

THE RELEVANCE OF FOREIGN BUSINESS PRACTICES UNDER DUTCH LAW

In a recent Dutch Supreme Court decision¹ it came up for discussion whether Turkish business practices could play a role in the interpretation of a contract under Dutch law. This question was answered affirmatively using the 'Haviltex-criterion'.

What is the 'Haviltex-criterion'?

In Dutch literature and case law the 'Haviltex-criterion' means as follows. In the case *Ermes/Haviltex*², the Dutch Supreme Court considered the question of whether the terms of a written contract can only be answered by a literal interpretation of the stipulations of that contract. According to the Supreme Court, it is important to determine the intention of the parties in the given circumstances and what they reasonably expected from each other. In addition, the social environment and the legal knowledge of the parties can also be relevant.

The course of the proceedings

In the present case the private limited company A³ entered into a credit agreement and a settlement agreement with ISBANK GmbH (hereinafter: "Isbank"). The aforesaid agreements will hereinafter be referred to as 'the Agreements'. The Agreements were signed by the entrepreneurs X and Y (hereinafter: 'Claimants X and Y'). In this case, Isbank held Claimants X and Y personally liable for the debts of their company. Isbank took the position that "according to Turkish business practice an entrepreneur who enters into a credit and a settlement agreement intends to bind himself for debts of his company and is accordingly personally liable towards the creditor concerned".

In the first instance, the District Court of Amsterdam held by final judgment that the Claimants were indeed personally liable towards Isbank under the Agreements and they were ordered to pay amounts to Isbank.

The Claimants appealed. With respect to Claimant X the Court of Appeals of Amsterdam upheld the final judgment. With respect to Claimant Y, however, the final judgment was upheld in part. The Court of Appeals applied the 'Haviltex-criterion' as discussed above and based the personal liability of the Claimants on the text and the manner of signing of the Agreements.

Both Claimants appealed to the Dutch Supreme Court, which decided that the complaints put forward in the legal remedies cannot lead to (an appeal in) cassation. According to the Supreme Court, no substantiation is required since the complaints do not demand an answer in the interest of the unity of law or legal development⁴. In conclusion, the Supreme Court dismissed the appeals in cassation. In spite of the foregoing, the Advocate-General of the Supreme Court made a conclusion that will be discussed below.

The opinion of the Advocate-General

The Advocate-General considered that the Claimants did not contest the aforesaid business practice on sufficient grounds. Additionally, if a party seeks an interpretation of a contract under Dutch law using the 'Haviltex-criterion', all circumstances of the case are important. The applicability of Dutch law does not prevent Dutch courts from attaching legal consequences to foreign business practices. Despite the fact that the applicable law in the proceedings is not up for discussion, foreign elements should be considered. The Advocate-General hereby referred to another judgment by the Dutch Supreme

Court, in which the usual Chinese criteria were taken into account while Dutch employment law was applied⁵. Given these facts, the decision of the Court of Appeals did not show incorrect interpretation of the law nor an inadequate substantiation. Therefore, he considered that the appeal in cassation should be dismissed.

Conclusion

The present case confirms that even though Dutch contract law is applicable, Dutch courts can still attach importance to foreign and Dutch business practices. Therefore, each of the contracting parties should be aware of the applicable business practices in the other party's country. Dutch courts may take these practices into consideration in the event of conflict on the interpretation of a contract.

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¹ HR 11 February 2011, LJN: BO9613

² HR 13 March 1981, NJ 1981, 635

³ No names are given in the judgment

⁴ Article 81 of the Dutch Judiciary Organization Act

⁵ HR 18 November 1983, LJN: AG4694, NJ 1984, 345

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