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De procesovereenkomst. Over de vrijheid van partijen het civiele proces vorm te geven

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The agreement as to proceedings. About the parties' freedom to shape civil proceedings. Summary

1 Introduction

In this dissertation the agreement as to proceedings is the central point. By means of an agreement as to proceedings, parties diverge from procedural law. It is relevant to conduct research into agreements as to proceedings, as they may contribute to a swift and efficient course of the civil proceedings. In addition, research into these agreements can result in a better insight into the question about the control over the proceedings. Who ultimately has the right to determine the course of affairs during the proceedings? Is it the parties, whose substantive rights are at issue, or is it the government, which makes the civil proceedings available?

Three main questions are to be distinguished in this research. Firstly, the admissibility of agreements as to proceedings has been examined. To what extent can parties validly conclude an agreement as to proceedings or derogate from procedural law by means of mutually attuned statements or behaviours? Secondly, the effect of agreements as to proceedings has been examined. What are the consequences of an agreement as to proceedings concluded by parties? Finally, it has been investigated what rules are applicable to such agreements.

2 Admissibility

2.1 *General guiding principles*

Sometimes it has been explicitly provided by law that parties may derogate from procedural law by means of an agreement or by means of certain behaviours or statements. Even if not explicitly provided by law, parties can in certain circumstances validly enter into an agreement as to proceedings. In order to see when this is so, it must be determined what procedural rules are of a directory nature.

In the German literature ideas about this subject are different. There, apart from agreements whereby parties derogate from a procedural rule, agreements are also recognised whereby the parties mutually undertake to exercise a procedural authority yes or no. In this way a broad admissibility of agreements as to proceedings is obtained. This distinction should not be taken over in Dutch law. Firstly, because the rule is that obligations of parties can never be detached from the rules that apply in the proceedings. Thus, it is not possible to assume that an agreement not to put up a

defence has no consequences in the proceedings to which it relates, but only results in a situation in which the party that does put up a defence becomes liable for compensation due to infringement of an obligation. Even if it should be accepted that such an agreement actually does have consequences for the primary proceedings, it cannot be recognised as a separate type of agreement as to proceedings. After all, if the parties commit themselves to exercise a certain procedural authority, they actually derogate from a rule of procedural law, notably the rule that a party is entirely free to exercise that authority. Therefore the admissibility of such agreements should be assessed according to the same criteria as are applicable to other agreements that diverge from procedural law.

To determine in what cases parties can validly conclude an agreement as to proceedings, then, it must be established which procedural rules are of a directory nature. This will need to be done by explaining these rules. The basic assumption here is that parties may derogate, unless specific reasons can be indicated that preclude derogation. In a state under the rule of law, any curtailments of freedom need to be properly legitimised.

The number of such curtailments depends on the question how the nature of civil procedural law is regarded. Procedural law is not only an instrument for enforcing parties' subjective rights, but also serves to maintain law and order and to safeguard legal peace. Wagner has argued that this latter goal is merely a side effect of the enforcement of the subjective rights of parties. In his view, legal peace is not jeopardised if a party itself decides not to enforce its rights. However, legal peace is jeopardised if a party does not have the *possibility* to enforce its rights. This even goes if the party *itself* has limited this possibility. A party may deem it highly iniquitous if it does not get what it is entitled to, *even if this is a direct result of its own acts*. Moreover, proceedings are not only important for the parties themselves, but also have an effect on the trust that society has in the administration of justice. If society sees that the court does not sufficiently enable a party to put forth its case, this will affect the court's authority, also if it acts in implementation of an agreement of the parties. Hence, legal peace cannot be maintained in all cases by simply following the wishes of the parties. Contrary to Wagner's view, the goal of maintaining law and order and safeguarding legal peace does bring its own requirements. It is perfectly possible to argue that a certain agreement as to proceedings is invalid due to general interests such as the maintenance of legal peace or the need to bring the truth in the case to light.

All in all, there are a number of interests that may prejudice the validity of an agreement as to proceedings. There is the interest of protection of the parties, the interest of protection of third parties, the interest of as limited a use of public funds as possible, the interest in sufficient access to the dispensation of justice being warranted, the interest of trust of society in the administration of justice and the interest of trust of society in the authorities. If none of these interests obstructs derogation from a procedural rule, parties can validly conclude an agreement as to proceedings.

The above is not changed if the legal relationship about which the parties are litigating is governed by mandatory private law. Only if a certain area has a strong link with the right of public order, are agreements as to proceedings excluded in this area. In addition, in such a case this only applies to those agreements as to proceedings that

are closely connected with the substantive case being litigated. Although the presence of 'ordinary' mandatory private law is no objection in principle, an exception applies furthermore if there is a standard of mandatory private law with the explicit purport to affect also the validity of agreements as to proceedings. An example in kind is article 7:6 BW (Dutch Civil Code) regarding consumer sale.

Within the context of arbitration and binding advice proceedings, parties can also enter into agreements as to proceedings. Indeed, in these contexts agreements as to proceedings are even more amply admissible than before regular courts. This is because the interest in the most limited use of public funds is not an issue, while there is a far more limited role for the trust in the administration of justice.

2.2 Application

On the basis of the guiding principles set out above it has been checked in this dissertation to what extent certain agreements are admissible. Each time it has been verified whether any of the aforementioned interests impedes the agreement as to proceedings. It is concluded in chapter 5 that agreements as to proceedings concerning the authority to conduct legal proceedings are usually invalid. Thus, parties cannot validly agree that there will be no access to a court whatsoever. The fact that parties can create natural obligations by an agreement can be explained because this concerns a substantive arrangement whereby, other than in the exclusion of the authority to conduct legal proceedings, there is no discrepancy between what applies inside and outside the courtroom. Invalid, too, are the agreement not to conduct legal proceedings about a portion of a claim, the agreement not to conduct interlocutory proceedings, the agreement limiting the authority to put forward facts or to take positions and the agreement to actually conduct legal proceedings. Admissible, on the other hand, is the agreement for binding advice. It would furthermore be a good thing if the possibility for the parties were accepted by means of an agreement for mediation temporarily to exclude the authority to conduct legal proceedings. And finally the legal system should be reviewed that parties cannot extend the competence of the court by assigning it another type of tasks than for which it is competent under the law. In cases in which the court's decision can contribute to an efficient settlement of (possible) disputes of parties which is in keeping with a competence that has indeed been granted by law, parties should have this option.

In chapter 6 it turns out that parties can, within the framework of the regular procedure, derogate from the fundamental principles of procedural law to a very limited extent only. Thus, they cannot agree a hearing in chambers, cannot derogate from the right to an independent and impartial court and cannot determine that the grounds of the judgment will be dispensed with. Admittedly, parties may agree not to plead in their case, but they cannot determine that the proceedings will be fully in writing. The right to an equal treatment cannot be put aside by an agreement as to proceedings. Nor can parties exclude the right to express an opinion on a certain performance of taking of evidence, nor can they validly agree that only the court can take cognisance of certain confidential documents or information, without this being possible for the other party. It is possible to a certain extent, though, for parties to restrict the procedural remedies that are available in proceedings. Even then, parties

must be left with sufficient opportunities to present their case. Within certain limits, parties can also extend the time limits applicable in the proceedings.

In the context of arbitration and binding advice parties clearly have more liberty by agreement to declare fundamental rights to be inapplicable. Through the mere conclusion of an agreement for arbitration or binding advice they cannot be deemed to have fully relinquished these principles, although the protection afforded by these principles will in some cases be less far-reaching than within the context of the dispensation of justice by a regular court. By explicit agreement parties can push aside the fundamental rights to a great extent. They can, for instance, agree on a confidential hearing of their case, agree that the proceedings will take place fully in writing and establish long time limits for its treatment. Although parties have ample powers to shape the procedure, they must always retain the practical possibility of presenting their case. In the context of binding advice parties can even agree to treatment by a third party charged with giving a binding opinion who is actually partial, even before a dispute arises. In the context of arbitration parties can only, when the dispute has already arisen, appoint an arbitrator who has the *appearance* of being biased against him. They can also at that moment determine that arbitrators will conduct their own examination within the framework of the assessment of evidence. In the context of arbitration and binding advice not all agreements as to proceedings are admissible. An agreement whereby parties agree that the grounds for the judgment will be dispensed with altogether, cannot be accepted. Nor can parties exclude the right to an equal treatment by agreement or can they declare the right to hear and be heard to be inapplicable by agreement.

In chapter 7 centre stage is occupied by the provisions that appear to require a certain statement or behaviour of the parties for derogation from procedural law. In these cases it depends on the tenor of the statutory provision to what extent the parties are already bound to an agreement preceding the statement or behaviour. Thus, parties cannot agree in advance by virtue of article 133 Rv (Code of Civil Procedure) unanimously to request a postponement – there will need to be an actual unanimous request made by the parties. The same applies in general to derogation from the National Rules of Procedure for civil summons before the courts pursuant to article 1.4 of these rules. It is possible, however, for the parties, at the moment when the dispute or the matter that is the subject of litigation has already arisen, to agree by virtue of article 255 paragraph 2 Rv to appear in interlocutory proceedings without any writ of summons; pursuant to article 270 paragraph 1 Rv to derogate from the relative jurisdiction in procedures commenced by petition; and by virtue of article 96 Rv to agree to turn to a specific subdistrict court. In the two last-mentioned cases the requirement of proof of article 108 paragraph 3 Rv should be applied (by analogy).

3 Effect

3.1 Obligatory effect?

By means of an agreement as to proceedings parties derogate from a rule of procedural law. In chapter 8 it is examined whether such an agreement also has an obligatory effect apart from that. Are the parties obligated vis-à-vis each other to

behave in accordance with the rule agreed? It is concluded that no obligations arise from agreements as to proceedings if the parties have not provided anything about this. Parties can explicitly agree to an obligatory effect, though. In addition, the parties' obligations cannot be isolated from the procedural rules that they have agreed upon. If, for example, the agreement whereby the parties have declared a specific court to have jurisdiction proves to be null and void, it is impossible that they have created valid obligations to conduct proceedings before this court. The Brussels I Regulation is not in conflict with the obligatory effect of jurisdiction agreements. The case law of the European Court of Justice does show that the delivery of a so-called 'anti-suit injunction', whereby a party is forbidden to conduct proceedings before the court of another country, is incompatible with the Brussels Convention. However, this case law does not preclude the *acceptance* of an obligation to litigate merely before a designated court, but only, in specific cases, the *enforcement* thereof. After all, in the ruling *Turner/Grovit* c.s. the Court explicitly considers that the *application* of national procedural rules may not impair the effectiveness of the Convention.¹

The question whether parties have in the framework of their agreement indeed agreed upon obligations is governed by procedural law. Whereas the concept of the obligation has not been provided for in Dutch procedural legislation, civil law can, in view of the principle of uniformity in law, in principle be applied *mutatis mutandis*. Within the context of agreements of an international nature, such as the agreement of an international forum selection or an arbitration agreement, foreign civil law may qualify for this as well.

As regards the agreement of a forum selection that is governed by the Brussels I Regulation, it can be said that this Regulation does not say anything about the question whether parties can also create obligations within this context. This is a question that is left to the national laws of the Member States. For this it will be necessary to examine the law of the Member State of the court designated by the parties in their forum selection. Here, too, the application of this law may not impair the effectiveness of the Brussels I Regulation.

3.2 *Ex-officio application?*

In chapter 9 it is examined what effect agreements as to proceedings have in the proceedings. Should parties invoke such an agreement, or does the court apply it of its own motion? In the answer to this question one should distinguish between agreements as to proceedings whereby parties derogate from directory law, and agreements whereby they derogate from the right of public order. Courts do not of their own motion apply agreements as to proceedings whereby directory law is derogated from. This implies that parties will have to invoke such agreements themselves. Nor do courts, in principle, review *ex officio* whether an agreement as to proceedings invoked by one of the parties has been concluded in a valid manner.

The law also recognises a number of agreements as to proceedings whereby parties do not derogate from directory law, but from the right of public order. An example is the agreement of a forum selection, whereby they derogate from the rules

¹ ECJ 27 April 2004, *NJ* 2007, 152, with commentary from P. Vlas (*Turner/Grovit* c.s.), legal ground 29.

of international jurisdiction. In case of such an agreement sometimes testing *ex officio* takes place, whereas in other cases an application from the parties is required. In order to be able to determine when which situation applies, paragraph 9.3 formulates a number of guiding principles that may be helpful.

Both for agreements as to proceedings whereby directory law is derogated from, and for those derogating from the right of public order, a special arrangement applies if they have been included as a clause in a consumer contract. As a result of the case law of the European Court of Justice the court then tests *ex officio* whether such a clause is unfair. For this purpose the court must exclude the application of articles 9 sub a, 110 paragraph 1 and 1052 paragraph 2 Rv (Code of Civil Procedure) and of 24 Brussels I Regulation.

4 Rules governing agreements as to proceedings

4.1 Applicable law

What law applies to agreements as to proceedings? Is it civil law, the civil procedural law, or perhaps both? To answer this question the criterion that civil law and civil procedural law form part of one legal system is of essential importance. This criterion entails that unnecessary differences between the two areas should be avoided. If this criterion is heeded sufficiently, its exact elaboration is less significant. In this dissertation the approach has been adopted that concepts in the grey area between civil law and civil procedural law will first be allocated to one of the two areas, with application *mutatis mutandis* of the rules of the other area where this is desirable.

In the approach adopted, agreements as to proceedings must be qualified procedurally, as they focus in particular on the establishment of consequences in the field of procedural law. This is not precluded by the fact that procedural legislation does not include an extensive arrangement of the concept of the agreement. The law of contracts as it has been developed in civil law can, in view of the principle of the uniformity of law, also be taken to be the starting point for civil procedural law. Analogous application is all the more obvious, considering the fact that agreements as to proceedings actually do have property-law characteristics. Derogations from the arrangement provided in civil law must be substantiated properly.

Agreements as to proceedings of an international nature must be assessed on the basis of Dutch procedural law by the Dutch court. Civil law can be applied *mutatis mutandis* here too, though. Dutch procedural law implies that foreign law qualifies for this as well.

The Brussels I Regulation allows limited scope for the application of national civil law to the agreement of forum selection. This concerns the law of the Member State of the court designated in the forum selection.

4.2 Content of the law on agreements as to proceedings

In chapters 10 and 11 it is examined what the application of the aforementioned general guiding principles leads to in concrete cases. It is studied in which cases civil law is indeed applied *mutatis mutandis* to agreements as to proceedings, and in what

cases derogations therefrom are legitimised pursuant to the procedural legal context. It turns out that civil law has been derogated from in a limited number of cases only. Firstly, the rules of civil law are in principle applied *mutatis mutandis* to the establishment of agreements as to proceedings. Contrary to this it has been determined with respect to certain agreements as to proceedings that they can be concluded tacitly and in some cases formal rules or requirements of proof apply. It also turns out that civil law is applied *mutatis mutandis* to the interpretation of agreements as to proceedings. Furthermore, agreements as to proceedings may be voidable on account of vitiated consent and their application may be excluded pursuant to the restrictive effect of reasonableness and fairness. Agreements as to proceedings featuring in general conditions may be annulled if it appears that they are unreasonably onerous. Application of a forum selection clause which is governed by the Brussels I Regulation must also be excluded if this clause features in a consumer contract and is unfair within the meaning of the Council Directive on unfair terms. In addition, an agreement as to proceedings in general conditions is voidable, if the user of the general conditions has not given the other party a reasonable opportunity to familiarise himself with those conditions. However, this does not apply to a forum selection clause that is governed by the Brussels I Regulation, since the formal rules of article 23 Brussels I Regulation provide for this matter exhaustively. Finally, agreements as to proceedings, if linked to an (action for enforcement of a) certain claim, pass to the new creditor if such a claim is assigned. Title 2 of Book 6 of the BW (Dutch Civil Code) is directly applicable in such a case.

If parties have established obligations within the context of an agreement as to proceedings, the guiding principle is also that civil law can be applied thereto *mutatis mutandis*. The procedural context regularly does imply that civil law must be derogated from. Firstly, in case of noncompliance with the obligation, an order to comply is possible only seldom, the reason being that this will always involve an imposition of a prohibition relating to a specific procedural behaviour. In principle it is up to the court seized of the substantive dispute to assess what procedural behaviour is admissible. Another court ought not to interfere with this. There is a limited number of exceptions to this guiding principle. Firstly, a prohibition may sometimes be imposed upon a party, in the enforcement of an obligation from a jurisdiction agreement, to litigate before a foreign court. This is the case if the other party shows that trust in this court is not justified. Also, it is conceivable that a party is forbidden in interlocutory proceedings, pursuant to an obligation from an agreement as to the exclusion of certain articles of evidence, to bring certain documents to the notice of the court hearing the main action.

Allowing a claim for damages is also possible only in a limited number of cases. In case of infringement of an obligation from a jurisdiction agreement it is in general only possible to award damages if this is in accordance with the judgment of the court seized of the case in contravention of the agreement. If this court declares that it lacks jurisdiction in view of the existence of the agreement, then the costs of the proceedings incurred in this case qualify for compensation. If, however, this court *does* deal with this case, damages are in principle excluded. An important exception exists if it concerns a foreign court of a non-Brussels I Regulation state. Then damages are

possible if it is shown that trust in this court is not justified, for example because there has been no fair hearing.

If a party violates an obligation from another kind of agreement as to proceedings than a jurisdiction agreement, the damages will usually consist of legal costs. In principle these costs qualify for compensation.