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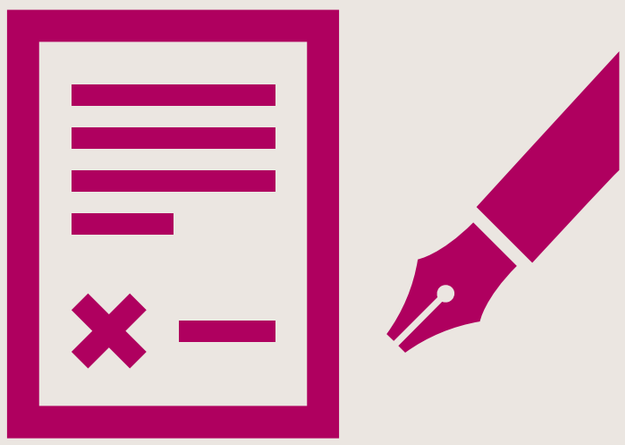
Supreme Court Summary

The *Rabobank/Melamo* ruling on the *contra proferentem* rule and subrogation of claims.



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Supreme Court Decision Date: 29/09/23
ECLI:NL:HR:2023:1354

What is the contra proferentem rule?

- The rule of contra proferentem (translating: "*against the offeror*") is a principle of contract interpretation applied in civil law and common law jurisdictions, including the Netherlands.
- The rule says that if the wording of a clause allows for multiple interpretations, the interpretation that is favourable to the party that did not draft the clause, should prevail.
- Thus, the contra proferentem rule protects the interests of e.g. consumers, who cannot influence the wording of clauses in a sales contracts and the applicable general terms and conditions.

What is **subrogation?**

- Subrogation means that one party (the *subrogee*) assumes the rights of another party (e.g. a creditor) to recover debts or claims.
- Under article 6:12 of the Dutch Civil Code (DCC) a party that satisfied a joint obligation of others (thus paid more than its share of the debt) subrogates into the original creditor's position vis-à-vis the co-debtors. The subrogee can then exercise the same rights as the original creditor against the co-debtors, including the original creditor’s security rights.
- Subrogation is not contingent on the original creditor having been paid in full.

What was the case about?

- Rabobank had provided loans to Anchor and Melamo, for which the companies were jointly and severally liable. Both companies had granted security rights to Rabobank.
- Anchor and Melamo had waived the right of subrogation. Both entities went bankrupt and Rabobank enforced. Melamo's secured assets were sold first. The proceeds exceeded the amounts due from Melamo; the surplus was applied towards part of Anchor's obligations. Next, Rabobank enforced a mortgage granted by Anchor.
- In the proceedings, the liquidators claim part of the proceeds of that mortgage enforcement on account of subrogation.

What was the case about?

- The liquidators relied on the Dutch law principle that contribution claims between joint and several debtors only arise when one debtor satisfies the other's obligation.
- Under Dutch law, a right arising post-bankruptcy cannot be waived pre-bankruptcy. The liquidators therefore considered the waiver of subrogation ineffective and claimed subrogation in accordance with the basic Dutch Civil Code provisions. Rabobank relied on an interpretation of the waiver as an upfront exclusion of the benefit of subrogation.

What did the Court of Appeal decide?

- The District Court and the Court of Appeal granted the claim of Melamo's liquidators.
- The Court of Appeal referred to long-standing case law on interpretation (the Haviltex standard), namely that interpretation cannot not solely rely on linguistic meaning of a clause, but that the reasonable expectations and intentions of the parties within the given circumstances must be factored in.
- The waiver clause under discussion in this case, however, was part of general terms and conditions and was not negotiated. The Court of Appeal thus reverted to a more objective and grammatical interpretation.

What did the Court of Appeal decide?

- In doing so, the Court of Appeal found that the words "*afstand doen van*" (“waives”) in the waiver clause does not mention an exclusion of subrogation.

- It distinguished between waiving a right, which implies that one already has a right but chooses to relinquish it, and excluding a right, which implies that no right would ever be obtained.

- The use of the term “waives” thus supported the liquidators’ interpretation.

What did the Court of Appeal decide?

- The consequence of how Rabobank drafted the clause was that Melamo subrogated into (a share in) Rabobank's rights in accordance with article 6:12 DCC, as the waiver of a right acquired during Melamo’s bankruptcy could not be validly given in the pre-bankruptcy financing contract.
- If that had not been Rabobank’s intention when drafting, that cannot be held against Melamo. Moreover, the fact that Rabobank later amended its banking conditions to explicitly exclude subrogation suggests that it recognized the lack of clarity in the clause under litigation.

What did the Advocate General (AG) advise?

- AG Assink advised to quash the decision by the Court of Appeal. He found the interpretation framework applied by the Court of Appeal to be overly restrictive and therefore incorrect.
- Contra proferentem is considered *one* of the possible factors for interpretation in Dutch law, rather than a *stand-alone* rule of interpretation. It functions as a weighing factor and does not alone determine the outcome.
- Assink found that the Court of Appeal fell short in factoring in the principle that, where two readings of a clause have different legal outcomes, it is also a weighing factor which legal effect the parties would likely have preferred.

What did the Advocate General (AG) advise?

- By doing so, the Court of Appeal attributed too absolute an effect to contra proferentem, inconsistent with the widely accepted view that it is one of *several* factors within the Haviltex standard, not a rule in itself.
- The AG found that the Court of Appeal had failed to take the potential legal outcomes into account in its interpretation, driven by the overarching principle that all circumstances of the case are pivotal, guided by the standards of reasonableness and fairness.
- Moreover, the AG held that it is possible to exclude subrogation in advance.

What did the Supreme Court decide?

- The Supreme Court quashed the decision in line with the AG's opinion. The Supreme Court ruled that the interpretation of a written contract must always account for all relevant circumstances of the specific case, evaluated based on the standards of reasonableness and fairness (*redelijkheid en billijkheid*).
- Importantly, the Supreme Court reiterated that if a clause allows for multiple interpretations, the court must also consider the plausibility of the legal effects of each interpretation. This rule applies as well when interpreting general terms and conditions, such as – in this case – the General Banking Conditions of Rabobank.

What did the Supreme Court decide?

- The Court of Appeal's opinion that Rabobank cannot blame Melamo for undesirable consequences resulting from Rabobank's own drafting went against that standard, as the Court should have factored in the plausibility of the legal effects of the different interpretations.

- The Supreme Court also considered that an exclusion of statutory subrogation is permissible under Dutch law (some authors had argued that it was not). The legislative history of article 6:12 DCC indicates that parties can deviate from that principle. The Supreme Court referred the case for further adjudication to the Court of Appeal of Arnhem-Leeuwarden.

Impact of the decision

- The plausibility of the legal effects of each possible interpretation is a relevant factor that must be considered in interpreting a written contract. It is not excluded that this factor (i.e. the plausibility of an interpretation) weighs heavier than the fact that a particular interpretation is disadvantageous to a party that did not draft the provision (the *contra proferentem* rule).

- It is therefore possible that an interpretation may prevail on the ground that it is plausible, even if such interpretation is disadvantageous to a party that did not draft the provision. Whether or not the interpretation of Rabobank will prevail in this particular case, is yet to be determined after cassation and referral.

Impact of the decision

- Importantly, the Supreme Court has now clarified – in line with legislative history – that parties are at liberty to exclude subrogation altogether, or to defer it to a specific point in time (e.g. full repayment, under a typical "Deferral of rights" provision). This is helpful for lenders, who generally want to avoid competition in a (pre)bankruptcy situation.

For more information

on this decision and what it means to you, please contact:

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