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Pluraliteit van werkgeverschap

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SUMMARY

The Dutch Civil Code includes a separate arrangement for employment contracts as special agreements. In Section 7:610(1) of the Dutch Civil Code the employer is defined as the party in whose employment the employee performs the work. That section serves as an access point to the arrangement of the employment contract in Title 10, Book 7, of the Dutch Civil Code. The performance of the work by the employee in the employer's service is based on the principle that the employer is the owner or operator of the undertaking in which the employee performs the work. In several situations that principle is no longer in keeping with the facts. There are several reasons for this. The main reasons are the advent of temporary staffing and other forms of secondment, group formation and the fact that transfers of undertakings have been simplified. As a result, due to the contractual agreements made with the employee, the law, or the manner in which the employer is organised under company law, the employer is not or does not remain the same party as the owner or operator of the undertaking in which the employee performs the work. Such situations involve plurality of employership (*i.e.* situations in which on the part of the employer different parties are simultaneously or successively involved in the performance of the employment contract). This study addresses the consequences of that plurality of employership for the meaning of the legal concept of employer and for the liability linked to the position of employer for obligations arising from the employment contract. Three research questions based on that theme have been answered in this study.

Chapter 2 addressed the history of the definition of the employment contract in Section 7:610(1) of the Dutch Civil Code and the changes in the way in which the employment contract has been interpreted in the course of the past century. The changing role and capacity of the employer and the employee as parties to the employment contract have been investigated and the possible consequences for the qualification of the employer as a party to the employment contract have been discussed. In that context attention has also been paid to the conditions for the conclusion of an employment contract and the meaning of general provisions on legal acts and agreements of Book 3 and Book 6 of the Dutch Civil Code for the binding force of obligations arising from the employment contract for the parties involved and third parties in the event of plurality of employership. The effect of European and (other) international treaties on the qualification of the employer in the application of treaty provisions (or Directives issued on that basis) regarding the performance of work or the organisation of the employment contract have also been discussed. Chapter 3 addressed the concept of employer in public-law employment legislation and investigates what function the civil-law concept of employer has in the application

of that legislation. Chapters 4 to 7 investigated situations involving plurality of employership as a result of the contractual agreements made with the employee, the transfer of the employer's undertaking, the employer's membership of a group and the employer's involvement in a merger or division. It has been researched on the basis of legislation, legislative history and case law who is deemed to be the employer in those situations and what other parties involved in the employment contract are or may be obligated towards the employee to perform obligations arising from the employment contract.

In Chapter 8 the research questions formulated in Chapter 1 have been answered. On the basis of the concept of employer in civil and public employment law researched in Chapters 2 and 3, and the situations involving plurality of employership researched in Chapters 4 to 7, it has been identified in what manner plurality of employership is taken into account. Attention has furthermore been paid to factors that are or may be relevant to the qualification of the employer in those situations.

The first question

In situations involving plurality of employership what meaning do the contractual agreements made between the parties have in the qualification of the employer and what consequences does that plurality have for the employer's obligation towards the employee under employment legislation and regulations in and outside the Dutch Civil Code?

If on the grounds of the contractual agreements made between parties the contractual employer is not the same as the de facto employer, the rulings of the (lower) courts are based, in principle, in applying the provisions of Title 10, Book 7, of the Dutch Civil Code, on the contractual agreements that the parties have made in that context. In other words, in that situation the party that has entered into a (written) employment contract with the employee in that capacity is regarded as the employer. The question is whether, despite the changed positions of the employer and the employee in the employment contract as a result of economic and social developments in the past century, such purely contractual employership is compatible with the mandatory nature of Section 7:610(1) of the Dutch Civil Code. The employer and the employee are not equal on a social-economic level even today. Moreover, the Supreme Court has ruled on several occasions since 1997 that facts take precedence over appearance in the qualification of the employment contract within the meaning of Section 7:610(1) of the Dutch Civil Code. It is conceivable that the latter also applies to the qualification of the employer under Section 7:610(1) of the Dutch Civil Code if, on the basis of the contractual agreements that the parties have made, the employer is not the same party as the owner or operator of the undertaking in which the employee performs the work. In that case the contractual employer could be regarded as the employer within the meaning of Section 7:610(1) of the Dutch Civil Code only if its role in the conclusion and performance of the employment contract is sufficiently important to assume that an employment contract with the contractual employer was indeed intended. In situations involving simultaneous plurality of employership where it is concluded that the employership of the contractual employer has

insufficient independent and substantive meaning, the contractual agreements that the parties have made should then be disregarded. That would be the case if an employment contract is concluded with the contractual employer primarily to circumvent legal and financial consequences of an employment contract with the de facto employer.

In Chapters 4 and 5 it has been demonstrated that in situations involving plurality of employership in which the contractual employer is qualified as the employer under Section 7:610(1) of the Dutch Civil Code, it is taken into account in case law and employment legislation and regulations that the employer is not or does not remain the same as the owner or operator of the undertaking. The purpose of doing so is to prevent the loss of employment law protection in those situations and/or to ensure that the employment legislation has the intended effect.

In the definition of the temporary employment contract in Section 7:690 of the Dutch Civil Code the contractual employer that makes employees available to hirers in the context of its profession or business to perform work at and under the authority of those hirers is qualified as the employer of those employees. The allocation function that temporary employment agencies have on the job market was the reason to include the special arrangement of the temporary employment agreement in Title 10, Book 7, of the Dutch Civil Code. Although that allocation function does not form part of the definition in Section 7:690 of the Dutch Civil Code, the government emphasised during the parliamentary debate that the arrangement of the temporary employment contract applies only to contractual employers that actually have an allocation function on the job market. Along that line of reasoning Section 7:690 of the Dutch Civil Code serves as an access point to the relaxed employment law regime recorded in Section 7:691 of the Dutch Civil Code, which does justice to the flexibility that is characteristic of temporary employment and is inherent in the allocation function of the temporary employment agency. On the other hand the *Wet allocatie arbeidskrachten door intermediairs* (Act on the Allocation of Workers by Intermediaries) ensures, inter alia, that the absence of a contractual link with the hirer does not result for the temporary employee in a lower salary compared with employees who are employed in the same or similar positions at the hirer. The triangular relationship under employment law between the temporary employment agency, the hirer and the employee is also taken into account in applying provisions of Title 10, Book 7, of the Dutch Civil Code in the field of the duty of care for the employee's health and safety and the accrual of protection against dismissal on the conclusion of successive fixed-term employment contracts. In employment legislation outside the Dutch Civil Code in the field of the employee's health and safety and combating illegality and abuse in the employment of third-country nationals, the hirer is regarded as the employer of the temporary employee in addition to or instead of the temporary employment agency.

It is apparent from the legislative history that if the employee, otherwise than in the context of the allocation function that his contractual employer has on the job market,

performs work in the undertaking of an employer other than his contractual employer, no temporary employment contract exists within the meaning of Section 7:690 of the Dutch Civil Code. In such triangular relationships under employment law, which are usually referred to as secondment, the parties intend a longer-term triangular relationship from the start. That is the case, for instance, in intra-group secondments by a personnel company (or other central employer within the group) and in payrolling. In that situation the seconding employer could be qualified as the employer under Section 7:610(1) of the Dutch Civil Code if it is apparent from the role that it plays in the conclusion and the performance of the employment contract that an employment contract was actually intended between it and the employee. If it is apparent from the facts and circumstances that the employership of the seconding employer does not have such an independent and substantive meaning, the contractual agreements could be disregarded and instead the de facto employer could be qualified as the employer under Section 7:610(1) of the Dutch Civil Code. If such a seconding employer can indeed be qualified as the employer under Section 7:610(1) of the Dutch Civil Code, the relaxed employment law regime of Section 7:691 of the Dutch Civil Code (and Appendix B to the Dismissal Decree) does not apply. However, the triangular relationship between the seconding employer, the de facto employer and the employee is also taken into account in applying the abovementioned provisions of Title 10, Book 7, of the Dutch Civil Code and in the concept of 'employer' in the aforesaid employment legislation outside the Dutch Civil Code. The Act on the Allocation of Workers by Intermediaries may furthermore apply if the seconded employee performs the work under the supervision and management of the de facto employer. The consequences of the applicability of that Act will be limited, however, if all the employees who work in the undertaking of the de facto employer (or all the employees in certain job categories) are employed by the seconding contractual employer, because in that case there are no employees who are employed (in the same or equivalent positions) at the de facto employer to whose employment conditions those of the seconded employee must be equivalent. That is more likely to be the case in secondment, in light of its longer-term nature.

In no part of Title 10, Book 7, of the Dutch Civil Code is plurality of (employer's) liability as far-reaching as in the case of a transfer of undertaking within the meaning of Sections 7:662 *et seq.* of the Dutch Civil Code. These articles are based on the European Directive on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts thereof. In case of such transfer of undertaking successive (employer)liability is not limited to certain obligations arising from the employment contract, but relates to *all* the obligations arising from the employment contract. The aim in doing so is to prevent a transfer of undertaking from resulting in dismissal or a deterioration of the employee's employment conditions. The mere fact that a party other than the employer continues the undertaking in which the employee works results in the transfer by operation of law of the employee's employment contract to the new operator of the undertaking. Because, however, under Section 7:663 of the Dutch Civil Code the employee's employment contract with the former operator of the undertaking is transferred, an employee who works in the undertaking otherwise than under an employment contract with the operator of

the undertaking would not be able to claim any protection under Sections 7:662 *et seq.* of the Dutch Civil Code. That does not apply to a temporary employee who de facto works in the undertaking of the client of the temporary employment agency under a temporary employment agreement under Section 7:690 of the Dutch Civil Code. For the purposes of Sections 7:662 *et seq.* of the Dutch Civil Code, the temporary employee is regarded as an employee who works in the undertaking of the temporary employment agency. This means that his employment contract is transferred by operation of law under Section 7:663 of the Dutch Civil Code when the undertaking of the temporary employment agency is transferred. That undertaking is related to the allocation function that the temporary employment agency has on the job market, *i.e.* coordinating the demand and supply for a specific type of work.

If, however, the contractual employer does not have or no longer has an allocation function on the job market but serves only as the employee's legal and administrative employer, the employee working in the undertaking of a de facto employer would never be transferred by operation of law on the grounds of Section 7:663 of the Dutch Civil Code, because (i) the activities of the contractual employer could in that case not be regarded for the purposes of Sections 7:662 *et seq.* of the Dutch Civil Code as the undertaking in which the employee works and because (ii) he does not have an employment contract with the operator of the undertaking at which he works. Until recently that was the case, for instance, in intra-group secondments by a personnel company. In its *Albron* judgment the ECJ ruled, however, that an employee permanently assigned to a group company other than his contractual employer is transferred by operation of law on the grounds of his "employment relationship" with that group company on the transfer of the undertaking of that group company. Because the relationship between the intra-group seconded employee and the group company at which he is seconded has no legal status in Dutch employment law, this means that the rights and obligations arising from the employee's employment contract with the intra-group seconding group company pass by operation of law to the transferee of the undertaking of the group company to which he has been assigned.

As a result of the *Albron* judgment it is therefore not (or no longer) a requirement for the transfer by operation of law of the employment contract of the employee who works in the transferred undertaking that he has an employment contract with the operator of the undertaking. In its judgment the Amsterdam Court of Appeal interpreted the ruling of the ECJ to mean that the term "employer" in Section 7:663 of the Dutch Civil Code can mean both the contractual employer (the intra-group seconding group company) and the non-contractual employer (the group company to which the employee has been assigned). The broader definition of the concept of employer based on Section 7:663 of the Dutch Civil Code upon a transfer of undertaking is therefore the most recent expansion of the concept of employer for the purposes of a provision of Title 10, Book 7, of the Dutch Civil Code. This expansion might also apply in situations in which the employer under Section 7:610(1) of the Dutch Civil Code and the operator of the undertaking to which the employee has been permanently assigned do not form part of the same group. Decisive in this respect is the answer to the question whether the employee can be regarded for the purposes of

Sections 7:662 *et seq.* of the Dutch Civil Code as working in the undertaking of the contractual employer. If so (which is the case in the event of temporary employment by a temporary employment agency), the employee is not transferred on the transfer of the undertaking of the non-contractual employer. If not, the employment contract of the employee assigned to the non-contractual employer is transferred by operation of law on the transfer of the undertaking of the non-contractual employer. Except in case of intra-group secondment the latter can therefore also be the case in the event of payrolling (if it is assumed that the payroll company is the employer under Section 7:610(1) of the Dutch Civil Code) and in the event of temporary employment or secondment by a temporary employment agency that no longer has any allocation function on the job market at the time of transfer of the hirer's undertaking but serves only as the legal and administrative employer of the employees in its service.

The second question

What is the meaning for employees of the protection of creditors and contracting parties in company law in the case of group membership or a merger or division of the employer, and how does that company-law protection relate to the employment-law protection of employees in such situations?

Although limitation of liability is the main reason to take part in economic transactions in the capacity of a company limited by shares, the law of legal entities of Book 2 of the Dutch Civil Code does not serve exclusively as a facility for entrepreneurs. Book 2 of the Dutch Civil Code also protects the interests of e.g. creditors and contracting parties of the legal entity. The capital maintenance and regulations related to the publication of the annual report and financial statements offer certainty and information to creditors and contracting parties of the legal entity regarding the counterparty's financial position. If the legal entity forms part of a group, exemptions from several of those regulations can be used. On the other hand, the parent company accepts joint and several liability for debts arising from legal acts of the exempted group company. They include obligations arising from employment contracts entered into by the group company. When employees of the group company invoked that liability of the parent company, liability was always involved on the grounds of the use by the group company of the exemption from the publication of the financial statements. Judges then broadly interpreted the extent and scope of that liability. All the obligations of the group company as an employer of the employees in question were deemed to come under the parent company's liability.

Though the spread of risks can be a legitimate reason to form a group, it may not result in the avoidance of liability by abusing the legal personality (and the limits involved) of the various group companies or the balance of control within the group. That may give rise to liability on the grounds of a wrongful act of the parent company towards the creditor or contracting party of its group company if serious blame can be attributed to it for non-performance by the group company. Unlike in the case of the aforesaid liability of the parent company as a condition for the invocation of an exemption under Book 2 of the Dutch Civil Code, liability for loss is involved here. The

parent company is therefore not jointly and severally liable in addition to the group company, but is liable for the loss incurred by a creditor or contracting party as a result of the non-performance by the group company.

Lower courts have ruled in several cases that the parent company was liable on the grounds of a wrongful act towards an employee of its group company. As in the case of the joint and several liability of the parent company on the ground of the use of the exemption from the filing of the financial statements in Book 2 of the Dutch Civil Code by the group company addressed above, those cases usually involved severance pay payable by the group company to its employees. The Supreme Court has not yet ruled on specific circumstances or situations in which the parent company can be liable towards employees of its group company on the grounds of a wrongful act. In the lower courts before which an employee invoked liability on the grounds of a wrongful act of the parent company, the fact that that invocation was made by an employee rather than by an ordinary trade creditor of the group company did not mean that the claim was more likely to be allowed. That was different in the Nacap case addressed in Chapter 6. In that case the court ruled that the parent company was liable on the grounds of a wrongful act towards the employees of its group companies because it had evaded its responsibility for obligations that had arisen from their employment contracts as a result of its involvement in the management of those group companies. Because no serious blame was attributed to the parent company for the non-performance by the group companies, the piercing of the corporate veil in those proceedings was in fact based only on its (close) involvement in the management of the group companies. For that reason the parent company's own responsibility for the employment-law consequences of its close involvement in the management of its group company that was introduced in the Nacap case can be regarded as a form of allocation of employer's liability. Allocation of employer's liability also takes place in group relationships without piercing of the corporate veil. It then means that for the purposes of employment law and regulations in the field of dismissal the group as a whole (and its financial situation) or earlier employment contracts with other group companies are taken into account. In such situations the employer's membership of a group is taken into account on the grounds of reasonableness and fairness and/or in the context of a reasonable application of the law.

If the employees who work within a group under employment contracts with a personnel company (or another central employer within a group) are assigned to the other operating companies that form part of the group, that personnel company is regarded as the employer under Section 7:610(1) of the Dutch Civil Code. Such a situation does not involve a temporary employment agreement within the meaning of Section 7:690 of the Dutch Civil Code, but in employment legislation and regulations in and outside the Dutch Civil Code consequences are attached to the fact that the employee performs the work in the undertaking of an employer other than his contractual employer. Moreover, that situation can involve the aforesaid plurality of liability on the grounds of Book 2 of the Dutch Civil Code, piercing of the corporate veil on the grounds of a wrongful act, or the allocation of employer's liability in group relationships addressed above.

Not only the employer's membership of a group can mean that plurality of liability is involved on the grounds of provisions of Book 2 of the Dutch Civil Code: Chapter 7 addressed the fact that that is also the case in a company-law change in the structure regime in the form of a merger or division. The transfer of assets by universal title on a merger or division means that the employees, as creditors and contracting parties of the legal entity involved in a merger or division, are faced, beyond their control, with a (different) counterparty with a drastically altered financial position. Book 2 of the Dutch Civil Code therefore contains several specific provisions protecting the interests of creditors and contracting parties of the legal entities involved in a merger or division. It has been established that there are no examples in case law of invocation of such provisions by or on behalf of employees (or former employees) of a legal entity involved in a merger or division. One of the reasons for this is probably that when the employment contract is transferred on the merger or division to an acquiring legal entity, a transfer of undertaking is almost always involved. The employment contract is then (also) transferred by operation of law on the grounds of Sections 7:662 *et seq.* of the Dutch Civil Code. Although the employee's employment contract is automatically transferred on the grounds of both arrangements, the merger or division arrangements that apply at the same time and Sections 7:662 *et seq.* of the Dutch Civil Code do not have the same consequences for the transferred employee. On the grounds of the merger and division arrangements in Book 2 of the Dutch Civil Code, the employee is not protected after the transfer of his employment contract against dismissal or a deterioration of his employment conditions as a result of the merger or division. The merger and division arrangement also does not provide for a right to information for the employee on a transfer of undertaking, such as that in Section 7:665a of the Dutch Civil Code. On the other hand, on the grounds of the merger and division arrangements, unlike in the case of a transfer of undertaking (on the grounds of Section 7:664 of the Dutch Civil Code), the pension promises and savings schemes of the transferred employees are transferred by operation of law.

In Chapter 8 it has been concluded with reference to the legislative history and the various objectives of the Merger Directive and the Transfer of Undertakings Directive that the European legislature intended to exclusively regulate the position of the employees transferred as a result of a merger or division of their employer in the Transfer of Undertaking Directive. On that ground it has been argued that exclusive application of Sections 7:662 *et seq.* of the Dutch Civil Code in the event of a merger or division would result in a better balance between the interests of the employer and the employee in those situations. The employment contract of the employees transferred as a result of a merger or division would then not be transferred by universal title on the grounds of Book 2 of the Dutch Civil Code, but by operation of law on the grounds of Section 7:663 of the Dutch Civil Code, and the employee could then not invoke the creditor protection provisions in the merger or division arrangements. As a result of the manner in which the Transfer of Undertakings Directive and the Merger Directive have been implemented in the Dutch Civil Code, such exclusive application of Sections 7:662 *et seq.* of the Dutch Civil Code would require measures by the legislature. An employee whose employment contract is not transferred on a merger or division and who is therefore not transferred by

operation of law on the grounds of Section 7:663 of the Dutch Civil Code, must be able to invoke the creditor protection provisions in the merger and division arrangements.

The third question

Does the law sufficiently accommodate the interests of the employer and the employee in situations in which on the part of the employer different parties are simultaneously or successively involved in the performance of the employment contract?

The change in the role and capacity of the employer and the employee as parties to the employment contract has given rise to situations in which the employee is increasingly performing work in an undertaking that is owned or operated by a party other than that with which he entered into an employment contract. Although it is not in debate in that case that an employment contract is involved and the employee is therefore an employee within the meaning of Section 7:610(1) of the Dutch Civil Code, an important question is which party must be regarded as the civil-law employer in that situation for the purposes of Title 10, Book 7, of the Dutch Civil Code. In various provisions of Title 10, Book 7, of the Dutch Civil Code the employment law protection regulated there is linked to the employership of the owner or operator of the undertaking in which the employee performs work. That employment law protection does not have the intended effect if the employer is not or does not remain the same as the owner or operator of the undertaking.

In principle, the fact that an employee enters into an employment contract with a party other than the owner or operator of the undertaking in which he performs his work has no consequences for the company law protection addressed in Chapters 6 and 7 to which he is entitled as a creditor or contracting party of a group company or of a merging or dividing counterparty. That “plurality of liability under company law” does not specifically relate to obligations arising from employment contracts and it is therefore not relevant in this context whether the employer as a debtor or contracting party is or remains the owner or operator of the undertaking in which the employee performs his work. The employee is entitled to that company law protection as a creditor or contracting party of the employer, and that protection is, as it were, additional to the employment law protection to which he is entitled as an employee within the meaning of Title 10, Book 7, of the Dutch Civil Code. Nevertheless, courts sometimes give a broader interpretation to that company law protection in a situation in which an employee invokes that protection as a creditor or contracting party of the legal entity.

In situations involving plurality of employership the disadvantages that the employee might experience as a result of the manner in which the employment contract is contractually organised, are removed in many cases by the applicable employment legislation and regulations. Insofar as that legislation offers no solution in such situations, both the European and national courts often show a willingness to give a broad and creative interpretation to legal provisions. Harmful consequences for the employee are thereby avoided and the party on the employer’s side that benefits from the (differing) manner in which the employment contract is contractually organised is

held liable for the disadvantage consequently incurred by the employee. In that case, however, the contractual employer is qualified as the employer under Section 7:610 (1) of the Dutch Civil Code. It has been argued in Chapter 8 that this plurality of (employer's) liability in triangular employment relationships in which the contractual employer plays an independent and substantive part in the conclusion and performance of the employment contract, as in the case of assignment and some other forms of secondment, adequately guarantees that no employment law protection is lost that is linked to the employership of the owner or operator of the undertaking in which the employee performs the work. The same applies to intragroup secondment by a personnel company. Within that triangular relationship under employment law the economic reality of the group gives meaning to the employership of the contractual employer.

In the triangular relationships under employment law in which the contractual employer does not play an independent and substantive role in the conclusion and performance of the employment contract, however, that plurality of (employer's) liability does not prevent erosion of employment law protection. In that case the employership of the contractual employer is at odds with the system of Title 10, Book 7, of the Dutch Civil Code and with the function that the civil-law concept of employer has in public-law employment legislation and in collective agreements law. That erosion of employment law protection particularly plays a part in triangular relationships under employment law that have been created exclusively (or primarily) with a view to transferring the legal and administrative employership to a third party. Payrolling is an example of such a triangular relationship under employment law.

In what is currently the most customary form of payrolling, the transfer by the de facto employer of the legal and administrative employership to a third party is the ground for the triangular relationship under employment law in which the employee enters into an employment contract with a payroll company. Payrolling is not assignment or a different, new form of labour, but rather an alternative to an employment contract with the owner or operator of the undertaking in which the employee performs the work. In payrolling the aforesaid erosion of employment law protection manifests itself in particular in reduced protection against dismissal of the employee, but also pertains to other regulations in Title 10, Book 7, of the Dutch Civil Code and in public-law employment legislation that is based on the civil-law concept of employer. The tension with collective agreements law is in the fact that the payroll company is required to apply a collective agreement only if that company itself is bound by that collective agreement or if its undertaking or activity falls within the scope of a collective agreement that has been declared generally binding. Payroll employees would consequently be unable to invoke the industry-wide collective agreement that applies to the de facto employer and the agreements recorded in it that specifically relate to the work in an undertaking such as that of the de facto employer (such as provisions in the field of pension, childcare and education). Payroll employees would then be placed in the same position as temporary employees, with the proviso that that is not justified by the fact that the employees work in the contractual employer's "own" undertaking aimed at the allocation of labour, and

invocation of the Act on the Allocation of Workers by Intermediaries will usually be of no avail to them. Since facts take precedence over appearance in the qualification of the employment contract, a judge might set aside the payroll agreement in qualifying the employer, because the payroll company plays no independent and substantive part in the conclusion and performance of the employment contract, and might instead rule that the payroll employee is or has remained employed by the owner or operator of the undertaking in which he performs the work.