

Supreme Court confirms right to limit liability

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The Supreme Court has reconfirmed the solid foundations of the right to limit liability under Dutch law, even in personal injury cases.

Background

Contracts for the carriage of passengers are governed by several sections of the Civil Code. Each section deals with a specific mode of passenger transport and contains an article which provides that the liability of the carrier in the event of the death or personal injury of a passenger is limited to an amount determined by Order in Council. In March 1991, several orders in council were made to set the limits of liability for each mode of passenger carriage. For the carriage of passengers by inland waters (Civil Code Article 8:893) the relevant Order in Council set the limit at Fls300,000, which was later converted to €137,000.

By the 24 November 2008 Order in Council the liability limits in two of the previous orders in council were raised to reflect international developments in rail and road carriage. In an explanatory note it was made clear that at the same time the government refrained from raising the limits applying to seagoing and inland shipping, despite realising that these limits were also outdated. The government indicated that it would await international developments regarding these modes of transport, such as amendments to the Limitation of Liability for Maritime Claims (LLMC) 1976 and the Convention on Limitation of Liability in Inland Navigation (CLNI) 1988. The intention was to bring Dutch legislation into line with these new regulations once adopted.

Facts

The dispute took place in July 2007, when a passenger on board the clipper Mathilda suffered serious injury when the vessel's boom broke and landed on top of him during a sailing trip.

The vessel was owned by a commercial tourist operator. The passenger held the operator and its liability insurer Allianz directly liable. Allianz accepted liability and paid €137,000, which is the limit of liability under Article 8:893 of the Civil Code. The passenger sought a declaration that Allianz cannot rely on any limitation of liability, arguing that it would be contrary to the principles of reasonableness and fairness, and called for Allianz to pay €621,381 in damages.

First-instance and appeal court decisions

At first instance, the Court of Rotterdam dismissed the action. However, the Court of Appeal of The Hague granted the appeal and awarded an additional sum of €61,787, allowing for inflation since the introduction of the €137,000 limit in 1991. The passenger and Allianz appealed and cross-appealed the decision respectively.

Supreme Court decision

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The first question considered by the Supreme Court was whether the limitation of liability under Article 8:893 of the Civil Code was a violation of the human right to protection of property under the First Protocol to the European Convention on Human Rights. The Supreme Court felt that the limitation introduced by Article 8:893 of the Civil Code would meet the 'fair balance' test under the First Protocol because it is nationally and internationally considered necessary that the liability of the carrier is limited, or may be limited, in the event of a passenger's death or personal injury. The reasons for limitation are an attempt to reach an acceptable balance between costs, revenues, risks and the insurability of the carriage.

Regarding the 11 March 1991 and 24 November 2008 orders in council, the Supreme Court made it clear that it had wider powers of review than with regard to statutory provisions, but that it should exercise restraint due to the nature of the power of the legislature and the position of the court within the Dutch political system. The Supreme Court accepted Allianz's view; it held that, in this case, the limit could not be left wholly or partly inapplicable, in connection with special circumstances which were not taken into account in the rule or regulation in question.

However, despite the government's decision in 2008 not to raise the limit, the Supreme Court concluded that the government could not reasonably refrain altogether from raising the limit under Sub-section(1), Article 8:893 of the Civil Code in 2008 (a rise which the government had stated was due).

This conclusion then raised the question of whether the courts could provide for a rise in the limit. The Supreme Court held that the courts could adjust the limit for the level of inflation, because such an adjustment is objective and deemed consistent with the view of a legislator in 1991. However, there were insufficient objective factors to adjust the amount to a higher level. The fact that higher limits already applied for modes of transport other than inland waters was insufficient reason to raise the limit of Article 8:893 of the Civil Code in proportion to those other limits. After all, the amount of the limit is also dictated by the specific risks and circumstances of the relevant mode of transport and the differences in international regulations on carriage.

Comment

Paradoxically, this judgment confirms only that the defence of limitation of liability is still virtually impenetrable in the Netherlands. The case did not involve limitation of liability under an international legal instrument, such as the LLMC and CLNI conventions or a European regulation. Regarding those international instruments, the Supreme Court does not have any power of review on the basis of national notions of law, such as reasonableness and fairness (ie, good faith).

Even in this particular case, involving a national case of limitation of liability, the Supreme Court confirmed that limitation as such is not a violation of the human right to protection of property under the First Protocol to the European Convention on Human Rights, and that it is nationally and internationally considered necessary that the liability of the carrier is limited or may be limited in the event of a passenger's death or personal injury. However, it did frown on the legislator that recognised the fact that limits were outdated across the board by 17 years and changed two of them in view of international developments, but left the others unaltered while waiting for further developments. Even then, the courts do not have the power to do more than adjust the limit for the level of inflation.

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