

The New Rules 2011

**Standard form of Basic contract
Explanatory notes on the Legal
relationship client — architect,
engineer and consultant DNR 2011**

B N A
N L INGENIEURS

Standard form of Basic contract Explanatory notes on the Legal relationship client – architect, engineer and consultant DNR 2011

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In this first revision (July 2013) article 56 has been adapted.

The New Rules 2011

Introduction

At the end of 2000 the Royal Institute of Dutch Architects (BNA) and the former Organization of consulting engineers (ONRI), at present NLingenieurs, took the initiative to develop a new set of regulations for the relation between client and consultant. This initiative was inspired by the fact that the different disciplines in the building industry active in design, consultancy and management sat more and more with each other around the table in order to obtain an integrated design. Although consultant disciplines outside the area of the building industry (for example the industrial, infrastructural and environmental sectors) are less often involved in this respect, the need for a new set of rules was acknowledged by the branch in its full breadth. Consequently there was room for an unequivocal set of rules to replace the SC 1997 and the RVOI 2001, which would regulate in an identical way the relation between the client and the designing parties. Until now it was customary for a client to appoint the consulting engineer on the basis of the RVOI 2001 and the architect on the basis of the SC 1997. Point of departure was to achieve one new common set of rules which would be determined unilaterally by BNA and ONRI and which would be used in the full breadth of the branch covered by BNA and ONRI/NLingenieurs. The Netherlands Association for Landscape Architecture (NVTL), the Association of Dutch Interior Architects (BNI), the Dutch Association of Quantity Surveyors (NVBK) and the Society of collaborating Architects and Building Consultants (SAB) were also involved in the drawing up of these rules.

Genesis

For the purpose of development of the new rules, two working parties were created which operated under the supervision of a steering committee. This steering committee was responsible for the coming about of the rules and consisted of, among others, board members of BNA and ONRI/NLingenieurs. The working party Law developed the legal relationship. This legal relationship is accompanied by explanatory notes and a standard form of basic contract. Besides, a standard specification of services is published.

The Standard form of Basic contract is a standardized contract letter, in which the parties make concrete agreements with respect to the specific commission granted to the consultant. The filling in of this basic contract differs per project, while the legal relationship remains the same.

The working party Package was responsible for the development and tuning of the different specifications of activities of the various consultants during the whole design process.

Both working parties consisted of representatives of BNA and ONRI/NLingenieurs and other user groups outside the direct circle of BNA and ONRI and were assisted by independent authors who were responsible for the actual writing and editing of the rules. Members of NVTL, BNI, NVBK and SAB also participated in the working.

The DNR 2005 has been revised in 2011. The reason therefore was that after a few years of use of the DNR 2005, it appeared that some provisions could be better formulated and furthermore that there was a need for a change in the liability regime.

Use of the rules

The New Rules are at the disposal of everyone, client or consultant, to be freely used in contracts. For use of the DNR 2011 for other purposes, permission necessary from the BNA and NLingenieurs. A pdf-file of the rules can be downloaded from www.bna.nl and www.nlingenieurs.nl. Members of BNA and NLingenieurs can buy the printed version for a reduced price, but also non-members can purchase the rules. The copyright of the rules as published lies jointly with BNA and NLingenieurs..

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The undersigned:

..... I
 residing at
 in this respect legally represented by
 hereinafter called: the client
 and

 residing at
 in this respect legally represented by
 hereinafter called: the consultant,

declare to have agreed upon the following.

The parties assess that prior to the drawing up of this contract the contents thereof have been sufficiently discussed, and that the DNR 201 I, of which a specimen was handed over or delivered electronically to the client, apply to this contract.

I
Project and/or object data

I
 The client commissions the consultant and the consultant accepts the commission to carry out the following activities for the project and/or the object de volgende werkzaamheden, further described in appendix 1.
 2
 The advice shall be carried out by the consultant having regard with the time schedule entered in appendix 2.
 3
 The [phasing of the] 2 execution of the activities shall take place according to the time schedule entered in appendix 2.
 4
 The sum involved with the execution costs of the object shall amount to approximately: euro, in words:
 5
 Having regard to the provisions about consultancy costs elsewhere in this contract as well as in the Legal relationship client – architect, engineer and consultant DNR 201 I attached to this commission, the sum for consultancy costs to be paid by the client to the consultant is calculated at euro, excluding VAT, in words
 These consultancy costs comprise the following components:
 fee
 supervision costs
 expenses
 [Split according to the different stages, these components amount to the fee
 the supervision costs.....
 the expenses.....] 3
 6 The compensation to be paid by the consultant 4
 o is limited per commission to a sum equal to the consultancy costs with a maximum of € 1.000.000.
 o is limited per commission to a sum equal to three times the consultancy costs with a maximum of € 2.500.000.
 7 The legal interest, as meant in the applied DNR 201 I, is the interest as meant in: 5
 o article 6:119 BW.
 o article 6:119a BW.

- 1 Parties fill in the empty places
 2 Where there are brackets, parties should indicate themselves whether the text between brackets is applicable
 3 Where there are brackets, parties should indicate themselves whether the text between brackets is applicable
 4 Here parties tick a choice
 5 Here parties tick a choice

2
Contract documents

I
 The following contract documents describe in mutual relationship the rights and obligations of the parties resulting from the contract:

A
the brief;

B
the Basic Contract filled in and signed by the parties;

C
the appendixes initialled by the parties with respect to:

- 1 the further description of the activities;
- 2 the time schedule;
- 3 the representation;
- 4 the elaboration of the quality management;
- 5 the nature and extent of the expenses;
- 6 the payment schedule;
- 7 communication and consultation;
- 8 handing over of documents;
- 9 activities to be carried out by third-party consultants;
- 10 the declaration with respect to the legal information duty of architects when tendering;
- 11

D
the Legal relationship client – architect, engineer and consultant DNR 201 I, which **6**

- o has been handed over.
- o with the permission of the client has been delivered electronically.

2
If contract documents are mutually contradictory, the order of precedence is as follows, unless another intention arises from the commission:

- a the Basic Contract;
- b the appendixes;
- c the Legal relationship client – architect, engineer and consultant DNR 201 I;
- d the brief.

3
The consultant bears the responsibility for the mutual contradictions between the documents mentioned in clause 2 insofar as he has drawn up their contents.

3 Data, information and goods to be supplied by the client

I
Besides the brief, the client supplies the following data and information:

- a
- b
- c

2
The client delivers to the consultant the following goods:

- a
- b
- c

3
The client provides access for the consultant to:
..... (address or work site)

4 Representation

The client designates to represent him with respect to the commission towards the consultant. In appendix 3 the scope and the duration of the authority of to represent the client are described. **7**
The consultant designates to represent him with respect to the commission towards the client. The scope and the duration of the authority of to represent the consultant are described in appendix 3.

6 Here parties tick a choice
7 The consultant is qualified to represent the client. In appendix 3 the scope and the duration of the competence to represent the client is described.

5
Legal obligations

1
The parties take into account the following special public and private legislation:

- a
- b
- c

2

The consultant takes upon him the following obligations with respect to the regulations mentioned in clause 1:

- a
- b
- c

6
Quality management

The manner in which the quality management of the consultant will further be developed for the benefit of the commission is described in appendix 4.

7
Consultancy costs

1

The fee of the consultant is determined: 8

- o as a percentage of the execution costs;
- o on the basis of the time spent on fulfilment of the commission;
- o as a fixed sum agreed upon between the client and the consultant;
- o according to any other criterion agreed upon between the client and the consultant.

2

The supervision costs are determined: 9

- o as a percentage of the execution costs;
- o on the basis of the time spent on fulfilment of the commission;
- o as a fixed sum agreed upon between the client and the consultant;
- o according to any other criterion agreed upon between the client and the consultant.

3

The nature and the volume of the expenses are described in appendix.

The expenses are determined: 10

- o as a percentage of the execution costs;
- o according to the actual costs;
- o as a fixed sum agreed upon between the client and the consultant;
- o as a percentage of the fee;
- o according to any other criterion agreed upon between the client and the consultant.

4

- o The client and the consultant determine the percentage of the execution costs for the calculation of the consultancy costs/fee/supervision costs/expenses (strike out what is not desired) at: %
- o The client and the consultant determine the rate per time unit for the consultancy costs/fee/supervision costs/expenses (strike out what is not desired) at EURO, in words
- o The client and the consultant determine the fixed sum for the consultancy costs/fee/supervision costs/expenses at EURO, in words for the next period:

5

With respect to consultancy costs as percentage of the execution costs, the execution costs are determined as 11

- o the building costs according to the description under 3.2 of NEN 2631, titled 'Investment costs of buildings', first edition, march 1979
- o the execution costs of the following parts of the object to be built in which are not included
- o otherwise, to wit

8 Here parties tick a choice
9 Here parties tick a choice
10 Here parties tick a choice
11 Here parties tick a choice

8 Consultation and communication

9 Cooperation with third-party consultants

10 Final provisions

6

Indexation of rates: 12

- o does not take place;
- o takes place according to

7

The nature and the scope of the expenses are described in appendix 5.

8

The client pays the consultant according to the payment schedule entered in appendix 6.

9

Payments shall be made on bank account/postal giro account number I in the name of

The parties lay down in appendix 7 and 8 with which frequency and in which form information is to be conveyed and consultation is to be entered into, and to whom and in which form a number of documents shall be supplied by the consultant and under which conditions.

The client commissions the following third-party consultants for carrying out the activities described in appendix 9:

.....

.....

The client designates participant as responsible for the tuning in of the activities of the different third-party consultants.

The client designates participant as responsible for steering the process of activities of the different third-party consultants.

1

The consultant has concluded a professional indemnity insurance/..... insurance to cover his liability as flowing from this commission. As evidence that this insurance has been taken out the consultant produces the following documents:

2

Issues which at the time of conclusion of this contract cannot yet be settled, are:

a

b

c

As soon as information about the mentioned issues is available, these issues shall be the object of consultation.

3

Disputes resulting from this commission shall be settled by means of: 13/14

- o arbitration.
- o the civil judge.

Thus agreed on

Signed at

On behalf of the client

On behalf of the consultant

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The users of the DNR 201 I are free to use this text, whether or not revised, when entering into contracts.

12 Here parties tick a choice

13 Here parties tick a choice

14 If a choice is made for arbitration, but the business is less than € 28,000, parties are free, when the dispute arises, to put the dispute before the cantonal judge. Should the mentioned sum be revised after the publication of this Standard form of basic contract, then one should read for the mentioned sum the revised sum.

The general provisions

A The general conditions: The Legal relationship client – architect, engineer and consultant DNR 201 I

The Legal relationship client – architect, engineer and consultant DNR 201 I is a set of general conditions. These general conditions can be used for every commission in unaltered form. The Legal relationship client – architect, engineer and consultant DNR 201 I is a consistent whole and it is therefore advised to ensure that these conditions in their entirety form a part of the agreement between parties. Needless to note that if a consultant causes damages towards a coincidental passer-by along a work under construction, the liability of the consultant towards this passer-by is not regulated by the DNR 201 I, because this relationship is not a contractual one. The passer-by will make a claim towards the consultant on the basis of wrongful act.

B Standard form of Basic contract

The Legal relationship client – architect, engineer and consultant DNR 201 I is accompanied by a Standard form of Basic contract. The Standard form of Basic contract is a standardized contract letter, in which the parties make a number of concrete agreements with respect to each specific commission granted to the consultant. The Standard form of Basic contract offers a number of subjects from which parties may make a choice. The use of the Standard form of Basic contract is strongly recommended, because certainty can then be acquired that important subjects of the agreement to be concluded will not be overlooked and regulated.

C Standard task specification

Besides the general conditions, laid down in the Legal relationship client – architect, engineer and consultant DNR 201 I and the Standard form of Basic contract, a specification of the activities involved in a commission with respect to design and consultancy tasks for the realization of a building, has also been developed. This so-called Standard task specification DNR-STB 2009 is an aid with which in a particular case the relevant activities are named and assigned to the different participants over the different stages. The use of the standard task specification is also recommended, because it provides clarity to all participants about the mutual division of tasks.

D Status of these explanatory notes

These explanatory notes on the Legal relationship client – architect, engineer and consultant DNR 201 I are an aid in the use of the conditions. The explanatory notes offer illustrative examples and sometimes describe what is determined in the rules in other words in order to clarify these. The explanatory notes are explicitly not meant to complement the rules. Should a divergence occur between the text of the rules and the text of the explanatory notes, than the text of the rules has the precedence. The explanatory notes do not constitute a part of the Legal relationship client – architect, engineer and consultant DNR 201 I.

2 The applicability

Attention:
read this section about applicability and defeasibility in its entirety!

A Applicability

General conditions, such as the Legal relationship client – architect, engineer and consultant DNR 201 I, are only applicable if they are provided by the consultant and accepted by the client. Therefore the parties declare in the Standard form of Basic contract:

- 1 that the consultant has handed over the Legal relationship client – architect, engineer and consultant DNR 201 I to the client prior to the coming about of the commission; and
- 2 that the client has accepted the proposal of the consultant to apply the Legal relationship client – architect, engineer and consultant DNR 201 I to the commission.

If this path is followed then the general conditions are applied to; they apply between both parties. The conditions also apply if the consultant indicates on his writing paper that the Legal relationship client – architect, engineer and consultant DNR 201 I is applied on his commissions and the client signs an offer on that writing paper. With a view to the following subject (defeasibility) it is important that the consultant has offered the client the possibility to become acquainted with the general conditions. It is not relevant for the applicability whether the client has also actually read the conditions.

B Defeasibility

When conditions are applicable, this does not mean that they keep their strength unconditionally. It is possible that one or more, or eventually even all conditions, can be nullified.

What is defeasibility?

Defeasibility means that a stipulation (or more stipulations or perhaps the whole set of general conditions) which has legally come about is nullified/ does not apply anymore and such with retroactive effect up to the moment of coming about of the commission.

An example of the consequence of defeasibility: should the limitation of liability of article 15 be nullified, then the statutory regulation applies in its place and this provision does not know such a limitation. So the consequences of a nullification are far-reaching.

When is this defeasibility threatening?

Defeasibility by the opposing party of the consultant is possible if the consultant 'has not offered a reasonable possibility to get acquainted with the general conditions', this follows from the Civil Code.

When has the user given the opportunity to get acquainted with the general conditions?

In the case that these rules have been offered to the other party before or at the conclusion of the agreement. One may speak of 'handing over':

- when the general conditions have been literally handed over;
- but also when the conditions come into the possession of the other party in another way such as per post, courier, fax or e-mail. In these last cases the conditions must actually have reached the other party.

In the Standard form of Basic contract the client and the consultant declare that the Legal relationship client – architect, engineer and consultant DNR 201 I has been handed over by the consultant. The requirement of handing over is thus fulfilled.

Finally it is of important relevance that no appeal can be made on this defeasibility of general conditions:

- by a so-called large party (in short: a legal person whose annual accounts must be published or a party who counts more than 50 employees);
- by a party which itself repeatedly uses the same or practically the same conditions in its agreements.

Proof of handing over

In general it is the consultant who is responsible for the proof that the general conditions have been handed over. This proof can be supplied by all legal means, as the law states: with witnesses, with written documents, with emails, etc. It is important that the law also states that the evaluation of the proof is left to the verdict of the judge, unless otherwise ruled by the law.

Culpable shortcoming

The concept of culpable shortcoming is divisible in two parts: culpable and shortcoming. The concept culpable is extensively described in the definition.

Examples of culpable shortcomings of the consultant are:

- exceeding the sum of the approximate execution costs which were agreed upon, see article 2 clause 3 sub j;
- the design fault, such as for example the calculation fault, the evaluation fault or the incompleteness of the advice;
- exceeding the authority of his representation;
- too late observance of his obligations.

Examples of culpable shortcomings of the client are:

- letting the consultant wait too long for his evaluations;
- not informing the consultant about a noted fault in a design;
- not reimbursing indebted sums at the agreed moments.

A culpable shortcoming of the consultant only leads to liability for damages if the shortcoming can be attributed to the consultant and if a proof of default has been issued, if a proof of default is required.

See also the explanatory notes about article 13 clause 1.

Whether the consultant is liable stands free from the insurance of the consultant. Of course in practice the insurance plays a major role with respect to the consequences of the liability of the consultant. If the consultant is insured, then the damages for which the consultant is responsible will be wholly or partially be borne by the insurer. It is possible that the cause of the liability for damages is not covered by the insurance. Think for example about the too late fulfilment of the commission or the exceeding of the execution costs. These costs will practically always be borne by the consultant

If there is a culpable shortcoming, different possible consequences come into the picture:

- an alteration of the commission becoming necessary, see article 9; for the compensation of consultancy costs in the event of a culpable shortcoming accountable to the consultant see article 55 clause 2;
- liability on the ground of article 13;
- cancellation on the ground of article 27.

Execution costs

For the determination of the execution costs, use can be made for example of the description of building costs under 3.2 of NEN 2631, titled 'Investment costs of buildings', first edition, march 1979. See also the explanation on article 52 clause 1.

Object

A range of activities can lead to a product of material nature to be executed. Not only does the execution of activities to obtain a new building or a new object fall under this definition, but also the adaptation, alteration, repair and demolition of a building or structure.

Handing over the rules (clause 2)

The necessity of handing over the conditions and the consequences of not doing so have already been taken into consideration under the heading 'general'.

Subjects on which consultation has to take place (clause 3)

The enumeration in clause 3 shows a great number of subjects about which, in many commissions, consultation has to be entered into and agreement has to be reached.

The list is an aid for the parties. The enumeration is not limitative. Most subjects come back in the Standard form of Basic contract, where they can be concretely filled in.

This provision is of importance in connection with the legal information duty of the architect (therefore in general not of the consultants) when he is about to submit an offer to a client. He has then to inform the client about his relevant expertise and professional competence, including refresher and post-graduate courses and furthermore the coverage by a professional indemnity insurance of the activities to be undertaken by him, his rights and duties towards the client and the guaranteeing thereof. The Standard form of basic contract also refers to this information duty. On the website of the BNA one can find a model declaration.

The provision in article 2 clause 3 sub i states that consultation should take place about quality management. Herewith are to be understood both the internal quality management as the quality management for the project in a specific commission.

Article 2 clause 3 sub o is dedicated to the exchange of information between the parties. There are many ways in which this can be achieved: orally, in writing, by electronic means, etc. Parties will yet have to determine this.

Separate attention is asked for the provisions of clause 3 under j up to and including n. For the further working out of these provisions Chapter 12 should be consulted.

Furthermore one is referred to the provision of clause 3 sub r: article 15 of these general rules prescribes that the scope of the liability is either equal to one time the consultancy costs (with a maximum of € 1,000,000) or equal to three times the consultancy costs (with a maximum of € 2,500,000). Parties must choose between one of the alternatives and article 1 clause 6 of the Standard form of basic contract provides an explicit choice.

Finally, it is also necessary to choose between the two legal interest rates which are mentioned in the Civil Code in art. 6:119 and 6:119a. This is stipulated in clause 3 sub s, which corresponds with article 1 clause 7 of the Standard form of basic contract. See also (the explanation on) article 56.

Consultation (clause 3)

In order to avoid an uncertain situation in the case that the proposal to

proceed with a preliminary investigation is turned down by the client, a provision stipulates that the parties then consult with each other. Here the parties are confronted with the fact that they have to clarify for each other what to do next. Do they definitely take leave of each other or is it possible to find a way out with respect to the reason for the recommendation to enter into a preliminary investigation (see the provision in clause 1). It is conceivable after all that after a closer look the client can adjust or clarify the brief or that the consultant can advise to grant a commission without a preliminary investigation if he gets more data.

Article 4

Laying down the commission

Drawing up the commission (clause 1)

Notwithstanding the basic assumption that the consultant draws up the written concept of the commission, it is of course also possible for the client to do this.

Point of departure and exception with respect to the coming about (clauses 2 and 3)

The point of departure is that the commission is laid down in writing and is confirmed in writing. The same goes for alterations which are brought in afterwards. This requirement about writing is not a requirement for the coming about. If a written document is lacking then the commission can also be proved by other means, in which case one can think in particular about witnesses. Without written document the one who wants to prove the commission finds himself in an awkward position, because some time after the coming about witnesses do not know exactly anymore what has or has not been agreed, and also other means of proof are more often than not less convincing compared to a written document. The consultant therefore saves himself as well as the other party much trouble with respect to the furnishing of proof if he sees to it that the commission is laid down in writing.

Chapter 3

Special provisions with respect to the commission

Article 5

Activities by other parties

It often happens in the consulting practice that the consultant does not carry out himself all the occurring activities, think for example about the making of detailed drawings. Having others carry out activities, eventually under the guidance of someone else, does not affect in the least the responsibility which the consultant has taken upon him towards the client. If for example a fault is made in a detailed drawing, then this is a fault for which the client can hold the consultant liable. Of course the consultant can subsequently hold the party which made the detailed drawing liable. See for the settlement of the liability of the consultant in this case article 13 clause 2 and article 14 clause 5.

Article 6

Appointing more than one consultant

The clauses 3 and 4 mention the tuning in of the activities and the steering of the process of activities by the different consultants. The tuning in of activities may concern for example the making of holes in constructions. Sometimes the constructions are calculated by different consultants and someone should control that the holes in part X connect to part Y which is to be linked to part X. The right timing of consecutive activities or the planning of simultaneous activities is all about the process of activities and this should also be assigned to one participant.

Clause 4 stipulates that if the consultant involves a person prescribed by the client, then the conditions under which this person is contracted should be settled and be submitted to the client for his approval and/or acceptance. This is important with a view on the provision in article 14 clause 5, see these Explanatory notes about that article.

Article 7

The consultant as agent of the client

Nomination and acting as agent (clause 1)

It happens quite often that the client nominates the consultant as his agent in matters related to the work. To this end the client should nominate the consultant in writing. In this document he not only states that the consultant is entitled to represent him, but also what the scope is of this representation. Should the consultant act beyond this competence, then this will not bind the client, in principle. By the way, he does not bind himself either contractually, because he did not, after all, have the intention to bind himself. Possibly this consultant can become liable. But there are important exceptions on the main rule that the client is not bound, so that should this occur, the client is nevertheless bound by the action of the consultant:

- a. for example, if the client nominates the consultant as his agent orally, or if the consultant exceeds the competence of his representation in the presence of the client and the client does not protest against this excess.
- b. if there is an emergency situation, in which the consultant has to handle, for example to avoid damage to goods of the client or of third parties.

Orders and instructions without consultation of the consultant (clause 2)

For the client who has endowed the consultant with a certain competence to act on his behalf, it is not practical to take actions which fall within that competence. The client runs the risk that, for example, orders are delivered twice and he will have to pay twice. It goes without saying that the consultant cannot be held responsible for eventual detrimental consequences of such orders and/or instructions.

Chapter 4 Adjustments and alterations

Article 9

Adjustments to the commission

Circumstances which lead to an adjustment of the commission (clause 2)

In this second clause examples are given of the situations mentioned in clause 1 under a and b. The term 'relevant' is used to convey that the alteration must have some weight. Briefs often change in the course of a commission; the alterations can vary from the simple wish to get twenty instead of five wall sockets to the limitation for example of constructing four storeys instead of five. Other examples are: the supervision lasts twice as long as originally budgeted; the object to be executed is executed, otherwise than originally planned, as a measurement contract. It has to be examined per case whether there is a reason to adjust the commission.

The adjustment of the commission can lead to a diminution or an augmentation of the consultancy costs. See for the working out of the financial aspects of an adjustment of the commission article 55 clause 3.

It is possible that a change in the starting points or in the circumstances underlying the commission is tantamount to force majeure for a party. In that case, the party on whose side this situation occurs can choose for cancellation on the ground of article 28 instead of an appeal on the present article. On the other hand, an appeal on article 9 can be made by both

parties, though it seems obvious that the appeal on this article will be made by the party on whose side the alteration occurs.

Article 10

Unforeseen circumstances

An unforeseen circumstance is a circumstance which the parties neither tacitly nor explicitly have taken account of in the commission. This does not mean that the circumstance was not foreseeable in the sense of: not conceivable. It is quite possible that a circumstance was foreseeable, but that within the meaning of these rules, which follow the legal regulation of article 6:258 of the Civil Code, it was not foreseen, was not taken account of. What matters is whether the parties have thought about the circumstance and have made a provision with respect thereto, whether tacitly or not. If they haven't, and the circumstance does occur, then one must speak of an unforeseen circumstance within the meaning of these rules. Suppose that an advice has been drawn up for a dwelling, in which a certain material has to be used, and due to a crisis on the international market in the trade of this material a huge shortage occurs, as a result of which the material is not available anymore, then the client cannot keep the consultant to his obligation to make a feasible design with this material as a part thereof. If the commission now does not provide a possibility how to handle or which alternative material could now be used, then one can speak of an unforeseen (not agreed upon) circumstance in this commission.

An appeal can be made on this article, in the case that unforeseen circumstances are of such a nature that according to standards of reasonableness and fairness one may not expect unaltered preservation from the other party. This makes it clear that this article may only be used with great restraint. Point of departure of the law which governs the commission is after all allegiance to one's given word.

As the legislator notes in the explanatory memorandum on article 6:258 of the Civil Code, one must be able to speak of an objectively unacceptable situation.

Chapter 5

General obligations of the parties

Article 11

General obligations of the consultant

Dispose of the necessary knowledge and capacity (clause 1 sub a)

It is not by any means necessary for the consultant himself to dispose of knowledge and capacity, the provision is so formulated that this requirement is also met if the consultant has ascertained himself that he can dispose of this knowledge and capacity.

It is also in the own interest of the consultant that he fulfils this requirement. A culpable shortcoming of the consultant is the matter according to article 1 in relation with article 13 if in the execution thereof he fails in a way which a good consultant, disposing of the required means and necessary knowledge and capacity and acting carefully, could and should have avoided.

Carry out the commission in a proper and careful manner (clause 2)

The nature and the scope of the obligations of the consultant are described in principle in the commission. On the basis of this document the parties determine what the consultant has to do. Should the consultant always be answerable for what has been agreed upon? That depends. Sometimes the consultant will be answerable for a certain result. Calculations for example should not contain any mistake. If the commission stipulates that an uncertain environment, for example a soil which cannot properly be

investigated before the start of the execution activities, should be examined, then the consultant cannot be answerable for the result, but he has met his obligation to advise in a proper and careful manner if he has 'done his best' in the given circumstances.

Estimates and budgets (clause 2)

If the consultant has been asked to draw up estimates or budgets, then the obligation to draw these up to the best of his knowledge also falls under the proper and careful carrying out of the commission. This obligation does not imply that the consultant warrants that the budgets or estimates will turn out to be correct for 100%. Due to its nature this obligation cannot have the character of a result, because one has always to wait how the subject of the budget or estimate, for example a building, will eventually materialize. There are more parties concerned than only the consultant, which exert an influence on the materialization. Nevertheless the consultant is answerable for estimating or budgeting to the best of his knowledge.

The provision implies that the consultant informs the client in time whether the sum he has at his disposal is appropriate or not for the realization of the design which is the subject of the estimate or budget.

Position of trust and independence of the consultant (clause 2)

The consultant acts for the client independently and in a position of trust. He avoids everything that could damage the independence of his advice. The fact of standing by the client in a position of trust brings along a reinforcement of the obligations which bear upon him. The position of the consultant can be compared to that of a lawyer or a doctor, who also have a relationship with their patron which is of a different nature than that, for example, of a supplier. The independence of the consultant brings along that he gives his advice free from influences which have nothing to do with the advice.

Public and private legislation (clause 4)

It is impossible to advise without the knowledge of regulations. In this respect the influence of rules on the daily practice of consultants has become too great. However this does not mean that for each commission of the consultant he is expected to know all the regulations.

It is not expected from consultants that they actually know all the regulations in their entirety, but that they are at least acquainted with the existence of the regulations with respect to their commission.

The provision limits the obligation for knowledge of the legislation: in the first place to the requirement to take account of the public and private legislation relevant for the commission, and in the second place to regulations of which the existence may be considered as pertaining to the general knowledge among consultants. The term legislation should be broadly interpreted. Not only do laws fall under the term, but also decrees, policy rules, orders in council, handbooks with security codes, covenants which have been concluded and have obtained publicity and which should be known among consultants.

This provision is closely connected with matters which the parties have to discuss prior to the coming about of the contract, according to article 2 clause 3 sub h.

An example: in hospitals people work with radioactive materials which, at a certain moment, become waste products and have to be stored in some way or other before being removed from the hospital. The storage of the radioactive materials in the different stages is subject to rules. It is not expected from a designer concerned with the hospital that he knows the

regulations as regards content, but that he knows about their existence. He is now expected to get acquainted with these regulations in order to be able to inform the client correctly and sufficiently. If he is tackled for example because he has made no provisions, he cannot defend himself with the proposition that he has never designed a hospital or with the proposition that these regulations are not of common knowledge among consultants.

Give information about the commission (clause 5)

The client depends to a large extent on the consultant with respect to information about the execution of the commission. This information obligation is the most important obligation of the consultant after the obligation to bring out the actual advice.

The consultant:

- takes himself the initiative to inform the client;
- provides, if requested, to the best of his knowledge and in time all information which could be of interest for the client.

Completion of the commission (clause 6)

The consultant has to fulfil the commission according to the agreed time schedule. The points in time which are recorded in the time schedule are not meant as fatal terms. This is to say that the sole turning up of the agreed point in time while the relevant activities are not completed, does not mean that the consultant is in default and thus liable. For a default and possibly a culpable shortcoming, it is at least necessary that:

- the client declares in writing the consultant to be in default;
- the consultant is granted a reasonable time to amend this default; and
- the consultant has not or not in time complied with the content of the proof of default.

What is to be considered as a reasonable term depends on the performance which is required from the consultant.

If the proof of default has been brought out correctly and if the consultant has not or not in time complied therewith while not appealing to a case of force majeure, then one can speak of:

- liability due to a culpable shortcoming, see article 13 and consequently
- the possibility to cancel the commission on the ground of the provisions in article 27 (cancellation on the ground of culpable shortcoming).

Provide documents at the termination of the commission (clause 9)

The client can have an interest in getting descriptions and drawings – for example because of the maintenance to be carried out – at the termination of the commission. The consultant has an obligation on the ground of the provision in clause 9 to hand over to the client at the termination of the commission the documents which are relevant for him. This does not mean all the documents prepared in the course of the commission. With respect to termination, one should not only think about completion of the commission, but also about termination on other grounds, such as cancellation.

The consultant can ask for a compensation for the handing over of these documents.

The fact that documents come into the possession of the client does not mean that the copyright on what has been laid down in these documents is thereby transferred to the client. Copyright is regulated separately in Chapter 11.

The consultant is well advised to provide the client automatically, without the client having to ask for them, with the mentioned documents after the termination of the commission. With a view to eventual subsequent problems of proof, and with a view to the ticking of the custody duty period, it is also well advised to demand a confirmation of receipt of these documents, or to care oneself for proof, for example by sending these documents by registered mail. The custody duty lasts five years.

Warning obligation (clause 10)

The client can also have taken obligations upon him, see article 12, for example providing the location where the work should be carried out or the handing over of certain goods. Besides, the client is responsible on the ground of article 12 clause 2 for the correctness as well as the timely handing over of information, data and decisions which are necessary for the proper fulfilment of the commission by the consultant. The consultant has an obligation to warn if this information, these data or decisions from the client manifestly contain such shortcomings or show such deficiencies that he would act in defiance of standards of reasonableness and fairness should he proceed with the fulfilment of the commission on the basis of this information, these data and decisions without warning.

It is not possible to indicate in general terms what the warning obligation exactly implies in a concrete case; each case will have its own concrete circumstances. Anyway the expertise of each party plays an important role. A warning should be clear and preferably issued in writing in order to prevent as much as possible discussions afterwards.

If the consultant has violated his warning obligation, then the following provisions come into picture:

- article 13 (the culpable shortcoming) and
- the subsequent liability for compensation, (see article 14);
- article 27 (cancellation on the ground of a culpable shortcoming) and
- the related articles with respect to the consequences of the cancellation (articles 33 and 34).

If the client does not pay heed to the warning, the consequences are at his expense if the risk against which the warning was issued occurs. Under certain circumstances, for example if security or imperative law are the subject of the warning, it is possible that the consultant has to refuse to carry out the commission with respect to the part on which his warning was bearing.

Keeping of data (clauses 11, 12 and 13)

Certain data have to be kept by the consultant for a period of five years from the day on which the commission is terminated. The storage time takes effect on the day that the commission is terminated. In article 16 the clauses 5 up to and including 7 indicate which day counts as the day of termination. The consultant does not have to keep the data if and insofar as he has handed them over to the client, see clause 13.

If the client asks for documents in the five-year period, then the consultant hands these over to him. For this, the consultant may ask a compensation.

The keeping obligation mentioned in article 11 is not the same as the keeping obligation which the consultant has towards the treasury. This keeping obligation should also be distinguished from the keeping for his own interest of data, with regard for example to the possibility for the consultant to defend himself in the case he is held liable.

Article 12

General obligations of the client

Act as a good and careful client (clause 1)

Between the client and the consultant there is a legal relationship which has a different character than the legal relationship between for example a supplier and a client. This brings along consequences for the consultant, but also for the client.

An example of a conduct of the client in defiance with this provision is the case in which the client requires from the consultant that he deviates from imperative law or exercises pressure on the client to reach certain conclusions while, for example, the outcome of research by the consultant points in another direction.

Timely and correct handing over of information etc and the responsibility therefor (clauses 2 and 3)

In accordance with the principle that an acting person is liable in principle for the consequences of his acting, clause 2 determines that the client is responsible for the timely and correct handing over of information, data and decisions. This enumeration is not limitative, if in a certain case the client has taken other obligations upon him, then he is also responsible for the timely and correct observance of these obligations. This responsibility of the client does not mean that the consultant can proceed just like that on the basis of this information etc, after all article 11 clause 2 puts on him a warning obligation, see to that end the explanation on that provision.

The information etc does not always have to come from the client himself; the client is also responsible for the information given on his behalf or at his request. In the relationship client – consultant the client is responsible for such information, even if that information has not been provided literally by the client but on his behalf, for example by one of the other participants involved in the project .

The degree to which the client has to provide information and data to the consultant depends on each concrete commission. A guideline will be that information and data which can easily be obtained by the consultant will be obtained by him. However, information and data which can only be gained from the client must be delivered on time by him to the consultant. Where article 12 clause 7 determines that the consultant will only proceed with a further stage after he has obtained permission to do so from the client, the client has to grant this permission in such a way that the activities of the consultant are not unnecessarily delayed. Obviously the client must be allowed some time to arrive at a balanced decision.

Not complying with this obligation can constitute a culpable shortcoming of the client. In such a case the consultant has to check whether a proof of default is required according to article 13 clause 1.

Approve and authenticate designs and documents (clause 3)

The client has an obligation to evaluate in time designs and other documents and after approval authenticate them if so requested. The client who lets his consultant unnecessarily wait for these can be declared liable for the consequences thereof because this possibly constitutes a culpable shortcoming.

Warning obligation of the client (clause 4)

The client is not obliged to actually control advices. The consultant himself is responsible for the correct fulfilment of the commission, see article 11

clause 2. However, if the client actually detects a shortcoming (criterion one) or should he have been conscious thereof (criterion two), then he has an obligation to warn the consultant in that respect. The criterion 'should have been conscious thereof' does not imply that the client should have noted the shortcoming. Should the second criterion have been formulated accordingly, then it would have been satisfied sooner than if it had been formulated as in the rules: 'must have been conscious thereof'. The criterion recorded in the rules is a factual criterion, while the criterion 'should have noted' is of a normative nature. The criterion 'should have been conscious thereof' can be called upon by the consultant when he finds himself in a situation in which he cannot prove that the client has actually noted a shortcoming, but that in this situation the facts are of such a nature that it may be taken for granted that the client has noted the shortcoming. Therefore the warning obligation which rests on the client does not stretch as far as the warning obligation which rests on the consultant by virtue of article 11 clause 12.

If it is established that the client has neglected his warning obligation, what is then the *de jure* situation? In the case that the neglect is established as a shortcoming of the client, the consultant may cancel the commission on that ground, see article 27 and articles 37 and 38, on which ground the consultant can claim an additional payment of 10%. Moreover the violation of the warning obligation can entail that the consultant is not necessarily responsible for all the damages which are now occurring (because after all it was a fault of the consultant for which the client failed to warn). One could judge that the damage is also caused by the client. Finally, through this neglect damage can also occur on the side of the consultant; possibly the client is liable for this damage, one should consult the civil code in such a case.

By the term 'in due time' is meant that, if necessary, some time may be taken for research or deliberation. How much time is acceptable depends on the circumstances, in which case one may think of complexity and/or the seriousness of the problem.

Representation of the client (clause 5)

Though the client does not have to appoint a representative, this is strongly recommended in the case of clients consisting of a large organization. In this manner it is clear for the consultant with whom he can make arrangements.

Indemnification of the consultant by the client (clause 8)

Advices often play a role in the relation between a client and a third party. Think for example about the case that a client commissions an adviser to deliver an advice about the pollution of the ground, this advice being needed to determine the price of the ground to be sold. Suppose now that, due to the advice of the adviser, the price is an X-sum lower than without the pollution. After the sale and the delivery of the ground, it turns out that the advice was not sound and the pollution was much worse. The buyer has paid too much for the ground. In this instance the buyer can tackle the client, but it is conceivable that the consultant will be tackled. In this situation the consultant probably cannot appeal to the indemnity he has agreed with the client. This limitation is only applicable between themselves, and third parties (in this case the buyer) have nothing to do with that limitation. This could bring the consultant in a more disadvantageous position than when he would be tackled by his client about this fault. With a view to this situation a provision has been formulated in this clause that the client indemnifies the consultant for claims by third parties, insofar as these claims have something to do with the advice.

Requirements for liability (clause 1)

The consultant who perpetrates a shortcoming (see for the description of that concept the definition in article 1 and the accompanying explanatory notes) is not by definition liable for the consequences of that shortcoming. It is possible that the client must first serve a proof of default in writing to the consultant. This is what the second sentence in article 13 clause 1 is about: insofar as performance is not already impossible, clause 1 is only applicable taking into consideration the legal regulation of neglect by the debtor. By debtor in the context of article 13 of these rules is to be meant: the consultant.

To be perfectly clear: by legal is to be meant that which is stated in part 9 book 6 of the Civil Code and the extensive jurisprudence thereupon. This jurisprudence makes the system of neglect by the debtor extremely subtle, and it is therefore not always clear when a written proof of default has to be served.

Two situations have to be distinguished:

- a. the shortcoming is such that performance is permanently impossible, or
- b. the shortcoming is such that amendment is still possible.

An example of a shortcoming where performance is permanently impossible: the consultant makes a mistake in a calculation of the reinforcement in concrete piles. After the piles have been made according to the calculation and placed in situ, they break because they are not calculated to withstand the horizontal forces which occur in the ground. The piles cannot be repaired and now the performance – to calculate good piles in one go – is not possible anymore.

An example of a shortcoming where performance is still possible: the consultant makes a mistake in a calculation of the reinforcement in concrete piles. Before the piles are fabricated, the consultant discovers the mistake. Performance of the duty to calculate the piles correctly in one go is possible.

In the first case the consultant is liable for the sole shortcoming. In the second case the legal rules about neglect by the debtor have to be considered. These usually come down to the fact that it is always necessary to serve a written proof of default in writing. If there is no written proof of default, then the main rule is that the consultant is not liable.

The proof of default must be done in writing. Should the proof of default be sent by e-mail or fax, then this requirement is met just as the case would be had the proof been sent by letter. The declaration duty and the evidence that the proof of default has been issued rest with the client. The proof of default only takes effect when it reaches the consultant.

It therefore speaks for itself to issue the proof of default by registered post or if need be by means of a writ.

What should the proof of default state?

- a clear description of the shortcoming;
- a clear specification of what is demanded from the consultant;
- a clear description of the ground for what is demanded;
- the deadline for what is expected from the consultant;
- holding the consultant liable in the case he does not, or not in time, meet the requirements.

The deadline should be reasonable, taking into account what is wanted from the consultant and the circumstances of the concrete case, such as weather conditions or preparations which have to be made (of course taking into consideration the fact that they possibly should already have been made). The consultant is liable for his culpable shortcoming at the moment that he has not answered the proof of default, only at that moment does he become liable. Insofar as damages for delay can be claimed, the calculation thereof only starts from that moment. Should the consultant fail wholly or partially to make good within the period determined in the proof of default, then he is in neglect and liable at the expiration of that period,

To be perfectly clear: if after an arbitration it has been determined that a proof of default should have been served and that this did not happen, then it is too late yet to do this. After all, article 16 clause 2 stipulates that protest should be made in due time against the consultant.

Liability of other persons (clause 2)

The consultant will often – and he may do so as article 5 shows – call in another person for his commission. These other persons can be employees of the consultant or persons who are not in his service and are prescribed or not by the client.

If the person who is called in by the consultant and is not prescribed by the consultant makes a miscalculation and this constitutes a culpable shortcoming, then the consultant is liable for this shortcoming towards the client as if he himself had failed.

Things are different if another person (no employee) is prescribed by the client; then the consultant is not liable for a culpable shortcoming by this person.

See for this case article 14 clause 5. Nevertheless, the warning obligation of the consultant, see article 11 clause 10, also applies to this person. If the client prescribes a person of whom the consultant knows that this person is not competent enough, then the consultant is bound to warn the client in this respect.

Article 14 Compensation

General

If a culpable shortcoming of the consultant occurs, then the client can claim a compensation. The client can also choose to cancel the commission, see article 25 or besides the cancellation ask for a compensation, see article 27 clause 3. Rules are laid down for compensation in article 14.

Article 14 only determines the compensation resting with the consultant. The compensation resting with the client is subject to legal regulations.

Direct damage (clauses 1 and 2)

If it is established that the consultant is culpably shortcoming, then article 14 settles what the scope of this liability will be. The first clause determines that the consultant is liable for the direct damage suffered by the client. Direct damage is not defined; this is left to arbitrators and judges. The second clause gives a not exhaustive enumeration of examples which anyway do not belong to direct damage and for which the consultant accordingly is not liable. On the ground of the provisions of clauses 6 and 7 one may depart from this, but then the requirements of these clauses have to be met, see the explanation on these clauses.

An example of the clauses 1 and 2 :

Suppose: the consultant designs a cooling installation, and this installation gets out of order after the client has stored his supply of fresh vegetables. Subsequently the vegetables fall in decay due to the rise of the temperature. Undoubtedly this is a culpable shortcoming of the consultant. The following falls under the direct damage to be compensated by the consultant:

- the damage to the cooling installation (with respect to the question how it should be repaired, see clause 3).

The following falls outside the direct damage:

- the damage to the vegetables due to the too high temperature (this is loss of profits);
- the costs involved in the repair of the installation if these costs would also have had to be made if the commission had been correctly carried out right from the beginning.

These last items do not, in principle, come under consideration for compensation. The damage for which the consultant or the client is liable, is not necessarily suffered by the other party. Third parties (i.e.: those who stand outside the contractual relationship client-consultant) can also suffer damages as a consequence of a shortcoming of the client or the consultant. For example one can think about the neighbour who suffers damage to his dwelling as a result of the shortcoming due to a design fault, or about the contractor called in by the client who suffers delay damage because the consultant is too late with his calculations. The client who is held responsible by the neighbour or the contractor can recover these damages from the consultant. It also goes for the recovering of these damages that they must be direct damages.

Making good by the consultant (clause 3)

The consultant is entitled to make good himself the shortcoming (have it made good) or to limit or remove the damage which is a result of this shortcoming (have it limited). He should do this in good consultation with the client. Suppose that the execution costs turn out to be much higher than approximately agreed upon (see article 2 clause 3 sub k), then this constitutes a shortcoming which can be made good by the consultant by revising the design. Of course no consultancy costs will be charged for this making good. If the consultant is unable to make good, for example because the design fault has already produced consequences in the execution stage, then the client himself can make good the shortcoming by commissioning the contractor to do so and, if there is direct damage, recover the costs involved therewith from the consultant.

Exceeding of competence (clause 4)

The consultant who exceeds his competence, for example by commissioning a contractor for work for a sum exceeding the sum for which he is authorized, perpetrates a culpable shortcoming and is liable for the direct damage which the client suffers in that respect. This provision should be read in conjunction with article 7 clause 1. Article 7 clause 1 stipulates that in a number of instances the consultant can exceed his competence as specified in writing, but that nevertheless he cannot be blamed therefor. In those cases the consultant cannot be held liable for exceeding his competence. This is the case for example if the client has explicitly given the permission to the consultant to commission the contractor.

Prescribed person to be called in (clause 5)

In his relation with the client a consultant is accountable for the activities of the assisting persons with whom he is working. The person prescribed by the client also falls under this regime. Clause 5 applies to this last situation.

The consultant is accountable towards the client for the prescribed person, but not for more than for what the consultant can tackle the prescribed person about his competence. A condition for this purpose is that the client must have accepted or approved the conditions of the prescribed person (article 6 clause 4). The client shall reimburse the consultant for the eventual extra costs insofar as the prescribed person has not done so, and the consultant has reasonably done his best to recover these costs. In exchange the client in that case hands over his claim on the failing prescribed person to the client, so that the client in his turn can tackle the prescribed person once more. This handing over of the claim which the consultant has on the prescribed person is called: to cede or to assign.

Reasonableness and fairness (clause 6)

It is possible that the conduct of one of the parties or an unexpected state of affairs leads to a situation in which the rules which apply to the parties are not to be applied and can be departed from. This can happen – there are verdicts by arbitrators and judges about such matters – for example when a consultant who is judged liable subsequently behaves in such an improper manner that, according to standards of reasonableness and fairness, he no longer can claim any limitation of his liability, as stipulated in article 14. Another reason to depart from article 14 can be found in the fact that there are technical reasons to do so, or arbitrators attach importance to the fact that the commission constitutes only a relatively small part of an object. In any case, it should be determined that not putting aside the provisions of article 14 must lead to situations unacceptable according to standards of reasonableness and fairness. In other words: observing the provisions of article 14 leads to a specially serious situation for one of the parties. The single fact that a consequence of the observation of these provisions is annoying for one of the parties is insufficient ground for making the article inoperative.

Furthermore, it is generally speaking of importance to know that also on the basis of the law it is possible to render provisions inoperative in the case that not doing so would lead to unacceptable consequences according to standards of reasonableness and fairness. This possibility is specially mentioned in this clause of article 14 for article 14, but is therefore valid for each provision of the DNR 201 I.

Insurance (clause 8)

In the case of execution of an object (a product of material nature) an insurance will generally be taken out by the client or at his expense (a customary All Risks insurance or comparable insurance). Has the insurance been concluded and there are damages, then these damages are frequently wholly or partially covered by the insurance and is the consultant not liable. This provision is about a customary insurance in which the consultants are also insured. The question whether the insurance has actually been concluded is therefore not relevant. Items which fall under a customary insurance are material damage to the object, liability with respect to the execution of the object, damage to properties of the insured client and the damage which is a result of liability of the various participants towards each other; the damage can be caused by the different parties participating in the execution of the object. Coverage of the consequences of design faults which arise during the defects liability period should also be included. An example of an insurance comparable to an All Risks insurance is the insurance for soil improvement.

Article 15

Extent of the compensation

General

The parties have the choice between two regimes with respect to the extent of the liability of the consultant. The liability can be limited to one time the consultancy costs with a maximum of € 1,000,000, or the liability can be limited to three times the consultancy costs with a maximum of € 2,500,000. Article 2 clause 3 sub r stipulates that parties prior to the coming about of the contract must make a choice, and the choice can be laid down in article 1 clause 6 of the Standard form of basic contract. Obviously the choice is only made for the commission to which this Standard form is related.

Under consultancy costs are to be understood; the fee (that is the compensation to which the consultant is entitled for his activities) and the costs (costs are supervision costs and expenses); the consultancy costs are further elaborated in Chapter 12; at the same time attention has to be given to the provisions with respect to cancellation. If the culpable shortcoming is coupled with a cancellation, then the consultancy costs which the consultant is entitled to must be calculated (under circumstances it is possible that a deduction will be applied). The outcome of this calculation is determining for the extent of the liability for damages of the consultant.

The consultancy costs are calculated without the turnover tax, with regard to the height of the liability for damages the VAT is therefore left aside; see for the VAT the provisions of article 49 clause 3. The consultancy costs which are meant here are the costs due by the client for the commission; whether partial commissions should be considered as part of a one and only commission cannot, generally speaking, be said. Arbitrators and judges will have to decide on this matter in occurring cases where the parties have left this unclear.

Making a choice

In article 1 clause 6 of the Standard form of basic contract a choice is provided with respect to the extent of the liability of the consultant. If no use is made of this possibility and the parties leave the choice open, then clause 2 of article 15 stipulates that the liability is limited to the height of the consultancy costs with a maximum of € 1,000,000 (the first regime mentioned in this clause under 1a).

Examples with regard to clause 1

Example: the parties have limited the liability to one time the consultancy costs and these amount to € 25,000 in a concrete case. Due to the culpable shortcoming a damage of € 35,000 has come into being. In this case a sum of € 10,000 remains at the expense of the client.

Suppose that the consultancy costs amount to € 1,000,500 and the damage is the same amount of € 1,000,500, then the extent of the liability is € 1,000,000 because this sum is the absolute limit to the extent of the liability. But suppose that in this case the parties had chosen for the limitation of the liability to three times the consultancy costs, then the client receives in the last case compensation for the whole damage, because the absolute limit in this case is € 2,500,000. And also in the first example (consultancy costs amount to € 25,000 and the damage is € 35,000), the client sees his damage wholly compensated, because the damage is compensated up to a sum equal to three times the consultancy costs and that is € 75,000 and the damage of € 35,000 is below that figure.

The consumer as client (clause 3)

The consumer must also make a choice with the help of the Standard form of basic contract, article 1 clause 6, between the two regimes with respect to the liability. To make sure that the consumer is insured for a minimum claim against the consultant in the case of liability, a provision is made in the third clause that, regardless of the choice made by the consumer, his damage will always be compensated up to a sum of € 75,000.

So suppose that the consumer has chosen for the regime of liability equal to the consultancy costs and the first example happens to occur (consultancy costs of € 25,000 and damage of € 35,000), then the consumer will be compensated for the whole damage, notwithstanding the fact that he has chosen for the first regime, because the damage is less than the € 75,000 of clause 3.

Article 16

Liability period and expiration terms

General

The expiration of the periods mentioned in this article does not imply that the arbitration board is not competent anymore. After all, article 58 clause 2 stipulates that all disputes, brought about by the commission, are subject to arbitration. The arbitration board therefore may always judge whether the question if a claim has been submitted too late, also in the case that this is indeed the case.

Expiration of the liability (clause 1)

Expiration of the liability of the consultant means that the client no longer has the authority to tackle the consultant after the indicated expiration term; in other words the right to tackle the consultant has been nullified. An expiration term cannot be stopped nor can it be extended, which means that the client cannot block or extend the course of the expiration. The liability of the consultant is limited in time to a period of five years from the day on which the commission is terminated either by completion or cancellation. What is to be understood by the day of termination is stipulated in clauses 5 up to and including 7 of this article. If the consultant is called upon after the lapse of five years, then he should himself indicate that he makes an appeal on this provision and is therefore not liable. An arbitrator or judge can by virtue of his office (without being asked) overrule this contractual expiration term. If the consultant fails to point at this expiration towards the arbitrator/judge, then there is no question of expiration of the liability. The consultant who is judicially involved by the client while the term of expiration has expired, is well advised to point at the expiration of the right of the client to file a claim, before all other defences which he may put forward against the claim of the client.

Legal action on account of a culpable shortcoming and written protest (clause 2)

The client who discovers that the consultant has perpetrated a culpable shortcoming while performance is not yet permanently impossible, or who reasonably should have discovered the shortcoming, while performance is not permanently impossible, must:

- with due diligence; and
- declare in writing and with good reasons the consultant to be in default (see for the requirements demanded for a proof of default the explanatory notes on article 13 clause 1).

If the client waits too long with the proof of default, then a legal action (putting the dispute judicially before the courts) is inadmissible, so that the damage does not come at the expense of the consultant. But also here, the consultant has to take care of eventually putting forward the issue of not taking into account the due diligence, before the arbitrator/judge. See the explanatory notes on article 12 clause 4 for the concept of due time.

The client who discovers that the consultant has perpetrated a culpable shortcoming while performance is not possible anymore, or who reasonably should have discovered the shortcoming, does not have to serve a proof of default according to article 13 clause 1, but may immediately call the consultant in court (this is called 'rough summon'). But in this case the period mentioned in clause 3 of this article is to be applied.

Legal action on account of a culpable shortcoming after the written protest (clause 3)

Suppose that the client has acted according to the provision in clause 2, he has indeed with due diligence issued the proof of default after discovering the shortcoming, he must then not wait too long with establishing a legal claim (putting the claim judicially before the courts): if he waits longer than two years after the proof of default, then the right to hold the consultant liable for the shortcoming expires and no legal action can take place anymore. This means that in a concrete case the legal claim which, according to the basic rule of clause 4, is inadmissible only after five years after termination, possibly becomes already inadmissible earlier because two years have elapsed since the written protest of clause 2. Suppose for example: two months after completion the client detects a shortcoming, he issues with due diligence a motivated proof of default in writing. Because the consultant does not produce a sound solution in time, the client puts the legal claim on the consultant before the courts within two years in order to prevent expiration of the right to make a legal claim. If the legal claim is put before the courts only after those two years, then the provision of clause 43 applies: inadmissibility. With other words, the legal action, just as the written protest of clause 2, is bound to an expiration term.

Again: the consultant must raise the issue of expiration of the term. The arbitrator/judge may not do so by virtue of his office.

Legal action on account of a culpable shortcoming five years after the termination of the commission (clause 4)

The possibility to involve the consultant de jure for a culpable shortcoming is excluded after five years after the day of termination of the commission either by completion or cancellation: after these five years the legal claim is not admissible anymore. This means that the client who discovers a shortcoming, for example a few months before the end of those five years, for which he wants to hold the consultant liable, must declare him to be in default as soon as possible (see the provision of clause 2) and for safety's sake just start a legal action in order to avoid the risk that the arbitrator or judge will establish that the five years have expired and that the judicial claim is therefore inadmissible. But also in this case, if the consultant does not himself make an appeal on the fact that the five years have expired, he loses this means of defence, because also here it is determined that with respect to this contractual expiration term, no appeal can be made by arbitrator or judge by virtue of one's office. The consultant who refrains from appealing on this provision can therefore be condemned on the ground of a culpable shortcoming, even if the term of clause 4 has expired.

Day of termination (clauses 5-7)

The term termination is the covering term for the different manners in which a commission can come to an end. Under the day of termination is to be understood the day on which the commission ends, either by completion, cancellation or dissolution. Cancellation means that a party terminates unilaterally the commission. The grounds for cancellation are exhaustively stipulated in Chapter 9 of these rules. Dissolution is a form of termination which can be used according to the Civil Code if a shortcoming by the other party occurs. In these rules the grounds for cancellation are determined in a limitative way for the parties, and so cancellation as regulated in the Civil Code is excluded except for consumers, see article 22.

Day of termination and investigation (clause 8)

Following the rules of the Civil Code article 7:761 clause 3, a provision is included for the case that an investigation is conducted with respect to the repair and attempts to the repair of faults. This investigation and the eventual repair can take some time, and therefore the term for taking legal actions is prolonged. It is explicitly pointed out that, unlike the mentioned rules of the Civil Code, in the rules here we have to do with (contractual) expiration terms. In line with Parliamentary History is to be meant under the notion of 'obviously considered as terminated' such declarations or conduct of the consultant that already at first sight it is clear for the client that the consultant does not want to carry on more investigation or attempts to repair. If so required the client can settle a period within which the consultant indicates whether he wishes to proceed with investigation or the repair of faults. The client cannot stop the course of this period, because this is about a expiration term.

Article 17

Other provisions with respect to compensation

The right to compensation and the obligation to pay (clause 1)

The sole fact of the liability for damages of the consultant does not mean that the client is relieved of his task to pay the consultant as agreed for that part of the activities which have been carried out correctly, though the obligations can be settled with each other.

What the client is indebted to the consultant depends also on the question whether he sees in the shortcoming a reason for cancellation. See for the settlement of payments in the case of a cancellation on the ground of a shortcoming article 27.

Secondment (clauses 2 and 3)

The consultant who seconded an employee to the client has little or no supervision on the performance of this employee. For that reason the liability of the consultant for this person is limited to the promised quality of this person, and in time to the agreed period of secondment. Should the seconded person cause damage which cannot be attributed to the promised quality, then the consultant is not liable for this damage.

Liability for persons seconded to the client (clause 4)

It is assumed that the client gives guidance to and/or supervises the persons seconded to him and that the consultant who seconded persons has no influence on the operations of these persons. For that reason clause 4 stipulates that the client is not only liable for damages caused by these persons towards third parties, but also that he indemnifies the consultant should the consultant be held liable in that case by third parties.

Other damages (clause 5)

In principle the liability of the consultant is limited to the damages mentioned in article 14. Should the perpetration of a culpable shortcoming be accompanied by intent or rough negligence, then the liability of the consultant is extended to other damages. An example is the damage to vegetables caused by the wrong temperature in the formerly given example of the cooling installation. This indirect damage would come into consideration in the case of intent or rough negligence.

Article 18

The client is a consumer

The law provides protection for the consumer by stating that sometimes regulations with a certain content are unreasonably onerous and if requested will be nullified. The competence conferred by these provisions to the consumer is concretized in these rules in two places. For the sake of completeness it should be noted that where this concretization is lacking, it is obviously not the intention of these rules to diminish this competence. The provisions in these rules where the protection of the consumer is explicitly mentioned can be found in the articles 15, 18 and 22. Article 18 takes this protection into account by stipulating that this chapter, with respect to the liability of the consultant, is applicable unless the provisions can be considered as unreasonably onerous. Parts which are regarded as unreasonable after a nullifying action do not belong (with retroactive effect) to the contract between parties.

Article 20

Consequences of the delay or interruption of the commission

Payment obligation (clause 2)

In the case of interruption or delay of the commission, the consultant is entitled to send a bill while on the ground of a possibly agreed payment schedule this was not yet foreseen, on the condition that the delay or interruption cannot be ascribed to him. The gauging point for the calculation is constituted by the state of the activities at the moment that the client orders the consultant to interrupt the commission. An example of the 'costs reasonably made and yet to make' mentioned sub d: the costs incurred by the consultant because he has contracted extra personnel or a particular service for the commission (for example to carry out a soil investigation) and for whom there is no work as a result of the delay or interruption. One should also think here about activities which cannot be stopped just like that.

Liability for damages of the client (clause 3)

If the delay or interruption cannot be ascribed to the consultant, then he has at the same time a right to compensation. The damage which the consultant can suffer is also called harm risk or mobilization and demobilization costs.

The consultant is bound to restrict his damage as much as possible. In the case of an interruption which is expected to be followed by a lengthy delay, one may expect for example that the consultant tries to put his employees on another commission. If he accountably refrains from doing so, then he will not be able to recover all his damage from the client.

When considering the costs caused by interruption and delay, one should think of the costs made in the sorting out and keeping of materials and files in such a way that they can be used again later on, evacuation costs of workshops which had been fit up for this commission, and for example costs

made for documentation of the state in which the object is; in short, all kinds of costs which would not have been made had there been no interruption or delay.

Revising the consultancy costs (clause 4 in relation with article 55 clause 3)

If the delay or interruption leads to an alteration of the starting points or other circumstances which underlie the commission, then this can constitute a ground to revise in consultation the consultancy costs

Article 21
Mode of cancellation

Mode of cancellation (clause 1)

The date of the cancellation can be identical with the day of the announcement of the cancellation or lie after that. What is not possible, is to confer a retro-active effect to the cancellation.

Lacking grounds (clause 2)

These rules couple different consequences to the different grounds for cancellation. It is therefore important to indicate on which ground the commission is cancelled. If the cancelling party omits to do so, then the cancellation is considered to be done within the meaning of article 24, the cancellation without reason. The consequences thereof are stipulated in articles 33 and 34 with regard to the client and in articles 35 and 36 with regard to the consultant.

Article 22
Limitative regulation of the grounds for cancellation

The system of termination of the commission is exhaustively regulated in these rules, except for the consumer. The basic rule is that cancellation can be done on the ground of article 24 (in which case a reason does not need to be specified) and on the grounds mentioned in article 25. According to these rules the commission can only be terminated in one other way, and that is completion. Dissolution is a mode of termination which the Civil Code recognizes for particular cases, besides the termination by cancellation or completion. The law attaches conditions and certain consequences to dissolution.

Due to this, the most important legal ground for dissolution because of a shortcoming, see article 6:265 BW (Civil Code) is excluded (other grounds such as dissolution on the ground of bankruptcy are also excluded). The legal shortcoming is not identical with the shortcoming as meant in these rules. These rules only recognize the culpable shortcoming, while the law does not call for accountability as a requirement for dissolution. This means that these rules regulate the possibility of terminating a commission in the case of a shortcoming in another way:

- dissolution is excluded, one has to cancel;
- only a shortcoming which is culpable gives the authority to cancel on that ground.

This system is a restriction of the legal possibilities to dissolve and this restriction is not permitted if the other party to the consultant is a consumer.

Consequences in the case of legal dissolution

Insofar as a party is free to dissolve the commission on a legal ground, because he is a consumer, the settlement of the relation has to take place according to these rules. After all, the Civil Code only stipulates imperatively that the ground for dissolution may not be restricted, but is mute about the

consequences flowing from the dissolution.

Suppose that the client/consumer dissolves on the ground of the provisions in article 6:265 BW (a shortcoming of the consultant), then he could do that for every shortcoming (except for the shortcoming of a particular nature or little importance) also if the shortcoming cannot be attributed to the consultant. The question which consequences this dissolution entails must be answered on the basis of the provisions of articles 37 and 38.

Chapter 9

Cancellation of the commission

Article 24

Cancellation of the commission without reason

The parties are at all times free to take leave of each other without reason. The announcement holding the cancellation, see article 21, can state that the cancellation is done on the ground of article 24, without reason. The consequences of this cancellation are regulated in articles 33 and 34 with regard to the client and in articles 35 and 36 with regard to the consultant.

Article 26

Delay and/or interruption

Not every delay or interruption constitutes a ground to cancel. If a party wants to cancel on that ground, then the delay or interruption should be of such a nature or last so long that fulfilment in unaltered form cannot reasonably be demanded. An example: suppose a client has received a promise for a municipal subsidy, and trusting to obtain this within a reasonable time the client grants the commission to the consultant. Thereupon the subsidy fails to come and the information comes that the subsidy will only be granted in the following budget year. In such a case each of the parties may cancel the commission. What about the consequences? Although of course this is a ground for which the client cannot be blamed, it is a ground on his side, so that the consequences of this cancellation in this example are to be read in the articles 39 and 40. The words 'cannot reasonably be demanded' entail that the delay or interruption should have serious consequences; restraint should therefore be observed in granting a cancellation on this ground.

Article 27

Culpable shortcomings

What is to be understood under culpable shortcoming is defined in the list of definitions, see article 1.

Reprehensible action (clause 2)

Reprehensible action is improper action. Sometimes this will be equal to a culpable shortcoming, but this is not always the case. One may think of the example given earlier with respect to the obligations of the client, article 11 clause 1. Suppose a client commissions a consultant to design a covering. Subsequently the client asks the executing party, who sees possibilities to economize on the execution, to run over the calculation. The client then asks the consultant to take over the responsibility for these savings which the consultant does not approve. One cannot say that the behaviour of the client constitutes a culpable shortcoming, but it is reprehensible. The relations can get so upset by this behaviour that it may be wise to take leave from each other. That is why the same consequences follow from reprehensible action as from a culpable shortcoming.

Other consequences (clause 3)

A culpable shortcoming can cause damages. The rules with respect to leave-taking in Chapter 10 do not provide for a settlement of the damage, therefore the provision of clause 3 sees to it that the right of cancellation does not affect the right to compensation as stipulated in Chapter 6. Besides cancellation the party suffering damages can bring out a claim for compensation.

Article 28

Force majeure

The notion of force majeure (clause 1)

The description of force majeure is in keeping with article 6:75 of the Civil Code. An addition has been provided to this description, to ensure that also this situation gives the right to cancellation on this ground with the attached consequences thereof.

Article 29

Insolvency

This article describes two sorts of insolvency, which are of a different nature. On the one hand it is about financial insolvency and on the other hand about insolvency caused by something else. One speaks of financial insolvency if suspension of payment has been applied for, if a financial reconstruction of debt has been demanded or in the case of bankruptcy. In this situation, the other party has the right to summon the insolvent party or his receiver or trustee to let him know within a reasonable term whether the commission still stands up and whether he is still willing to proceed thereto. At the same time security can be demanded.

Difficulties can also arise if there are good grounds to expect that the other party will fail in the observance of its obligations. In that case the other party does not yet find itself in the situation that there is a problem, but it may be expected that this situation will occur in the near future. This problem can be of financial nature, but can also follow from something else, for example a circumstance in the personal area or the failure to obtain cooperation from third parties. In these cases article 20 provides the possibility to cancel, if the request to the other party to declare that it is prepared and in state to proceed with the commission or provide security, has not been answered. The party who summons and intends to cancel on the above ground must explain why it is to be feared that good performance will not be achieved.

Article 30

Modification of the legal form or the collaboration form

Modification (clause 1)

The first clause contains a non-limitative enumeration of instances in which the legal form or the collaboration form is modified.

General

The rules with respect to the consequences of cancellation are set up in such a way that for the client as well as for the consultant the consequences are always regulated separately:

- the articles 33 and 34 stipulate the consequences of cancellation by the client without ground;
- the articles 35 and 36 stipulate the consequences of cancellation by the consultant without ground;
- the articles 37 and 38 stipulate the consequences of cancellation by the client on a ground accountable to the consultant;
- the articles 39 and 40 stipulate the consequences of cancellation by the client on a ground accountable to the client himself;
- the articles 41 and 42 stipulate the consequences of cancellation by the consultant on a ground accountable to the client;
- the articles 43 and 44 stipulate the consequences of cancellation by the consultant on a ground accountable to the consultant himself.

This way and with respect to the payment obligation of the client and the copyright of the consultant, the cancelling party can easily oversee the consequences of its cancellation in the two relevant articles. This does not imply that other articles need not to be consulted anymore.

If for example there is a cancellation due to a culpable shortcoming, then it is surely conceivable that this culpable shortcoming has caused damage on the side of the cancelling party. In that case the provisions of the chapter about liability will have to be consulted. Furthermore the provisions of Chapter 12, financial provisions, will have to be taken account of.

Elements of the payment obligation

The payment obligation is always composed of the same elements:

- the fee, that is the remuneration which the consultant is entitled to for his activities, see article 1;
- the expenses, see article 50 clause 4, in which a non-limitative enumeration is given of what falls hereunder;
- the supervision costs, these are the costs which the consultant makes for supervising the execution of the object, see article 50 clause 3;
- all costs reasonably made and yet to make, following from obligations which the consultant has already taken upon him.

Payment obligation increased

Moreover, in three cases the client is possibly compelled to pay 10% of the remaining part of the consultancy costs which would be indebted if the commission had been completely fulfilled. With regard to this matter see:

- article 33 clause 2 (cancellation by the client without ground);
- article 39 clause 2 (cancellation by the client on a ground accountable to the client);
- article 41 clause 2 (cancellation by the consultant on a ground accountable to the client).

The extra payment bears on the consultancy costs (fee, expenses and supervision costs). The costs which result from already contracted obligations fall outside of these provisions. The extra payment does not always apply in the mentioned cases, the relevant provisions show variations for special cases in the clauses 2. If the extra payment leads to unacceptable consequences, then one can depart from it, as the articles 33 clause 3, 39 clause 4 and 41 clause 4 stipulate.

Payment obligation possibly diminished

In three cases the client is entitled to deduct 10% on what he has to pay.

This arises in the cases of:

- article 35 (cancellation by the consultant without ground);
- article 37 (cancellation by the client on a ground accountable to the consultant);
- article 43 (cancellation by the consultant on a ground accountable to himself).

Moreover, in these cases the payment obligation does not stretch farther than insofar as the activities have been useful for the client.

Is it also possible in these cases to deviate from the sum which has to be paid if manifestly unacceptable consequences arise.

Manifestly unacceptable

In accordance with the meaning which the legislator gives to this notion, the notion of 'manifestly unacceptable consequences' indicates that it is only with great restraint that one can depart from the outcome of the payment obligation resulting from the afore mentioned provisions.

Rights on the advice after cancellation

Under rights on the advice are to be understood the works within the meaning of the Copyright Act 1912 as well as all advices which do not fall under that definition, but do fall under the definition of advice within the meaning of these rules: the result of the activities of the consultant. Examples: the calculations which have been made for setting up a certain installation, which could also be applied for another object to be executed on behalf of the client; the drawing which does not qualify for the requirement of originality in the Copyright Act 1912.

Permission required for using the advice

In three cancellation cases the client may use the advice only after the previous permission in writing of the consultant:

- article 34 clause 1 (cancellation by the client without ground);
- article 40 clause 1 (cancellation by the client on a ground accountable to the client);
- article 42 clause 1 (cancellation by the consultant on a ground accountable to the client).

This point of departure allows an exception if at the time of the cancellation a start has already been made with the execution of the object (see clause 3). But the client is then bound to pay a compensation to the consultant for the use of the advice and is also bound to let the consultant control whether the advice is used according to his intentions. This supervision naturally costs time of the consultant (after all, think about another consultant entrusted with the execution of his advice) and he has therefore the right to ask compensation for these costs.

No permission needed for using the advice

In three cases of cancellation, the client may use the advice without intervention of the consultant:

- article 36 (cancellation by the consultant without ground);
- article 38 (cancellation by the client on a ground accountable to the consultant);
- article 44 (cancellation by the consultant on a ground accountable to himself).

Chapter 11
**Ownership and use of rights
on documents of the consultant
with respect to the advice**

General

Article 46 looks at the copyright, patent law and model law within the meaning of the relevant legislation. Besides, Chapter 11 is about the rights in another sense which can be resting on the advices, see thereto the articles 47 and 48.

Article 45
Ownership of documents

Ownership of documents (information carriers in whatever form) bears on the physical document, that is to say: the client is the owner of the piece of paper on which the advice is printed, drawn or otherwise embedded. This right of ownership stands loose from the copyright which the consultant has on the advice.

Article 46
Rights of the consultant on the advice

This article is about the different rights which can rest on the advices and follow from the Copyright Act 1912 as well as the Patent law and the Benelux Convention with respect to the intellectual property of trademarks, drawings and models.

Article 48
Right of repetition of the advice

Repetition of the advice by the client (clause 3)

Even in the case of the complete repetition of a former commission, the consultant will generally carry out activities and incur expenses. A compensation will have to be agreed upon for these activities and costs, besides the remuneration for copyright to which the consultant is entitled.

Chapter 12
Financial provisions

General

The settlement of the financial provisions does not include fee schedules or fee formulas, nor propositions for the distribution of the fee over the different stages of the commission. Such schedules and distribution codes are difficult to formulate unequivocally for consultancy activities from different professional disciplines. Besides such schedules and formulas do not fit in with the present times, in view of the developments in competition law. These rules indicate without preference the mostly used modes of calculation of the fee, the supervision costs and the expenses and give definitions of these terms. The chapter 'Financial provisions' is restricted to the headlines; not all the factors which can be relevant for the calculation of consultancy costs have been handled here.

For the making of arrangements by their members, BNA and NLI engineers will publish, insofar as allowed by the law, supporting material; historic figures of consultancy costs will also be made public.

The mode of calculation of the fee, the supervision costs and the other costs, as well as the height of a percentage or of a sum should be agreed by the consultant and the client on the basis of a proposal, respectively an offer by the consultant or an offer by the client.

In the determination of his proposal the consultant will take into account all the data and factors typical for the present commission.

In this respect one may think about the following:

- the nature, scale and complexity of the commission;
- the scope and quality of the available data, such as the brief;
- the kind and quantity of the activities to be carried out;
- the planned duration for carrying out the commission;
- the eventual phasing of the commission;
- the collaboration with third party-consultants from other professional areas and/or within the own discipline;
- activities which are put out by the consultant to specialists;
- to what extent available know-how and results from former commissions can be applied;
- whether the activities can be carried out in the own office, elsewhere or also abroad;
- the influence of governmental instructions and regulations;
- the records, documents and papers to be delivered.

And insofar as the commission bears upon the execution of an object moreover:

- the budget which is available for the execution costs;
- the eventual collaboration with a team of executing parties;
- whether the commission concerns new construction, extension, alteration, repair, renovation or restoration;
- whether there is one user or more users to communicate with;
- whether the execution is commissioned to one or more parties within the same field or work is to be done in a building team relationship;
- how the execution is to be tendered or if the execution will be carried out as a measurement contract;
- the eventual phasing of the execution.

In addition an estimate of the internal costs to be spent on the commission can of course serve as a handle to determine the percentage or the sum. It is important for the parties to realize that in the event of alterations in the points of departure the concluded financial arrangements should be adjusted, see article 9.

Article 50

Consultancy costs

Supervision costs (clause 3)

Supervision can be carried out as follows:

- full-time supervision for the duration of the execution during working hours as held on to by the executing parties;
- part-time supervision at certain fixed times or days of the week;
- part-time supervision for an average percentage to be agreed upon of the execution period;
- ad hoc or on demand by the executing party or the client.

The method of supervision, full-time, part-time or on demand can be determining for the mode of settling the supervision costs, as a percentage, on the basis of time spent or as a fixed sum, see article 51 clause 2.

Expenses (clause 4)

The settlement of the expenses includes more than what used to be known under the term 'advances and/or out-of-pocket expenses'.

Article 51

Determination of the consultancy costs

General

The consultancy costs can be determined in one sole manner for all parts, for example on the basis of spent time. In some cases however it will stand to reason to calculate for instance the fee according to one method and the supervision costs and expenses according to another method. A differentiation over the different stages can also be envisaged, see to this end the provision in article 2 clause 3 under k.

Article 52

Calculation as a percentage of the execution costs

The execution costs (clause 1)

For the determination of the execution costs, use can be made of the description of the construction costs under 3.2 of NEN 2631, titled 'Investment costs of buildings', first edition, march 1979. For that matter other standards with respect to execution costs can also render good service. It has to be settled whether the total execution costs of the object will constitute the basis for the calculation of the consultancy costs, or only further to specify parts, such as the costs of the structure or the installations. It can also be determined that the agreed percentage will be applied for all the execution costs, whether or not with the exception of particular parts which fall completely outside the attention area of the consultant. It is recommended anyway to settle this exactly.

Article 53

Calculation on the basis of spent time

The consultant is well advised to make an estimate of the time to be spent and of the fee and/or the supervision costs to be calculated on that basis. Should a limit-sum be agreed for the costs on the basis of spent time, then the consultant would be well advised to inform the client in time about a possible exceeding of this limit, to indicate the reasons therefor and to present a proposal for an adjusted sum.

Article 54

Determination of a fixed sum

A fixed sum does not mean that the sum of the consultancy costs due at the end of the commission has not been altered in comparison with the agreed sum at the beginning of the commission. After all, the article states clearly that the sum is related to the volume and duration of the activities mentioned in the commission. Should the work last longer owing to a cause which is to be attributed to the client and the consultancy costs therefore have raised accordingly, then the originally agreed fixed sum can be adapted.

Article 55

Consultancy costs in the case of adjustments and alterations

Alterations in the execution of the commission (clauses 1 and 3)

Alterations in the execution of the commission can follow among other things from:

- data delivered by the client which do not match the reality;
- wishes or decisions which are not communicated in time to the consultant;
- variants or alternatives for studies or designs already completed;

- coming back on previous decisions;
- increase or reduction of the previously fixed budget;
- comments on the activities of the consultant which, with regard to content, professionalism or aesthetics, fall under his responsibility, and obviously insofar as they are not the consequence of a fault by the consultant;
- the choice for alternative solutions, constructions, techniques, execution methods and the like brought up by third parties;
- faults perpetrated by third parties.

The consultant is well advised to report in time to the client the coming about of alterations, in a well-founded and motivated manner. The client will possibly ask the consultant to make an estimate of the alteration costs.

As soon as the points of departure on which the agreed percentage or sum is based at the conclusion of the contract, undergo a relevant change in the course of the commission, this percentage or sum is not fixed anymore.

Article 56

Payment of consultancy costs

Term of payment of the consultancy costs (clause 4)

In clause 4 of article 56 it is stipulated that the client shall pay the declared sum within 30 days after the date of the relevant bill, insofar as not agreed otherwise. To avoid discussions, clause 6 of article 56 stipulates that the client, without proof of default, is himself in default if he has not settled the payment within 30 days. The term of 30 days is therefore a fatal term.

Clause 4 mentions a term of 30 days. If the parties wish to agree on a longer term of payment, then they should lay this down in the agreement. If this term is longer than 60 days, then the law (see article 6:119 a clause 5 Civil Code) requires that this term should not be unfair towards the creditor (the consultant), as well as with regard to the question whether the debtor (the client), has objective reasons to depart from the 60 days term, the nature of the performance and every substantial departure from good business practices.

If the agreement is an agreement with the authorities (article 6:119 b clause 5 Civil Code), then it may be agreed to depart from the 30 days term, but only if parties lay down explicitly a longer term of payment in the agreement and the special nature or characteristics of the agreement justify objectively this departure. In that case the payment term can amount at the utmost to 60 days.

Indebted interest (clause 6)

If the client does not pay the consultant on time, then this has two consequences:

- a) he has to pay interest from the day following the day which has been agreed upon as the ultimate settling day up to and including the day on which the client has settled the bill.
- b) collection costs may be incurred.

Article 56 clause 6 fixes the interest and clauses 9 and 10 fix the collection costs.

The Civil Code acknowledges two kinds of legal interest. One for the consumer, see article 6:119 BW and one for the so-called business agreement, that is the agreement for benefit which compels one or more parties to give or do something and which has been concluded between one or more natural persons acting in the exercise of a profession or business,

see article 6:119a. These percentages diverge. It is therefore important to observe the correct percentage. Article 2 clause 3 sub s stipulates that the parties must make a choice prior to the coming about of the commission. Furthermore, article 7 clause 7 of the Standard form of basic contract is the place to determine the choice.

Collection costs (clauses 9 and 10)

If the client does not fulfill on time his payment obligations (see clause 4 as to what is to be meant by timely payment), then the situation could arise that the consultant has to make costs in order to get his due. The clauses 9 and 10 are about these costs. The point of departure is that all costs actually incurred by the consultant to get his bill paid, both judicial and extrajudicial costs, are at the expense of the client.

The legislator has provided a different rule for consumers, so that the provision of clause 9 is not applicable for them. Therefore clause 10 stipulates that for commissions in which the client is a consumer, the Legal rules for collection costs are to be applied.

This is what the Legal rules stipulate:

- a) Rules for the remuneration of collection costs will be laid down (by Order in Council).
- b) It is not allowed to depart from these rules at the expense of the creditor (that is: the consumer-client).
- c) The consumer-client is only indebted for these collection costs when the following conditions are fulfilled:
 - i) the consumer-client has not fulfilled his payment obligation on time;
 - ii) the consultant has summoned the consumer-client to pay within fourteen days after the day of the summons;
 - iii) the summons mention that the consequence of the failure to pay leads to the indebtedness of judicial and extrajudicial collection costs;
 - iv) the consumer-client does not pay.

The Rule by Order of Council of 27th march 2012 (Rule for the remuneration of extrajudicial collection costs) can be consulted at: www.wetten.overheid.nl.

Chapter 13 Applicable law, disputes and enactment

Article 58 Disputes

General

A difference of opinion does not necessarily lead to a dispute to be submitted to arbitrators. The first clause provides the possibility of solving the difference of opinion by friendly settlement. In this respect one may think, among other things, of mediation. To this end one can turn to the Dutch Mediation Institute in Rotterdam. Furthermore one may point at the existence of the complaint committee of NLingenieurs and at the possibility to bring up a problem before the dean of the BNA.

Court of justice, section cantonal court (clause 4)

Disputes with a claim with a value up to € 25,000 can be brought up before the court of justice, section cantonal court, instead of the arbitration court. If a counterclaim is set up with a higher value, and if there is the faintest relation between the two claims, and this will often be the case, then the court of justice, section cantonal court, will settle both cases. On the other hand an expert will have to be appointed if the case becomes technically complicated. Possibly the financial limit under which a claim can be submitted to the cantonal judge may be raised. However this will not entail a change in this provision (see thereto also the provision in footnote 13 of the Standard form of Basic contract).

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