Legal certainty and the construction of contracts in Dutch law

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1 INTRODUCTION[1]

Dutch contract law relies heavily on the open standard of reasonableness and fairness. In the end, the interpretation of a contract is based on "*reasonableness and fairness*", hereinafter also referred to as "good faith and fair dealing". The same goes for the question whether an addition to the contract is required, because the parties have forgotten to include a provision.[2] Moreover, the exercise of contractual rights is not only corrected when there is abuse of rights, but also if reliance on those rights were unacceptable in the circumstances according to standards of reasonableness and fairness.[3] Finally, a number of provisions are regarded as special elaborations of the principle that parties should behave in accordance with the requirements of reasonableness and fairness. A typical example is the provision about unforeseen circumstances.[4] According to this provision the court may, upon the demand of a party, modify or set aside the contract on the basis of unforeseen circumstances that are of such a nature that the other party may not, according to standards of reasonableness and fairness, expect the contract to be maintained in unmodified form.

This express acknowledgement of the role of reasonableness and fairness is not unique. There are more legal systems in which similar notions have roles to play. Thus, anyone who familiarises themselves with the Unidroit Principles for International Commercial Contracts (PICC) or the comparative comments on the Draft Common Frame of Reference (DCFR), can see that such notions are recognisable everywhere, for example in words to the effect that contract parties must observe "good faith and fair dealing".[5] Although the differences

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1 This contribution is based on two earlier publications. See M.H. Wissink, 'Vertrouwen op tekstuele uitleg', in: Th.M. de Boer, J.W. Fokkens, P. Vlas, M.J. Vos & C.L. de Vries Lentsch-Kostense, *Strikwerda's Conclusies (Essays in honour of Luc Strikwerda)*, Deventer: Kluwer 2011, pp. 585-601 and 'Afspraak is afspraak?", Tijdschrift voor Agrarisch Recht 2005, pp. 210-219.

2 Article 6:248 paragraph 1 DCC (Dutch Civil Code).

3 Article 6:248 paragraph 2 DCC.

4 Article 6:258 DCC.

5 C. Von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, München: Sellier 2009, p. 679 *et seq.*

between legal systems often concern the formal position of such notions (e.g. do they only pertain to the performance of the contract?), in the end they are concerned with their importance. Do such notions play a prominent role, indeed one which sometimes permeates contract law as a whole, as is the case in Germany and the Netherlands? Or is this a marginal role, whereby express recognition is granted merely in certain cases, as in English law?[6]

The above may give the impression that reasonableness and fairness will in Dutch contract law usually play a dominant role when solutions for concrete cases are sought. Nevertheless, theory may differ from practice in this respect. In theory, reasonableness and fairness always come into play. And it stands to reason that nobody (wherever this may be) will defend the position that the court must attain a result which is obviously unreasonable. That is the long and the short of it for most cases, though. What really matters, is to determine the true meaning of reasonableness and fairness in concrete cases where the issue is the interpretation of or addition to a contract or interference in the exercise of contractual rights. For example, the court cannot simply interpret the contract in a way which it deems reasonable and fair. It must interpret the contract on the basis of rules of law that are geared to the intention of the parties or to the meaning that third parties attribute to the text used by the parties. Reasonable expectations will be instrumental here, such as the question how certain words will normally be understood. Still, the importance attached to this may be greater, but it may also be less.

Indeed, when a court has to assess a contract there is always an area of tension between "certainty" and "flexibility". This may be translated roughly into the question whether the court should interpret the contract primarily literally, should sparingly add terms, and should only in highly exceptional circumstances – i.e. practically speaking: should not – interfere in the exercise of contractual powers. Naturally these questions also turn up in a system such as Dutch contract law. While Dutch law encompasses the possibility of "flexibility", it is not compulsory. The system provides an equal opportunity to give priority to "certainty". The court may postulate a flexible approach to a written contract, for example when it has been drafted by parties lacking expertise, in great haste and with the intention to represent no more than the outlines of their agreement in words understandable for them at that moment. The court may postulate the (relative) certainty of the text, for instance when there have been final negotiations about the contract by professional parties assisted by expert legal advisers who have made sure that the text of the contract adequately and fully represents the consensus of the parties.

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6 On the question how English law should deal with the duty to act in good faith accepted elsewhere, see for example Gerard McMeel, *The Construction of Contracts. Interpretation, Implication and Rectification*, Oxford University Press 2011, pp. 104 and 297 *et seq*.; Neil Andrews, *Contract Law*, Cambridge University Press, pp. 375, 659 *et seq*.

In the former case a flexible approach represents what in that particular case is in keeping with reasonableness and fairness, since that approach takes into account the circumstances of the case and the interests of the parties. In that sense it is sufficient for the parties to make an inadequate representation of their agreements in the contract, for they will not be punished with a textual interpretation that does not do justice to their intentions. Of course they will pay the price for this, i.e. they will have to incur costs *ex post* in order by means of proceedings to obtain clarity on the contents of their contract and in so doing will run the risk of the court ruling against them. In the latter case a strict approach, aiming at legal certainty, will represent what in that case is in agreement with reasonableness and fairness, because that approach takes the circumstances of the case and the interests of the parties into account. They have invested *ex ante* in a contract representing their consensus as adequately and fully as possible and may therefore assume that the text of the contract will take priority in its interpretation.

These examples indicate that giving a central role to reasonableness and fairness in contract law admittedly opens up the possibility of a flexible approach to a contract, but does not compel anyone to do so, and that the circumstances may also justify a stricter approach. While this broad range of options may be agreeable for a court, enabling it thereby to attune its resolution of a conflict to the particularities of a case, it may simultaneously lead to a measure of uncertainty for the parties about the way in which the court will view their contract, if they are forced to seek a court judgment in case of a conflict. It is against this background that this contribution concentrates on the question to what extent the parties can exert influence on the way in which the court will approach their contract. Thereby the interpretation of the contract will be first and foremost. In this respect Dutch law shows a distinct development, emphasising the importance of "certainty" in specific cases. Following on that, some attention will be devoted also to the influence of the parties on the addition to the contract and on the possibility of rectifying the exercise of contractual powers.

2 Certainty and interpretation of the contract

The discussion whether Dutch law in its interpretation of certain contracts succeeds in striking the right balance between legal certainty and flexibility has been going on for a while. Some authors are of the opinion that the manner in which contracts are interpreted according to Dutch law leads to uncertainty

which specific types of parties would wish to avoid.[7] A remedy could be found in an approach to the contract that would be textual in principle. Thereby the interpretation of the contract would be influenced less by 'the circumstances of the concrete case, assessed according to standards of reasonableness and fairness'.[8] The result would be that it is clearer beforehand how the contract should and will be interpreted. It appears that this criticism is voiced (in any case: also) against the background of the international commercial legal practice.[9] Just think of professional parties in an international context, under the influence of the Anglo-American legal sphere, concluding commercial contracts about the text of which they have had final negotiations assisted by specialised legal advisers, whether based on internationally current models or not. If these parties need the contract to be interpreted textually, there is reason to consider to what extent Dutch law can fulfil that need.

In order to prevent misunderstandings it is useful to describe what is meant by the phrase 'textual interpretation' in this contribution. While this may differ from case to case, an attempt will be made to give a general interpretation of this for the benefit of the discussion. Textual interpretation obviously means

7 See for this opinion, with different nuances, inter alia F.W. Grosheide, 'Lees maar, er staat wat er staat', Contracteren 2000/4, p. 100 *et seq*.; the same, 'Ad fontes', *Contracteren* 2005/2, p. 30; R.P.J.L. Tjittes, 'Enige opmerkingen over de beperkte rol van de redelijkheid en billijkheid in het ondernemingsrecht', *Contracteren* 2001/2, p. 31; the same, *Uitleg van schriftelijke contracten*, Nijmegen: Ars Aequi Libri 2009, p. 24; C. Drion, 'Evenwicht en proportionaliteit in het (commerciële) contractenrecht', in: J.J. Brinkhof *et al.* (ed.), *Contracteren internationaal* (Grosheide-bundel), Den Haag: Bju 2006, p. 190; R.H.J. van Bijnen, *Aanvullend contractenrecht* (doctoral thesis Tilburg), Den Haag: Bju 2005, p. 319; R. de Vrey, 'Het waterdicht maken van een Nederlands contract op Angelsaksische wijze', in *Contracteren internationaal* 2006, p. 87 *et seq*.; R. Hofstede and W. Oostwouder, 'To cultivate command of language. Over het gebruik en de uitleg van Engelse termen in Nederlandse (overname-)contracten', in *Contracteren internationaal* 2006, p. 30; H.N. Schelhaas, 'Pacta sunt servanda bij commerciële contracten', *NTBR* 2008/4, p. 150 *et seq*.; J. Meier Timmerman Thijssen, 'De ontvankelijkheid van het Nederlandse privaatrecht voor invloeden vanuit de Anglo-Amerikaanse financieringspraktijk', *Contracteren* 2009/4, p. 123. Further compare M. Wolters, 'Uitleg van schriftelijke overeenkomsten. Over de onzalige trend naar een primair taalkundige uitleg van contracten', *Contracteren* 2009/1, p. 14; M.M. van Rossum, *De redelijkheid en billijkheid bij commerciële contracten* (oration OU), Deventer: Kluwer 2010; C.E. Drion, 'Anglo-Amerikaanse contracten, een zegen of een ramp?', *NJB* 2011/24, p. 1523; P.S. Bakker, 'Uitleg van commerciële contracten (I)', *WPNR* (2011) 6891, p. 477.

8 Dutch Supreme Court 20 February 2004, *LJN* AO1427, *NJ* 2005/493 with commentary from C.E. du Perron (*Pensioenfonds DSM-Chemie/Fox*).

9 Thus, there are many references to English law. See on interpretation Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912. See for example R.P.J.L. Tjittes, *Uitleg van schriftelijke contracten*, Nijmegen: Ars Aequi Libri 2009, p. 77. This has brought English law closer to Dutch law among others, but how much closer is a matter of appreciation. See for instance Lord Hoffmann in *Chartbrook Limited v Persimmon Homes Limited and others* [2009] UKHL 38 esp. nos. 37-39 and 47; J.M. van Dunné, 'Normatieve uitleg à l'anglaise. Investors Compensation Scheme (1998) als de Engelse Haviltex-zaak', in: E.H. Hondius *et al*. (ed.), *Contracteren internationaal* (Grosheide-bundel), Den Haag: Bju 2006, p. 104.

an interpretation based on the text as a whole, i.e. including arguments that may be derived from its methodology. That will not suffice, though, as it is inevitable to consider factors outside the text in order to attach significance to it. Factors such as the type of transaction and its business background do tend to cast light on the meaning of the text. In addition, the context may prove that the contract does not use certain terms in their customary linguistic meaning, but in a technical meaning connected with the nature of the transaction. Although the above may be extended with more examples,[10] the aim here is to clarify that textual interpretation encompasses more than a merely linguistic interpretation of the contract and cannot go without the context. Consequently, textual interpretation is not at odds with a contextual interpretation, it is more a matter of gradation. Textual interpretation presupposes a certain attitude to the text of the contract. To put it briefly, the point is that in determining what the parties have agreed, the third party called in to do so (court, arbitrator) should focus attention on the text. The text is central and contextual factors, if any, play a role in that light. First the text, then the rest, if necessary. In this way, one avoids elaborations unknown beforehand (i.e. at the time of conclusion of the contract) of what requirements of reasonableness and fairness would entail in the circumstances of the case, unless this is impossible.

What does Dutch law now have to offer to the professional parties referred to in 7? According to the casebook judgment Pensioenfonds DSM-Chemie/Fox, in the interpretation of a written contract all circumstances of the concrete case are always decisive, assessed according to what the standards of reasonableness and fairness entail.[11] At first glance this is a far cry from the textual interpretation described above. On closer consideration, though, that is not always so. After all, in practice interpretation does not take place on the basis of this principle, but on the basis of a criterion of interpretation grafted onto it.[12] Briefly put, interpretation is generally conducted on the basis of either the 'Haviltex' criterion, named after the 1981 judgment in the case Ermes/Haviltex).[13] Upon application of the (subjective-objective) Haviltex criterion the question at issue is what the parties thought and could think they agreed to; in that context all circumstances of the case are relevant. However, in some case, notably when interpreting collective bargaining agreements, an (objective) criterion is applied. According to this so called CAO criterion (these three letters refer to the Dutch abbreviation for collective bargaining agreement) the question is what third parties think the document means; in that context not only

10 Think of interpretive tools such as those expressed in articles 4.4-4.7 of the Unidroit PICC.

11 Dutch Supreme Court 20 February 2004, *LJN* AO1427, *NJ* 2005/493 with commentary from C.E. du Perron *(Pensioenfonds DSM Chemie/Fox)*.

12 Dutch Supreme Court 1 October 2004, *LJN* AR2974, *NJ* 2005/499 *(Taxicentrale Middelburg)*, refers only to the principle, for that matter.

13 Dutch Supreme Court 13 March 1981, *NJ* 1981/635 with a commentary form C.J.H. Brunner.

textual arguments are relevant, but other arguments also, provided they are objectively apparent.[14] The casebook judgment referred to holds that there is a smooth transition between the two criteria of interpretation. On the one hand, because there is sometimes a reason for a more objective interpretation in the application of the Haviltex criterion in connection with the position of third parties. On the other hand, because the collective bargaining agreement criterion takes into account more circumstances than just textual ones. The contracts discussed in this contribution must in principle be interpreted according to the Haviltex criterion, which, as stated, already leaves room for an objective application. In all cases the text of the contract is, of course, an important factor. In the Pensioenfonds DSM-Chemie/Fox judgment it is also observed that the idea underlying both the collective bargaining agreement criterion and the Haviltex criterion is that the interpretation of a written contract should not be made only on the basis of the linguistic meaning of the words in which it has been put. However, as the Dutch Supreme Court continues, in practice the linguistic meaning usually attributed to these words, when read in the context of that document as a whole, according to generally accepted standards (in the relevant circle of society), are often of great relevance in the interpretation of that document. This observation is made against the background that (even) according to the Haviltex criterion the text of the contract is not sanctifying. As the Haviltex criterion is context-sensitive, it is equally possible in its application in a concrete case that much or little weight should be accorded to the text of the contract. This is right and proper according to Dutch (and other)[15] views, because the parties are bound to what they envisaged. If the text expresses the parties' intention inaccurately or incompletely, then this will be taken into account. For the Dutch Supreme Court it appears to be relevant to retain an equilibrium between factors providing "certainty" and factors providing "flexibility" in the interpretation of contracts. A judgment balancing between different approaches may well be unavoidable, not only because Dutch law is familiar with both approaches (and variants), but also because the Dutch Supreme Court here speaks at a high aggregation

14 See for example Dutch Supreme Court 20 February 2004, *LJN* AO1427, *NJ* 2005/493 with commentary from C.E. du Perron *(Pensioenfonds DSM Chemie/Fox)*; Dutch Supreme Court 8 October 2010, *LJN* BM9621, *NJ* 2010/456.

15 See C-W Canaris and H.C. Grigoleit, 'Interpretation of Contracts', in: A. Hartkamp *et al.* (ed.), *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri and Kluwer Law International, 2011, pp. 606-607; article II:801(1) DCFR and the pertinent Notes 8 and 9 (C. Von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, München: Sellier 2009, p. 558. This approach is taken in article 56 of the Feasibility study for a future instrument in European Contract Law dd. 3 May 2011 of the Commission Expert Group on European Contract Law (http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf) and in article 58 of Annex I to the Proposal for a Regulation on a Common European Sales Law (COM(2011) 635 final) of 11 October 2011.

level, namely about the interpretation of all contracts in all possible sorts of cases, which may thus be vastly different from each other.

At the same time reference may be made to a tendency in the case law of the Dutch Supreme Court in the interpretation based on the Haviltex criterion to attribute much weight to textual arguments when the dispute concerns commercial contracts concluded between professional parties for which the final negotiations have been conducted with the assistance of legal experts.[16] Thereby, then, it aims for the objective application variant of the Haviltex criterion. In a number of cases, (too) briefly put, a (more) textual interpretation of the relevant contracts is approved by the Dutch Supreme Court. That textual arguments in these cases carry a lot of weight, does not appear to be the result of a merely case-bound judgment of the weight of the arguments put forward by the parties for or against a certain interpretation. It turns out that there is a normative component at play as well: textual arguments must weigh heavily here. This tendency forms part of a broader development in Dutch law, whereby different cases are mentioned in which an objective interpretation occupies a special place.[17] At the same time the standard application of the Haviltex criterion is maintained, which also gives the court more scope to tackle the interpretation of the contract in the manner it deems best in the given case,[18] even if this should mean that the contract is not interpreted literally. Thereby the court deciding questions of fact has a great

16 Dutch Supreme Court 19 January 2007, *LJN* AZ3178, *NJ* 2007/575 *(Meyer Europe/PontMeyer);* Dutch Supreme Court 29 June 2007, *LJN* BA4909, *NJ* 2007/576 with commentary from M.H. Wissink *(Derksen/Homburg)*; Dutch Supreme Court 9 April 2010, *LJN* BK1610, *NJ* 2010/411 *(UPC/Aandeelhouders Signal)*; Dutch Supreme Court 4 June 2010, *LJN* BL9546, *NJ* 2010/ 312 *(Euroland/Gilde Buy-Out Fund)*.

17 Dutch Supreme Court 20 February 2004, *LJN* AO1427, *NJ* 2005/493 with commentary from C.E. du Perron *(Pensioenfonds DSM Chemie/Fox)* mentions the collective bargaining agreement criterion and considers that there may be reasons for a more objective interpretation under Haviltex in connection with the interests of third parties. See further: Dutch Supreme Court 8 December 2000, *LJN* AA8901, *NJ* 2001/350 *(Eelder Woningbouw/Van Kammen)*, Dutch Supreme Court 13 June 2003, *LJN* AH9168, *NJ* 2004/251 *(Teijsen/Marcus)* and Dutch Supreme Court 22 October 2010, *LJN* BM8933, *NJ* 2011/111 with commentary from F.M.J. Verstijlen *(Kamsteeg/Lisser)*, all about the interpretation of a notarial deed of transfer of or creation of a right to a registered property regarding the question what has been transferred or created; Dutch Supreme Court 23 December 2005, *LJN* AU2414, *NJ* 2010/62 *(De Rooij/Van Olphen)* about the interpretation of a provision about 'normal use' in a standard deed such as the NVM deed; Dutch Supreme Court 2 February 2007, *LJN* AZ4410, *NJ* 2008/104 *(NBA Management/Meerhuysen)* about the interpretation of a perpetual clause in auction conditions. Sometimes it is sufficient to indicate that there is a reason for interpreting a contract especially on the basis of objective factors; see Dutch Supreme Court 16 May 2008, *LJN* BC2793, *NJ* 2008/284 *(Chubb/Dagenstead)* concerning the description of cover in a contract of insurance; Dutch Supreme Court 22 October 2010, *LJN* BN5665, *NJ* 2010/570 *(Euronext/ASF Brokers)* concerning the AEX Listing and Trading Rules; Dutch Supreme Court 18 June 2010, *LJN* BL8514, *NJ* 2010/354 *(Erasmus Beleggingen)* concerning a perpetual clause and a stipulation attached to a certain capacity.

18 Dutch Supreme Court 23 April 2010, *LJN* BL5262, *RvdW* 2010/579 *(Halliburton/X)*.

arsenal of strategies at its disposal for the interpretation of a contract. Although it is clear in some cases that a certain mode of interpretation must be selected, the choice of the approach to be adopted is mostly left to the understanding of the court (of the fact-finding instance).

In view of this case law there is a good chance that according to Dutch law, textual arguments will play a big role, or will even be decisive, in the interpretation of commercial contracts concluded between professional parties for which the final negotiations have been conducted with the assistance of legal advisers. However, it is not a foregone conclusion that the court *must* in such contracts *always* select this mode of application of the Haviltex criterion. Perhaps that would be asking too much, notably for a practical reason. Even though this group of contracts may be described in the abstract on the basis of a number of factors (such as professional parties, commercial contract, negotiations assisted by advisers), that description is not so accurate that one can always say that textual arguments should carry a lot of weight in the interpretation. It does make a difference how professional the parties involved really are: is it a small shopkeeper, working locally, or an internationally operating company? It also makes a difference how intensive the negotiations have been and to what extent the pertinent expert assistance influenced the phrasing of the contract. Prescribing a certain manner of interpretation exclusively on the basis of the factors mentioned could give rise to discussions about the proper delineation of the relevant category, when the discussion should focus on the proper interpretation of the contract. Conversely, an inductive approach, like the one adopted so far by the courts , allows the court to assess on the basis of the concrete case whether the case is one in which a (more) textual interpretation of the contract is called for.

Does this case law sufficiently meet the need of certain parties for their contract to be interpreted textually? For the parties that would like to have clarity beforehand about the question whether their contract will be interpreted textually, the message has not been unambiguously confirmed according to the current state of the art in case law. The existence of the possibility or even likelihood of a textual interpretation of the contract may not be enough to meet the need for textual interpretation when that question implies that the parties (and their advisers) may firmly depend on it. Can this certainty be provided under Dutch law?

Although courts, on the basis of their extensive experience in deciding all kinds of matters about different types of contracts, may have reasons to question the correctness of a textual interpretation, there may be grounds in certain cases to focus on that in particular. Not in every case does the contract prove to be the reliable compass which the parties had beforehand thought they could go by safely. Experience has shown that a textual interpretation only gives certainty to the extent that the text closes discussions. Whether the text will indeed prove to do so, is something that the parties can never be sure of in

advance.[19] Nor are they sure in advance whether their own party interest will in a future dispute be served best by a textual interpretation. Still, it is conceivable that the parties are aware of this and yet display a preference for textual interpretation. This may be explained as follows. In a certain sense the desire for a contract to be interpreted textually implies a lack of confidence in the ability of a third party (court or arbitrator) – still unknown at the time of conclusion of the contract – who will judge a possible dispute, to judge on the basis of what the parties really envisaged when concluding the contract.[20] This is not intended to disqualify any such third party, for that matter. The lack of confidence in this third party may be seen as a derivative of a lack of confidence in the other party. Will the latter, in case of a dispute about the contract arising after its conclusion, not be tempted to give its own interpretation ('twist') to the contract, only because that is advantageous for it and will its scope to do so not increase as contextual factors are more decisive for the interpretation? Maybe it does not end with the fear that such perceived opportunism of the other party will succeed with the court or the arbitrator. The lack of confidence may also be related to the contracting party itself. There are always different people from the organisations of the parties and from their advisers involved in (highly) complex transactions, while the degree of involvement and responsibility of each of them will vary. In such transactions there is a risk that a joint memory regarding the meaning of some of the agreements made at the time is absent, or cannot be (re)constructed afterwards with sufficient certainty.[21] Thus, the preference for a textual interpretation eventually rests on an effort to reduce uncertainty. For the parties – particularly the other party – the margin must be reduced to plead (apparently) with the force of arguments certain views not supported by the text of the contract. For the court or the arbitrator the margin must be reduced to take a certain decision not supported by the text of the contract. Parties who think along

19 Compare for instance Dutch Supreme Court 19 January 2007, *LJN* AZ3178, *NJ* 2007, 575 *(Meyer Europe/PontMeyer) LJN* BL9546, and Dutch Supreme Court 4 June 2010, *LJN* BL9546, *NJ* 2010/312 *(Euroland/Gilde Buy-Out Fund)*.

20 Compare R.H.J. van Bijnen, *Aanvullend contractenrecht* (doctoral thesis Tilburg), Den Haag: Bju 2005, p. 200.

21 A similar thing applies when standard contracts or boilerplate provisions are used without the parties devoting sufficient attention to their contents. Compare C.E. Drion, 'Anglo-Amerikaanse contracten, een zegen of een ramp?', *NJB* 2011/24, p. 1523. The problem may be obviated partly by working with a customary or standard meaning of such provisions. However, it is not the starting point of Dutch law that certain formulations have a standard or customary meaning. The familiar example refers to terms such as 'vouch for' or 'guarantee'; see Dutch Supreme Court 22 December 1995, *LJN* ZC1930, *NJ* 1996/300 *(Hoog Catharijne)*; Dutch Supreme Court 4 February 2000, *LJN* AA4728, *NJ* 2000/562 with commentary from JBMV *(Mol/Meijer Beheer II)*. When such a meaning is actually established, the Haviltex criterion subsequently takes it into account. See Dutch Supreme Court 4 May 2007, *LJN* BA1564, *NJ* 2007/187.

these lines, choose to rely on the text of their agreements, knowing that this entails risks as well.

In view of the principle of party autonomy the court has reason to respect that choice. As argued, however, it is difficult to formulate a general sub-rule by way of a distinction of the general Haviltex criterion. Indeed, under Dutch law the circumstances under which the arguments in favour of a textual interpretation apply are circumstances that will not always be valid. Therefore it is for the court to decide whether the case is one in which the conditions for a textual interpretation are present. An expedient may be for the parties in their contract to make a distinct choice for a textual interpretation. This is not necessary for the court to arrive at a decision that in the circumstances of the case the interpretation should accord a lot of weight to textual arguments; this decision is made even now, without such a clause. It is possible for the court to derive from a contractual choice for textual interpretation that the parties insist on this form of interpretation, provided that choice was made deliberately. If it then concerns a case that qualifies for this, the court can rest assured that this manner of interpretation, with all the pros and cons it entails, is the desirable form of interpretation for the parties concerned. That provides the basis for taking things a step further and stating that under these circumstances the parties' choice for textual interpretation must be respected. Once that is assumed, the parties can be certain beforehand that their contract will be interpreted textually.

3 Certainty of and addition to the contract

This will not suffice, because the legal consequences of contracts are not determined only by (interpretation of) the agreements made, but also by the other sources of law referred to in article 6:248 DCC (Dutch Civil Code): law, usage and reasonableness and fairness. The effect of reasonableness and fairness warrants particular attention in this context,[22] for its impact on the contract is the most difficult to gauge beforehand. It is known that interpretation and addition are legally related instruments. According to the (prevailing) view, which is also expressed in the case law of the Dutch Supreme Court,[23] these are two separate tenets. Indeed, only after it has been established by means of interpretation what rights and duties arise directly from the con-

22 Compare C.E. Drion, 'Uitleg van uitleg', *NJB* 2010, p. 279 and 'De status van de redelijkheid en billijkheid, *NJB* 2007, p. 433, which speaks of the 'knotty tenet' of interpretation and the 'panacea' of reasonableness and fairness.

23 See for example Dutch Supreme Court 19 October 2007, *LJN* BA7024, *NJ* 2007/565, *JOR* 2008/23 with commentary from Tjittes *(Vodafone/ETC)*, legal grounds 3.4-3.5 (cf. about this judgment also the discussion between Grosheide and Drion in *Contracteren* 2008, pp. 30-32); Dutch Supreme Court 19 November 2010, *LJN* BN7886, *NJ* 2010/623 *(Skare/Flexmen)*; Parl. Gesch. Boek 6, pp. 67 and 69; Asser/Hartkamp&Sieburgh 6-III* 2010, nr. 366.

tractual agreements, can it be ascertained which obligations and other legal consequences are additionally attached to these agreements by the law, usage and reasonableness and fairness. It is at once acknowledged that in practice the interpretation of the contract as a whole and the role of the additional effect of reasonableness and fairness are occasionally difficult to separate, seeing that reasonableness and fairness also play a role in the interpretation. As a result, one cannot always indicate clearly where 'interpretation' stops and 'addition' begins. For that matter, the prevailing doctrine in the Netherlands is in line with that of other (European) systems, which also make the distinction between interpretation and addition, along with their own nuances.[24]

Whereas the blurred boundary line between interpretation and additional effect of reasonableness and fairness is not problematic in general, it may give rise to problems in contracts referred to here whereby the parties' wish is that the text should be central in their interpretation. That is precisely where the follow-up question may crop up: is it not likely that a contract interpreted so strictly should have shortfalls rather than a contract that allows for a broad and reasonable interpretation based on the circumstances of the case? And if so, does this not imply that this leaves more room for the additional effect of the principle of reasonableness and fairness? Or, conversely, should the strict approach governing the interpretation of such a contract be carried through also to the additional effect of reasonableness and fairness? The latter approach is preferable when it may be assumed that the parties have deliberately decided on a strict interpretation in a case qualifying therefor. This approach seems feasible.

The impact of the additional effect of reasonableness and fairness may fluctuate, depending on the nature of the contract. This *may* mean that there is little room left for the additional effect of reasonableness and fairness, because it concerns a contract that must be interpreted strictly. In case law this is expressed, for example, in the idea that a strict application of the conditions of an independent bank guarantee cannot be circumvented by attaining a result deviating from that strict application on the basis of the additional effect of reasonableness and fairness.[25] Following on this, it may also be argued that a strict application of the additional effect of reasonableness and fairness ties in with the nature of the contract in the sense that the result of the strict interpretation of the contract cannot be prejudiced by means of the

24 See M.W. Hesselink, *De redelijkheid en billijkheid in het Europees privaatrecht* (doctoral thesis Utrecht) 1999, p. 138; N. Kornet, *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (doctoral thesis Maastricht), 2006, p. 4, 266.

25 Dutch Supreme Court 26 March 2004, *NJ* 2004/309 *(Anthea Yachting Company/ABN-AMRO).* This does not exclude, by the way, that the bank may be obliged to point out to a party that the party's reliance on the guarantee does not satisfy the requirements. See Dutch Supreme Court 9 June 1995, *LJN* ZC1749, *NJ* 1995/639 *(Gesnoteg/Mees Pierson)* with commentary from PvS, in which the Dutch Supreme Court recognises the principle of strict conformity in accordance with the conclusion of advocate general Strikwerda.

addition.[26] This is not to say that no scope would be left for the additional effect of reasonableness and fairness. Here too, though, restraint will need to be exercised. The wish to do so could also be expressed by the parties in their contract, for instance by indicating that they think that the contract should only be added to on the ground of reasonableness and fairness when this is necessary to make the contract work in accordance with the parties' intentions.[27] In this context reference can be made to the provision of article II-9:101 paragraph 4 DCFR. It says that no 'implied term' can be assumed by the court 'if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing'. The comment clarifies that this provision is intended for the event 'where the parties have foreseen a contingency and have deliberately left it unprovided for, accepting the risks and consequences of so doing.' The provision is not intended for the event 'where the parties foresee a situation but either think it will not materialise or "forget" to regulate it without intending to accept the risks.'[28] A similar provision has been included in article 66 par. 3 of the Feasibility Study, though formulated slightly differently: 'if the parties have deliberately left a matter unprovided for, accepting that one or other party would bear the risk.' Article 68 par. 3 of the proposal for a Common European Sales Law also uses this formulation.[29] This formulation expresses even better that there is a distribution of risks. One could say that with regard to these deliberately 'unregulated' situations there is no 'gap' in the agreements, as it has been agreed that the party confronted with this situation must bear the consequences thereof itself.[30] It concerns situations of which the parties know that they could occur and which they knowingly leave 'unregulated' in the sense referred to just now.

4 Certainty and unforeseen circumstances

According to art. 6:258 DCC a contract may be modified or set aside 'on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form'. The provision concerns the occurrence

26 See also a case such as Dutch Supreme Court 16 May 2008, *LJN* BC2793, *NJ* 2008/284 *(Chubb/Dagenstead)*. It is difficult to conceive that the additional effect of reasonableness and fairness could lead to yet another result than the objective interpretation of the description of cover.

27 Compare Tjittes, *Uitleg van schriftelijke contracten*, Nijmegen: Ars Aequi Libri 2009, p. 88, about the correction by means of addition of a meaningless interpretation result.

28 C. Von Bar and E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law, DCFR, Full Edition*, München: Sellier 2009, p. 580.

29 On the understanding that one speaks of 'a matter unregulated' instead of 'a matter unprovided for'.

30 That is why in Dutch Supreme Court 19-11-2010, *LJN* BN7886, *NJ* 2010, 623 (*Skare/Flexmen*) it could be judged that the contractual provision about the allocation of taxes was not of such a far-reaching tenor as appeared to be the case at first sight.

of circumstances after the conclusion of a contract which are unforeseen, i.e. which have not been taken into account in the contract because the parties have not made any (tacit) arrangement about them. In addition, it must be a change of circumstances that is not for the risk of the party which suffers a loss as a result. According to settled case law the provision should be applied restrictively, since reasonableness and fairness require allegiance to the given word first and foremost.[31]

In the application of a provision such as article 6:258 DCC uncertainties are bound to present themselves, for the very reason that it concerns such special cases.[32] This may be clarified by some examples. Fluctuations in the market and hence of prices are a general fact. In principle, then, these cannot lead to the application of article 6:258 DCC. The same goes for price changes caused by amendments to legislation and regulations. In extreme cases the application of article 6:258 DCC is not excluded. A clear criterion is lacking, however. Sometimes a change in value of 50% or more is mentioned.[33] This is not meant to indicate that at such a percentage the contract should be modified; at most it gives an indication that article 6:258 DCC could apply (leaving aside whether, upon an affirmative answer, a price correction by the same percentage should take place). A very sharp fall in prices (by 170%) of waste paper has been deemed sufficient in case law, though.[34] One should consider that a contract of a (partly) speculative nature is incompatible with modification for that very reason, as it has allowed for the risk of price changes. In that sense the court ruled on a disappointing development in the price of building land when an appeal was made to a building company to fulfil its repurchase obligation after having transferred land to the municipality within the framework of the development of a zoning plan.[35]

The parties may have an interest in agreeing on a contractual arrangement about unforeseen circumstances. In this respect it should be noted that article 6:258 DCC is mandatory and cannot be contractually excluded.[36] The parties can try to put the flesh on the bones of this provision. They can make arrangements from which it follows that allowance has been made for certain changes in the contract. It may be agreed that certain changes are at the risk of one of the parties. Such a clause may also indicate how such changes should be

31 Dutch Supreme Court 20 February 1998, *LJN* ZC2587, *NJ* 1998/493 (*Briljant Schreuders/ABP*); Asser/Hartkamp & Sieburgh 6-III* 2010, nr. 444.

32 For an extensive survey of possible applications see P. Abas, *Rebus sic stantibus*, Deventer: Kluwer 1989, pp. 215-216. See also R. Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts-Comparative Perspectives* (doctoral thesis Utrecht), Antwerp: Intersentia 2011.

33 In the comment on art. 6.2.2 Unidroit Principles for International Commercial Contracts. See also Abas, WPNR 6307.

34 District Court of Roermond (summary proceedings) 1 July 1993, KG 1993, 317.

35 Court of Appeal of 's-Hertogenbosch 17 November 1983, BR 1984, p. 152.

36 Article 6:250 DCC.

dealt with. Thus, a price clause may indicate that the price is indexed according to a certain formula. Clauses like this clarify that the said change of circumstances cannot be considered to be 'unforeseen' in the sense of art. 6:258 DCC. However: no absolute certainty can be obtained thereby. The extent of the clause will need to be determined through interpretation (such as: does a price indexation also regard excessive price increases or only those that are normally foreseeable?). Here a contractual arrangement about the interpretation, such as discussed in section 2, may be useful.

5 Conclusion

All things considered, what role is left for reasonableness and fairness? Although that role is not played out, practically speaking it has been driven away towards the edges of the playing field. Rendered briefly, the following applies. In the approach described above, too, the starting point is maintained as described in the judgment Pensioenfonds DSM-Chemie/Fox, that for the interpretation of a written contract decisive importance will always be attributed to all circumstances of the concrete case, assessed according to standards of reasonableness and fairness. In the administration of justice this principle is made operational in an interpretation criterion which under certain circumstances may be objective (Haviltex criterion) or is objective by definition (the CAO or collective bargaining agreement criterion). It has been argued that an application of the Haviltex criterion may result in an objective interpretation whereby textual factors are dominant, that the parties may have good reasons for deciding on these in their contract and that the court can and must respect that choice in the cases referred to. Further, it has been argued that the additional effect of reasonableness and fairness should reflect this strict manner of interpretation of the contract. This means that the additional effect must not detract from the result of the interpretation when it concerns subjects which the parties have deliberately not provided for. The above implies that the parties can to a great extent exert influence on what reasonableness and fairness entail in the interpretation of and addition to their contract.[37] That also applies to parties' agreements about the application of article 6:258 DCC. Focusing attention on the text when determining the contents of the contract is, in these cases, not at odds with what reasonableness and fairness imply

37 This is not the same as the question whether the parties could contractually declare the additional effect of reasonableness and fairness to be inapplicable. See for that view R.H.J. van Bijnen, *Aanvullend contractenrecht* (doctoral thesis Tilburg), Den Haag: Bju 2005, p. 284; C.E. Drion, *NJB* 2007, p. 433; H.N. Schelhaas, *NTBR* 2008, p. 153. Against that H.C.F. Schoordijk, 'Het betwiste onderscheid tussen uitleg en derogeren te goeder trouw breekt op', *NJB* 2007, p. 1233; Asser/Hartkamp&Sieburgh 6-III* 2010, nr. 380; P.S. Bakker, 'Uitleg van commerciële contracten (I), *WPNR* 6890 (2011), pp. 481-482 and (II, end)', *WPNR* (2011) 6891, pp. 505-508.

in the relationship between these parties. However, in extreme cases, reasonableness and fairness will intervene. That follows from the presence of corrective mechanisms, such as articles 3:13, 6:248 par. 2 and 6:258 DCC. Thus, certain undesirable forms of party behaviour can be corrected (such as acting in bad faith and conduct resulting in forfeiture of rights), and in exceptional cases of circumstances really not foreseen by the parties the contract may be modified.