De notaris en private rechtspraak

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Summary

The Public Notary and Civil Proceedings

In this thesis the subject of our investigation is the use of the first legal copy of the notarised reporting deed ("*de notariële proces-verbaalakte*") as enforceable verdict in the civil proceedings before a private court under Dutch law. This is a complicated subject. In Chapter 1 we introduce the subject. We describe the Dutch social (legislative and political) background of the research, and we discuss in particular the Dutch government's policy, which is aimed to reduce the role of the public courts and to promote the use of alternative dispute resolution. This issue is followed by an explanation of the e-Court initiative, which was launched in the Netherlands in January 2010, as well as the modernisation and digitalisation of the public courts since 2010. We set out the cause of this research, being the letter from the Deputy Minister of Security and Justice dated 23 June 2011. The problem statement that arose from this letter, is as follows: "To what extent is the public notary permitted to draw up the reporting deed and issue the first legal copy within the context of civil proceedings pursuant to (1) article 7:900 Dutch Civil Code (a binding third-party ruling) and (2) article 1020 Dutch Code of Civil Proceedings (arbitration), in order to serve as a title for execution for the parties involved?" For that purpose, we formulated four research questions. In this summary they are mentioned in the chapter in which they are discussed.

In Chapter 2 an analysis is made of the legal framework regarding private courts. In particular, we discussed the fact that legal proceedings belong to the domain of law enforcement. The relevance of this observation has been included in the investigation, and in the answers to the research questions.

In Chapter 3 an analysis is made of the legal framework of notarial acts. The knowledge and notions of the notarial legal perspective have been applied to the answers to the research questions.

In Chapter 4 the first research question is discussed, which is: "How can the public notary establish which obligations have been incurred by the parties?". In order to answer this question we have examined the difference between a notarial party-deed and the reporting-deed. A notarial party-deed is required if the primary goal of the parties is to create new legal consequences and to give evidence thereof. Our research showed that the goal of court proceedings is not to create new legal consequences, but that they are organised for the purpose of allowing the parties to exercise their legal rights, i.e., to defend their legal position and be heard by a neutral third party, regarding a conflict. The role of the public notary is the registration of this event, whereby it is not certain who will appear, what statements will be made, what legal obligations will be established and what other legal facts will occur. Furthermore, we have investigated who can be the client of the public notary (article 2 Act on the Public Notary). The investigation showed that there are three possibilities: (i) both parties to the conflict are considered to be represented as clients, (ii) one of the parties is represented, and (iii) the private court (or the institute that organises private court

proceedings) as an autonomous client without any form of representation. We consider the last two possibilities suitable and we substantiated our preference for that last figure. Subsequently, we examined whether the authority of the public notary is restricted. Based on our findings we may conclude that the public notary can establish by means of the court ruling which obligations have been imposed to which party.

In Chapter 5 the second research question is examined, which reads as follows: "To what extent is the public notary able to establish that the parties involved in the court proceedings had the intention to have their legal obligations to be registered in the reporting deed in order to have the deed serve as an enforceable verdict ending their dispute?" In order to answer this question we examined the use of deeds and concluded that in the traditional practice, in which the use of the party-deed is dominant, is based on the contractual freedom and the subjective will of the parties to create legal consequences that would otherwise not derive from the legislation. However, in relation to the reporting deed, the public notary is authorised to register his witnessed findings, in relation to persons (who qualify as "objects of his observations"), regardless whether they requested the registration thereof, but only to the extent that it regards acts in which these persons have participated. Participation in a situation of contractual freedom implies that personal acts are required in order to create legal consequences. Without actions there will be no new legal consequences. Justice, however, falls in the domain of law enforcement. The law imposes legal consequences to the situation, where statements or acts fail to happen. As such the defendant qualifies as participant in the court proceedings before a private court if he remains absent during the trial. This participation must be understood as the lack of taking timely action, with the knowledge that no action will lead to legal consequences. The subjective will of a defendant does not become relevant again until after the enforceable verdict of the private court has been issued. The defendant who wants to take action against the verdict has several legal remedies. We have then investigated whether the Supreme Court's decision known as Rabobank/Visser impedes the public notary to relate his findings to the parties in the court proceedings as the objects of his observation. The situation of private justice does not see to future conflicts, but a conflict from the past. In our view the Supreme Court did not want to end the use of the notarial reporting deed. The answer to the second research question is that the public notary can establish that the parties wanted to have the legal obligations registered in the reporting deed with the intention that it will serve as an enforceable verdict in their dispute, because the legal system deems them participants in the court proceedings and the public notary is authorised to register his testimony, including the bare legal facts during the trial, and relate them to the parties involved.

In Chapter 6 we examined the third research question. "In what manner should the public notary comply with his duty of care ("*Belehrungspflicht*") when registering the private court's verdict in the reporting deed?" In order to answer this question we first referred to chapter 2, where we examined that the doctrine has been developed to avoid that one of the parties abuse their stronger position or legal knowledge, when creating new legal consequences, on a voluntary basis

and without professional legal counsel. On a principle level, the doctrine is not applicable to private justice, as the parties do not appear to create new legal consequences in the meaning as described. We have found that the public notary will nevertheless be obliged to do research prior to accepting the request to witness the proceedings and register his findings. He will also want to comply with the meaning of the doctrine, in view of his independent and impartial performance of public office. The public notary will therefore examine private justice on a "system level." He must have an in-depth understanding of the trial and the warrants of the court. The public notary will also examine the private court on a "case level." The answer to the third research question is that the public notary can establish on the basis of all documents, including the court bailiff's writ of summons, the rules of the proceedings, the information on the website and so on, that there is no situation of abuse of position or legal knowledge. In addition, he can establish that the parties have been properly and timely informed that the private court will issue an enforceable verdict, before their choice for the private court has become irreversible (article 6:236 sub n Dutch Civil Code). By doing so, the public notary has exercised his duty of care towards the parties.

In Chapter 7 we examined the fourth research question: "To what extent do technological developments influence the observation of the court proceedings by the public notary? Based on these findings, the answer to the fourth research question is that the digital tools will support the public notary. The observations will be more accurate and complete; the report will be realised quickly. The public notary can verify the observations afterwards by looking into the logged mutations in the original digital file. In addition, we examined the influence of ICT-tools on the protection of the legal position of consumers. We made a comparison between the legal protection of consumers in the traditional court proceedings versus digital court proceedings. We conclude that ICT-tools have no negative impact on the legal protection. We believe that ICT-tools have certain advantages in the areas of legal equality, accuracy and verifiability.

On the basis of the research above the answer to the problem statement is formulated in Chapter 8. The public notary is authorised, in the context of civil proceedings on the basis of article 7:900 Dutch Civil Code or article 1020 Dutch Code of Civil Proceedings to draft a reporting deed and issue the first legal copy thereof, with the purpose to serve as an enforceable verdict for the parties in the conflict, if six conditions have been met. We have established that the public notary is able to assess whether the conditions are met, depending on the circumstances. The answer to the problem statement has led to four conclusions. In this summary we describe the first two conclusions. The first conclusion is that the public notary does not only register the events during the trial and make the decision enforceable, but he also protects the integrity of the legal system to a certain extent. From the perspective of legal certainty this is an additional protection of the integrity of the legal system. The second conclusion is that the notarial examination is an improvement compared to the examination of private verdicts by the public courts. This improvement is first of all in the interest of the parties, but also serves the protection of the integrity of the legal system.

We then formulated five points of self-criticism and we addressed each point, one by one. Thereby a new paradox emerged, being that the notary serves consumer protection without any physical contact with him. We have presented four subjects for future investigation, which follow on from our findings or are related to this thesis. We then looked back at the cause of this research, being the letter of the Deputy Minister of 23 June 2011. Based on our research described in this thesis we may conclude that this letter is fit for a revision procedure.