

# Dutch court rules that tank storage provider cannot invoke exoneration clause contained in VOTOB conditions

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## Facts

### Standic's defence

### Decision

### Comment

The Rotterdam District Court recently ruled that a tank storage provider could not invoke the exoneration clause contained in the General Conditions for Tank Storage in the Netherlands (the VOTOB conditions), which are frequently used by Dutch tank terminals and storage companies. The decision is relevant, as it appears to contravene the rather strict approach adopted in Dutch case law in relation to successfully setting aside a VOTOB exoneration clause.

## Facts

Standic, the operator of a tank terminal in the Netherlands, entered into an agreement under the VOTOB conditions (2014 version) to store base oils for Scanica, a Finnish wholesale oil trader, pending their sale. Meanwhile, under a financing arrangement with ING Bank, Scanica agreed that all goods would be held at all times to the exclusive and irrevocable order of ING Bank. Standic was obliged to send warehouse receipts to ING Bank and copies thereof to Scanica. Further, it was allowed to release consignments of oil only after receiving written release letters from ING Bank, to be sent after buyers had paid Scanica for the oil in advance.

In practice, the requirement for ING Bank to approve every consignment leaving Standic's terminal proved to be cumbersome. As a result, Standic and Scanica agreed on a different practice, whereby ING Bank would no longer approve the release of each consignment separately, but rather an entire volume at once.

German buyer Hocem Oil Chemical sent several emails (copying in Scanica) instructing Standic to release specified quantities of oil, and oil appears to have been delivered to Hocem even though it was not paid for in advance. When Hocem was subsequently declared bankrupt, Scanica argued that Standic had released a larger volume than the total volume approved by ING Bank.

## Standic's defence

Scanica brought its claim for €232,966 to the Rotterdam District Court, where Standic argued that it had legitimately relied on Hocem acting on behalf of Scanica – and hence on Hocem's instructions by email – to release certain quantities of oil. Standic maintained that Scanica had been provided with information on a daily and monthly basis and had been aware of the relevant circumstances and practices. Further, Standic invoked the exoneration clause in Article 57.3 of the VOTOB conditions to exclude liability, except in cases of wilful intent or gross negligence on the part of the storage company or its staff responsible for carrying out storage agreements or services.

## Decision

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The Rotterdam District Court held that Standic could not have legitimately relied on Hocem's instructions to release consignments of oil outside the approved volume.<sup>(1)</sup> In doing so, Standic had breached the storage agreement and financing arrangement.

A notable part of the judgment concerns 'gross negligence' as stated in Article 57.3 of the VOTOB conditions. All facts and circumstances will be taken into account when assessing whether there is 'gross negligence' on the part of a storage company. Gross negligence may exist where a party knowingly:

- takes risks which it knew to be too high; or
- omitted to investigate clearly existing risks while being aware that their realisation would potentially have severe consequences.

The burden of proof is on the principal.

Finding that Standic had acted in a grossly negligent manner, the court noted that Standic was a professional storage company which had been aware of the potentially substantial consequences of mistakes when releasing goods. On the basis of the warehouse receipts, Standic had unconditionally committed itself to release oils only after obtaining ING Bank approval. Standic had been aware of Scanica's considerable interest in complying with the financing arrangement, as ING Bank would approve release only after buyers had paid for the goods in advance. It was found that Standic had omitted to verify properly whether the release instructions from Hocem had fallen within the volume approved by ING Bank, even though this would have been relatively easy to do.

Further, the court held that invoking Article 57.3 of the VOTOB conditions would be unacceptable considering the principles of reasonableness and fairness. There would have been no financial incentive for Standic to act diligently if it could have successfully relied on Article 57.3.

## **Comment**

This decision is surprising because the Dutch courts usually take a stricter approach regarding interpreting wilful intent or gross negligence in exoneration clauses and setting such clauses aside on the basis of the principles of reasonableness and fairness.

Previous case law on Article 57.3 of the VOTOB conditions shows that the courts will focus on the wilful intent or gross negligence of a storage keeper's board of directors or at least the storage keeper's staff responsible for carrying out the agreement or services. The mere negligence of, for example, administrative staff will be insufficient. Further, the claim of a lack of a financial incentive is not often seen in dealings between professional and commercial parties. The courts usually consider the fact that general terms and conditions with far-reaching exoneration clauses are standard in the bulk storage industry.

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## **Endnotes**

(1) March 21 2018, ECLI:NL:RBROT:2018:2415.

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