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Chapter 1: Binding Advice

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(*)

THE CIVIL-LAW PERSPECTIVE

1 Introduction

1. In the Netherlands, binding advice (*bindend advies*) is one of the alternative methods which, like arbitration and mediation, falls under the English concept of Alternative Dispute Resolution. The term binding advice was first mentioned in the Netherlands in 1892, when the General Rules regulating the Execution of Works under the Management of the Ministry of Water Management, Trade and Industry provided that in disputes between contractors and the government a contractor who was not satisfied with the minister's decision had the right to demand appointment of a committee consisting of three persons, which committee was charged with issuing an advice on the issue in dispute that would be binding on both parties. (1)

2. Dutch academic literature distinguishes two types of binding advice. (2) The first type refers to decisions taken by one or more third parties to resolve existing or future disputes where both parties to the dispute have agreed that the decision shall be binding on them (adjudicatory binding advice). This form of binding advice is rather similar to dispute resolution by the regular courts. It is to be distinguished from the other type of binding advice, by which a third-party falls gaps in or modifies an existing legal relationship between the parties, or determines the quality or quantum of goods or contractual obligations (declaratory binding advice). Examples of the latter type of binding advice are the determination of the amount of damage, rent or ground rent, or the valuation of shares. This type of binding advice is given in situations where there is no legal dispute between the parties. Declaratory binding advice is therefore not similar to adjudication by the regular courts, its nature is more like an expert's opinion. The Dutch Supreme Court, however, does not distinguish in its case law between adjudicatory binding advice and declaratory binding advice. In judgments on the question to what extent the principles of due process must be respected the Dutch Supreme Court has opted for a sliding scale. (3) In practice it is in fact not always possible to make the strict distinction between the two types of binding advice that is made in academic literature. A seemingly simple matter of valuation may easily turn out to involve a legal dispute. This may happen, for instance, when the valuation of shares or the valuation of real estate requires a further explanation of the valuation method laid down in the agreement.

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3. Binding advice is a typically Dutch legal concept. (4) Some civil-law countries have a legal concept that is comparable to binding advice. Belgium, for instance, has the *binding third-party decision* (*bindende derdenbeslissing*). (5) In this country the third party can by its decision resolve a legal dispute as well as fill in a gap or modify a legal relationship and determine the quality of goods or contractual obligations. There is no distinction in Belgium between the two types of binding advice as distinguished in the Netherlands. (6) The picture emerging from literature and case law suggests, however, that the binding third-party decision procedure is mainly used in cases which in the Netherlands will be considered to fall in the category of declaratory binding advice. This may be explained by the fact that in Belgium parties can only submit such cases to a third party giving a binding decision, while in the Netherlands the introduction in 1986 of Book IV (arbitration) of the Dutch Code of Civil Procedure (DCCP) made it possible for the parties to obtain a decision filling in a gap or modifying an existing legal relationship between the parties in arbitration proceedings. (7) Apparently, the binding third-party decision procedure is rarely used in Belgium to resolve legal disputes. In Germany, there is the *Schiedsgutachten* or expert determination procedure. This is a procedure in which a third party establishes facts, determines a party's contractual obligations (e.g., the quantum of damages, adjustment of rent or ground rent and the determination of the quality or condition of a good) or modifes a contract. (8) Italy has *arbitrato irrituale* or informal arbitration. This procedure is only used to resolve disputes between a consumer and an entrepreneur and results in a settlement. First, representatives of the consumer and the entrepreneur make an (obligatory) attempt to mediate the dispute, which in the event of failure is followed by a decision given by a dispute committee consisting of the two mediators and a professional arbitrator. This dispute committee decides in accordance with the principle of fairness. (9) The scope of application of these procedures is more limited, however, than that of the Dutch binding advice procedure.

4. In this article I will describe binding advice procedures under Dutch law and compare some of its aspects with the procedures in the countries mentioned above.

2 Institutional Binding Advice Procedure and ad hoc Binding Advice Procedure

5. In Dutch legal practice, a binding advice may be given by a permanent dispute committee on the basis of its own procedural rules (institutional binding advice procedure), but also by a binding adviser or a board of binding advisers established for a specific case (ad hoc binding advice procedure). The institutional binding advice procedure is used mainly to resolve consumer disputes. There are no figures on the use of the ad hoc binding advice procedure in the Netherlands. This form of binding advice procedure seems to be frequently used by professional parties. It is used, for example, in disputes concerning the interpretation of an acquisition agreement or in disputes between insurance companies concerning the interpretation of a policy or for the valuation of shares. In contrast to the institutional binding advice procedure, an ad hoc
P 12 binding advice procedure ● is usually not subject to detailed rules. However, the parties do agree on some arrangements, either on the initiative of the binding adviser or otherwise, which are laid down in a so-called ‘order of proceedings'.

3 Scope of Application

6. It is already clear from the distinction made in Dutch academic literature between declaratory binding advice and adjudicatory binding advice that parties may agree to submit to a binding adviser (1) existing or future legal disputes, whether or not arising from an agreement, but also (2) the determination of the quality or condition of goods, the determination of the quantum of damages or the sum of money owed, and the filling in of gaps or modification of a legal relationship. Prior to the introduction of the Dutch Arbitration Act in 1986, parties could not submit the second category of cases to an arbitrator. However, the binding advice procedure was available in those cases and filed this gap. (10) This was the reason why the Dutch legislature extended the scope of application of arbitration to the cases specified in article 1020(4) DCCP, so that henceforth it was no longer necessary for parties to resort to a binding advice procedure. (11) In Belgium, too, a third party may give a binding decision on a legal dispute as well as fill gaps in or modify a legal relationship or determine the quality of goods or contractual obligations. The German expert determination procedure can only be used to establish facts, to modify a contract or to determine a contractual obligation.

7. Nevertheless, not all matters may be submitted to a binding adviser under Dutch law. It is true that Title 7.15 of the Dutch Civil Code (DCC), which is now the legal basis for the binding advice procedure, does not include a provision listing the matters capable of being decided by binding advice. According to legislative history, the answer to the question which matters may be submitted to a binding adviser must be sought in article 1020(3) DCCP, since it is stated that article 7:902 DCC, which is part of Title 7.15 DCC, is an elaboration of article 1020(3) DCCP. (12) This article 1020(3) DCCP restricts the scope of application of arbitration by providing that an arbitration clause may only be agreed for the purposes of determining legal consequences that are at the disposal of the parties.

8. Consequently, the answer to the question whether an issue may be decided by binding advice depends on whether the parties can freely dispose of the issue. It must be concluded from the fact that article 7:902 DCC is an elaboration of article 1020(3) DCCP, that decisions in the field of property law are at the free disposal of the parties and can therefore be subject to binding advice. The legislator considered it impossible to further specify precisely which matters are at the free disposal of the parties. (13) In the literature on article 1020(3) DCCP it is assumed that public policy matters are not at the free disposal of parties. Indications that a dispute concerns a matter of public policy exist when special provisions make clear that the regular courts have exclusive jurisdiction over a dispute or that the decision on a dispute has erga omnes effect. (14) Based on these criteria the assumption under Dutch law is that a binding adviser may not decide on matters like the validity of a marriage, acknowledgement of a child, adoption, the annulment of a decision of a legal person or a declaration of bankruptcy. (15)

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4 Statutory Provisions

9. In contrast to arbitration, the binding advice procedure is not regulated in the Dutch Code of Civil Procedure and the procedural rules for arbitration in the Dutch Code of Civil Procedure do not apply mutatis mutandis to binding advice. Binding advice just has a basis in substantive law only, namely in article 7:900 DCC, which is part of Title 7.15 DCC.

10. In the Netherlands, two legal relationships are created in connection with a binding advice. These two legal relationships are relevant to the making and enforceability of a binding advice. In the first place, there is a binding advice agreement between the parties. Such an agreement is a particular type of the settlement agreement provided for in Title 7:15 DCC. Any agreement by which the parties have agreed to be bound by a decision in order to end an existing or future dispute about the existing legal relationship between them, or in order to determine the specific content of the legal relationship, respectively, falls within the definition of a settlement agreement given in article 7:900, paragraphs (1) and (2), DCC, respectively. By concluding a settlement agreement, the parties bind themselves towards each other, in order to end or avoid any uncertainty or dispute about their legal relationship, in favour of a settlement thereof (art. 7:900(1) DCC).

Pursuant to article 7:900(2) DCC the settlement can be made by a decision given by a third party. If a binding advice fills a gap or modifes the existing legal relationship between the parties, the agreement underlying this binding advice is not a settlement agreement within the meaning of article 7:900(1) or 7:900(2) DCC. Article 7:906(2) DCC provides, however, that article 7:904 DCC, relating to the annulment of a binding advice, applies mutatis mutandis to decisions filling a gap or modifying an existing relationship between the parties. (16) In the second place, there is the agreement for services between the parties on the one hand and the binding adviser on the other hand (art. 7:400 DCC). (17) The agreement for services is concluded subsequent to the earlier binding advice agreement. By concluding the agreement for services with the binding adviser the parties implement the binding advice agreement that was already concluded between them. In addition to the aforementioned special rules of Title 7.7 DCC (agreement for services) and Title 7.15 DCC (settlement agreements), the general rules of contract law are relevant to the making and enforceability of a binding advice as well.

11. The Belgian binding third-party decision and the German expert determination is also not regulated in a Code of Civil Procedure and the procedural rules for arbitration do also not apply mutatis mutandis. In connection with the Belgian binding third-party decision, two legal relationships are also created. The parties conclude an agreement in which they agree that existing or future disputes between them or any uncertainty or undetermined issue in their legal relationship will be decided by a third party to be appointed by the parties jointly or in a manner agreed between them. (18) Pursuant to article 1134 of the Belgium Civil Code (BCC) the decision is binding on the parties. Under Belgian law, too, the agreement between the parties is considered a settlement agreement, but unlike Dutch law, the Belgian Civil Code does not contain any rules on the matter. (19) As a result, the concept of binding third-party decision has no general legal
P 14 basis under Belgian law. In addition to this relationship between the parties, a ● legal relationship arises between the parties on the one part, and the third party who is instructed to take the binding decision on the other part. The question of how to qualify this legal relationship is a matter of debate in Belgian academic literature. Traditionally, it used to be qualified as a mandate agreement. In this view the third party instructed to take the binding decision is considered an agent of the contract partners jointly, in the sense that in taking the binding third-party decision he is acting in the name of and on behalf of the contract parties jointly. (20) Storme finds that this is an incorrect qualification of the legal relationship between the parties and the third party taking the binding decision, since the third party does not act as agent of the parties and does not conclude an agreement in the name of the parties. (21) There are others who qualify the legal relationship between the parties and the binding adviser as one of service hiring. (22) This qualification bears greater similarity to how the legal relationship between the parties and the binding adviser is qualified in the Netherlands, but in my opinion it is likewise incorrect because the service to be provided by the third party taking the binding decision cannot be classified in any of the main categories of service hiring mentioned in article 1779 BCC. In my opinion, therefore, some authors rightly consider the legal relationship between the parties and the third party taking the binding decision to be a non-identified contract or a sui generis contract without any further qualification (23) In Germany, the expert determination is based on an agreement which is also considered as a type of settlement agreement and is governed by the rules pertaining to settlement agreements (paragraphs 317-319 German Civil Code (GCC). Besides this agreement there is also a separate agreement between the parties and the expert, which is based on the general rules of contract law. (24) Because of the absence of statutory regulation in the Belgium Code of Civil Procedure (BCCP) and in the German Civil Code of Procedure (GCCP), the legal relationships described above are relevant to the making and the enforceability of the decision.

5 Binding Advice Procedure

12. There is no legislation in the Netherlands regulating the procedure for making a binding advice. The absence of a formal statutory framework leaves room for the parties and the binding adviser to determine the manner of proceedings themselves, including the evidence rules. (25) This makes it possible to design a custom-made procedure. In the Netherlands, it follows from the service agreement between the parties and the binding adviser that in principle the parties must take the initiative as regards procedure and that they should agree between them how to conduct the proceedings, which means that they can arrange the proceedings in a way that best fits the nature of the case. (26) In ad hoc binding advice cases it frequently happens in the Netherlands that the parties do not make any prior arrangements, in which case the binding adviser will usually present a proposal on how to conduct the procedure, to which the parties then agree. It is common practice to lay down this proposal in an ‘order of proceedings'. When drawing up such an ‘order of proceedings' the binding adviser and the parties may give consideration to the nature of the dispute. In the Netherlands, dispute committees for consumer affairs use a binding advice procedure to resolve disputes that is based on procedural rules to which
P 15 the parties have agreed because a reference to them is included in the binding ● advice clause, which forms part of the relevant general terms and conditions. In procedures before dispute committees for consumer affairs the parties have hardly any say in the manner of procedure, and the same applies to other forms of institutional binding advice, but factors like the status of the parties, the nature of the disputes or common

practice in the branch or industry can be taken into account when drawing up the procedural rules.

13. However, the scope for determining the procedure is restricted in the Netherlands by the principles of due process which must be safeguarded in the binding advice procedure. Via the route of article 7:904(1) DCC, the principles of due process enshrined in article 6(1) ECHR also apply in binding advice procedures, unless the parties have of their own free will and unequivocally waived any of the rights under these principles. Pursuant to article 7:904(1) DCC, a binding advice is voidable if in the circumstances of the case its binding force would be unacceptable according to standards of reasonableness and fairness in view of its content or the way in which it was made (see section 7 below). It follows from the case law of the Dutch Supreme Court that where one of the principles of due process has been disregarded (for instance the audi alteram partem principle), this can make binding force of a binding advice unacceptable according to standards of reasonableness and fairness and thus make the binding advice voidable. One of the relevant factors in this situation is whether, and if so, to what extent the procedural defect has harmed the other party. Case law shows that the grounds for voiding a binding advice include violation of the principle of independence and impartiality, the principle of audi alteram partem and failure to state reasons. (27) The Dutch Supreme Court does not make a difference between adjudicatory binding advice and declaratory binding advice in this respect. The requirements which apply to the manner of making a binding advice must ensure that the content of the binding advice is reasonable and fair. The aforementioned principles are therefore decisive for the manner of proceedings and for the manner in which the binding adviser handles evidence.

14. There is also no legislation in Belgium (28) and Germany (29) regulating the procedure for making a Belgium-binding third-party decision or a German expert determination. The principles of due process play an important role as well. In Belgian literature and case law the presumption is that the third party making a binding decision must be independent and impartial. According to the literature, this principle is inherent to the concept of a binding third-party decision itself. (30) There is no consensus as to whether the principles of audi alteram partem and of stating reasons must be observed in Belgium as well. (31) It is not clear from the debate, however, whether the nature of the binding third-party decision plays a role in the matter. The fact is that several annulment procedures can be found in Dutch case law in which it was alleged that the principle of audi alteram partem and the principle of stating reasons do not apply to a declaratory binding advice. The Dutch Supreme Court rejected this allegation. However, the nature of the specific binding advice concerned does play a role in answering the question of whether these principles are sufficiently guaranteed. (32) There are Belgian authors, however, who hold the opinion that the procedure for making a binding third-party decision must guarantee respect for the three aforementioned principles. (33)

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15. Under German law the presumption is that the expert making a binding decision must be independent and impartial. (34) The expert must also state reasons for his decision. (35) A breach of these principles has consequences for the binding effect of the expert determination (para. 319 GCC). (36) There is in the German literature no consensus as to whether the expert should hear the parties before rendering the decision. The general opinion is that in more technical matters the expert is not obliged to hear the parties before rendering a decision. (37) This is a limitation of the audi alteram partem principle.

6 Enforcing a Binding Advice

16. Under Dutch law, a binding advice does not automatically constitute an enforceable title. In contrast with arbitration, however, in the case of a binding advice there is no simple court procedure for obtaining an enforceable title. This is the same in Belgium (38) and Germany (39) . Under Belgian law, a simple procedure for obtaining an enforcement order is likewise only possible for arbitral awards (art. 1710 BCCP). (40) In the Netherlands, if one of the parties fails to comply with the binding advice, the winning party can initiate court proceedings by writ of summons and claim performance of the obligations ensuing from the binding advice. If the other party mounts a defense, the court will review the binding advice against the criterion laid down in article 7:904(1) DCC (see section 7 below). This means that the court will generally allow the claim for performance, unless according binding force to the binding advice would be unacceptable according to standards of reasonableness and fairness in view of its content or the way in which it was made. The judicial decision granting the claim for performance constitutes an enforceable title. (41) The Belgian binding third-party decision likewise does not constitute an enforceable title and a party can only seek a performance order in court proceedings. (42)

17. For this reason legal practitioners in the Netherlands have looked for another simple method to enforce a binding advice. In the case of dispute committees falling under the Foundation for Disputes Committees for Consumer Cases (*Stichting Geschillencommissies Consumentenzaken* or SGC) the lack of an enforceable title is solved by the compliance guarantee rules drawn up by the trade organisation concerned, which rules are referred to in the general terms and conditions agreed between consumer and trader. According to these rules the trade organisation guarantees compliance with the decisions of the

dispute committees falling under the SGC. This compliance guarantee applies only to cases in which the trader fails to comply voluntarily with the obligations ensuing from the decision. The trade organisation can subsequently seek recovery of the guarantee amount from the trader. However, such a compliance guarantee does not exist for all dispute committees falling under the SGC and does not always fully cover all obligations ensuing from the advice. (43) Other possibilities are setting down the binding advice agreement or the binding advice itself in a notarial deed or in an arbitral settlement award. (44)

7 Annulment of a Binding Advice

18. Under Dutch law, a binding advice can be annulled pursuant to article 7:904 DCC. This
P 17 article provides that a binding advice may be annulled if in the ● circumstances of the case its binding force would be unacceptable according to standards of reasonableness and fairness in view of its content or the way in which it was made. Any review of a binding advice under this provision will be restricted to a test for reasonableness. (45) The decision is presumed to have binding force, and only serious defects will result in annulment of a binding advice. (46)

19. Article 7:904(1) DCC states two grounds for review. Firstly, the content of the binding advice may be a ground for annulling the binding advice. Case law shows that a binding advice will fail the test of reasonableness if no binding adviser acting reasonably could have arrived at such a decision. (47) Case law of the lower Dutch courts shows that this can be the case where a binding adviser acted beyond his mandate. (48) The second ground for review consists of the *way in which the binding advice was made*. An example is the failure to observe the principles of due process. Case law shows that the grounds on which a binding advice can be annulled include violation of the principle of independence and impartiality, violation of the principle of *audi alteram partem*, and failure to state reasons. (49) The requirements applying to the manner of making a binding advice must ensure that the content of the binding advice is reasonable and fair. Nevertheless, not every procedural defect results in annulment of the binding advice. It follows from the case law of the Dutch Supreme Court that one of the relevant factors in this connection is whether, and if so, to what extent the procedural defect has caused harm. (50)

20. The Belgian Civil Code does not include a specific provision with regard to review of a third-party decision similar to the Dutch article 7:904(1) DCC. However, the Belgian courts are competent, just like the Dutch courts, to review both the procedural aspects and the substance of a binding third-party decision. This remedy of review is based on article 1134(3) BCC, which lays down the principle of good faith or the principle that agreements must be performed in good faith. It likewise concerns a test for reasonableness, allowing the courts to examine whether the minimum requirements applying to the process of making the binding third-party decision were satisfed. (51)

21. Under German law *Schiedsgutachten* can be annulled pursuant to article 318(2) GCC. The grounds for annulment differ from the grounds for annulment of a Dutch binding advice and the Belgium binding third-party decision. The grounds for annulment are if the Schiedgutachten is made in light of mistake, duress or deceit. Besides annulment, *Schiedsgutachten* do not have binding force when the decision is obviously unreasonable or incorrect (para. 319 GCC). Under para. 319 GCC the content or the way the *schiedsgutachten* is made can be reviewed. For example, *Schiedsgutachten* do not have binding force when the expert was not independent and impartial. (52)

8 Binding Advice Versus Arbitration Under Dutch Law

8.1 Similarities between binding advice and arbitration

22. Arbitration and binding advice are often mentioned in the same breath in the Netherlands. It also happens regularly that the relevant agreement does not make clear whether the parties have agreed on binding advice or on arbitration. (53) This raises the
P 18 question what the added value is of the Dutch ● binding advice with regard to arbitration. There are indeed significant similarities between arbitration and binding advice. For instance: in principle, both arbitration and binding advice have their basis in an agreement (art. 1020 DCCP and art. 7:900 DCC). In Belgium and Germany, too, arbitration and the Belgium binding third-party decision and the German expert determination in principle have their basis in an agreement.

23. Under Dutch law, binding advice and arbitration have the same scope of application. Parties may submit existing or future disputes, whether arising from an agreement or otherwise, to arbitration (art. 1020(1) DCCP). This form of arbitration is by its nature identical with the form of binding advice which in Dutch literature is referred to as adjudicatory binding advice. In addition, the determination of the quality or condition of goods, the determination of the quantum of damages or monetary debt owing as well as the filling of a gap in or modification of a legal relationship may also be submitted to arbitration (art. 1020(4) DCCP). When issues falling in the latter category are submitted to a binding adviser, Dutch literature uses the term declaratory binding advice. Furthermore, only issues that are at the free disposal of the parties may be submitted to arbitration and binding advice (art. 1020(3) DCCP and art. 7:902 DCC).

24. However, the scope of application of the Belgium binding third-party decision and the German expert determination is different from arbitration. The scope of arbitration and the scope of Belgium binding third-party decision only partially overlap. The scope of arbitration is defined in article 1676(1) BCCP, which provides that any dispute which has already arisen or which may arise in the future from a specific legal relationship and which can be resolved by settlement, is arbitrable. It follows from this provision that only legal disputes may be submitted to arbitration. Parties cannot obtain a decision filling a gap in or modifying the existing legal relationship between them in arbitration proceedings. (54) In Belgium, in contrast with the Netherlands, the latter cases may be submitted only to a third party making a binding decision. In Belgium, a binding third-party decision may resolve a legal dispute as well as fill in gaps or modify a legal relationship and determine the quality of goods or obligations to be performed. With regard to the resolution of legal disputes, however, arbitration and binding third-party decision have the same scope of application. (55) Parties may, by means of an agreement, submit a dispute which has already arisen or which may arise in the future to either arbitration or a binding third party decision, provided the dispute may also be resolved by settlement (art. 1676(1) BCCP). In Belgian literature, too, settlement is presumed to be impossible for disputes concerning a matter of public policy. (56) This means that the Dutch binding advice and the Belgian binding third-party decision have the same scope of application, and that in both the Netherlands and Belgium binding advice and binding third-party decision have the same scope of application as arbitration with regard to the resolution of legal disputes. The scope of application of the expert determination and arbitration under German law is also different. In arbitration, it only possible to resolve a legal dispute. The German expert determination cannot give a decision to resolve a legal dispute. (57) The added value of the Belgium third-party decision and the German expert determination with regard to arbitration is given by the differences in scope of application. This is different in the Netherlands.

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8.2 Differences between binding advice and arbitration

25. There are also a number of differences between arbitration and binding advice. Arbitration occupies an intermediate position between the administration of justice by the regular courts and the resolution of disputes by binding advice/binding third-party decision. (58) Binding advice is a form of alternative dispute resolution which are entirely governed by contract law. Unlike proceedings in the regular courts and arbitration, the proceedings of binding advice are not regulated by any provision in the DCCP. Arbitral proceedings, on the other hand, is subject to regulation by law in the Netherlands. Because of the fact that arbitration is governed by provisions in the DCCP the manner of making an arbitral award and its enforceability are not only subject to substantive rules but also to procedural rules, which is not the case for binding advice. Because the binding advice proceedings are not regulated by procedural law, they can offer a more informal way of dispute resolution than arbitration. (59) This also applies for the Belgium third party decision and the German expert determination. However, in spite of the existence of statutory rules on arbitral proceedings, arbitration in the Netherlands also leaves scope for a more informal procedure because the manner of conducting the arbitration proceedings is in principle determined by the parties (art. 1036 and art. 1039 DCCP). Apparently, it is nevertheless legal practice in the Netherlands to take a formalistic approach to arbitration, probably partly due to comprehensive and detailed arbitration rules. As a result, arbitration proceedings take a long time and have little flexibility. In my view, it is conceivable that this is a reason why parties take the view that arbitration takes place in an atmosphere of conflict.

26. The absence of formal legislation on the binding advice proceedings explains a number of other important differences between arbitration and binding advice. These differences correspond with the differences existing in Belgium and Germany between arbitration and binding third-party decisions respective to expert determination. An important difference is that it is simple for a party possessing an arbitral award to obtain an enforceable title since the court may, at the request of one of the parties, give a decision granting enforcement of the award in preliminary relief proceedings (art. 1062 and art. 1063 DCCP), whereas a party who has obtained a binding advice must initiate court proceedings by writ of summons, claiming performance of the obligations ensuing from the binding advice. In that case, the binding advice will be reviewed by the criterion laid down in article 7:904(1) DCC. This difference between binding advice and arbitration is only relevant when the decision comprises an order to perform an obligation, so that there is in fact something that can be enforced. In addition, the review of a binding advice under Dutch law (art. 7:904(1) DCC) differs from the review of an arbitral award (art. 1065 DCCP). In the case of a binding advice, both its content and the manner in which it was made can be reviewed under the standard of reasonableness and fairness, while article 1065 DCCP sets a limited number of formal grounds for review of arbitral awards. Under Belgian law, too, an arbitral award can only be annulled on formal grounds (art. 1704 BCCP), while a binding third-party decision can likewise be annulled on substantive grounds as well (art. 1134(3) BCC). The broader review of a binding advice or binding third-party decision may be an advantage, because it means that the advice or decision will in
P 20 any case be reviewed for reasonableness by the court. (60) However, the possibility that a binding advice or binding third-party decision will be subjected to broader review

can also be perceived as a disadvantage, because it increases the risk of the advice or decision being annulled and thus diminishes the chances that the advice or decision will really put an end the dispute. (61) It must be noted in this context, however, that there have been developments in Dutch case law (62) as a result of which the review differences under Dutch law have become minimal. (63)

8.3 Justification of the existence of the binding advice procedure in the Netherlands

27. Arbitration offers a procedure for which the law provides more safeguards than for the binding advice procedure and it results in a decision that can be enforced without difficulties both in the Netherlands and abroad, which raises the question whether, in addition to arbitration, there is a need for the binding advice procedure in the Netherlands. A study on this issue, '*Arbitrage en/of bindend advies bij de SGC*' (64) [Arbitration and/or binding advice by the SGC], resulted in the recommendation that the dispute committees for consumer affairs should no longer use the binding advice procedure but only arbitration. Underlying this recommendation was the notion that arbitration offers a procedure with more guarantees regarding independence and impartiality, implementation and enforcement. Moreover, the current procedure followed by the dispute committees for consumer affairs would require very little modification to realise this. The procedural rules of the dispute committees for consumer affairs strongly resemble the statutory arbitration rules laid down in Book IV of the DCCP, which is an indication that the procedure followed by the dispute committees for consumer affairs does not differ very much from arbitral procedure. The availability of the committee's clear rules in writing is important, however, to keep the procedure accessible to consumers, who usually litigate without legal representation. It is understandable, given the marginal differences between the procedures, that the question arose whether it would be better to resolve consumer disputes by arbitration. I can agree with the recommendation that the dispute committees for consumer affairs would use arbitration instead of binding advice. Since these dispute committees are applying procedural rules that closely resemble the rules laid down in Book IV DCCP regarding arbitration, the parties should also be able to benefit from a simple procedure for obtaining a decision granting leave to enforce arbitral awards (art. 1062 and art. 1063 DCCP). Thus, I would not want to defined the existence of binding advice by referring to the dispute committees for consumer affairs that in current practice frequently use binding advice to resolve disputes.

28. The foregoing does not mean that there is no justification in the Netherlands for the binding advice procedure in its current form. In Dutch legal practice, it is felt to be a positive aspect of the binding advice procedure, as compared to arbitration, that the former can be more informal because of the absence of formal legislation (see para. 4 above). The binding advice procedure will therefore continue to serve a purpose in addition to arbitration, even though this is true in particular for ad hoc binding advice.

29. The informality of the procedure is an important reason to opt for binding advice in
P 21 cases concerning the filling in of a gap or the modification of an existing legal relationship or determination of an obligation to be performed under an existing legal relationship. These cases concern a clearly defined issue. It is easier for the expert, e.g. an accountant, who (usually) has no legal training, to deal with the binding advice procedure than with arbitration because of the absence of statutory procedural rules.

30. In the case of legal disputes, too, the informal and expeditious binding advice procedure can be a reason to opt for this method of dispute resolution. A dispute can be settled in an informal manner by mediation, too. Mediation takes a different approach. It is a type of conflict negotiation where a neutral mediation expert, the mediator, leads the negotiations between the parties involved to work from their actual interests towards mutually supported and equally satisfying and optimal results. (65) There are, however, types of disputes that need a *decision*, because they concern an issue that is not negotiable (it is A or it is B?) and/or because the parties failed to reach an settlement in negotiations with or without the assistance of a third party.

31. In my opinion there are two situations in which it is preferable to use the informal way of resolving a dispute offered by the binding advice procedure. The two situations mentioned below are not cumulative, but in practice *both* situations will often occur simultaneously. The first is the situation in which the relationship between the parties is (still) good and in which it is desirable that it continue to be good. In ongoing relationships, for instance, it is important that the parties still be able to get along with each other after the dispute has been resolved. Examples are disputes arising in connection with long-term agreements such as joint ventures and partnerships, but also company-law relationships like the relation between shareholders and the company, or mutual relationships between shareholders. Because of its more formal nature, arbitration may on the contrary put relations between the parties further on edge. The second situation is where the dispute concerns a strictly legal issue, while the parties agree on the facts or have agreed to leave the facts out of the matter, thus making it unnecessary to set up full arbitration proceedings. For this reason, the binding advice procedure is frequently used in the Netherlands for insurance law issues, in particular in disputes between insurance companies. These disputes are often about the interpretation of a policy, on the basis of a simple set of facts on which the parties agree. An example is the question whether a particular type of damage is covered by the policy.

In practice, insurers may send the binding adviser a joint letter in which they state the facts and request the binding adviser to give a binding advice. Since such cases usually lead to a declaratory decision, the question of whether or not there is a simple procedure for obtaining an enforceable title does not play a role. An example of a dispute in which both situations are at play is a dispute on a minor point which arises between parties in the course of negotiations or mediation, with the result that the parties cannot achieve an extrajudicial resolution of the main dispute. The resolution of this minor point must not be allowed to put the relationship on edge, because the parties will subsequently have to continue negotiating. Another factor is that it will usually not be necessary to start full proceedings because the matter only concerns a minor element of the dispute. The binding advice procedure is then ideally suited to resolve such a minor issue. (66)

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9 Conclusion

32. Binding advice is used in the Netherlands to resolve both existing and possible future legal disputes, and to fill in a gap or modify an existing legal relationship or to determine an obligation to be performed under an existing legal relationship. In this respect, the situation in the Netherlands is special compared to other civil-law countries. Belgium has a procedure that is similar to the Dutch binding advice, but in Belgian legal practice it is only used to fill gaps in and/or modify an existing agreement between parties or to determine the content of an obligation to be performed under an existing agreement. The German expert determination is likewise used only to establish facts, to determine a contractual obligation to be performed or modify a contract.

33. A typical characteristic of Dutch binding advice is the informal procedure by which it is made, due to the absence of applicable rules in the DCCP. For this reason, the binding advice procedure is easier to deal with for an expert without legal training who is requested to fill in a gap or modify a legal relationship or to determine an obligation to be performed under an existing legal relationship. The expert's freedom to act is not absolute, however. The expert in his role as binding adviser must observe several principles of due process. With regard to settling legal disputes, too, there may in practice be a need for the informal manner of dispute resolution by means of binding advice. This is the case when the relationship between the parties is (still) good and it is desirable for it continue to be good, and/or if the parties want a decision on a strictly legal issue and are in agreement as to the relevant facts.

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