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# Forum selection clauses may not be binding for private individuals

## AKD | Litigation - Netherlands



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Dispute resolution clauses and jurisdiction clauses that designate where disputes shall be heard are, of course, a common feature of contractual agreements. However, the Amsterdam Court ruled recently<sup>(1)</sup> that a foreign individual was not subject to a forum selection clause in favour of the Court as contained in a purchase agreement for a pleasure yacht. The decision is a reminder that forum selection clauses in contracts involving private individuals require specific attention.

#### Facts

The dispute before the Amsterdam Court involved the construction and purchase of a new-build motor yacht for an Australian businessman acting in his capacity as a private individual. In July 2018 a purchase agreement was signed between the buyer and the Dutch shipyard in Singapore. The price of the yacht was set at €5.4 million and pre-delivery was scheduled for December 2018 in Italy.

The agreement included a forum selection clause providing for any proceedings to be heard in the Amsterdam Court.

A week after the contract was signed, the buyer declared he would not take delivery of the yacht due to insufficient funds. The yard announced its intention to, among other things, pursue the buyer for the contractual penalty fee of €1.35 million, and began proceedings in the Amsterdam Court.

The defendant challenged the jurisdiction of the Amsterdam Court on the grounds that, despite the inclusion of a forum selection clause, the Amsterdam Court was not competent to hear the claim. The defendant argued, among other things, that the forum selection clause was "unreasonably onerous" under the section of the Civil Code dealing with the applicability and validity of general conditions.

#### Decision

In order to establish whether it had jurisdiction in the case, the Amsterdam Court examined two distinct elements of the jurisdictional clause: the formal requirements and the substantive validity.

On the first point, the Amsterdam Court found that the clause had been both drafted and agreed upon as required by article 25 of the EU Brussels Recast Regulation (1215/2012/EU). As a result, the formal requirements for application had been met.

The Amsterdam Court next examined the substantive validity of the jurisdiction clause, as per article 25 and recital 20 of the EU Brussels Recast Regulation, and whether, as had been argued by the buyer, it could be considered "unreasonably onerous".

In the case of consumers, article 6:236 of the Civil Code states that the referral to a court which differs from the court which would otherwise be competent may be deemed unreasonably onerous and consequently null and void.

Although some may feel that the purchase agreement involving a high-value yacht resembles a commercial transaction, the buyer had participated as a private individual.

The Amsterdam Court subsequently found that there were substantive grounds that the jurisdiction clause in favour of the Amsterdam Court was indeed "unreasonably onerous". The Amsterdam Court thus held that the clause was null and void, and declared itself incompetent to hear the case.

#### Comment

The ruling calls into question whether forum selection clauses can always be relied upon in contracts involving private individuals who may subsequently be considered "consumers".

In this case, a high-net-worth individual was deemed a consumer by the Amsterdam Court despite the high value of the contract and its similarity to a commercial transaction.

Furthermore, the international nature of the transaction – involving an Australian national residing in Australia, who had signed the contract in Singapore and who was to take pre-delivery of the yacht in Italy – did not prevent the Amsterdam Court from overruling the forum selection clause.

In the wake of the ruling, which is subject to appeal, foreign parties entering into a contract as a private individual should no longer assume they will be automatically bound by a forum selection clause involving a court in the Netherlands.

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#### Endnotes

(1) Judgment ECLI:NL:RBAMS:2021:4531.