

Fire Insurance (Right of Recourse) Sectoral Regulations 2014



Introduction

Right of Recourse Regulations

Under the law, fire insurers have a right of recourse. However, they have rarely availed of this right. In particular, insurers are reluctant to disrupt their relationships with private individuals by subrogating against them. The fire insurance market in the Netherlands has had a unique provision in place for decades. Under this provision, the right of recourse is not exercised against private individuals. For the public this has provided clarity. Insurers on the other hand have been afforded a clear playing field which has enhanced competition.

Over the years, various brochures have appeared setting out the scope of the recourse restrictions. In 1984, the Association of Fire Insurers published an edition titled 'Bindend Besluit Regres' (Binding Right of Recourse Decision). This version was replaced by the Dutch Association of Insurers in 2000 by the Fire Insurance (Right of Recourse) Sectoral Regulations (BBr 2000). In the new version, the old figures were converted to euros, the text was simplified and various sections of the regulations were explained in more detail.

New Fire Insurance (Right of Recourse) Regulations

The Fire Insurance (Right of Recourse) Sectoral Regulations exist for quite some time and are in support of the public interest. The pros and cons of waiving the right of recourse have regularly been discussed by the Dutch Association of Insurers. In 2012, this led to a proposal to retain the Regulations (BBr 2000) for private individuals and for non-private tenants. As from 1 January 2014, this is set to change for non-private tenants (the market for business insurances). This proposal was adopted on 19 December 2012 by the general membership meeting of the Dutch Association of Insurers and was consequently ratified by the general membership meeting on 18 December 2013. An important argument in favour of changing the right of recourse regulations for the market for business insurances is the conundrum whereby no action can be taken against companies involved in fire-hazardous activities which are not compelled to place a stronger emphasis on fire prevention measures. Where the market for business insurances is concerned, the right of recourse regulations have also led to (too) much disruption of the competitive conditions between members and non-members of the Dutch Association of Insurers.

In this brochure you will find a copy of the Regulations together with an explanation. The Dutch Association of Insurers hopes that this new edition will be of use to all users in the claims settlement sector.

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Fire Insurance (Right of Recourse) Sectoral Regulations (2014)

(The words printed in italics refer to the definitions provided in Article 7)

In all instances occurring after 31 December 2013 regarding losses that are covered under the insured's *fire insurance policy* and subsequently claimable against third parties under Dutch law, the following regulations shall be observed by *fire insurers*:

1. Fire insurers shall refrain from directly or indirectly pursuing claims against private individuals who in their private capacity are solely liable for the compensation payable by the fire insurer. Neither will the right of recourse be exercised against non-private tenants, tenant farmers, lessees, borrowers and custodians of the damaged property.
2. Fire insurers shall exercise their right of recourse against non-private individuals only in the event that the liability is due to a negligent act or an omission on their part.
3. Notwithstanding the provisions of 1 and 2, the statutory right of recourse will apply without limitation with respect to:
 - a. any person who has *intentionally* caused the loss or damage;
 - b. any person who pursuant to the loss or damage has been subject to a final and binding court decision in connection with an offence;
 - c. any collision or crash or any damage caused by aircraft, unless the damage has been caused by tenants, tenant farmers, lessees, borrowers or custodians of the damaged property;
 - d. damage for which the Dutch State or foreign governments are liable.
4. In their *fire insurance* terms and conditions, *fire insurers* are not permitted to deviate from the right of recourse referred to above. Neither are they at liberty to rely where applicable on deviations.
5. In the event of an accumulation of recoveries by *fire insurers* and of recoveries by directly affected third parties who are not insured or insufficiently insured against the damage that occurred, the following rule of conduct will apply:

Fire insurers will refrain from exercising their right of recovery wholly or in part if this happens to prejudice the uninsured interests of the insured party or other directly affected third parties. However if other parties are pursuing a claim in addition to the directly affected parties, the *fire insurers* must apply to the General Insurance Disputes Committee (Geschillencommissie Schadeverzekeringen) of the Dutch Association of Insurers for a binding decision in regard to the manner and extent to which the right of recourse may be exercised.
6. Insurers other than the *fire insurers* referred to in these Regulations can declare their intention to act in accordance with the rules laid down in these Fire Insurance (Right of Recourse) Sectoral Regulations.

7. Definitions

7.1 Fire insurer

Members of the Dutch Association of Insurers who in their capacities as fire insurers have concluded a fire insurance agreement in connection with the loss contingency.

7.2 Fire insurance

The term 'fire insurance' is deemed to pertain to the following types of insurance:

- a) fire insurance;
- b) burglary insurance;
- c) theft insurance;
- d) storm and tempest insurance;
- e) flood insurance;
- f) water pipe insurance;
- g) insurance against damage caused by aircraft;
- h) refrigeration insurance;
- i) fire insurance, including cover against non-fire related contingencies;
- j) insurance covering direct trading losses and other indirect losses in connection with one of the contingencies referred to under a. to i. above;
- k) all other types of insurance which by virtue of a decision by the sectoral management of the Dutch Association of Insurers are deemed to pertain to or be associated with the fire insurance industry.

7.3 Intent

An unlawful intentional act or omission committed against a person or property as a result of which damage is caused or occurs.

With regard to the wilful nature of this intentional act or omission, it is of no consequence if the relevant person is under the influence of alcohol or other substances to the extent that he/she is incapable of exercising his or her will.

7.4 Private person

A natural person who is not acting in a professional or commercial capacity.

Information

The waiver of the right of recourse is a rule of conduct which over the years has generated much goodwill amongst the insured public. Long before 1940, this waiver had in fact not been exercised. However in 1954, the waiving of the right of recourse became a general rule following the Right of Recourse Waiver that was published in February of that year. This regulation worked well for many years but over time it became more difficult to apply for a variety of reasons. It was considered inconvenient that the 1954 regulations applied only with respect to fire or explosion and not to other causes of loss or damage. Moreover the insurance industry had failed to unanimously agree on a wording that was generally acceptable to them and this had a disrupting effect on competitive conditions.

These drawbacks led to a new regulation: the Binding Right of Recourse Decision 1984 (BBR 1984). Under this Regulation, claimants had the right to seek recourse in the market for business insurances with respect to losses valued at between 5,000 and one million Dutch guilders. The regulation for private individuals remained relatively unaffected. The limitation of claims to one million guilders had to do with the fact that this was the amount on which companies could rely in terms of liability coverage. In 2000, sixteen years after the introduction of the BBR 1984, the Regulation was amended. The Association of Fire Insurers in the Netherlands had merged with the Dutch Association of Insurers. The references in the wording of the BBR 1984 no longer corresponded properly whereas the introduction of the euro rendered it necessary to adjust the amounts. The opportunity was also availed of to provide a more detailed explanation of the Regulation.

In 2012, a further decision was taken to amend the Regulation and this was due to come into effect in 2014. The main changes are that the previously applicable maximum amounts have been dropped. Moreover as from 2014, the regulation will apply only to private individuals and non-private tenants.

Entry into force of BBr 2014

The Fire Insurance (Right of Recourse) Sectoral Regulations 2014 (BBr 2014) came into force on 1 January 2014: all recoverable losses occurring after 31 December 2013 come under this Regulation for private individuals and non-private tenants alike. The Fire Insurance (Right of Recourse) Sectoral Regulations 2000 (BBr 2000) no longer applies to claims of this kind.

The Regulation will apply to the types of insurance listed in the above definition for fire insurance (7.2). Many of the claims under these insurance policies will never be recoverable in practice since they are not attributable to a culpable behaviour (e.g. storm, lightning strike). In practice, claims may only be recoverable where the damage is caused by fire or explosion, scorching damage, or damage caused by singeing and melting, smoke and ash, water and oil. Glass breakages are only covered under this Regulation on condition that the risk of glass breakage is also covered under the fire insurance (see notes to Article 7).

Dispute resolution

Differences of opinion between insurers regarding the interpretation of this Regulation may be submitted by the insurers to the General Insurance Disputes Committee of the Dutch Association of Insurers, whose findings in such matters are regarded as binding advice.

Bypassing the fire insurer

Where an injured party seeks recourse directly from the liable party or his/her liability insurer in respect of a loss that would have been covered by a fire insurer under the BBr 2014 had the loss been reported directly to the fire insurer, the liability insurer shall compensate the injured party for the loss. The fire insurer will then reimburse the monies paid to the liability insurer.

In the event of a disagreement regarding whether coverage should be provided by one or both insurers, both insurers will outline their position at the earliest possible opportunity and exchange the relevant documents in the matter. If necessary, the insurers can submit the matter under dispute to the General Insurance Disputes Committee of the Dutch Association of Insurers. Needless to say, the General Insurance Disputes Committee does not rule on the liability of the parties.

Article 1

The Decision prohibits the taking of recourse against natural persons acting in a private capacity and against other non-private persons referred to below.

Private persons

There is no major objection against indemnifying private persons against recourse actions when it comes to fire prevention. This is because private persons have much less to contribute than companies in concrete terms in regard to fire prevention.

The introduction of this limitation also corresponds to the public role of insurers as the protectors of calamities. This is also regarded as a key factor in maintaining a good relationship with the insured public.

Tenants, tenant farmers, lessees, borrowers and custodians

Neither may recourse be sought against non-private tenants, tenant farmers, lessees, borrowers or custodians of the damaged goods. The owner's fire insurance is also deemed to include the interests of these persons under the cover provided. Indeed, this insurance premium is paid for indirectly by the tenants, tenant farmers and lessees in their rental or leasehold charges.

The term tenant, etc. should be broadly interpreted. The term does not refer only to the person who has signed the lease with the lessor. It refers also to all resident family or household members, etc. No recourse may be sought against resident family or household members. The same applies for example to employees of a non-private tenant.

Article 2: Liability based on fault and strict liability

The BBr 2014 is founded on the principle that it should be possible to seek recourse against any party responsible for persons who have acted negligently. A determining factor here is whether a negligent act or omission was a relevant factor in the occurrence of the fire. The nature of the liability proper (liability based on fault and strict liability) is not a determining factor. The term 'negligence' here refers to the legal criterion for loss cited in Book 6, Section 162 of the Dutch Civil Code (an imputable act or omission and/or attribution of a cause).

Article 4: Recourse clauses

The right of recourse clauses which in the past were a common feature of the terms and conditions of insurance should not undo the working of the BBr 2014. This would also have the effect of undoing the most important reason for introducing this Decision, i.e. the adoption of a uniform approach to the right of recourse.

Article 5: Accumulation of recourse actions

Article 5 contains a provision which aims to prevent claims being brought by parties seeking redress (not insurers) being adversely affected because of claims that are also being pursued by insurers. This is a consequence of the adopted principles that should not impact against these third parties where recourse is concerned.

Article 6: Voluntary observance of the BBr

With the introduction of the new Fire Recourse Regulation (which applies only to private persons and non-private tenants), it is hoped by the Dutch Association of Insurers that this Regulation will also be observed by insurers who are not members of the Dutch Association of Insurers. They can notify the Dutch Association of Insurers hereof in writing and the Association will keep this on file. A list may be obtained from the Dutch Association of Insurers of all insurers who have declared themselves in compliance with the terms of the BBr 2014.

Article 7: Definition of fire insurer and fire insurance

The definition emphasises that the insurer must act in the proper capacity of a fire insurer and that the insurance must be a bona fide fire insurance. These sectoral regulations therefore are not meant for insurers who act in any capacity which traditionally pertained to another sector of the industry. For example, motor, transport or technical insurers. Neither does the Regulation relate to insurance policies in which fire risk may form part of the cover but which traditionally did not pertain to fire insurance, such as hail, contractors all risks, electronics and transport insurance policies. A separate glass or valuables insurance is not covered under the terms of this Decision because under the definition provided herein, this does not relate to fire insurance. However, a glass or valuables insurance forming part of an existing fire insurance policy as outlined in point i. of the definition does come under the meaning of fire insurance and therefore is covered under the terms of this Decision.