingen der Nederlandse Juristen-Vereniging, p.88.

[12]Royal decree of 25 April 1947, which can be found in C.J.van Zeben (ed.), Parlementaire geschiedenis van het nieuwe burgerlijk wetboek, Algemeen deel: voorgeschiedenis en inleiding, Deventer/Antwerpen: Kluwer 1961. Further information on the draft Civil in note 13.

[13]Meijers never finished the immense work. At his death in 1954 four out of the nine proposed books had been finished; drafts for Book 5 had been prepared. After Meijers' death the process slowed down. In 1955 Book 5 had been completed by a Commission consisting of J.Drion, Eggens and De Jong. By 1961 the Commission (then consisting of J.Drion, De Jong and De Grooth) had finished Book 6. At this time (September 1969) Books 7-9 have not yet been finished. Although it will still be a long time before the other books will become effective, Book 1 (Family law) will become effective as from 1 January 1970. An English translation of the Draft B.W. by E.J.Drion-Van Rooijen (the widow of J.Drion) will be published shortly. The Draft B.W. has led to a plethora of law review articles—see C.J.van Zeben and G.J.L.Seesink, Nieuw Burgerlijk Wetboek, Deventer: Kluwer 1959 (loose-leaf). Some of the most interesting foreign language articles are:

French G.E.Langemeijer, «La réforme du Code civil néerlandais», 17 Revue internationale de droit comparé 55-72 (1965).

German U.Drobnig, 29 Rabels Zeitschrift 642-643 (1965); A.E.von Overbeck, Zeitschrift für Rechtsvergleichung 1962, p.190 ff.

by the Second Chamber of Parliament and this finally led to section 6.5.1.2 of the draft B.W.[13] Section 6.5.1.3 also deals with standard contracts. Both sections and the interrogatory have been dealt with in law review articles.[14]

In 1957 the *Nederlandse Juristen-Vereniging* once again made a contribution to our topic by bringing to the floor the subject of exemption clauses. Of the two papers delivered for this meeting by Salomonson and H.Drion, the latter deals extensively with adhesion contracts.[15]

The most important contribution to our subject of recent years has come from the H.R. In Saladin v. Hollandsche Bank-Unie[16] the HR gave new directions to the discussion. This is the more interesting since the HR has had but little opportunity to hand down decisions on standard contracts.

Appeal to the HR will only be allowed, when a lower court has erred in the law. Since standard contracts are still considered *fact*, appeals to the *Hoge Raad* concerning their interpretation are dismissed. This situation was criticized by Zeylemaker and Jansma in their papers.[17] It led to a proposal by the Department of Justice of a new section providing for the possibility of 'cassation' from decisions dealing with standard contracts. The proposed provision was withdrawn, however, after considerable criticism from a Parliamentary Commission.[18]

English J.Dainow, 'Civil code revision in the Netherlands; the fifty questions', 5 American Journal of Comparative Law 595 (1956).
J.Dainow, 'Civil code revision in the Netherlands; general problems', 17 Lousiana Law Review 273 (1957).
J.Dainow, 'Civil code revision in the Netherlands; some new developments in obligations and property'. In: XXth Century comparative and conflict law; Legal essays in honor of Hessel E.Yntema, Leiden: Sythoff 1961, p.172 ff.

[14]See W.G.Verkruisen, 'Standaardcontracten', 6 ARS AEQUI 166-173 (1957); S.N.van Opstall, 'Algemene voorwaarden', Weekblad voor Privaatrecht, Notarisambt en Registratie no. 4735 (1962); H.J.Pabbruwe, 'Art.6.5.1.3', 39 Nederlands Juristenblad 402 (1964), Bakels, Macht en onmacht in het privaatrecht, oration 1965, reviewed by W.J.Slagter in Rechtsgeleerd Magazijn Themis 1965, p.431 ff.; H.J.Pabbruwe, Het nieuwe Burgerlijk Wetboek—Artikel 6.5.1.2 (standaardregelingen), 41 NJB, p.153 ff. (1966); K.Jansma, reply to Pabbruwe in 41 NJB, p.304 ff. (1966); C.J.van Zeben, 'Het ontwerp voor een nieuw burgerlijk wetboek; standaardcontracten', Maandblad voor handelswetenschappen en administratieve praktijk 1964/1965, p.153 ff.

[15]L.Salomonson and H.Drion, 'Dient de wet algemene regelen te bevatten omtrent bedingen tot beperking of opheffing van aansprakelijkheid, en zo ja, welke?', 1 Handelingen der Nederlandse Juristen-Vereniging 141-183 and 185-270, Zwolle: Tjeenk Willink 1957. In the same year a thesis was published, which contained an interesting chapter on standard contracts: P.A.Stein, Misbruik van omstandigheden als grond voor ongeldigheid van rechtshandelingen, thesis Leiden, 's-Gravenhage 1957.

[16]HR 19.5.67, NJ 1967, 261 (G.J.S.), 16 ARS AEQUI 214 (P.A.Stein) (1967), see also A.R. Bloembergen, 'Exoneratieclausules', 6 BOUWRECHT, p.355-370 (1969).

[17]Zeylemaker at p.108, Jansma at p.162.

[18]See infra, Chapter III.

A completely different aspect of standard contracts attracted considerable attention in the 1950's. Assuming that government interference is imperative, is delegation of legislation to the statutory trade organizations constitutional?[19] In 1967 it was observed that this was no longer a purely academic question.[20] A subject which has been given much thought in Germany, but which hardly has been noticed in The Netherlands is the relationship between standard contracts and anti-trust law.[21]

5. Definitions

The terminology used by Dutch writers tends to be rather confusing.[22] In 1913 Jansma used the term 'form contract', but later the term 'standard contract' came into use. Although the category of 'General conditions' etc. strictly speaking does not fall within the scope of this paper (except when general conditions are referred to in an adhesion contract), it will be dealt with, since the issues involved seem to be more or less the same. For the same reason single standard clauses will be treated where necessary.

As the question whether a contract is a standard contract or not has no legal consequences, no attempt at a sharp definition will be made in this paper.[23] I shall confine myself to the summing up of the *characteristic aspects* of standard contracts, which seem to be:

a) a body of terms

There should be a more or less detailed body of terms covering the relationship between two or more parties. Because of their simplicity bills and cheques are singled out.

b) contractual terms

This paper is confined to the subject of standard *contracts*. Attention should be drawn, however, to the model forms which are in use by Dutch notaries public and which also apply to many non-contractual transactions. Secondly, the standard conditions applicable to the lease of corporate lands by municipalities should be mentioned.

c) written terms

The writing may be a standard form, a booklet published by a trading society or a document deposed at the local Chamber of Commerce or lodged at the office of the registrar. The contract itself need not be written.

[19]Cf. Van der Grinten, Prae-adviezen uitgebracht aan de Vereeniging 'Handelsrecht' over de Vraagpunten 24, 26, 27, 28, 31, 33, 34 en 35 inzake het nieuwe Burgerlijk Wetboek, Zwolle: Tjeenk Willink 1953. See also the discussion in Sociaal Economische Wetgeving by Vegting, SEW 1954, p.216-225, Belinfante, SEW 1955, p.105-117, Van der Grinten, SEW 1955, p.165-169 (with postscript by Belinfante, p.169-170) and L.J.Schippers, SEW 1955, p.269-270.

[20]Cf. H.Cohen Jehoram, SEW 1966, p.138 ff. and the same, Wie geeft de burgerlijke wet?

d) terms usually not essential to the contract

In the field of sale of goods standard conditions usually do not cover price, number/measurement/weight, and quality, i.e.the essential elements of the contract of sale. Likewise in the insurance branch general conditions do not provide for premium and risk.These essential elements usually are still negotiated or at least discussed by parties. However, this is not the case in all branches (labor contracts, general conditions of gas, water and electricity works!).

e) terms drafted in advance

Standard contracts are always drafted before a specific contractual relationship is entered into. They may be drafted unilaterally or multilaterally. A more detailed division has been made by Verkruisen[24], who distinguishes:
1) standard contracts drafted by one party;
2) standard contracts drafted by a group of parties who are in the same position (sellers, employers, etc.);
3) standard contracts drafted by two organizations representing the respective parties to certain transactions (collective labour agreements), or by an organization representing both parties (trade organizations);
4) standard contracts drafted by an organization which does not represent either of the parties (Incoterms).

As Verkruisen himself observes, this distinction is not very sharp and indeed, many standard contracts in between can be imagined.

For the first two categories the term '*adhesion contracts*' is in use.This term will be further explored in the next paragraph.

f) drafted for a large number of transactions

This is the most characteristic aspect of standard contracts: their *standardized* use. It is the factor which has started the development of standard contracts.

In the Draft B.W. one also finds the term '*standard regulations*' (Section 6.5.1.2). This term is used to denote standard conditions which are effective in a whole branche of trade.

6. Adhesion contracts

The term 'adhesion contract' is used for standard contracts, which have been drafted unilaterally (the first two categories mentioned in par.5 sub e). As has been indicated above the transition of adhesion contracts into non-adhesion

Oration Amsterdam 1967, Deventer: Kluwer 1967.

[21]Infra, Chapter VI.

[22]The reason may be the different origins of standard contracts, mentioned in par.3.

[23]Cf. E.M.Meijers, Algemene leer van het burgerlijk recht, Deel 1, De algemene begrippen van het burgerlijk recht, Leiden: Universitaire Pers 1948, p.268-269.

[24]W.G.Verkruisen, 'Standaardcontracten', 6 ARS AEQUI, p.166-173 (1957).

contracts is very gradual. However, the adhesion character of a transaction also has the following characteristics:

a) *The adhering party usually does not know, read or understand the contents of a standard contract.* He does not know them, when the general conditions are lodged at a registrar's office (which of course no one visits before entering into a minor transaction). He does not read the contents, since they usually are far too long. And even if he reads the contract, he may not understand it because of the vagueness (often deliberate) and technicality of the clauses.

b) *The adhering party usually is under coercion.* Even in the rare case that the adhering party completely understands the contents of a standard contract, he will not be able to change these. Either the other party or its organization has a monopoly or it has a central position.[25]

These characteristics often lead to abuse. Two different methods for dealing with this abuse will be discussed in Chapters IV and V.

II. APPLICABILITY OF STANDARD CONDITIONS

7. Introduction

In this chapter I shall discuss the question wether standard conditions are applicable to a specific legal relationship. The problems of abuse will be dealt with in a later chapter.

A distinction will be made between:

a) standard clauses which are found in or referred to in a signed form, cf. par. 8.
b) standard clauses which are found in or referred to in other writing between parties, cf. par. 9.
c) standard clauses on printed boards or notices, cf. par. 10.
d) standard clauses which have been stipulated in a previous contract, cf. par. 11.
e) customary standard clauses, cf. par. 12.
f) compulsory standard clauses, prescribed by the government or by other public agencies, cf. Chapter IV.

[25] Jansma, p.131.

[26] Asser-Rutten II, p.78, where several cases are cited.

[27] Ibidem. The other party is bound to fill in the blank spaces in good faith: F.G.Scheltema, Nederlandsch burgerlijk bewijsrecht, Zwolle: Tjeenk Willink, 1939, p.355-356. But the onus of proof that he did not do so rests upon the one who signed.

[28] In the following pages Dutch cases will be cited according to Dutch legal custom. Two sources will be cited: the *Nederlandse Jurisprudentie* (NJ), which is published by Tjeenk Willink in Zwolle from 1913, and the *Weekblad van het Recht* (W), published by Belinfante in The Hague from 1838-1935 as a separate publication. After the abbreviation NJ are indicated first the year and then the page, or beginning from the year 1936 the number. After the abbreviation W is indicated first the number (a continuing numeration from 1838) and then the page. In this paper I shall only cite some of the most interesting cases, because of lack of space allotted to me. For the same reason I shall refrain from

8.Standard clauses which are found in or referred to in a signed form

According to a general rule of Dutch contract law any person who signs a document is bound by its contents.[26] This rule is applied even when a form contains blank spaces which are to be filled in by the other party to the contract (as often happens in insurance practice).[27] Does this rule also apply to standard contracts? Dutch case law[28] [29] and writers concur in a nearly unanimous answer.

Less unanimity exists as to argumentation. In 1939 a District Court argued:

'From normal people participating in legal traffic it may be expected that at least they read a document before signing it; those who neglect doing so should bear the consequences'.[30]

This was the general line of thought of the judiciary in the first half of this century. The untruthfulness, especially in the case of adhesion contracts, springs out. Can it really be expected from a hire-purchaser that he reads a contract of two or more densely printed pages *in toto* before signing on the dots?[31] [32] Legal practice should accord more weight to the customs of the people. Nobody reads these contracts.

According to most present day writers standard contracts are binding because of a general submission of the will. 'Although the subscriber did not know all the terms of the document, he has submitted knowingly and willfully to these terms and he has wanted to be legally bound according to the contents of these terms'.[33]

Exceptions to the general rule are allowed when the subscriber does not evoke the other party's expectation that he submits to the complete contents of the contract (for example when the other party has inserted highly unusual terms, see Chapter IV), and when in the signed form reference is made to standard terms which have not been published or not in the usual or announced way.

9.Standard clauses which are found in or referred to in other writing between parties

The signing of a document often is a cumbersome practice, sometimes capable

citing arbitration cases, which are published in the '*Arbitrale Rechtspraak*' from 1919 and in other specialized law reviews, and maritime time cases, which are published in the highly interesting '*Schip en Schade*'.

[29]E.g. Hof 's-Gravenhage 9.4.26, NJ 1928, 486, W 11687, p.3 (rent), Rb. Amsterdam 29.5.36, NJ 1937, 744 (advertisement contract). As to the abbreviations used here, see Appendix A.

[30]Rb. Middelburg 15.11.39, NJ 1940, 903.

[31]As Asser-Rutten II at p.78 remarks, this is not a problem peculiar to standard contracts: many a sale or rent contract is also drafted unilaterally in advance.

[32]The question rises whether or not the subscriber might still retire after reading the contract at home. Dutch law probably would not allow this, although a cooling-off period as under the proposed American Uniform Consumer Credit Code would seem to me highly desirable.

[33]Asser-Rutten II, p.78, where other writers are cited.

of arousing the subscriber's suspicion. Therefore in most branches of trade it is customary to limit oneself to a mere announcement or reference in the writing which is exchanged between parties. Documents which easily lend themselves to such announcements or references are an offer, a letter of acceptance, a cover note slip, a waybill, a consignment note, etc. etc. Both case law[34] and writers[35] are of the opinion that in these cases standard clauses in general are binding.

The standard clauses may either be printed in the writing itself (often a letter head) in which case they are considered applicable even when printed on the back of the writing without a reference on the front[36], or published in other writing. This other writing may consist of standard conditions, lodged at the local Chamber of Commerce or at the Registrar's office, which often were drafted by an organization to which the party concerned belongs. In the latter case (a) the reference should be clear[37], (b) and available.[38]

Standard clauses are not considered applicable when they are only announced or referred to in a bill-head or invoice-head.[39] The argument usually found to deny applicability is that these instruments are exchanged *after* the contract has been concluded. I do not find this argument very satisfactory, since the (reference to the) standard clause in a confirmation of order is considered valid[40] and this confirmation is also only sent after the contract has been concluded. A more satisfactory argument is, I think, that standard clauses were not customarily expected in these writings, just as they are not expected on a cloak room ticket. Since at the present time they should customarily be expected in bill- and invoice-headings, I conclude (contrary to the prevailing Dutch opinion) that standard clauses or references should be applicable, unless the receiver of the

[34]Out of the plethora of cases I select Ktg. Oudenbosch, 26.3.1872, W 3492, p.3, affirmed Rb. Breda, 29.10.1872, W 3532, p.3, Rb. 's-Gravenhage, 8.1.20, NJ 1922, 134 (reference in letter from intermediary).

[35]Same writers as mentioned in par.9.

[36]Rb. Utrecht, 13.6.34, NJ 1935, 1357. Contra: Rb. Amsterdam, 30.5.30, W 12197, p.4.

[37]Rb. Amsterdam 28.2.28, W 11820, affirmed Hof Amsterdam 21.5.29, W 12035, p.2 (the clause in a letter head: 'Ausserdem gelten die Bedingungen und Bestimmungen, die Dritte an der Ausführung Beteiligten aufgestellt haben, zum Beispiel: Eisenbahnen, Schiffer und sonstige Frachtfuhrunternehmungen' considered too vague), Rb. Amsterdam 23.5.30, NJ 1931, 578, W 12197, p.3 (German clause 'Verbands Konditionen' too vague for a Dutch merchant). The reference 'Member of ...' (for instance: Dutch Association of Architects) is not sufficient for application of the General Conditions of such association. This has been decided in many cases. As to certain standard clauses, such as arbitration clauses, special clearness is required: Hof Amsterdam 23.11.38, NJ 1939, 694.

[38]In case the other party asks for a copy of the General Conditions, this should be sent to him: HR 10.11.27, NJ 1928, 251 with note by E.M.Meijers, W 11768.

[39]Rb. Amsterdam 29.6.1900, W 7500, p.3, Rb. Amsterdam 9.5.06, W 8519, p.3, Rb. Amsterdam 18.3.18, NJ 1918, 1068, W 10309, Rb. Dordrecht 24.12.19, NJ 1920, 363. Rb. Dordrecht, 9.5.21, NJ 1922, 1023, Ktg. Assen 16.12.20, NJ 1922, 803, Hof Arnhem 15.11.21, NJ 1922, 607, Rb. 's-Hertogenbosch 13.1.22, NJ 1923, 562, Rb. 's-Gravenhage 9.1.23, NJ 1924, 1047, Rb. Rotterdam 13.2.25, W 11365, p.4, Rb. Maastricht 17.6.26, W 11702,

bill, the invoice of the confirmation letter protests within a reasonable time. The protest should be made in good faith, for example not because at that moment a more profitable contract can be concluded. The question which standard clause to apply when both parties have referred to or announced standard clauses, which are at variance, has barely been discussed in Dutch literature or arisen in cases.[41]

What is the argumentation of the applicability? The same arguments are advanced as in par.8, but now those writers who make the same distinction as this paper are aware of the theoretical problems themselves. 'In any case the opinion that the standard conditions are not binding would lead to disastrous results' as Rutten remarks.[42]

10.Standard clauses on printed boards or notices (par.7 sub c)

In cycle or motor car parkings, in garages, cloack-rooms and dry-cleaning shops one often finds printed notices or boards, containing one or more standard clauses or a reference to general conditions. Do these clauses or conditions become part of the contract? Dutch case law and writers usually answer this question affirmatively.[42a] In order to be binding, however, the standard clauses should meet the following conditions:

a) they should be written in *clearly readable characters*[43];
b) in a language which is *understandable* to the usual circle of customers[44];
c) they should be affixed at a *clearly visible place*[45];

p.5, Rb. Breda 30.11.26, NJ 1927, 539, Rb. Amsterdam 11.11.29, W 12165, p.6 and many other cases. Contra: Rb. Rotterdam 16.5.1891, W 6065, p.3, Ktg. Maastricht 8.6.1928, W 12021 and Rb. Zwolle 18.3.59, NJ 1959, 534.

[40]Rb. Rotterdam 12.12.1891, W 6160, p.3, Hof Amsterdam 23.11.1938, NJ 1939, 694. Cf. W.Nolen, Handleiding voor arbiters, Zwolle: Tjeenk Willink, 3rd edition 1957.

[41]This question is discussed in among others German literature (see the citations in Staudinger-Weber, p.346-349) and French literature (see for example R. et J.Savatier, Droit des affaires, Paris: Sirey, 1967, at p.408).

[42]Asser-Rutten II at p.78. One often has the impression, as Drion remarks in his Preadvies (paper), that the applicability is thought desirable a priori and only construed afterwards, (Drion at p.210). See also Stein, thesis at p.155.

[42a]Contra: Rb. Amsterdam 9.4.35, NJ 1936, 799 (auction conditions); Ktg. 's-Gravenhage 27.12.1943, NJ 1944, 529 (dry-cleaning conditions).

[43]Rb. Rotterdam 2.12.53, NJ 1955, 66, Ktg. Haarlem 4.9.53, NJ 1954, 410 (both cases concerned the once famous—or infamous—'BOVAG'-clause, an exemption clause used by most Dutch garages).

[44]Rb. Zwolle 20.11.1968, NJ 1969, 187 (exemption clause on the office of a wharf both in German and Dutch) reversed by Hof Arnhem 31.12.1969, Schip & Schade 1970 no.46.

[45]Ktg. Haarlem 4.9.53, NJ 1954, 410 (BOVAG-clause) even requires a *conspicuous* place. A printed notice in a station or its waiting room can be insufficient: Ktg. Breda 16.4.19, NJ 1919, 640.

d) and visible to the customer before he enters into the contract.[46]
The answer to the question wether these requirements have been met, may be influenced by the fact that boards or notices are customary in a certain branch of trade.[47]

11.Standard clauses which have been stipulated in a previous contract—(par.7 sub d)

Two parties have a commercial relationship, which has lasted for years. Every invoice sent by the seller to the buyer contains an arbitration clause. In general, the buyer is not bound by such a clause.[48] But by not reacting through all these years—according to Dutch case law[49]—he has submitted himself to the clause. The same reasoning is applied when the seller has referred to the arbitration clause in all previous transactions, but has failed to do so in the present one.

How often should the parties involved have dealt with each other before the transaction in litigation? One such prior transaction at least is insufficient.[50]

12.Customary standard clauses—(par.7 sub e)

Some standard clauses may not only have become customary between two specific parties, they may be customary in a whole branch of trade. Even a whole set of standard conditions may have become customary. When both parties are members of the same branch of trade, customary clauses are binding according to Dutch law, even when not explicitly stipulated in a specific contract.[51]

When both parties belong to different trading branches, the customary clauses of which are at variance with each other, rules of the law of conflicts (private international law) may help in finding which custom is to be applied.[52]

[46]Rb. 's-Hertogenbosch 15.1.43, NJ 1943, 408 (exemption clause printed on a ticket which was handed to the customer after the contract had been concluded, held inapplicable).
[47]Ktg. Amsterdam 5.4.43, NJ 1944, 298.
[48]Supra par.9 at page 108.
[49]Rb. Rotterdam 6.5.14, NJ 1914, 1220 (expedition contract), Rb. Amsterdam 11.4.19, W 10571, p.3; Rb. 's-Hertogenbosch 24.7.19, NJ 1920, 357, W 10532, p.2; Rb. Assen 4.11.1919, W 10554, p.3; Rb. Rotterdam 6.10.20, W 10700, p.5; Rb. Utrecht 26.10.1921, NJ 1922, 1286 (all involving transport conditions); Hof 's-Gravenhage 18.12.24, W 11307, p.4, reversing Rb. Rotterdam 29.6.23, W 11101, p.7, appeal dismissed: HR 26.6.25, NJ 1925, 977, W 11478, p.4 (tugging conditions); Rb. Rotterdam 12.12.1928, W 11958, p.7 (sales conditions); Hof Amsterdam 23.11.1938, NJ 1939, 694 (sales conditions); Ktg. Groningen 15.10.53, NJ 1954, 343 (car repair); Rb. Rotterdam 2.12.53, NJ 1955, 66 (car repair).
[50]Rb. Amsterdam 14.3.1919, NJ 1920, 958.
[51]Sections 1375 and 1383 of the B.W.
[52]Hofmann-Van Opstall, p.427.
[53]Conditions were considered customary by among others: Rb. 's-Graven hage 28.6.21, W 10797, p.3; Ktg. Haarlem 2.7.43, NJ 1946, 699; Rb. Rotterdam 29.5.64, NJ 1965, 118.

Difficulties arise when one of the parties is no tradesman at all. In that case it will be far more difficult for the other party to establish that a standard clause has become customary.[53] This is especially the case, when standard clauses are only customary between members of a certain organization and their clients.[54] Then the other party not only has to prove that a certain clause has become customary in these transactions, but also that the client knew that he belonged to this organization.[55]

So far we have dealt with standard clauses, the *substance* of which was considered customary. One can also imagine that the substance is unknown, but the *fact* that employers in a certain branch of trade usually stipulate certain conditions is known by everyone. In that case some Dutch tribunals tend to conclude that these conditions are binding[56], especially when the client is a tradesman himself.[57]

The question of customary standard clauses raises large theoretical problems. The Dutch Civil Code distinguishes between autonomous customary clauses, which are considered to be part of the parties' will (section 1383) and— heteronomous—customs, which are binding even when parties are unaware of them (section 1375). To what category do standard conditions belong?[58] In the Draft B.W. the two sections have been combined into section 6.5.3.1, but this seems to have made the discussion even more heated.

13. Standard conditions and other contents of the contract

The contents of a contract are determined by a number of factors, standard conditions being but one of them. Other factors are a) obligatory law, b) what has been explicitly stipulated, c) what has been implicitly stipulated, d) custom-

Considered *not* customary: Rb. Amsterdam 4.2.24, W 11265, p.3; Rb. Utrecht 4.12.40, NJ 1941, 461; Hof Arnhem 20.10.64, NJ 1966, 56.

[54]Rb. Assen 4.11.19, W 10554, p.3; Rb. Amsterdam 16.1.23, W 11127, p.3.

[55]Rb. Amsterdam 14.3.19, NJ 1920, 958, W 10466; Rb. 's-Hertogenbosch 12.7.23, NJ 1924, 640, W 11140, p.3, but see especially HR 26.2.60, NJ 1965, 373 (Mozes v. Automobielbedrijf Uijting & Smits): 'That, although in general the circumstance that in a certain branch of trade an important majority of traders is accustomed to incorporate a certain clause in the contracts with their clients, may lead to the conclusion that in such a branch of trade such clause is a customary clause, this is different, when the traders belonging to this majority only use to make this stipulation because of their membership of an organization which prescribes this clause to its members ...'

[56]As for example the once famous BOVAG-clause (customary disclaimer clause stipulated by all members of the Association of Dutch Automobile Garages), which gave rise to much litigation, including the Supreme Court case mentioned in note 55. See especially Hof Leeuwarden 8.3.50, NJ 1950, 725.

[57]Rb. Assen 4.11.19, W 10554, p.3; Rb. Amsterdam 16.1.1923, W 11127, p.3.

[58]See Mozes v. Automobielbedrijf Uijting & Smits, cited in note 55. Cf. also H. J. Pabbruwe, Artikel 6.5.3.1, 37, NJ 965 (1962).

ary clauses, e) non-obligatory law, f) customs, and g) equity and good faith. These factors determine the contents of a contract in the order named above.[59] Where do standard contracts, conditions and clauses fit in? This may be either under b) (rarely), c), d), or f).

When standard conditions belong to category c), what has been explicitly stipulated by parties prevails. Can this rule be evaded by standard clauses such as 'oral stipulations are not binding, unless confirmed writing by the other party'? In the 1930's this was often tried, but Dutch tribunals considered these clauses at variance with section 1374.1 of the Civil Code ('pacta sunt servanda'), which is obligatory, and therefore declared the clauses not binding.[60]

As to standard conditions which are at variance with one another, cf. Chapter III.

III. INTERPRETATION OF STANDARD CONTRACTS

14. Introduction

All contracts must be interpreted. Usually this is done by the parties themselves. But when a conflict arises, the judiciary has to interpret. According to which rules are standard contracts, conditions and clauses interpreted? In sections 1378-1387 the B.W. gives some indications how the contracts in general should be interpreted. These sections are not very important however, the main interpretation rules all being judgemade law.

Four problems involving standard conditions will be discussed in this chapter:

a) the problem of unclear and obscure standard conditions - par.15;
b) subjective or objective interpretation? - par.16;
c) interpretation in favor of the adhering party? - par.17;
d) should standard regulations be interpreted like laws? - par.18.

In a final paragraph the problem of whether or not appeal to the H.R. about the interpretation of standard contracts should be allowed, shall be discussed.

15. Unclear and obscure standard conditions

How should standard contracts and conditions, which contain various clauses

[59] Cf. Asser-Rutten II, p.228-230; Hofmann-Van Opstall p.432.

[60] Ktg. Amsterdam 13.3.29, NJ 1929, 1537, W 12035, p.7; Ktg. 's-Gravenhage 3.5.33, NJ 1933, 1288, W 12684, p.5.

[61] Hof 's-Gravenhage 29.6.62, NJ 1963, 422, Schip en Schade 1964, no.29 (m.s. 'Hélène') (type-written clause prevails over clause printed in red in the policy form); Hof Amsterdam 6.5.36, NJ 1936, 829 (type-written clause prevails over clause in the general conditions to which the policy refers); Ktg. Utrecht 11.3.1941, NJ 1941, 424 (lease); Huurcommissie Enschede 6.3.19, NJ 1919, 473 (rent); Rb. Utrecht 9.9.36, NJ 1937, 629 (suretyship); Rb. Groningen 18.2.44, NJ 1944/45, 656 (charter-party). See also T.J.Dorhout Mees, Schadeverzekeringsrecht, Zwolle: Tjeenk Willink, 4th edition 1967, at p.101.

which are at variance with one another, be interpreted? Especially insurance policies sometimes show a hodgepodge of clauses, which are printed in red ink, black ink, italics, or pasted, written, etc. In that case the following order should be observed:

1) written or type-written clauses[61];
2) pasted clauses which are printed in red ink or in italics[62];
3) other clauses pasted onto a form[63];
4) non-pasted clauses which are printed in red ink or in italics;
5) other non-pasted clauses.

In order to prevail, the type-written, written or pasted clause should quite clearly derogate from the clauses in the general conditions.[64]

As to unclear or obscure conditions, which are not at variance with one another see par.17.

16.Subjective or objective interpretation

Should standard contracts be interpreted subjectively, as the adhering party would and should do? Or objectively, uniformly, more or less like the law? Interpretation in the first place means finding the intention of the parties. Where one of the parties—the train passenger, bank client or insured person—has no intention at all as to the contents of a standard contract, should only the intention of the other party count? No, is the answer of Dutch case law, standard contracts should be interpreted objectively.[65]

Exceptions to this rule are often made, especially in the case of adhesion contracts; see par.17.

17.Interpretation in favor of the adhering party?

As to the interpretation of adhesion contracts, the Dutch judiciary has developed some special rules of interpretation, the most important of which is that adhesion contracts should be interpreted in favor of the adhering party. This rule is not applied to the same extent as in England[66], but all the same its effect is more far-reaching than some Dutch authors seem to think.[67] The rule is most

[62]Hof 's-Gravenhage 23.11.28, NJ 1930, 236, W 12055, p.1 (insurance).
[63]Rb. Amsterdam 30.1.53, NJ 1954, 317 (s.s. 'Consul Horn').
[64]Hof 's-Gravenhage 23.11.28, NJ 1930, 236, W 12055, p.1 (insurance). See also J.Offerhaus in Weekblad voor Privaatrecht, Notarisambt en Registratie, no.3121.
[65]Cf. for example Hof 's-Hertogenbosch 15.5.1956, NJ 1956, 585 (objective interpretation of the 'BOVAG-clause', not according to the intention of the BOVAG).
[66]Cf. H.Drion at p.224. Drion cites Canada Steamship Lines Ltd. v.Regem (1952) 1 All E.R. 305 (Privy Council) as an example of far-reaching interpretation.
[67]Cf. H.Drion at p.225.

clearly expressed as to exoneration (disclaimer) clauses; it is also laid down in several sections of the Dutch Commercial Code.[68]

Some examples of interpretation in favor of the adhering party: the clause 'the Publisher is not liable for statements, which are not incorporated in the contract' only excludes liability for acts performed in good faith[69]; the BOVAG-clause[70] does not apply in special circumstances[71], such as an abnormal construction of the garage[72]; in the confirmation letter is only referred to 'General conditions of supply and payment', this does not include a jurisdiction clause.[73] Further examples are cited by Drion.[74]

18. Interpretation of standard regulations

Just like the special category of standard contracts, the adhesion contracts have their own special interpretation rules, so the category of standard regulations (standard contracts or conditions which are more or less the law in a whole branch of trade) has its problems and solutions to these.

Since these standard regulations have the same effects as a law, the question rises wether the same interpretation methods should be used as in interpreting the law. Some courts have applied the method of ascertaining the meaning of a law by taking into account its legislative history to standard regulations.[75] This method may raise some problems, however. Not always the documents concerning the 'legislative' history of a standard regulation are available. When the regulation has been arrived at only after hard-boiled negotiations, the minutes are often kept secret.

19. Appeal to the Supreme Court

The most controversial issue as to the interpretation of standard contracts concerns the possibility of 'cassation'. Should the HR be allowed (or allow itself)

[68]Sections 815, 921 and 931 W.v.K.: exoneration clauses must be stipulated explicitly.
[69]Rb. Amsterdam 30.3.28, NJ 1928, 1123.
[70]See note 56, p.113, and par.23.
[71]Hof Amsterdam 4.3.43, NJ 1943, 618.
[72]Ktg. Groningen 15.10.53, NJ 1954, 343.
[73]Ktg. Arnhem 20.4.53, NJ 1954, 683.
[74]Drion at p.225. Drion cites among others: Hof 's-Gravenhage 21.3.92, W 6191; Hof 's-Gravenhage 11.11.29, NJ 1930, 453; Rb. Rotterdam 6.9.40, NJ 1940, 929; Hof 's-Hertogenbosch 27.10.42, NJ 1943, 327; Rb. Rotterdam 17.6.53, NJ 1955, 275. To this collection a large number of other decisions could be added.
[75]Hof 's-Gravenhage 4.12.63, NJ 1965, 215 for example.
[76]Wet op de Zamenstelling der Regterlijke Magt en het Beleid der Justitie van 18 april 1827, Staatsblad no.365 (Law on the Judicial Organization) section 99. Cf. D.J.Veegens, Cassatie in burgerlijke zaken, 1959. Time and again it has been argued that the distinc-

to reverse decisions of lower courts involving the interpretation of standard contracts?

In The Netherlands the highest judicial authority is the 'Hoge Raad'. The HR can only reverse decisions of lower courts, when these have erred in the *law*. Errors in the interpretation of *fact* cannot be reversed by the HR.[76] Since standard contracts, conditions, clauses, etc. are considered *fact*, errors in their interpretation by the lower courts cannot be rectified by the HR.[78] In theory it is possible that a single standard clause is interpreted in two completely different ways by two different Courts of Appeal ('Gerechtshoven') - the highest courts that can decide on the facts. In reality this seems to happen only very rarely. In Dutch case law I could not find any example.[79] All the same 'uniformity of the law' is the only argument, which Dutch writers advance in favor of the possibility of 'cassation'.[80]

Personally I would favor the possibility of 'cassation', but for a different reason. A very important element of the legal development in The Netherlands is the law finding function of the HR. As has been apparent in the United States for many years, a Supreme Court may use its influence not only by interpreting but also by giving directions as to which issues are important in new developments and how to solve them.

Earlier I have already indicated that one of the most important recent developments in the law of standard contracts is a HR-decision of 1967.[81] This did not involve a standard contract, but in a highly interesting obiter dictum the Court laid down several principles, which are especially valid for standard contracts. Should 'cassation' be possible, more of such leading decisions would be possible.

The argument(s) advanced in favor of the possibility of 'cassation' have not escaped the attention of the legislator. In 1950-1951 the Government proposed as an addition to section 99 of the Law on the Judicial Organization that a third

tion between interpretation of law and fact should be abolished. Before the consequences of such abolishment—such as an enormous increase of the case-load of the HR—the legislature has always receded.

[78]Jansma, Preadvies, at p.156. Jansma cites a great number of decisions by the HR.

[79]Dutch writers only refer to different interpretation of a single clause in a Japanese bond issue by the Courts of Appeal of Paris and Besançon: 7 March 1929, G.P. 22 March : 929, and 12 December 1928, G.P.1929.1.292. Cf. Jansma at p.161. However, the same problem of different interpretation of a single widely-used clause rises also in the field of statutes and regulations of various societies. In that field the impossibility of cassation in The Netherlands has led to a famous controversy as to the interpretation of the statutes of the Dutch Reformed (Presbyterian) Churches between the five Courts of Appeal. The conflict ended with the reversal by the dissident court of its previous opinion.

[80]Zeylemaker at p.107, Jansma at p.161. Jansma argues that it is very illogical that the Hoge Raad does interpret rarely-applied municipal ordinances but not standard clauses, which are used every day.

[81]Saladin v. Hollandsche Bank Unie, NJ 1967, 261 (G.J.S.), 16 ARS AEQUI 214 (P.A.Stein) (1967), cf. note 16 supra.

basis for cassation would be[82]:
'the incorrect interpretation of regulations, statutes and standard clauses'.

This proposal was criticized among others by the Dutch Bar Association (Nederlandse Orde van Advocaten) on the ground that terms such as 'standard clauses' are too vague and would lead to uncertainty. The Justice Commission of the Second Chamber of Parliament concurred and thereupon the Government withdrew its proposal.[83]

The possibility of cassation might also be introduced by the HR itself, as has been done in several other countries. Although the legislative history of section 99 of the Law on the Judicial Organization seems to rule out this proposal, several members of the Parliamentary Justice Commission in 1956 did not think so.[84]

IV. ABUSE OF STANDARD CONTRACTS—JUDICIAL CONTROL

20. Introduction

The aspect of standard contracts which traditionally has attracted most attention in Dutch legal literature is their abuse. This abuse occurs almost exclusively in standard conditions which are unilaterally drafted, such as sales or contracting conditions, insurance policies, etc. Three ways are available to suppress abuse:
a) judicial control;
b) legislative control;
c) economical control.
Judicial control will be the subject of this chapter. Legislative control will be discussed in Chapter V, together with other governmental influence on standard contracts. Economical control will not be discussed in this paper, since no sufficient data are available to the author.

Economical control, by means of forming Consumer's Unions, etc. seems to be a most promising redressing factor. So far, it has been only relevant in limited fields, such as Labor law, where trade unions have had great influence. The influence of Dutch Consumer Unions, such as the Nederlandse Consumentenbond, in our field has been very little until now, but they have already started warning consumers against unfair conditions.[85]

The judiciary has at its disposal several ways of dealing with onerous clauses. A court may declare such clauses void or inapplicable by the following means:

[82]Kamerstuk no.2079, see 'Bijlagen van het verslag der handelingen van de Tweede Kamer der Staten-Generaal' 1950-1951, 1956-1957 and 1962-1963.
[83]Zitting (session) 1962-1963, no.2079, no.5, p.5 right column.
[84]Kamerstuk 2079, no.4, p.5, Bijlagen Handelingen Tweede Kamer, zitting 1956-1957.
[85]In 1968 the Nederlandse Consumentenbond warned against the General Conditions in use with radio and television retailers, but to my knowledge it did not undertake any

1) through the reliance theory;
2) through interpretation in favor of the adhering party, see par.17;
3) misrepresentation;
4) fundamental breach of contract, see par.21;
5) contrary to public policy, see par. 22;
6) undue influence, see par.23;
7) good faith, see par.24-25;
8) contrary to imperative (obligatory) law, see par.13.

Through the *reliance theory* (1) a court may argue, that the drafter of the standard conditions may have relied upon the assumption that the adhering party submits to all of his standard conditions, but this reliance is not valid as to unusual clauses in these conditions.

Misrepresentation (error) (3) will not often be a ground to void a standard clause. An appeal to misrepresentation will only succeed, when there has been a real meeting of the wills and the clause involved was of essential importance. The above-mentioned list is by no means complete. The Dutch judiciary has a number of other possibilities available to deal with unfair standard clauses, such as abuse of law, Act of God, etc.[86] One possibility, which is often found in foreign law but which is not available under Dutch law, is *laesio enormis*.

21.Fundamental breach of contract

Although the English principle of 'fundamental breach of contract' in general is not accepted in Dutch case law, in the case of standard clauses it sometimes is. The nature of the contract of safe-keeping of a bicycle entails that the safe-keeper guarantees against theft or loss. Exemption clauses which provide for the contrary result are at variance with good faith and unenforceable.[87]

One might doubt whether this principle should only be applied to standard clauses. But just imagine that the safe-keeper and the owner of the bicycle have explicitly agreed upon the condition that the safe-keeper will not be liable for loss or theft, why should not this condition be enforceable? It is the fact, that the owner is not or hardly aware of the clause, that makes it unenforceable.

22.Standard conditions contrary to public policy

Under sections 1371 and 1373 of the B.W. a contract, which is at variance with good morals or with public policy, is void.

further action.

[86]This chapter will not deal with these possibilities, nor with the means employed in arbitration cases.

[87]Rb. Amsterdam 16.6.33, W 12680, p.3; Rb. 's-Hertogenbosch 15.1.43, NJ 1943, 408; Ktg. 's-Gravenhage 27.12.43, NJ 1944-1945, 509 (all concerning exemption clauses in safekeeping contracts).

These sections have often been invoked by Dutch courts to nullify onerous clauses in an adhesion contract.[88] This has several dogmatic disadvantages, as Drion has pointed out. First, it is impossible to separate some clauses—such as exoneration clauses—from the main contract.[89] When a court declares a certain exoneration clause void, in fact this amounts to conversion of the contract into a different contract, which was not wanted by the parties.[90] Second, 'at variance with good morals' is an absolute criterium; the good faith sections (1374 and 1375) leave more possibilities to relativate, to take into account many different circumstances.

23. Undue influence

The B.W. contains no section on undue influence (or abuse of circumstances).[91] However, in Automobielbedrijf Uijting en Smits v.Mozes[92], the Supreme Court decided that a contract may be at variance with good morals and therefore void under sections 1371 and 1373 of the B.W.:

Mozes had given his car in repair to plaintiff, an automobile garage. A mechanic of the garage, while driving Mozes' car, caused an accident in which two girls were wounded. The girls' insurance company sued the garage, which in turn sued Mozes because of the clause: 'Garage accomodation, attendance, repair and driving of motor vehicles only happens under the express condition that we shall be liable in no way for theft, loss, or whatever damage unless serious negligence of the manager(s) personally is indicated, and that our client shall indemnify us for any damages and liability towards third parties' (the so-called BOVAG-clause).

The District Court (Rechtbank) decided that the garage had not proven that the clause was part of the contract. In appeal the parties argued about two issues: 1) whether the 'BOVAG-clause' was a customary clause, and 2) whether the printed notice had been clearly visible in the garage (supra, par.10 and 12). The Court of Appeal (Hof) completely disregarded these issues and declared the contract null and void: because of abuse of monopolistic power by the Association of Automobile Garages (BOVAG).

The HR agreed with the Court of Appeal in principle, but reversed its decision since

[88]See for example: Rb. Amsterdam 29.5.1867, W 2942 (exemption clause in auction terms void) (*contra*: Hof Noord-Holland 28.5.1868, W 3041); Rb. Rotterdam 7.4.22, W 10896 (discharge clause in bill of lading void); Rb. Groningen 30.12.32, W 12622, p.2 (two clauses in hire-purchase contract void). Even more often, however, onerous clauses in adhesion contracts have been held to be *not* at variance with good morals: HR 18.11.1887, W 5501, p.1 (exemption clause in bill of lading), Rb. Rotterdam 12.12.28, W 11958, p.7 (jurisdiction clause in sales conditions), Rb. Rotterdam 28.6.1939, NJ 1940, 367 (exemption clause in hire-purchase contract) etc.

[89]Drion at p.236.

[90]Cf.HR 21.1.44, NJ 1944, 120.

[91]The Draft B.W. devoted section 3.2.10 to abuse of circumstances (voidable upon request of the abused party).

the Court had not sufficiently considered the specific circumstances of the case. (In considering the specific circumstances the Court of Appeal indeed concluded, that since Mozes was insured the BOVAG-clause did not impose upon him such a disproportionately heavy liability and therefore was valid. The Court now had to settle the issues originally raised by the parties; it decided that the BOVAG-clause was a customary clause, so a decision as to the second issue was not necessary. But alas, again the HRreversed the decision in a case, which has already been discussed supra in par.12 (HR 26.2.60, NJ 1965, 373). The case was again referred to the Court of Appeal, which still had to settle the second issue raised by parties: whether the printed notice was clearly visible to Mozes. Whether or not the Court reached a verdict on this issue I do not know. Anyway no decision was published).

By this decision the HR seemed to have given a promising direction in the field of standard contracts. However, the decision was not followed up by cases in the lower courts and the HR itself indicated that the rule should be confined to cases involving aged or disabled persons.[93]

24. Good faith

According to section 1374.3 all contracts must be performed (executed) in good faith. Writers and judiciary have concurred in finding in this section the best basis for dealing with onerous clauses. Most writers prefer this basis to sections 1371 and 1373 (good morals)[94], and in some cases this preference is also expressed.[95]

The HR has probably also given preference to application of section 1374.3 (although by no means ruling out sections 1371 and 1373) in the leading case of Saladin v.Hollandsche Bank Unie.[96]

A deputy manager of a bank in Willemstad (Curaçao) had given an investment advice to a trusted client, who thereupon ordered the bank to buy the recommended shares. In its letter of confirmation of the buying order, which was signed for acceptance by Saladin, the bank inserted the clause 'Although our information about Savard and Hart is favorable, we can take on no liability for this transaction'.

[92]HR 11.1.57, NJ 1959, 37 (note by Hijmans van den Berg), 6 ARS AEQUI 181 (1957) (note by J.H.Beekhuis), 5 Verkeersrecht 75 (1957) (note by Polak). Cf. also Stein, thesis.
[93]Cf. Van Elmbt v. Feierabend, HR 29.5.64, NJ 1965, 104, 14 ARS AEQUI 235 (1935) (note by Van der Grinten).
[94]See for example Zeylemaker at p.114, W.L.Haardt and J.C.van Oven in 2 Handelingen der Nederlandse Juristen-Vereniging, Zwolle: Tjeenk Willink 1949, at p.48 and 36 (1948). See also Drion at p.236.
[95]See for example Rb. Rotterdam 9.6.20, W 10610.
[96]HR 19.5.67, NJ 1967, 261 (note by G.J.Scholten), 16 ARS AEQUI 214 (1967) (note by P.A.Stein). See also A.R.Bloembergen, 'Exoneratieclausules', 6 Bouwrecht 355-370 (1969).

The investment proved unsound and Saladin sued the Bank for damages. Both the Amsterdam District Court and Court of Appeal denied recovery because of the exemption clause. In cassation the HR judged that the Court of Appeal 'could have come to this decision'. Although no standard or adhesion contract was involved, the HR delivered a very interesting obiter dictum:

'Considering that the answer to the question in which cases he, who—as in this case the Bank—has disclaimed his liability for certain acts by contractual clause even if these would be negligent towards the other party, cannot invoke this clause, can depend upon the appraisal of a number of circumstances, such as:

1) the weight of the fault, also in relation to the nature and the seriousness of the interests involved in any of the acts;
2) the nature and further contents of the contract in which the clause is found;
3) the social position and the mutual relation between the parties;
4) the way in which the clause has been concluded;
5) the extent to which the other party has been conscious of the clause'.

Although the HR does not clearly state the basis of this decision, the words used—'invoke'—point to section 1374.3 (good faith).[97]

An example of the application of section 1374.3 is the decision, that although the insurance policy requires notice by registered letter, the insurance company cannot invoke this clause when it is established that it did receive a non-registered letter of notice.[98]

25. *Good faith in precontractual relations*

One dogmatic objection that might be made against application of section 1374.3 is that this section deals with the *performance* of a contract. However, in a number of leading cases the HR has extended this principle to non-contractual relationships[99], among others to precontractual relationships.[100] Even in a precontractual phase parties must act in good faith. Does not this imply that the drafter of the adhesion contract should refrain from inserting onerous clauses? That he should consult consumers' unions—if any—before making a final draft? That the terms should be drafted in a clear, concise and unequivocal way? One might consider the obligation to consult the consumers' unions as an equivalent of the obligation to consult trade unions in labor cases.

What is stated in this paragraph is the personal opinion of the author. It is not supported by the Dutch writers.

[97]G.J.Scholten in his note. Contra: P.A.Stein in his note.

[98]Ktg. Apeldoorn 17.4.29, W 12072, p.7; Ktg. Haarlem 30.9.49, NJ 1950, 854. Some other examples: Ktg. Bergen op Zoom 10.7.29, W 12073, p.4 and HR 10.11.27, NJ 1928, 251.

[99]Cf. HR 20.12.46, NJ 1947, 59 (the heirs to a common inheritance should act in good faith); HR 9.5.52, NJ 1953, 563 (division of an estate).

[100]HR 15.11.57, NJ 1958, no.67 (note by L.E.H.Rutten), 7 ARS AEQUI 103 (1958).

V. STANDARD CONTRACTS AND GOVERNMENT INFLUENCE

26. Introduction

The judiciary is not the only public body, which may interfere in the use or abuse of standard contracts. Other governmental agencies may interfere in an earlier phase than the judiciary. These agencies also may interfere for different reasons than the judiciary, such as public welfare and prohibition of murderous competition.

In general the Dutch government has at its disposal three ways for interference with standard contracts:[100a]

a) by enacting imperative (obligatory) legislation, the most far-reaching, but also most effective measure against abuse of standard contracts. The Dutch legislature has enacted legislation of an obligatory nature to prevent abuse of labor contracts and of hire-purchase contracts of movables. See par.27.

b) by declaring privately drafted standard contracts binding, or not binding. The Dutch government has used this method to interfere with

1) employer's agreements, see par.28;

2) collective labor agreements, see par.29;

3) transport of goods, see par.30.

c) by drafting standard conditions for its own private use in commercial traffic, for example the 'Algemene Rijks Inkoop Voorwaarden' (General State Buying Conditions) and the 'Uniforme Administratieve Voorwaarden voor de uitvoering van werken, 1968' (General Contracting Conditions).[101] Because of the important role which the State plays in private commercial traffic, these standard conditions have a substantial influence.[101a]

Not only the State, but also various lower public bodies have a varying influence on the use of standard contracts:

d) Provincial and municipal bodies also play an important role in private commercial traffic, especially in the public utilities field (gas, water, electricity, public transport).

e) Statutory trade organizations may declare standard conditions binding in their branch of trade.

Whether or not these measures are unconstitutional will be discussed in par.31.

[100a]Cf. E.Drooglever Fortuijn, 'De overheid en de standaardcontracten', WPNR 5067 (1970, p.33).

[101]Cf. M.A.van Wijngaarden, De nieuwe A.V., thesis Free University Amsterdam, Deventer: Kluwer, 1969.

[101a]The State not only takes part in commercial traffic through its own agencies, but also through various public corporations—such as the Netherlands Bank, Dutch Railways, State Printing and Publishing Company, Post Office, State Savings Bank, etc.—and private corporations controlled by the State, such as KLM, etc. Cf. B.van den Tempel, Publieke en semi-publieke ondernemingen (1935).

27.Imperative legislation - labor contract, hire-purchase

In the 19th century the labor contract was abused to such an extent (not only through the use of standard conditions[102]), that imperative legislation became necessary. In 1907 the three sections on the labor contract, which the Dutch Civil Code contained, were superseded by approximately 80 new sections, mainly of an obligatory nature.[103] Sections 1637j/m deal with labor codes, or regulations. Section 1637j requires among others that the laborer signs a declaration that he agrees with the code.

The legislative interference with hire-purchase contracts and conditional sales in general was more directly the result of abuse of standard clauses. In 1936 a new title on hire-purchase contracts of movables was inserted in the B.W., which also contains mainly provisions of an obligatory nature.[104]

28.Employers' agreements

Under section 6 of the Wet Economische Mededinging (Antitrust Law) of 28 June 1956, Staatsblad 401, employers' agreements which either have been concluded by far more than half of all employers in a certain branch of trade or which cover far more than 50% of the sales in that branch, can be declared binding for all employers in that branch by the minister involved.

Under section 10 of the same law, provisions in employers' agreements can also be declared unbinding. These sections will be further explored in Chapter VI.

29.Collective labor agreements

Under sections 2 and 8 of the Law of 25 May 1937 on the declarations of binding and not binding force of provisions in collective labor agreements, the government has the power to declare certain provisions in such agreements either binding or not binding for all labor contracts.[105]

[102]See E.A.van Beresteijn, Arbeidsreglementen, thesis Utrecht, Amersfoort: Valkhoff, 1903.

[103]The complete parliamentary history of the law of 1907 can be found in Bles, De wet op de arbeidersovereenkomst, 4 volumes, 1907/1909. See also P.W.Kamphuisen, De collectieve en de individuele arbeidsovereenkomst, 1956.

[104]The parliamentary history can be found in: F.W.Fischer and L.D.Frank, De wettelijke regeling van den koop en verkoop op afbetaling, 1936, and in C.W.A.Schürmann, De afbetalingshandel, Zwolle: Tjeenk Willink, 1936. See also: P.Scholten and A.A.H.Struycken, 'Is wettelijke regeling van het afbetalingscontract wenschelijk?' 36: 1 Handelingen

30. Transport of goods

Large parts of the law of transport of goods consist of standard conditions or former standard conditions, which are now incorporated in the codified law (such as the Hague Rules, which were incorporated in the Dutch Commercial Code by the Law of 15 August 1955, Staatsblad 398).

The Dutch government often prescribes transport enterprises which general conditions to use in a not very straightforward way. I shall give two examples.

Road transport in the Netherlands is legally regulated by the Wet Autovervoer Goederen (Law Automobile Transport of Goods). Under section 139.1 of the Uitvoeringsbesluit Autovervoer Goederen (Executive Decree Automobile Transport of Goods) contracts for the transport of goods, for which a licence is necessary according to the Law Automobile Transport of Goods, may only be concluded when a way-bill is used, which is approved by the Minister of Transport. By decrees of 11 February 1954 and 22 November 1955 (Nederlandse Staatscourant 1954, no. 30 and 1956, no. 251), the Minister has approved the way-bill formulated by the Foundation 'Way-bill' (Stichting 'Vervoer-adres') in The Hague. This way-bill—the only one approved by the Minister—contains the clause that the General Transport Conditions of 1950 (privately drafted) are applicable to the contract for which the way-bill is used. Not a very direct way to make the use of these General conditions obligatory. Moreover, the system has some weak points. The use of the 'way-bill' is prescribed under a criminal sanction. Most Dutch writers and case-law conclude that without the use of the approved way-bill, the General Transport Conditions are not applicable automatically.[106]

As a second example I would like to mention Dutch *inland navigation law.* After very prolonged preparatory work a new title in the Dutch Commercial Code on inland navigation had been enacted in 1939 (Staatsblad 201). Because of the war and its aftermath, the new law did not come into force until 1 November 1952 (Royal Decree of 23 June 1952, Staatsblad 349). However, at about the same time as the coming into force of the new law, the Government prescribed the use of charter parties which declare the (privately drafted) Freight Conditions 1952 applicable. Shortly afterwards this situation was legalized. Section 59.3 of the Wet Goederenvervoer Binnenscheepvaart (Law on the Transport of Goods in Inland Navigation), of 1 November 1951, Staatsblad

der Nederlandsche Juristen-Vereeniging 82-, 142-, Zwolle: Tjeenk Willink, and Chr. Zevenbergen, Het afbetalingscontract, Zwolle: Tjeenk Willink, 2nd edition 1938.

[105]See L.G.Kortenhorst and M.M.J.van Rooy, De collectieve arbeidsovereenkomst: juridisch en economisch-sociaal, Zwolle: Tjeenk Willink, 2nd edition 1939 (with a 15 page bibliography!). See also P.W.Kamphuisen, De collectieve en de individuele arbeidsovereenkomst, 1956. See also Buitengewoon Besluit Arbeidsverhoudingen 1945, Staatsblad F 214.

[106]Cf. Molengraaff-Zevenbergen IV-1.

472, *juncto* section 82 Uitvoeringsbesluit Goederenvervoer Binnenscheepvaart (Executive Decree Inland Navigation Transport of Goods) of 16 January 1954, Staatsblad 7, provides that internal freighting contracts may only be concluded if a charter party is used which has been approved by the Minister. And once again the Minister has only approved charter parties (by decrees of 9 February 1954, Staatscourant 1954, nos.28,31 and 33), which declare the—privately drafted—freight Conditions 1952 applicable.[107]

31. Standard regulations and the statutory trade organizations

An increasing influence on the use of standard conditions is exercised by the statutory trade organizations, public bodies with regulatory powers, to which all enterprises in a certain trade are forced to belong.[108] These organizations now often either prescribe the use of privately drafted standard conditions, or the use of conditions drafted by themselves. Section 93 *juncto* section 71 of the Wet op de bedrijfsorganisatie (Law on the Trade Organization) of 27 January 1950 provided the—doubtful—basis for this practice.

Two arguments are advanced against this practice:
1) disintegration of legal unity, a return is feared to the pre-1795 era when every town, every province had its own ordinances;
2) delegation of codification of the law to lower public bodies is inadmissible (being too important) and at variance with section 164 of the Dutch Constitution (the codification section), which says:

'The civil and commercial law, civil and military criminal law, procedure and organization of the judiciary are regulated by the law, in general codes, except for the power of the legislature to regulate some subjects in special laws.'

These arguments have been advanced mainly against the latter method—of drafting standard conditions themselves—even long before the question arose in practice.[109]

Neither argument, in my opinion, is very strong. First, if disintegration is feared, this fear should have been expressed when the use of standard conditions came into practice. Moreover, under section 133 of the Law on the Trade Or-

[107] J.Verhoeve, Het nieuwe binnenvaartrecht (1954), B.Wachter, De beurtvaart (1959), Molengraaff-Zevenbergen-Verhoeve, IV-3. Moreover, by decree of 11 February 1954, Staatscourant 1954 no.30, the Minister approved a way-bill, which declares the General Transport Conditions of 1950 applicable.

[108] Wet op de bedrijfsorganisatie (Law on the Trade Organization) of 27 January 1950, Staatsblad K 22.

[109] Cf. especially H.Cohen Jehoram, Wie geeft de burgerlijke wet? Deventer: Kluwer, 1967, at p.13. An earlier discussion took place in the law review 'Sociaal Economische Wetgeving' by Vegting, SEW 1954, p.216-225, Belinfante, SEW 1955, p.105-117, Van der Grinten, SEW 1955, p.165-169 (with postcript by Belinfante, p.169-170) and L.J.Schippers, SEW 1955, p.269-270.

ganization the Crown has the power to nullify any ordinance by a statutory trade organization, which could easily be used when such organization strays too far from the common law.

Secondly, the constitutional argument is not only rather unimportant, but also unsound: the use of standard conditions has just the result that is aimed for by the codification section, the general use in a whole branch of trade of a 'code' of general conditions, where before every trader used his own conditions.

One doubt, which I personally entertain, is whether the statutory trade organizations will remain a useful instrument for dealing with standard conditions. Not only is it one of the most criticized legal institutions of the Netherlands, it can also be predicted that an organization by trade is losing its significance though a number of factors, such as the territorial explosion of the markets (Common Market), the functional explosion of retailing and the increasing diversification of producing.[110]

Not every trade in the Netherlands is organized in a statutory trade organization. However, even some privately organized trades have organized methods for dealing with unfair standard conditions. Examples are building (contracting) and insurance.

VI. STANDARD CONTRACTS AND ANTI-TRUST LAW

32. *Introduction*[111]

As has already been mentioned in par.26 and 28 employers' agreements can be declared binding for a certain branch of trade. This power was given to the government by section 2 of the Law of 24 May 1935 on the declarations of binding and not binding force of employers' agreements.

Under this section at least eight employers' agreements were declared binding, of which six concerned general sales conditions.[112] Chiefly because of murderous competition in these trades, sales conditions were declared binding in the dresses[113], shoe[114], leather[115], woolen goods[116], salt[117] and Amsterdam baker's trade.[118]

In 1956 the Wet Economische Mededinging (Antitrust Law) of 28 June 1956, Staatsblad 401, superseded the Law of 1935, and section 6 of this Law now provides the basis for the ministerial declaration of binding force.

[110]P.Verloren van Themaat, Nieuw leven in de PBO?, in SEW 1969, p.256-267, at p.258.
[111]Since the number of words allotted to me has already run out, I have reduced this chapter to one paragraph.
[112]A.Mulder and M.R.Mok, Kartelrecht, Alphen a/d Rijn and Deventer: Samsom and Kluwer, 1962, at p.108.
[113]Staatscourant 1 November 1937, no.210.
[114]Staatscourant 9 August 1938, no.153.
[115]Staatscourant 18 July 1938, no.137.
[116]Staatscourant 9 August 1938, no.153.
[117]Staatscourant 13 June 1938, no.112.
[118]Staatscourant 2 February 1938, no.23.

Likewise section 10 of the Antitrust Law (section 6 of the Law of 1935) provides that a Royal Administrative Decree can direct that provisions of a certain nature will be not binding. This section has been invoked to declare not binding (among others):

a) provisions in employers' agreements regarding disciplinary arbitration, which do not provide for a minimum of fair play[119];

b) provisions in employers' agreements, which establish vertical price controll.[120]

Not only Dutch law is involved, also European law, especially sections 85 and 86 of the Rome Treaty of 25 March 1957, Tractatenblad 1957, no.91 and the Cartel decree of the Council of the EEC of 6 February 1962, no.17, as modified by Decree no.59. However, since this is not a specific Dutch topic, it will not be discussed in this paper.

[119]Royal decree of 24 July 1962, Staatsblad 307. See J.M.Polak, Algemene beginselen van behoorlijke rechtspraak, 43 Nederlands Juristenblad 417-422 (1968), at p.418.

[120]Royal decree of 1 April 1964, Staatsblad 110.