The New Rules 2005

Explanatory notes on the Legal relationship client–architect, engineer and consultant DNR 2005 Standard Form of Basic Contract

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Royal Institute of Dutch Architects BNA

Organization of consulting engineers ONRI

BNA
Royal Institute of Dutch Architects BNA

Keizersgracht 321
P.O. box 19606
1000 GP Amsterdam
T 020 555 3666
F 020 555 3699
bna@bna.nl
www.bna.nl

ONRI
Organization of consulting engineers

Koningskade 30
P.O. box 30442
2500 GK Den Haag
T 070 314 1868
F 070 314 1878
onri@onri.nl
www.onri.nl

Introduction

At the end of 2000 the Royal Institute of Dutch Architects (BNA) and the Organization of consulting engineers (ONRI) took the initiative to develop a new set of regulations for the relation between client and consultant. This initiative was inspired by the fact that the different disciplines in the building industry active in design, consultancy and management sat more and more with each other around the table in order to obtain an integrated design. Although consultant disciplines outside the area of the building industry (for example the industrial, infrastructural and environmental sectors) are less often involved in this respect, the need for a new set of rules was acknowledged by the branch in its full breadth. Consequently there was room for an unequivocal set of rules to replace the SC 1997 and the RVOI 2001, which would regulate in an identical way the relation between the client and the designing parties. Until now it was customary for a client to appoint the consulting engineer on the basis of the RVOI 2001 and the architect on the basis of the SC 1997.
Point of departure was to achieve one new common set of rules which would be determined unilaterally by BNA and ONRI and which would be used in the full breadth of the branch covered by BNA and ONRI.
The Netherlands Association for Landscape Architecture (NVTL), the Association of Dutch Interior Architects (BNI), the Dutch Association of Quantity Surveyors (NVBK) and the Society of collaborating Architects and Building Consultants (SAB) were also involved in the drawing up of these rules.
The NVTL announced in this respect that it would not update its own present rules, the ARTA-1993, after the coming about of the new rules. The Royal Institution of Engineers in the Netherlands (KIVI-NIRIA) supports the DNR 2005. KIVI-NIRIA turns from the publishing of the RVOI-2001 to the co-distribution of the DNR 2005. The DNR 2005 thus replaces the RVOI-2001.
The BNSP, the Dutch Professional Organization of Urban Designers and Planners, investigates the possibility to join the rules in 2005.
Regular consultation would take place with the members of BNA and ONRI and with the representatives of clients who would use the new rules. The rules would be applicable to every scope of commission, that is to say as well for a mono-disciplinary commission as for an integrated commission.

Genesis

For the purpose of development of the new rules, two working parties were created which operated under the supervision of a steering committee. This steering committee was responsible for the coming about of the rules and consisted of, among others, board members of BNA and ONRI.
The working party Law developed the legal relationship. This legal relationship is accompanied by explanatory notes and a standard form of basic contract.
Besides, a standard specification of services is published.
The standard form of basic contract is a standardized contract letter, in which the parties make concrete agreements with respect to the specific commission granted to the consultant. The filling in of this basic contract differs per project, while the legal relationship remains the same.
The working party Package was responsible for the development and tuning of the different specifications of activities of the various consultants during the whole design process.
Both working parties consisted of representatives of BNA and ONRI and other user groups outside the direct circle of BNA and ONRI and were assisted by independent authors who were responsible for the actual writing and editing of the rules. Members of NVTL, BNI, NVBK and SAB also participated in the working party Package.

During the development of the rules the members of BNA and ONRI as well as representatives of the clients were consulted.
The text of the legal relationship was also submitted to the juridical working party of the BNA and the committee juridical matters of the ONRI.

Result

The novelty resides in the fact that the current basic and supplementary activities of the various consultants during the different stages of the design process are written out and are fully brought in relation to each other in the form of a standard task specification.
Also new is the fact that the rules offer the possibility to bring together all the designing activities in one agreement, the integrated commission.
The client can conclude agreements with the different consultants involved in the design process on the basis of the new rules, but he can also conclude one agreement with one consultant, who in turn can contract the various other consultants, all this on the basis of the new rules.

Use of the rules

The New Rules are at the disposal of everyone, client and consultant. Members of BNA and ONRI can buy the set of rules for a reduced price, but also non-members can purchase the rules. The copyright of the rules lies jointly with BNA and ONRI.
All documents are to be found on the websites of BNA and ONRI.
www.bna.nl/serviceonline
www.onri.nl

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Explanatory notes on the Legal relationship client–architect, engineer and consultant DNR 2005

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General

a
The general conditions: The Legal relationship client-architect, engineer and consultant DNR 2005
The Legal relationship client-architect, engineer and consultant DNR 2005 is a set of general conditions. These general conditions can be used for every commission in unaltered form. The Legal relationship client-architect, engineer and consultant DNR 2005 is a consistent whole and it is therefore advised to ensure that these conditions in their entirety form a part of the agreement between parties.

b
Standard Form of Basic Contract
The Legal relationship client-architect, engineer and consultant DNR 2005 is accompanied by a Standard Form of Basic Contract. The Standard Form of Basic Contract is a standardized contract letter, in which the parties make a number of concrete agreements with respect to each specific commission granted to the consultant. The Standard Form of Basic Contract offers a number of subjects from which parties may make a choice. The use of the Standard Form of Basic Contract is strongly recommended, because certainty can then be acquired that important subjects of the agreement to be concluded will not be overlooked and regulated.

c
Standard task specification Buildings
Besides the general conditions, laid down in the Legal relationship client-architect, engineer and consultant DNR 2005, and the Standard Form of Basic Contract, a specification of the activities involved in a commission with respect to a building has also been developed. This specification is an aid with which in a particular case the relevant activities are named and assigned to the different participants over the different stages. The use of the standard task specification is also recommended, because it provides clarity to all participants about the mutual division of tasks.

d
Status of these explanatory notes
These explanatory notes on the Legal relationship client-architect, engineer and consultant DNR 2005 are an aid in the use of the conditions. The explanatory notes offer illustrative examples and sometimes describe what is determined in the rules in other words in order to clarify these.
The explanatory notes are explicitly not meant to complement the rules. Should a divergence occur between the text of the rules and the text of the explanatory notes, than the text of the rules has the precedence. The explanatory notes do not constitute a part of the Legal relationship client-architect, engineer and consultant DNR 2005

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Applicability and defeasibility of the general conditions

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

a
Applicability
General conditions, such as the Legal relationship client-architect, engineer and consultant DNR 2005, are only applicable if they are provided by the consultant and accepted by the client. Therefore the parties declare in the Standard Form of Basic Contract:

1 that the consultant has handed over the Legal relationship client-architect, engineer and consultant DNR 2005 to the client prior to the coming about of the commission; and
2 that the client has accepted the proposal of the consultant to apply the Legal relationship client-architect, engineer and consultant DNR 2005 to the commission.

If this path is followed then the general conditions are applying; they apply between both parties. The conditions also apply if the consultant indicates on his writing paper that the Legal relationship client-architect, engineer and consultant DNR 2005 is applying on his commissions and the client signs an offer on that writing paper. With a view to the following subject (defeasibility) it is already important at this moment that the consultant has offered the client the possibility to become acquainted with the general conditions.
It is not relevant for the applicability whether the client has also read the conditions.

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

What is defeasibility?
Defeasibility means that a stipulation (or more stipulations or perhaps the whole set of general conditions) which has legally come about is nullified/does not apply anymore and such with retroactive effect up to the moment of coming about of the commission.
An example of the consequence of defeasibility: should the limitation of liability of article 15 be nullified for example, then the statutory regulation applies in its place and this provision does not know such a limitation. So the consequences of a nullification are far-reaching.

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

When has the user given the opportunity to get acquainted with the general conditions?
In the case that these rules have been offered to the other party before or at the conclusion of the agreement. One may speak of 'handing over':
– when the general conditions have been literally handed over;
– but also when the conditions come into the possession of the other party in another way such as per post, courier, fax or e-mail. In these last cases the conditions must actually have reached the other party.

In the Standard Form of Basic Contract the client and the consultant declare that the Legal relationship client-architect, engineer and consultant DNR 2005 has been handed over by the consultant. The requirement of handing over is thus fulfilled.

Attention: in the case of a difference of opinion, it is the consultant who must prove whether the general conditions have been handed over.

Finally it is of important relevance that no appeal can be made on this defeasibility of general conditions:
– by a so-called large party (in short: a legal person whose annual accounts must be published or a party who counts more than 50 employees);
– by a party which itself repeatedly uses the same or practically the same conditions in its agreements.

2
Explanatory notes per article

Chapter 1
Definitions

Article 1
Definitions

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

Culpable shortcoming
This concept bears upon shortcomings of both the client and the consultant. The notion of shortcoming is neutral, this means that each case of not complying with an obligation following from the commission falls under the terms. The shortcoming can have many forms: not at all complying, not well complying, complying too late, etc.
One may speak of a culpable shortcoming when the client or consultant could and should have avoided the shortcoming. Not every shortcoming is a shortcoming within the meaning of these rules. A criterion is given in the rules on the basis of which a shortcoming can be evaluated in a particular case. The criterion is that of a well and carefully acting consultant or client, who acted taking account of a normal attentiveness. With respect to the consultant, the criterion is specified: he should be equipped with the required professional knowledge and means, while these requirements are related to the actual commission.

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

Examples of culpable shortcomings of the client are:
- letting the consultant wait too long for his evaluations;
- not informing the consultant about a noted fault in a design;
- not reimbursing indebted sums at the agreed moments.

A culpable shortcoming of the consultant only leads to liability for damages if all the requirements set by article 13 are fulfilled. These are (besides the short-coming):
- issuing a written proof of default and
- not or not in time meeting the requirements of the client as set in the proof of default.

See for the explanation of these requirements the notes on article 13.

If liability for damages is the case, then the question arises whether this is also fully covered by the insurance of the consultant. This has no connection with the question of liability. Possibly the consultant is liable for more than that for which he is insured. Examples of culpable shortcomings which will not be covered by the insurance are too late performance or exceeding the agreed execution costs.

If there is a culpable shortcoming, different possible consequences come into the picture:
- an alteration of the commission becoming necessary, see article 9; for the compensation of consultancy costs in the event of a culpable shortcoming accountable to the consultant see article 55 clause 2;
- liability on the ground of article 13;
- cancellation on the ground of article 27.

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

Chapter 2
General provisions with respect to the commission

Article 2
The commission

Handing over the rules (clause 2)
The necessity of handing over the conditions and the consequences of not doing so have already been taken into consideration under the heading 'general'.

Subjects on which consultation has to take place (clause 3)
The enumeration in clause 3 shows a great number of subjects about which, in many commissions, consultation has to be entered into and agreement has to be reached. The list is an aid for the parties. The enumeration is not limitative. Most subjects come back in the Standard Form of Basic Contract, where they can be concretely filled in.

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

Article 3
Preliminary investigation

Consultation (clause 3)
In order to avoid an uncertain situation in the case that the proposal to proceed with a preliminary investigation is turned down by the client, a provision stipulates that the parties then consult with each other. Here the parties are confronted with the fact that they have to clarify for each other what to do next. Do they definitely take leave of each other or is it possible to find a way out with respect to the reason for the recommendation to enter into a preliminary investigation (see the provision in clause 1). It is conceivable after all that after a closer look the client can adjust or clarify the brief or that the consultant can advise to grant a commission without a preliminary investigation if he gets more data.

Article 4
Laying down the commission

Drawing up the commission (clause 1)
Notwithstanding the basic assumption that the consultant draws up the written concept of the commission, it is of course also possible for the client to do this.

Point of departure and exception with respect to the coming about (clauses 2 and 3)
The point of departure is that the commission is laid down in writing and is confirmed in writing. The same goes for alterations which are brought in afterwards. This requirement about writing is not a requirement for the coming about. If a written document is lacking then the commission can also be proved by other means, in which case one can think in particular about witnesses. Without written document the one who wants to prove the commission finds himself in an awkward position, because some time after the coming about witnesses do not know exactly anymore what has or has not been agreed, and also other means of proof are more often than not less convincing compared to a written document. The consultant therefore saves himself as well as the other party much trouble with respect to the furnishing of proof if he sees to it that he commission is laid down in writing.

Chapter 3
Special provisions with respect to the commission

Article 5
Activities by other parties

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

Chapter 4
Adjustments and alterations

Article 9
Adjustments to the commission

Circumstances which lead to an adjustment of the commission (clause 2)
In this second clause examples are given of the situations mentioned in clause 1 under a and b. The term 'relevant' is used to convey that the alteration must have some weight. Briefs often change in the course of a commission; the alterations can vary from the simple wish to get twenty instead of five wall sockets to the limitation for example of constructing four storeys instead of five. Other examples are: the supervision lasts twice as long as originally budgeted; the object to be executed is executed, otherwise than originally planned, as a measurement contract. It has to be examined per case whether there is a reason to adjust the commission.
The adjustment of the commission can lead to a diminution or an augmentation of the consultancy costs. See for the working out of the financial aspects of an adjustment of the commission article 55 clause 3.

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

Article 10
Unforeseen circumstances

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

An appeal can be made on this article, in the case that unforeseen circumstances are of such a nature that according to standards of reasonableness and fairness one may not expect unaltered preservation from the other party. This makes it clear that this article may only be used with great restraint. Point of departure of the law which governs the commission is after all allegiance to one's given word. As the legislator notes in the explanatory memorandum on article 6:258 of the Civil Code, one must be able to speak of an unacceptable situation.

Chapter 5
General obligations of the parties

Article 11
General obligations of the consultant

Dispose of the necessary knowledge and capacity (clause 1 sub a)
It is not by any means necessary for the consultant himself to dispose of knowledge and capacity, the provision is so formulated that this requirement is also met if the consultant has ascertained himself that he can dispose of this knowledge and capacity.
It is also in the own interest of the consultant that he fulfils this requirement.
A culpable shortcoming of the consultant is the matter according to article 1 in relation with article 13 if in the execution thereof he fails in a way which a good consultant, disposing of the required means and necessary knowledge and capacity and acting carefully, could and should have avoided.

Carry out the commission in a proper and careful manner (clause 2)
The nature and the scope of the obligations of the consultant are described in principle in the commission. On the basis of this document the parties determine what the consultant has to do. Should the consultant always be answerable for what has been agreed upon? That depends. Sometimes the consultant will be answerable for a certain result. Calculations for example should not contain any mistake. If the commission stipulates that an uncertain environment, for example a soil which cannot properly be investigated before the start of the execution activities, should be examined, then the consultant cannot be answerable for the result, but he has met his obligation to advise in a proper and careful manner if he has 'done his best' in the given circumstances.

Estimates and budgets (clause 2)
If the consultant has been asked to draw up estimates or budgets, then the obligation to draw these up to the best of his knowledge also falls under the proper and careful carrying out of the commission. This obligation does not imply that the consultant warrants that the budgets or estimates will turn out to be correct for 100%. Due to its nature this obligation cannot have the character of a result, because one has always to wait how the subject of the budget or estimate, for example a building, will eventually materialize. There are more parties concerned than only the consultant, which exert an influence on the materialization. Nevertheless the consultant is answerable for estimating or budgeting to the best of his knowledge.
The provision implies that the consultant informs the client in time whether the sum he has at his disposal is appropriate or not for the realization of the design which is the subject of the estimate or budget.

Position of trust and independence of the consultant (clause 2)
The consultant stands by the client independently and in a position of trust. He avoids everything that could damage the independence of his advice. The fact of standing by the client in a position of trust brings along a reinforcement of the obligations which bear upon him. The position of the consultant can be compared to that of a lawyer or a doctor, who also have a relationship with their patron which is of a different nature than that, for example, of a supplier. The independence of the consultant brings along that he gives his advice free from influences which have nothing to do with the advice.

Public and private regulations (clause 4)
It is impossible to advise without the knowledge of regulations. In this respect the influence of rules on the daily practice of consultants has become too great. However this does not mean that for each commission of the consultant he is expected to know all the regulations. The provision limits the obligation of knowledge of the rules:

- in the first place to the requirement of taking into account the private and public regulations which are relevant for the commission, and
- in the second place to the regulations of which the existence may be considered as common knowledge among consultants.

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

An example: in hospitals people work with radioactive materials which, at a certain moment, become waste products and have to be stored in some way or other before being removed from the hospital. The storage of the radioactive materials in the different stages is subject to rules. It is not expected from a designer concerned with the hospital that he knows the regulations as regards content, but that he knows about their existence. He is now expected to get acquainted with these regulations in order to be able to inform the client correctly and sufficiently. If he is tackled for example because he has made no provisions, he cannot defend himself with the proposition that he has never designed a hospital or with the proposition that these regulations are not of common knowledge among consultants.

Give information about the commission (clause 5)
The client depends to a large extent on the consultant with respect to information about the execution of the commission. This information obligation is the most important obligation of the consultant after the obligation to bring out the actual advice.
The consultant:

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

The client has a right to information, but the obligation rests on him to use this competence in a way which is in accordance with the rationale of this provision. After all the aim of the provision is to warrant that the client knows what the state of affairs is with respect to the progress of the commission and that he does not get confronted at any moment with surprises. If the client wants information which serves another goal or if he wants information in another form which also serves another goal, then this request for information falls outside the rationale for this provision. The consultant can then argue that extra activities are now involved and that costs will be charged with respect thereto.

Completion of the commission (clause 6)
The consultant has to fulfil the commission according to the agreed time schedule. The points in time which are recorded in the time schedule are not meant as fatal terms. This is to say that the sole turning up of the agreed point in time while the relevant activities are not completed, does not mean that the consultant is in default and thus liable. For a default and possibly a culpable shortcoming, it is at least necessary that:

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

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

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

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

Provide documents at the termination of the commission (clause 9)
The client can have an interest in getting descriptions and drawings – for example because of the maintenance to be carried out – at the termination of the commission. The consultant has an obligation on the ground of the provision in clause 9 to hand over to the client at the termination of the commission the documents which are relevant for him. This does not mean all the documents prepared in the course of the commission. With respect to termination, one should not only think about completion of the commission, but also about termination on other grounds, such as cancellation.
The consultant can ask for a compensation for the handing over of these documents.
The fact that documents come into the possession of the client does not mean that the copyright on what has been laid down in these documents is thereby transferred to the client. Copyright is regulated separately in chapter 11.

Warning obligation (clause 10)
The client can also have taken obligations upon him, see article 12, for example providing the location where the work should be carried out or the handing over of certain goods. Besides, the client is responsible on the ground of article 12 clause 2 for the correctness as well as the timely handing over of information, data and decisions which are necessary for the proper fulfilment of the commission by the consultant.
The consultant has an obligation to warn if this information, these data or decisions from the client manifestly contain such shortcomings or show such deficiencies that he would act in defiance of standards of reasonableness and fairness should he proceed with the fulfilment of the commission on the basis of this information, these data and decisions without warning.

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

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

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

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

Keeping of data (clauses 11, 12 and 13)
Certain data have to be kept by the consultant for a period of five years from the day on which the commission is terminated. The storage time takes effect on the day that the commission is terminated. In article 16 the clauses 5 up to and including 7 indicate which day counts as the day of termination. The consultant does not have to keep the data if and insofar as he has handed them over to the client, see clause 13.
If the client asks for documents in the five-year period, then the consultant hands these over to him. For this, the consultant may ask a compensation.

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

Article 12
General obligations of the client

Act as a good and careful client (clause 1)
Between the client and the consultant there is a legal relationship which has a different character than the legal relationship between for example a supplier and a client. This brings along consequences for the consultant, but also for the client. An example of a conduct of the client in defiance with this provision is the case in which the client requires from the consultant that he deviates from imperative law or when the client, against the negative advice of the consultant, nevertheless takes his chance with a third party.

Timely and correct handing over of information etc. and the responsibility therefor (clauses 2 and 3)
In accordance with the principle that an acting person is liable in principle for the consequences of his acting, clause 2 determines that the client is responsible for the timely and correct handing over of information, data and decisions. This enumeration is not limitative, if in a certain case the client has taken other obligations upon him, then he is also responsible for the timely and correct observance of these obligations. This responsibility of the client does not mean that the consultant can proceed just like that on the basis of this information etc, after all article 11 clause 2 puts on him a warning obligation, see to that end the explanation on that provision.
The information etc does not always have to come from the client himself; the client is also responsible for the information given on his behalf or at his request. In the relationship client – consultant the client is responsible for such information, even if that information has not been provided literally by the client but on his behalf, for example by one of the other participants involved in the project .

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

Not complying with this obligation can form a culpable shortcoming of the client. The consultant however must first:

– declare in writing the client to be in default;
– grant him a reasonable term to comply as yet with his obligation.

Approve and authenticate designs and documents (clause 3)
The client has an obligation to evaluate in time designs and other documents and after approval authenticate them if so requested. The client who lets his consultant unnecessarily wait for these can be declared liable for the consequences thereof because this possibly constitutes a culpable shortcoming.

Warning obligation of the client (clause 4)
The client is not obliged to actually control advices. The consultant himself is responsible for the correct fulfilment of the commission, see article 11 clause 2. However, if the client actually detects a shortcoming (criterion one) or should he have been conscious thereof (criterion two), then he has an obligation to warn the consultant in that respect. The criterion 'should have been conscious thereof' does not imply that the client should have noted the shortcoming. If the second criterion had been formulated accordingly, then it would be satisfied sooner than if it had been formulated as in the rules: 'should have been conscious thereof'. The criterion recorded in the rules is a factual criterion, while the criterion 'should have noted' is of a normative nature. The criterion 'should have been conscious thereof' can be called upon by the consultant when he finds himself in a situation in which he cannot prove that the client has actually noted a shortcoming, but that in this situation the facts are of such a nature that it may be taken for granted that the client has noted the shortcoming. Therefore the warning obligation which rests on the client does not stretch as far as the warning obligation which rests on the consultant by virtue of article 11 clause 12.
If it is established that the client has neglected his warning obligation, what is then the de jure situation? In the case that the neglect is established as a shortcoming of the client, the consultant may cancel the commission on that ground, see article 27 and articles 37 and 38, on which ground the consultant can claim an additional payment of 10%. Moreover the violation of the warning obligation can entail that the consultant is not necessarily responsible for all the damages which are now occurring (because after all it was a fault of the consultant for which the client failed to warn). One could judge that the damage is also caused by the client. Finally, through this neglect damage can also occur on the side of the consultant; possibly the client is liable for this damage, one should consult the civil code in such a case.

By the term 'in due time' is meant that, if necessary, some time may be taken for research or deliberation.

Representation of the client (clause 5)
Though the client does not have to appoint a representative, this is strongly recommended in the case of clients consisting of a large organization. In this manner it is clear for the consultant with whom he can make arrangements.

Chapter 6
Liability of the consultant

Article 13
Liability of the consultant for culpable shortcomings

Requirements for liability (clause 1)
The consultant who perpetrates a shortcoming (i.e: he perpetrates a shortcoming which a consultant acting correctly and carefully in the given circumstances, taking into consideration normal attentiveness and equipped with the necessary knowledge and means required for the commission, could and should have avoided) is not by definition liable therefor. To be declared liable, the following requirements should also be met:
- the client must declare in writing the consultant liable and
- grant him a reasonable time to make good the consequences of the shortcoming and moreover
- the consultant has not or not on time complied with this summons.

The proof of default must be done in writing. Should the proof of default be sent by e-mail or fax, then this requirement is met just as the case would be had the proof been sent by letter. The declaration duty and the evidence that the proof of default has been issued rest with the client. The proof of default only takes effect when it reaches the consultant.
It therefore speaks for itself to issue the proof of default by registered post or if need be by means of a writ.
What should the proof of default state?
- a clear description of the shortcoming;
- a clear specification of what is demanded from the consultant;
- a clear description of the ground for what is demanded;
- the deadline for what is expected from the consultant;
- holding the consultant liable in the case he does not, or not in time, meet the requirements.

The deadline should be reasonable, taking into account what is wanted from the consultant and the circumstances of the concrete case, such as weather conditions or preparations which have to be made (of course taking into consideration the fact that they possibly should already have been made).
The consultant is liable for his culpable shortcoming at the moment that he has not answered the proof of default, only at that moment does he become liable. Insofar as damages for delay can be claimed, the calculation thereof only starts from that moment.
The proof of default does not have to be issued in all cases. For example, if a term has been agreed (in defiance of what follows from these rules) as fatal, then the sole expiry of this date, without the work having been executed that should have been carried out, is enough to be in default. Because it is not always clear whether a term is fatal or not, it is always recommended to issue a written proof of default. The consequences flowing from not issuing a proof of default while this proof should have been issued, are far-reaching, as is now explained.
What is the de jure situation if the client does not issue a proof of default?
Then the consultant is in principle not liable even if he perpetrates a culpable shortcoming.

Liability of other persons (clause 2)
The consultant will often – and he may do so as article 5 shows – call in another person for his commission. These other persons can be employees of the consultant or persons who are not in his service and are prescribed or not by the client.
If the person who is called in by the consultant and is not prescribed by the consultant makes a miscalculation and this constitutes a culpable shortcoming, then the consultant is liable for this shortcoming towards the client as if he himself had failed.

Things are different if another person (no employee) is prescribed by the client; then the consultant is not liable for a culpable shortcoming by this person.
See for this case article 14 clause 5. Nevertheless, the warning obligation of the consultant, see article 11 clause 10, also applies to this person. If the client prescribes a person of whom the consultant knows that this person is not competent enough, then the consultant is bound to warn the client in this respect.

Article 14
Compensation

General
If a culpable shortcoming of the consultant occurs, then the client can claim a compensation. The client can also choose to cancel the commission, see article 25 or besides the cancellation ask for a compensation, see article 27 clause 3.
Rules are laid down for compensation in article 14.
Article 14 only determines the compensation resting with the consultant. The compensation resting with the client is subject to legal regulations.

Direct damage (clauses H 1 and 2)
If it is established that the consultant is culpably shortcoming, then article 14 settles what the scope of this liability will be. The first clause determines that the consultant is liable for the direct damage suffered by the client. Direct damage is not defined; this is left to arbitrators. The second clause gives a not exhaustive enumeration of examples which anyway do not belong to direct damage and for which the consultant accordingly is not liable. On the ground of the provisions of clauses 6 and 7 one may depart from this, but then the requirements of these clauses have to be met, see the explanation on these clauses.

An example of the clauses 1 and 2 :
Suppose: the consultant designs a cooling installation, and this installation gets out of order after the client has stored his supply of fresh vegetables.
Subsequently the vegetables fall in decay due to the rise of the temperature.
Undoubtedly this is a culpable shortcoming of the consultant. The following falls under the direct damage to be compensated by the consultant:
- the damage to the cooling installation (with respect to the question how it should be repaired, see clause 3).

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

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

Making good by the consultant (clause 3)
The consultant is entitled to make good himself the shortcoming (have it made good) or to limit or remove the damage which is a result of this shortcoming (have it limited). He should do this in good consultation with the client. Suppose

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

Exceeding of competence (clause 4)
The consultant who exceeds his competence, for example by commissioning a contractor for work for a sum exceeding the sum for which he is authorized, perpetrates a culpable shortcoming and is liable for the direct damage which the client suffers in that respect. This provision should be read in conjunction with article 7 clause 1. That clause stipulates that in a number of instances the consultant can exceed his competence as specified in writing, but that nevertheless he cannot be blamed therefor. In those cases the consultant cannot be held liable for exceeding his competence. This is the case for example if the client has explicitly given the permission to the consultant to commission the contractor.

Assignment (clause 5)
The consultant who gets confronted with a prescribed person who does not, not in time or not soundly perform, should try to get compensation from this person for the damage which he consequently incurs. If he does not succeed in getting all the damage compensated, then the client refunds the remaining part to the consultant. In exchange the consultant hands over his claim on the failing person to the client, in order to enable the client in turn to tackle once again the failing person. This handing over of the claim which the consultant has on the prescribed person is called: to cede or to assign.

Other damages (clause 7)
In principle the liability of the consultant is limited to the damages mentioned in article 14. If perpetrating a culpable shortcoming is coupled with evil intent or gross negligence , then the liability of the consultant is also extended to other damages. An example is the damage to vegetables caused by the wrong temperature in the afore mentioned case of the cooling installation. This indirect damage would, in the case of evil intent or gross negligence, indeed qualify for compensation.

Insurance (clause 8)
In the case of execution of an object (a product of material nature) an insurance will generally be taken out by the client or at his expense (a customary All Risks insurance or comparable insurance). In that case, the damage for which the consultant is liable is frequently, completely or partially, covered by this insurance. Insofar as this is the case, the consultant is not liable. This provision is about a customary insurance in which the consultants are also insured, and not about the insurance which has actually been taken out. Items which fall under a customary insurance are material damage to the object, liability with respect to the execution of the object, damage to properties of the insured client and the damage which is a result of liability of the various participants towards each other; the damage can be caused by the different parties participating in the execution of the object. Coverage of the consequences of design faults which arise during the defects liability period should also be included.
An example of an insurance comparable to an All Risks insurance is the insurance for soil improvement. The Guideline and Checklist All Risks and Liability insurances, published by AVBB, BNA and ONRI is a practical aid for questions with respect to legal insurance matters.

Article 15
Extent of the compensation

At the most equal to the consultancy costs (clause 1)
The basic rule is that the liability of the consultant for a culpable shortcoming is equal at the most to the consultancy costs. Under consultancy costs are to be understood; the fee (that is the compensation to which the consultant is entitled for his activities) and the costs (costs are supervision costs and expenses); the consultancy costs are further elaborated in chapter 12; at the same time attention has to be given to the provisions with respect to cancellation. If the culpable shortcoming is coupled with a cancellation, then the consultancy costs which the consultant is entitled to must be calculated (under circumstances it is possible that a deduction will be applied). The outcome of this calculation is determining for the extent of the liability for damages of the consultant.
The consultancy costs are calculated without the turnover tax, with regard to the height of the liability for damages the VAT is therefore left aside; see for the VAT the provisions of article 49 clause 3.

Suppose that the consultancy costs amount to € 33.000 and the damage is € 45.000, then the consultant is liable for € 33.000.
If the consultancy costs amount to more than € 1.000.000, then the extent of the liability is equal to € 1.000.000, this is an exception to the basic rule. This is about the consultancy costs which the client is indebted to the consultant; whether partial commissions should be considered as part of one commission one cannot say in general. Arbitrators or judges will have to decide on such matters as the occasion arises.

The consumer as client (clause 2)
The regime described in clause 1 does not apply if the client is a consumer. A consumer is a natural person who is not engaged in the exercise of a profession or business. If the client is a consumer and if the consultancy costs are lower than € 75.000, then the maximum damage to be compensated is equal to € 75.000. Suppose the consultancy costs amount to € 2.000 and the damage is € 45.000, then the liability is € 45.000.
If the client is a consumer in the given definition of the word, but the commission is one for which the consultancy costs amount to more than € 75.000, then the provision of the first clause applies.

Article 16
Liability period and expiration terms

Expiration of the liability (clause 1)
Expiration of the liability of the consultant means that the client no longer has the authority to tackle the consultant after the indicated expiration term; in other words the right to tackle the consultant has been nullified.
An expiration tem cannot be stopped nor can it be extended, which means that the client cannot block or rather extend the course of the expiration.
It is important furthermore to realize that the expiration of this term (nor of the other terms mentioned in this article) does not imply that the arbitration court is not competent anymore. Article 58 clause 2 determines that all disputes resulting from the commission are subject to arbitration.
The liability of the consultant is limited in time to a period of five years from the day on which the commission is terminated either by completion or cancellation. What is to be understood by the day of termination is stipulated in clauses 5 and 6 of this article. If the consultant is called upon after the lapse of five years, then he should himself indicate that he makes an appeal on this provision and is therefore not liable. An arbitrator or judge can by virtue of his office (without being asked) overrule this contractual expiration term. If the consultant fails to

point at this expiration towards the arbitrator/judge, then there is no question of expiration of the liability. The consultant who is judicially involved by the client while the term of expiration has expired, is well advised to point at the expiration of the right of the client to file a claim, before all other defences which he may put forward against the claim of the client.

Legal action on account of a culpable shortcoming (clause 2)
The client who discovers that the consultant has perpetrated a culpable shortcoming, or who should have discovered this in reason, must:
- with due diligence;
- declare in writing and with good reasons the consultant to be in default (see for the requirements demanded for a proof of default article 13 clause 1).

Under due diligence is to be understood that the client has some time to declare in writing the consultant to be in default. How much time is acceptable depends on the circumstances of the case; one could think of the complexity and/or the seriousness of the problem. If the client waits too long with the proof of default, then a legal action (putting the dispute judicially before the courts) is inadmissible, so that the damage does not come at the expense of the consultant. But also here, the consultant has to take care of eventually putting forward the issue of not taking into account the due diligence, before the arbitrator/judge.

Expiration of the right to a legal claim (lid 3)
Suppose that the client has acted according to the provision in clause 2, he has indeed with due diligence issued the proof of default after discovering the shortcoming, he must then not wait too long with establishing a legal claim (putting the claim judicially before the courts): if he waits longer than two years after the proof of default, then the right to hold the consultant liable for the shortcoming expires and no legal action can take place anymore.
This means that in a concrete case the legal claim which according to the basic rule of clause 4 is inadmissible only after five years after termination, possibly becomes already inadmissible earlier because the right to a legal claim has expired. Suppose for example:
- that two months after completion the client detects a shortcoming,
- that with due diligence he issues a motivated proof of default in writing,
- that because the consultant does not produce a sound solution in time, the client puts the legal claim on the consultant before the courts within two years in order to prevent expiration of the right to make a legal claim. If the legal claim is put before the courts only after those two years, then the provision of clause 4 applies: inadmissibility.

Again: the consultant must raise the issue of expiration of the term. The arbitrator/judge may not do so by virtue of his office.
With other words: putting a legal claim before the courts is also bound to an expiration term.

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

Day of termination (clauses H 5 and 6)
The term termination is the covering term for the different manners in which a commission can come to an end. Under the day of termination is to be understood the day on which the commission ends, either by completion, cancellation or dissolution. Cancellation means that a party terminates unilaterally the commission. The grounds for cancellation are exhaustively stipulated in chapter 9 of these rules. Dissolution is a form of termination which can be used according to the Civil Code if a shortcoming by the other party occurs. In these rules this mode of termination is excluded except for consumers, see article 22.

Article 17
Other provisions with respect to compensation

The right to compensation and the obligation to pay (clause 1)
The sole fact of the liability for damages of the consultant does not mean that the client is relieved of his task to pay the consultant as agreed for that part of the activities which have been carried out correctly, though the obligations can be settled with each other.
What the client is indebted to the consultant depends also on the question whether he sees in the shortcoming a reason for cancellation. See for the settlement of payments in the case of a cancellation on the ground of a shortcoming article 27.

Secondment (clauses H 2 and 3)
The consultant who seconds an employee to the client has little or no supervision on the performance of this employee. For that reason the liability of the consultant for this person is limited to the promised quality of this person, and in time to the agreed period of secondment. Should the seconded person cause damage which cannot be attributed to the promised quality, then the consultant is not liable for this damage.

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

Article 18
The client is a consumer

The law provides protection for the consumer by stating that sometimes regulations with a certain content are unreasonably onerous and if requested will be nullified. The competence conferred by these provisions to the consumer is concretized in these rules in two places. For the sake of completeness it should be noted that where this concretization is lacking, it is obviously not the intention of these rules to diminish this competence. The provisions in these rules where the protection of the consumer is explicitly mentioned can be found in the articles 18 and 22 clause 1. Article 18 takes this protection into account by stipulating that this chapter, with respect to the liability of the consultant, is applicable unless the provisions can be considered as unreasonably onerous. Parts which are regarded as unreasonable after a nullifying action do not belong (with retroactive effect) to the contract between parties.

Chapter 7
Interruption, delay and the consequences thereof

Article 20
Consequences of the interruption or delay of the commission

Payment obligation (clause 1)
In the case of interruption or delay of the commission, the consultant is entitled to send a bill while on the ground of a possibly agreed payment schedule this was not yet foreseen, on the condition that the delay or interruption cannot be ascribed to him. The gauging point for the calculation is constituted by the state of the activities at the moment that the consultant draws up his bill. An example of the 'costs reasonably made and yet to make' mentioned sub d: the costs incurred by the consultant because he has contracted extra personnel or a particular service for the commission (for example to carry out a soil investigation) and for whom there is no work as a result of the delay or interruption.

Liability for damages of the client (clause 2)
If the delay or interruption cannot be ascribed to the consultant, then he has at the same time a right to compensation. The damage which the consultant can suffer is also called harm risk or mobilization and demobilization costs.
The consultant is bound to restrict his damage as much as possible. In the case of an interruption which is expected to be followed by a lengthy delay, one may expect that the consultant for example tries to put his employees on another commission. If he accountably refrains from doing so, then he will not be able to recover all his damage from the client.

Revise the consultancy costs (clause 3 in relation with article 55 clause 3)
If the delay or interruption leads to an alteration of the starting points or other circumstances which underlie the commission, then this can constitute a ground to revise in consultation the consultancy costs

Chapter 8
Provisions applicable to cancellation

Article 21
Mode of cancellation

Mode of cancellation (clause 1)
The date of the cancellation can be identical with the day of the announcement of the cancellation or lie after that. What is not possible, is to confer a retroactive effect to the cancellation.

Lacking grounds (clause 2)
These rules couple different consequences to the different grounds for cancellation. It is therefore important to indicate on which ground the commission is cancelled. If the cancelling party omits to do so, then the cancellation is considered to be done within the meaning of article 24, the cancellation without reason. The consequences thereof are stipulated in articles 33 and 34 with regard to the client and in articles 35 and 36 with regard to the consultant.

Article 22
Dissolution of the commission

The system of termination of the commission is exhaustively regulated in these rules, except for the consumer. The basic rule is that cancellation can be done on the ground of article 24 (in which case a reason does not need to be specified) and on the grounds mentioned in article 25. According to these rules the commission can only be terminated in one other way, and that is completion.
Dissolution is a mode of termination which the Civil Code recognizes for particular cases, besides the termination by cancellation or completion. The law attaches conditions and certain consequences to dissolution.
Due to this, the most important legal ground for dissolution because of a shortcoming, see article 6:265 BW (Civil Code) is excluded (other grounds such as dissolution on the ground of bankruptcy are also excluded). The legal shortcoming is not identical with the shortcoming as meant in these rules. These rules only recognize the culpable shortcoming, while the law does not call for accountability as a requirement for dissolution. This means that these rules regulate the possibility of terminating a commission in the case of a shortcoming in another way:
- dissolution is excluded, one has to cancel;
- only a shortcoming which is culpable gives the authority to cancel on that ground.

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

Consequences in the case of legal dissolution (clause 2)
Insofar as a party is free to dissolve the commission on a legal ground, because he is a consumer, the settlement of the relation has to take place according to these rules. After all, the Civil Code only stipulates imperatively that the ground for dissolution may not be restricted, but is mute about the consequences flowing from the dissolution.
Suppose that the client/consumer dissolves on the ground of the provisions in article 6:265 BW (a shortcoming of the consultant), then he could do that for every shortcoming (except for the shortcoming of a particular nature or little importance) also if the shortcoming cannot be attributed to the consultant. The question which consequences this dissolution entails must be answered on the basis of the provisions of articles 37 and 38.

Chapter 9
Cancellation of the commission

Article 24
Cancellation of the commission without reason

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

Article 26
Delay and/or interruption

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

Article 27
Culpable shortcomings

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

Reprehensible action (clause 2)
Reprehensible action is improper action. Sometimes this will be equal to a culpable shortcoming, but this is not always the case. One may think of the example given earlier with respect to the obligations of the client, article 11 clause 1. Suppose a client commissions a consultant to design a covering. Subsequently the client asks the executing party, who sees possibilities to economize on the execution, to run over the calculation. The client then asks the consultant to take over the responsibility for these savings which the consultant does not approve. One cannot say that the behaviour of the client constitutes a culpable shortcoming, but it is reprehensible. The relations can get so upset by this behaviour that it may be wise to take leave from each other. That is why the same consequences follow from reprehensible action as from a culpable shortcoming.

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

Article 28
Force majeure

The notion of force majeure (clause 1)
In the first clause the word 'also' is used, this is to make clear that one may speak of force majeure in the judicial meaning of the word as well as in the case described in clause 1. One may speak of force majeure if a shortcoming cannot be ascribed to the creditor, nor cannot come at his expense by virtue of the law, legal action or views prevailing in society. Here the situation must also be a serious one, in view of the wording that in all reasonableness continuation may not be demanded.

Article 29
Insolvency of one of the parties

Financial insolvency (clause 2)
Financial problems do not always lead to, and sometimes only after a while, to bankruptcy or one of the other circumstances described in clause 1. However the financial insolvency of one party can bring the other party in trouble. Difficulties can also arise if there are good grounds to expect that the other party will fail in the observance of its obligations. In these cases clause 2 provides the possibility to cancel, if the request to the other party to declare that it is prepared and in state to proceed with the commission or provide security has not been answered.

Chapter 10
Consequences of the cancellation of the commission

Article 30
Modification of the legal form or the collaboration form

Modification (clause 1)
The first clause contains a non-limitative enumeration of instances in which the legal form or the collaboration form is modified.

General
The rules with respect to the consequences of cancellation are set up in such a way that for the client as well as for the consultant the consequences are always regulated separately:
- the articles 33 and 34 stipulate the consequences of cancellation by the client without ground;
- the articles 35 and 36 stipulate the consequences of cancellation by the consultant without ground;
- the articles 37 and 38 stipulate the consequences of cancellation by the client on a ground accountable to the consultant;
- the articles 39 and 40 stipulate the consequences of cancellation by the client on a ground accountable to the client himself;
- the articles 41 and 42 stipulate the consequences of cancellation by the consultant on a ground accountable to the client;
- the articles 43 and 44 stipulate the consequences of cancellation by the consultant on a ground accountable to the consultant himself.

This way and with respect to the payment obligation of the client and the copyright of the consultant, the cancelling party can easily oversee the consequences of its cancellation in the two relevant articles. This does not imply that other articles need not to be consulted anymore.
If for example there is a cancellation due to a culpable shortcoming, then it is surely conceivable that this culpable shortcoming has caused damage on the side of the cancelling party. In that case the provisions of the chapter about liability will have to be consulted. Furthermore the provisions of chapter 12, financial provisions, will have to be taken account of.

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

Payment obligation increased
Moreover, in three cases the client is possibly compelled to pay 10% of the remaining part of the consultancy costs which would be indebted if the commission had been completely fulfilled. With regard to this matter see:
- article 33 clause 2 (cancellation by the client without ground);
- article 39 clause 2 (cancellation by the client on a ground accountable to the client);
- article 41 clause 2 (cancellation by the consultant on a ground accountable to the client).

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

Payment obligation possibly diminished
In three cases the client is entitled to deduct 10% on what he has to pay. This arises in the cases of:
- article 35 (cancellation by the consultant without ground);
- article 37 (cancellation by the client on a ground accountable to the consultant);

– article 43 (cancellation by the consultant on a ground accountable to himself).
Moreover, in these cases the payment obligation does not stretch farther than insofar as the activities have been useful for the client.
Is it also possible in these cases to deviate from the sum which has to be paid if manifestly unacceptable consequences arise.

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

Copyright after cancellation
Here the term copyright means more than the Copyright Act implies. Not only do the works within the meaning of the Copyright Act fall under this term, but also all advices which do not fall under the definition, but do fall under the definition of advice within the meaning of these rules: the result of the activities of the consultant. Examples: the calculations which have been made for setting up a certain installation, which could also be applied for another object to be executed on behalf of the client; the drawing which does not qualify for the requirement of originality in the Copyright Act.

Permission required for using the advice
In three cancellation cases the client may use the advice only after the previous permission in writing of the consultant:
– article 34 clause 1 (cancellation by the client without ground);
– article 40 clause 1 (cancellation by the client on a ground accountable to the client);
– article 42 clause 1 (cancellation by the consultant on a ground accountable to the client).
This point of departure allows an exception if at the time of the cancellation a start has already been made with the execution of the object (see clause 3). But the client is then bound to pay a compensation to the consultant for the use of the advice and is also bound to let the consultant control whether the advice is used according to his intentions.

No permission needed for using the advice
In three cases of cancellation, the client may use the advice without intervention of the consultant:
– article 36 (cancellation by the consultant without ground);
– article 38 (cancellation by the client on a ground accountable to the consultant);
– article 44 (cancellation by the consultant on a ground accountable to himself).

Chapter 11
Rights of ownership and copyright of the consultant

General
The term copyright mentioned in the title of this chapter is used in a narrow and in a broad sense. Article 46 looks at the copyright in a narrow sense, meaning by this term: copyright, patent law and model law within the meaning of the relevant legislation.
In the broad sense the term includes, besides what is meant in the narrow sense, also all other advices, see for this meaning the use in the broader sense in the articles 47 and 48.

Article 45
Ownership of documents

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

Chapter 12
Financial provisions

Article 46
Copyright of the consultant

This article concerns the copyright resting on those advices which, within the meaning of the Copyright Act 1912, may be considered as a work for which copyright applies. In article 46 clause 2b the rights are formulated to which the qualified author is entitled on the basis of article 18 clause 1 of the Copyright Act. Not all the rights are of the same practical importance, but nevertheless they have been included in these rules in order to ensure the conformity with the judicial regulations. At the same time this article bears upon the advices which, within the meaning of the Governmental Patent Act and the Benelux Law with respect to Drawings and Models are considered to be falling under these laws.

Article 48
Right of repetition of the advice

Repetition of the advice by the client (clause 3)
Even inn the case of the complete repetition of a former commission, the consultant will generally carry out activities and incur expenses. A compensation will have to be agreed upon for these activities and costs, besides the remuneration for copyright to which the consultant is entitled.

General
The settlement of the financial provisions does not include fee schedules or fee formulas, nor propositions for the distribution of the fee over the different stages of the commission. Such schedules and distribution codes are difficult to formulate unequivocally for consultancy activities from different professional disciplines. Besides such schedules and formulas do not fit in with the present times, in view of the developments in competition law. These rules indicate without preference the mostly used modes of calculation of the fee, the supervision costs and the expenses and give definitions of these terms. The chapter 'Financial provisions' is restricted to the headlines; not all the factors which can be relevant for the calculation of consultancy costs have been handled here.
For the making of arrangements by their members, BNA and ONRI will publish, insofar as allowed by the law, supporting material; historic figures of consultancy costs will also be made public.

The mode of calculation of the fee, the supervision costs and the other costs, as well as the height of a percentage or of a sum should be agreed by the consultant and the client on the basis of a proposal, respectively an offer by the consultant or an offer by the client.
In the determination of his proposal the consultant will take into account all the data and factors typical for the present commission.
These can be:
– the nature, scale and complexity of the commission;
– the scope and quality of the available data, such as the brief;
– the kind and quantity of the activities to be carried out;
– the planned duration for carrying out the commission;
– the eventual phasing of the commission;
– the collaboration with third party-consultants from other professional areas and/or within the own discipline;
– activities which are put out by the consultant to specialists;
– to what extent available know-how and results from former commissions can be applied;
– whether the activities can be carried out in the own office, elsewhere or also abroad;
– the influence of governmental instructions and regulations;
– the records, documents and papers to be delivered.

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

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

Article 50
Consultancy costs

Supervision costs (clause 3)
Supervision can be carried out as follows:
- full-time supervision for the duration of the execution during working hours as held on to by the executing parties;
- part-time supervision at certain fixed times or days of the week;
- part-time supervision for an average percentage to be agreed upon of the execution period;
- ad hoc or on demand by the executing party or the client.

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

Expenses (clause 4)
The settlement of the expenses includes more than what used to be known under the term 'advances and/or out-of-pocket expenses'.

Article 51
Determination of the consultancy costs

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

Article 52
Calculation as a percentage of the execution costs

The execution costs (clause 1)
For the determination of the execution costs, use can be made for example of the description of the construction costs under 3.2 of NEN 2631, titled 'Investment costs of buildings', first edition, march 1979. For that matter other standards with respect to execution costs can also render good service.
It has to be settled whether the total execution costs of the object will constitute the basis for the calculation of the consultancy costs, or only further to specify parts, such as the costs of the structure or the installations. It can also be determined that the agreed percentage will be applied for all the execution costs, whether or not with the exception of particular parts which fall completely outside the attention area of the consultant. It is recommended anyway to settle this exactly.

Article 53
Calculation on the basis of spent time

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

Article 55
Consultancy costs in the case of adjustments and alterations

Alterations in the execution of the commission (clauses 1 and 3)
Alterations in the execution of the commission can follow among other things from:
- data delivered by the client which do not match the reality;
- wishes or decisions which are not communicated in time to the consultant;
- variants or alternatives for studies or designs already completed;
- coming back on previous decisions;
- increase or reduction of the previously fixed budget;
- comments on the activities of the consultant which, with regard to content, professionalism or aesthetics, fall under his responsibility, and obviously insofar as they are not the consequence of a fault by the consultant;
- the choice for alternative solutions, constructions, techniques, execution methods and the like brought up by third parties;
- faults perpetrated by third parties.

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

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

Article 56
Payment of consultancy costs

Indebted interest (clause 6)
The Civil Code acknowledges two kinds of legal interest. One for the consumer, see article 6:119 BW and one for the so-called business agreement, that is the agreement for benefit which compels one or more parties to give or do something and which has been concluded between one or more natural persons acting in the exercise of a profession or business, see article 6:119a. These percentages, which are regularly published by BNA and ONRI, diverge. It is therefore important to observe the correct percentage.

Chapter 13
Applicable law, disputes and enactment

Article 58
Disputes

General
A difference of opinion does not necessarily lead to a dispute to be submitted to arbitrators. The first clause provides the possibility of solving the difference of opinion for example by mediation, to this end one can turn to the Dutch Mediation Institute in Rotterdam. Furthermore one may point at the existence of the complaint committee of the ONRI and at the possibility to bring up a problem before the dean of the BNA.

Court of justice, section cantonal court (clause 4)
Disputes with a claim with a value up to euro 5.000 can be brought up before the court of justice, section cantonal court, instead of the arbitration court. If a counterclaim is set up with a higher value, and if there is the faintest relation between the two claims, and this will often be the case, then the court of justice, section cantonal court, will settle both cases. On the other hand an expert will have to be appointed if the case becomes technically complicated.

3
Standard Form of Basic Contract

The undersigned:

.....[1]
residing at .....
in this respect legally represented by .....
hereinafter called: the client
and
.....
residing at .....
in this respect legally represented by .....
hereinafter called: the consultant,

declare to have agreed upon the following.

The parties assess that prior to the drawing up of this contract the contents thereof have been sufficiently discussed, and that the DNR 2005, of which a specimen was handed over to the client, apply to this contract.

1
Project data

1
The client commissions the consultant and the consultant accepts the commission to carry out the following activities ....., further described in appendix 1.
2
The advice shall be carried out by the consultant having regard with the time schedule entered in appendix 2.
3
The phasing of the execution of the activities shall take place according to the time schedule entered in appendix 2.
4
The sum involved with the execution costs of the object shall amount to approximately: euro ....., in words: .....
5
Having regard to the provisions about consultancy costs elsewhere in this contract as well as in the Legal relationship client-architect, engineer and consultant DNR 2005 attached to this commission, the sum for consultancy costs to be paid by the client to the consultant is calculated at euro ....., excluding VAT, in words .....
These consultancy costs comprise the following components:
fee .....
supervision costs .....
expenses .....

2
Contract documents

1
The following contract documents describe in mutual relationship the rights and obligations of the parties resulting from the contract:
A
the brief;
B
the Basic Contract filled in and signed by the parties;
C
the appendixes initialled by the parties with respect to:
1 the further description of the activities;
2 the time schedule;
3 the representation of the client and the consultant;
4 the further elaboration of the quality management;
5 the nature and extent of the expenses;
6 the payment schedule;
7 communication and consultation;
8 handing over of documents;
9 .....

1 The parties fill in the empty places

D
the Legal relationship client-architect, engineer and consultant DNR 2005.
2
If contract documents are mutually contradictory, the order of precedence is as follows, unless another intention arises from the commission:
a the Basic Contract;
b the appendixes;
c the Legal relationship client-architect, engineer and consultant DNR 2005
d the brief.
3
The consultant bears the responsibility for the mutual contradictions between the documents mentioned in clause 2 insofar as he has drawn up their contents.

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

1
Besides the brief, the client supplies the following data and information:
a .....
b .....
c .....
2
The client delivers to the consultant the following goods:
a .....
b .....
c .....
3
The client provides access for the consultant to:
..... (address or work site) 1

4 Representation

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

5 Legal obligations

1
The parties take into account the following legal regulations:
a .....
b .....
c .....
2
The consultant takes upon him the following obligations with respect to the regulations mentioned in clause 1:
a .....
b .....
c .....

6 Quality management

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

7 Consultancy costs

1
The fee of the consultant is determined: 2
o as a percentage of the execution costs;
o on the basis of the time spent on fulfilment of the commission;
o as a fixed sum agreed upon between the client and the consultant;
o according to any other criterion agreed upon between the client and the consultant.

2 Here the parties tick their choice

2
The supervision costs are determined: 2
o as a percentage of the execution costs;
o on the basis of the time spent on fulfilment of the commission;
o as a fixed sum agreed upon between the client and the consultant;
o according to any other criterion agreed upon between the client and the consultant.
3
The expenses are determined: 2
o as a percentage of the execution costs;
o according to the actual costs;
o as a fixed sum agreed upon between the client and the consultant;
o as a percentage of the fee;
o according to any other criterion agreed upon between the client and the consultant.
4
o The client and the consultant determine the percentage of the execution costs for the calculation of the consultancy costs/fee/supervision costs/expenses (strike out what is not desired) at: % .....
o The client and the consultant determine the rate per time unit for the consultancy costs/fee/supervision costs/expenses (strike out what is not desired) at euro ....., in words .....
o The client and the consultant determine the fixed sum for the consultancy costs/fee/supervision costs/expenses at euro ....., in words ..... for the next period: .....
5
With respect to consultancy costs as percentage of the execution costs, the execution costs are determined as:
o the building costs according to the description under 3.2 of NEN 2631, titled 'Investment costs of buildings', first edition, march 1979
o the execution costs of the following parts of the object to be built ..... in which are not included .....
o otherwise, to wit .....
6
Indexation of rates:
o does not take place;
o takes place according to .....
7
The nature and the scope of the expenses are described in appendix 5.
8
The client pays the consultant according to the payment schedule entered in appendix 6.
9
Payments shall be made on bank account/postal giro account number ..... in the name of .....

8 Consultation and communication

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

9 Cooperation with third-party consultants

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

10 Final provisions

1
The consultant has concluded a professional indemnity insurance/..... insurance to cover his liability as flowing from this commission. As evidence that this insurance has been taken out the consultant produces the following documents: .....

2
The client sees to it that an All Risks insurance as mentioned in article 2 clause 3q of the Legal relationship client-architect, engineer and consultant DNR 2005 is concluded. As evidence that this insurance has been taken out the client produces the following documents: …..
3
Issues which at the time of conclusion of this contract cannot yet be settled, are:
a …..
b …..
c …..
As soon as information about the mentioned issues is available, these issues shall be the object of consultation.
4
Disputes resulting from this commission shall be settled by means of:
o arbitration ….. 2,3
o the civil judge: 2

Thus agreed on …..
Signed at …..
On behalf of the client …..
On behalf of the consultant …..

2 Here the parties tick their choice)
3 Even if parties have chosen arbitration and the interest is lower than € 5000, they can still bring the dispute before the court of justice, section cantonal court, when the dispute occurs

Edition
BNA
Royal Institute of Dutch Architects BNA
Keizersgracht 321
P.O. box 19606
1000 GP Amsterdam
T 020 555 3666
F 020 555 3699
bna@bna.nl
www.bna.nl

ONRI
Organization of consulting engineers
Koningskade 30
P.O. box 30442
2500 GK Den Haag
T 070 314 1868
F 070 314 1878
onri@onri.nl
www.onri.nl

Typography
Reynoud Homan, Muiderberg
Krista Kolkman, Duiven

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