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Rulings from Dutch Supreme Court shed light on legal capacity of online logistics platforms

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Introduction

Online platforms that connect the providers of logistics services with customers are proliferating rapidly. Market entrants include both start-up platforms and traditional logistics service providers that have decided to also offer their services digitally. A relevant issue remains the legal capacity of these platforms. This capacity will strongly influence the platforms' legal position, including as regards liability.

In 2021, the Supreme Court rendered two noteworthy decisions in respect of the legal capacity of online booking platforms Booking.com and Airbnb. The decisions are highly relevant to online logistics platforms that connect professional carriers and customers.

Background

Digital logistics platforms, such as Uber Freight, Shypple and Twill, connect the suppliers of logistics services (eg carriers, freight forwarders, shipbrokers and/or non-vessel operating common carriers) with their business customers (eg, sellers or buyers of goods) and other carriers and freight forwarders.

Through such platforms, customers can book transport and related services, such as warehousing, packing or repacking, and customs clearance. However, under Dutch civil law, the legal capacity of such platforms is not clear cut.

A digital platform can generally adopt the following legal capacities:

- carrier – a carrier accepts the obligation to carry goods from one place to another. Mandatory provisions of international conventions and national law apply to the carriage of goods. Although a platform may enable carriers and customers to conclude a contract of carriage together, in most cases, the platform is not itself a party to the contract and thus does not act as carrier;
- freight forwarder – a freight forwarder concludes a contract of carriage with a carrier on behalf of its principal. Pursuant to Dutch law, the freight forwarder is not mandatorily liable for damages incurred during carriage. However, the Civil Code does contain some mandatorily applicable provisions with regard to the freight forwarder's position;
- agent – a (commercial) agent is instructed by its principal to act as an intermediary in the conclusion of contracts and, as the case may be, enter into such contracts in the name and for the account of the principal. Most of the provisions in the Civil Code regarding agency services are mandatory; and
- intermediary – an intermediary connects two parties so that the parties can conclude a contract together. The intermediary does not enter into that contract itself, but instead facilitates the conclusion of contracts. The provisions in the Civil Code regarding intermediary services (article 7:425 et seq of the Civil Code) are non-mandatory.

Supreme Court decisions

Booking.com

On 9 April 2021, the Supreme Court ruled in respect of the qualification of Booking.com's services.⁽¹⁾ Booking.com is an online reservation platform where travellers can book accommodation. The question was whether Booking.com qualified as a "travel agent" and, consequently, whether it was obliged to participate in the pension fund for the travel industry. A "travel agent" is defined as a person who acts as an intermediary in the conclusion of contracts relating to travel. In the ruling, the Court found that Booking.com acted as an intermediary in the conclusion of contracts in the field of travel within the meaning of article 7:425 of the Civil Code.

The Court stated that whether activities are regarded as intermediary services depends on the facts and circumstances of the case. With regard to Booking.com, the Court found it relevant that:

- customers can book accommodation provided by accommodation holders via Booking.com's website using the digital facilities available thereon;
- Booking.com performs the administrative processing of the booking by providing the booking data to the accommodation holder and the booking confirmation to the customer; and
- Booking.com receives a fee from the accommodation holder once it concludes a contract with the customer.

The fact that third parties can also conclude contracts with the accommodation holder without the involvement of Booking.com did not change the fact that Booking.com provides intermediary services.

Airbnb

A similar ruling was issued by the Supreme Court on 19 November 2021 regarding the booking platform Airbnb.⁽²⁾ The case concerned a request by a customer for a refund from Airbnb. The customer sought to rely on Dutch law, which prohibits an intermediary from charging

fees to tenants in cases where the intermediary also serves the landlord (article 7:417(4) of the Civil Code).

The Court held that Airbnb was allowed to charge intermediary costs to tenants as the statutory provisions prohibiting the practice did not apply to short-term rentals of holiday accommodation. A noteworthy element of the ruling for logistics platforms was that the Court held that Airbnb is an intermediary within the meaning of article 7:425 of the Civil Code; the Court referred to the *Booking.com* decision.

According to the Court, it was relevant that:

- Airbnb facilitates the conclusion of contracts between users through its website;
- Airbnb receives a compensation upon the conclusion of a contract between users; and
- users can contact each other only through Airbnb's platforms.

Comment

On the basis of these two recent Supreme Court decisions, it would seem that digital logistics platforms will generally be regarded as providing intermediary services under Dutch law.

This is potentially favourable for platforms because under provisions in the Civil Code, intermediary services are non-mandatory and thus a platform can contractually limit or exclude its liability.

However, the legal capacity of the platform and the qualification of its services will largely depend on the facts and circumstances of the case. For instance, if the platform's business model is to conclude logistics contracts with a carrier on behalf the platform's customer, the platform will usually qualify as a freight forwarder.

In light of these rulings, digital logistics platforms should carefully consider their legal position and exposure under civil law. They should also define their position in a contract or in general terms and conditions as much as possible.

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Endnotes

(1) 9 April 2021, ECLI:NL:HR:2021:527.

(2) 19 November 2021, ECLI:NL:HR:2021:1725.