

The reasonable interpretation of a contract under Dutch law

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In contract drafting, contractual freedom and business certainty are vital principles. The parties involved want to know what to expect from their contracting party and what in turn is expected of them. At a glance, the common law seems to provide greater certainty in this regard than Dutch law (being a civil-law system). For example, Dutch law and the common law have different perspectives on how to construe contracts, and under Dutch law the concept of “reasonableness and fairness” plays a key role. Ultimately,

however, the differences between Dutch law and the common law are not as ambiguous as they might seem.

The interpretation of a contract

Under Dutch law, how a contract is construed does not depend on its wording alone. Although the wording of a contract offers an important view on what the parties have agreed, it is not conclusive for interpreting the meaning of a contract or the parties’ contractual rights and obligations. Under Dutch law, essentially, all the circumstances are relevant.

The principle of “reasonableness and fairness” also plays a prominent role under Dutch law when interpreting the parties’ rights and obligations under a contract. This principle is the Dutch equivalent of “good faith”, and in most ways the two are similar. In short, it means playing fair and being open with the parties involved. The principle of reasonableness and fairness is an independent source of obligations under Dutch law. Based on this principle, written contractual terms can be set aside and unwritten contractual terms might be inferred.

The principle of reasonableness and fairness can lead to implicit terms in a contract, as demonstrated by a ruling by the Dutch Supreme Court given in 2016 (Dutch Supreme Court’s



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judgment of 4 November 2016, ECLI:NL:HR:2016:2517, at 3.6.1), where the Supreme Court ruled that a debtor who had, with justifiable reason, suspended payments and gained an interest advantage as a result was nevertheless obliged to compensate half the interest so gained. Although the sale and purchase agreement between the debtor and the creditor did not stipulate any contractual right to that effect, the Supreme Court ruled that the creditor was owed the interest by standards of reasonableness and fairness.

Also, the principle of reasonableness and fairness can be used as grounds to set aside contractual arrangements, as demonstrated by a 2014 ruling by the Dutch Supreme Court (Dutch Supreme Court's ruling of 10 October 2014, ECLI:NL:HR:2014:2929, at 3.4.2.). The Supreme Court ruled that a bank's contractual right to terminate a credit agreement had to be acceptable according to standards of reasonableness and fairness. In this case, this meant that the contractual clause giving the bank the right to terminate the agreement was set aside on grounds of the principle of reasonableness and fairness.

As these examples show, the principle of reasonableness and fairness can be of great influence on the interpretation of



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contracts and the contracting parties' rights and obligations. However, this does not mean that under Dutch law the wording of a contract is irrelevant.

Even under Dutch law, it is important how a contract is worded. However, in the construal of a contract under Dutch law, its wording is not the deciding factor. All the relevant circumstances need to be taken into account – although the circumstances that a contract was drafted with diligent care and that the parties' intentions correspond to how the contract is worded might give the wording greater weight than other circumstances. This might be the case where professional parties are involved, for example, especially if they are assisted by lawyers. Given such circumstances, the contract will be less and less likely to be interpreted by standards of reasonableness and fairness.

The Haviltex rule

Interpreting a contract with due allowance for all the circumstances of the case is standard practice in the Netherlands. This practice is based on the "Haviltex rule", which dictates that the meaning that the parties ascribe to a contract should be determined as follows:

The question of how the relationship between the parties is regulated in a written contract and whether that contract leaves a gap which must be filled cannot be answered on the basis of a purely linguistic interpretation of the provisions of that contract. The answer to that question depends on the meaning that the parties could reasonably ascribe to those provisions in the given circumstances and on what they could reasonably expect from each other in that regard.

This rule given by the Dutch Supreme Court (Dutch Supreme Court's judgment of 13 March 1981, ECLI:NL:HR:1981:AG4158, NJ 1981, 635) is still relevant for interpreting contracts and the contracting parties' rights and obligations under Dutch law. The consequences of this "subjective approach" as it concerns the construal of contracts are not as ambiguous as they might seem. The Haviltex rule primarily offers a starting point for interpretation, namely to determine the contracting parties' intentions and what may reasonably be inferred from their pronouncements towards each other. As described above, this subjective Haviltex approach is used to interpret all contracts that are governed by Dutch law, both commercial and non-commercial. Conversely, the objective approach

used in the common law mostly relies on the linguistic meaning of how the contract is worded, as read by a reasonable third party.

Conclusion

In conclusion, the following differences between Dutch law and the common law should be taken into account when drafting or interpreting a contract that is governed by Dutch law:

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Common law:	Dutch law:
Differentiates between the interpretation of commercial and non-commercial contracts.	Does not differentiate between the interpretation of commercial and non-commercial contracts.
Achieves legal certainty through strict interpretation (no references to good faith).	Achieves legal certainty through interpretation by standards of reasonableness and fairness (good faith).
Takes the linguistic meaning of a contract as the starting point for its interpretation.	Takes the parties' intentions and what can be inferred from their pronouncements to each other as the starting point for interpretation.
Contextual interpretation applies only when the contract itself is ambiguous or its linguistic interpretation has an absurd outcome.	Contextual interpretation applies when it serves to help determine the parties' intentions and reasonable expectations.

“
Let's be reasonable!”

“
*It's not always what you
read in the contract.*”

