Exoneraties in (ICT-)contracten tussen professionele partijen

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Summary

Exemption clauses in contracts (in particular ICT contracts) between professional parties

1 INTRODUCTION

Parties are free to exclude or limit their potential liability for damage caused by a breach of contract or a tort by agreeing on an exemption clause ('*exoneratieclausule*'). A court may only limit the right to invoke an exemption clause in exceptional cases. According to the Saladin/HBU judgment of 1967, whether an exemption clause may be invoked depends on the weighing of many circumstances, such as:

- the degree of culpability, also in connection with the nature and gravity of the interests at stake;
- the nature and further content of the contract in which the clause is included;
- the social position and the relative position of the parties;
- the manner in which the clause came into existence;
- the extent to which the other party was aware of the clause's purpose.

Exemption clauses are generally tested against the 'limiting effect of the principles of reasonableness and fairness' (*derogerende/beperkende werking van de redelijkheid en billijkheid*). This means that a court can refuse to enforce such a clause based upon those principles. There are three ground rules that must be respected when applying this test. First, the standard is whether invocation of the exemption clause would be *unacceptable* on the basis of the principles of reasonableness and fairness, and therefore not whether its invocation would be contrary to those principles. A higher threshold must be met to satisfy the first test than the second. Second, in contracts between professional parties, it can be argued that *extra restraint* must be exercised when determining whether an exemption clause is unacceptable. Third, in making the determination, *all* relevant circumstances must be considered.

In this book, I first analysed the Saladin/HBU circumstances. In each case, I assumed that an exemption clause in a contract governed by Dutch law is concluded between professional parties (a supplier and a customer) that are both legal entities resident in the Netherlands. I then applied, as much as

possible, the knowledge I had acquired to the supplier-friendly FENIT[1] conditions of 2003 and 1994 and the customer-friendly BiZa[2] contracts (in particular, the software licence agreement). I reached the following conclusions.[3]

In the past, exemption clauses were tested against good morals (*goede zeden*). Nowadays, they are tested against reasonableness and fairness. Some writers argue that both tests should be used, first the good morals test and then the reasonableness and fairness test. According to these writers, this would result in legal certainty (*rechtszekerheid*) because, among other things, (i) application of the good morals test involves weighing a limited number of circumstances whereas application of the reasonableness and fairness test involves weighing an (in theory) unlimited number of circumstances, and (ii) a failure to pass the first test would make it unnecessary to apply the second, more extensive test. I disagree with these writers because even if the number of circumstances under the good morals test were indeed limited, and even if these circumstances could be identified, there would still be no consensus on the question of which exemptions clauses are, and which are not, contrary to good morals. Take what would seem to be the most obvious example of a circumstance in which the invocation of an exemption clause should be contrary to good morals, i.e. in the case of wilful misconduct (*opzet*). Although many authors indeed take this position, there is nevertheless no consensus. This means that almost all exemption clauses would still have to reviewed under the reasonableness and fairness test. Since the introduction of a good morals test prior to the reasonableness and fairness test would seem to have little added value, I believe that combining both tests does not make sense.

In practice, situations often arise in which a customer may choose whether it wishes to have an exemption clause reviewed under the unreasonably-burdensome test (Art. 6:233 (a) Netherlands Civil Code) or the reasonableness and fairness test (Art. 6:248 (2) Netherlands Civil Code). Under the first test, only circumstances which occurred *prior to or at the time of the conclusion* of the contract may be considered. Under the second test, circumstances which occurred *after* the conclusion of the contract may *also* be considered. Given that the second test, by its nature, also encompasses circumstances which are relevant for the first test (and not vice versa) and given that there is no material difference between the criteria 'unreasonably burdensome' and 'unacceptable on the basis of reasonableness and fairness', I decided to limit my investigation to the reasonableness and fairness test.

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1 FENIT is a Dutch trade organisation of ICT suppliers.

2 BiZa is the Dutch Ministry of the Interior. These contracts are often used in public procurement with respect to ICT products and services.

3 The conclusions with respect to the FENIT conditions and BiZa contracts are not included in this summary due to their technical nature.

2 THE DEGREE OF CULPABILITY, ALSO IN CONNECTION WITH THE NATURE AND GRAVITY OF THE INTERESTS AT STAKE

The first Saladin/HBU circumstance – degree of culpability – is, in my opinion, the most important one.

The invocation of an exemption clause is, *as a general rule*, unacceptable in the case of the supplier's wilful misconduct or conscious recklessness (*bewuste roekeloosheid*) or that of the supplier's top level management (*bedrijfsleiding*). The invocation of an exemption clause in any other circumstances is therefore, *a contrario* (in principle) acceptable.

An exemption clause always consists of a *main rule* (i.e. a part in which liability is accepted, e.g. 'supplier is liable for damages directly or indirectly connected to this contract up to an amount of EUR x per annum') and an *exception* (i.e. a part which states the circumstances in which the limitation of liability does not apply, e.g. 'except in the case of wilful misconduct or conscious recklessness of the supplier or the supplier's top level management'). If an exemption clause does not contain an explicit exception, the exemption is valid, but the exception pertaining to 'wilful misconduct or conscious recklessness of the supplier or its top level management' will be regarded as implied.

If a customer wishes to invoke the *main rule*, it has to prove, among other things, that (i) the act of the person causing the damage must be characterised as an act of the supplier (Babbel doctrine) or (ii) the supplier is vicariously liable for that act (Art. 6:76, 170 or 171 Netherlands Civil Code).

If a customer wishes to invoke the *exception*, it has to prove, among other things, that the act of the person causing the damage must be characterised as an act of the supplier. An act of the supplier's top level management automatically qualifies as an act of the supplier. An act of anyone else (such as an employee not belonging to the supplier's top level management) will not readily be characterised as an act of the supplier for this purpose because of the nature of an exemption clause (to exclude or limit liability), the all-or-nothing character and the far-reaching consequences of the sanction (unlimited liability) if the act is attributed to the supplier and the fact that it is still possible for the exemption clause to be considered unacceptable in combination with other Saladin/HBU circumstances. The customer is not entitled to claim against the supplier under the exception on the basis of vicarious liability (Art. 6:76, 170 or 171 Netherlands Civil Code).

In the performance of ICT contracts, the expertise of both the supplier and the customer are relevant in determining the degree of culpability of the supplier. A preliminary question is whether the expertise of the supplier should be tested at all. The answer to that question is determined by the obligations which the supplier takes on.

The test known from the RBC/Brinkers judgment – whether the conduct 'meets the standard of care that can be demanded from a reasonable and competent automisation expert' – only comes into play if the contract with the supplier includes the provision of services. This professional malpractice standard is a minimum one and is set as of the time of contracting. If the actual expertise is at a higher level than this minimum standard, the minimum standard is 'set' at the level of the actual expertise. The expertise can vary as the contract progresses, but the level of expertise required must always equal or exceed the minimum standard, even if the actual expertise has dropped below that level. The customer's expertise can also vary as the contract progresses, but is not subject to any minimum standard.

If the difference in expertise between the supplier and the customer increases in favour of the supplier, it becomes more likely that the invocation of the exemption clause by the supplier will be deemed unacceptable on the basis of reasonableness and fairness. Unless the customer's expertise is of the same nature as that of the supplier, a comparison will not even be made (the customer will simply be regarded as not having the relevant expertise). The comparison must be made as of the time at which the act causing the damage occurred. The supplier's expertise at the time the comparison is made must in any case equal or exceed the minimum standard set at the time of contracting.

The degree of culpability is affected by the 'nature and gravity of the interests at stake'. In my opinion, this somewhat cryptic formulation by the Supreme Court refers to (i) the importance which the customer attaches, and is entitled to attach, to the supplier's performance and (ii) the nature and gravity of the damage suffered by the customer as a result of the supplier's act.

As the *importance* which the customer attaches to the supplier's performance (and the possible damage) increases, and the amount of damage that will be compensated under the exemption clause decreases, the likelihood that the supplier's invocation of the exemption clause will be deemed unacceptable on the basis of reasonableness and fairness increases. In my opinion, a certain restraint is called for when applying the above principle. This is because, in my opinion, as the importance which the customer attaches to the supplier's performance increases, the customer's responsibility to agree on a liability clause providing for sufficient compensation in the event of the supplier's breach also increases. However, as the importance attached to the performance increases, the amount of damage to be expected generally increases as well. Consequently, the willingness of the supplier to compensate that damage, at least in full, decreases. How these conflicting interests relate to each other – unfortunately I cannot be more specific – will depend on the circumstances of the case.

Invocation of an exemption clause will more readily be considered unacceptable on the basis of reasonableness and fairness if the *damage* was caused

by a violation of traffic and safety standards than if it was caused by a violation of other standards. Similarly, invocation of an exemption clause will more readily be considered unacceptable on the basis of reasonableness and fairness if the damage was caused by the supplier's fault (e.g. Art. 6:74 and 162 Netherlands Civil Code) than if it was caused by acts for which the supplier bears the risk (e.g. Art. 6:76, 170 and 171 Netherlands Civil Code), more readily if the damage was caused by death or personal injury than if it consists of property damage, and more readily if it consists of property damage than if the damage is purely financial.

3 Nature and further content of the contract

The circumstance 'nature and further content of the contract' (such as the principal obligation and any express or tacit guarantees) should not, in my opinion, have any bearing on whether the invocation of an exemption clause is deemed unacceptable on the basis of reasonableness and fairness.

The breach of a *principal obligation* should not preclude the invocation of an exemption clause since such a clause is generally entered into primarily with the principal obligation in mind.

Although I realise that there is a large range of different guarantees, I assumed, for the purposes of this book, that it is possible to speak of a 'normal type' guarantee. Such a guarantee should be characterised as an enhanced obligation to achieve a particular result (*obligation de resultat*). If breached, the supplier in principle cannot – in contrast to where a 'normal' obligation to achieve a particular result is breached – invoke *force majeure*. By giving the guarantee, the supplier relinquishes this right in advance.

Contrary to the view expressed by many authors, a breach of an *express guarantee* does not, in my opinion, automatically result in the invocation of an exemption clause being deemed unacceptable on the basis of reasonableness and fairness. Like all other guarantees, express guarantees are, in my opinion, only relevant in the liability phase of a legal action. After that, they play no further role and therefore are of no special significance when deciding whether an exemption clause may be invoked. *Tacit guarantees* are – or in any case should be – used solely to circumvent the rules regarding hidden defects (*verborgen gebreken*) in the old Netherlands Civil Code. Once the hidden defect rules have been set aside, the function of the tacit guarantee is exhausted and it serves no further purpose. If parties wish to attach consequences to the invocation of an exemption clause where a principal obligation or guarantee is breached, they should agree on this explicitly.

An *imbalance* between the price and the possible damage (in the sense of low price, high possible damage) should not, in my opinion, influence whether or not the supplier is liable. It should also not influence the enforceability of

an exemption clause even if there is, in addition, an imbalance between the possible damage and the scope of the exemption (in the sense of high possible damage, far-reaching exemption clause). In those situations, a supplier insists on such a far-reaching exemption clause precisely because the price is low.

The possibility of the supplier to take recourse against its prior suppliers, the availability of *insurance* coverage under third-party or first-party insurance policies and the question of *insurability* are circumstances that in my opinion should not, in view of their nature, influence whether or not the supplier is liable. These factors should also not influence whether an exemption clause can be invoked. For one thing, recovery against a prior supplier or under an insurance policy is never certain. Moreover, it should be no business of either the supplier or customer whether the other is insured or whether recovery from a third party is possible and neither of them should be allowed to benefit, other than indirectly, from the fact that this is the case. If a party wishes to benefit directly from the existence of a prior supplier or insurance, it should ensure there are clauses to this effect in the contract.

An ICT supplier can , in general, take out two types of third-party insurance, business liability insurance (*AansprakelijkheidsVerzekering Bedrijven (AVB)*) and professional liability insurance (*BeroepsAansprakelijkheidsVerzekering (BAV)*). An AVB policy covers the liability of the supplier and its subordinates for property damage and personal injury suffered by third parties as well as the financial losses resulting therefrom. A BAV policy covers the liability of the supplier and its subordinates for damage suffered by third parties as a result of a professional error in the performance of the supplier's activities. Both types of policy contain exclusions from coverage, two of which almost always pertain to wilful misconduct and clauses leading to increased liability. These exclusions are not entirely parallel to the exception 'in the case of wilful misconduct or conscious recklessness of the supplier or its top level management'. There are situations in which the supplier cannot invoke the exemption clause but the AVB or BAV insurer must pay.

Guarantees, penalties, liability clauses and indemnity clauses are generally considered to be *clauses increasing liability*. It is the insurer who must prove that the contract in question contains a clause increasing liability. The exclusion does not apply, however, to the extent the supplier can prove that it would also have been liable in the absence of such a clause.

First-party insurance plays almost no role in ICT practice because (i) the damage usually caused during the performance of an ICT contract is not covered by the most common first-party insurance policies and (ii) first-party insurance covering all or part of that damage is largely unavailable.

4 OTHER CIRCUMSTANCES

The other circumstances (social position and the relative position of the parties, the manner in which the clause came into existence and the extent to which the other party is aware of the purpose of the clause) should, in my opinion, also not be relevant when applying the Saladin/HBU test.

The circumstance '*social position*' mainly plays a role in relationships in which the element of trust is viewed as essential, such as with doctors, lawyers, civil law notaries, banks and insurers. This is not the case in ICT contracts between professional parties.

The circumstance '*relative position of the parties*' has three main aspects: a difference in expertise regarding the products and/or services supplied, abuse of a dominant market position and the difference in legal expertise on exemptions clauses.

The influence of a difference in expertise regarding the products and/or services supplied is important and has been discussed above in connection with the degree of culpability.

The possible effect of the abuse of a dominant market position on an exemption clause can be deduced from the literature on competition law. If there are no objections from a competition law perspective, the 'larger' party is, in my opinion, free to take advantage of its stronger *bargaining position.* Put differently, in contract negotiations it is not necessary to compensate for unequal bargaining positions as long as the competition laws are observed.

A difference in legal expertise on exemption clauses is, in my opinion, also not a circumstance which should affect whether the invocation of an exemption clause is unacceptable on the basis of reasonableness and fairness. The buyer or potential buyer should in my view bear the consequences of its own lack of legal expertise. A professional party may be expected to be aware of and understand the price and other conditions governing its purchases. Exemption clauses are part of those conditions. If the buyer or potential does not possess such expertise itself, it can hire someone who does.

The '*manner in which the clause came into existence*' (such as the fact that the exemption clause is a standard term) should, in my opinion, also not affect whether the invocation of an exemption clause is unacceptable based on reasonableness and fairness.

A customer, if it is interested in examining the standard terms, must in my opinion request a copy of them. If the supplier then fails to provide this, the customer is, in my opinion, not bound by the standard terms (there is no acceptance within the meaning of Article 6:217 of the Netherlands Civil Code) or can nullify them (Articles 6:233 (b) and 6:234 (1) Netherlands Civil Code, unless Art. 6:235 (1) or 6:247 (2) Netherlands Civil Code applies). If the stand-

ard terms include an exemption clause, its content will in that situation not be tested. If the supplier does provide a copy of the standard terms, the customer can make an educated choice to accept or negotiate them. In those two cases (accept or negotiate), the circumstance 'manner in which the clause came into existence' should not influence the enforceability of the exemption clause. If the customer accepts the exemption clause, it obviously agrees to the risk allocation the clause brings about. And if the customer decides to negotiate, it can influence that risk allocation in the same manner as it can influence the other conditions of the contract. If the customer is unable to affect the risk allocation to its liking, it can refuse to enter into the contract.

If the customer does not request a copy of the standard terms, it is in my opinion obviously not interested in them and accepts the risk that they will contain a disadvantageous exemption clause. In that case, the customer may, in my opinion, no longer argue that it has not accepted the standard terms or that the supplier's obligation to provide information has been breached. The customer may also not argue at a later stage that the invocation of the exemption is unacceptable based on the principles of reasonableness and fairness in view of 'the manner in which the clause came into existence' although it can of course still make this argument on the basis of other circumstances.

If an exemption clause is not a standard term, the clause is (by definition, see Art. 6:231 (c) Netherlands Civil Code) not intended to be included in more than one contract. It is therefore an individual term to which the general statutory provisions on offer and acceptance apply (Art. 3:33 et seq. and 6:217 et seq. Netherlands Civil Code). In that event, it can be assumed that the exemption clause was negotiated. If the clause was in fact not negotiated, it is even easier to say that the customer has accepted the risk because it could have negotiated the clause and did not do so. If the supplier refuses to negotiate, the customer can always decide not to purchase the relevant product or service. In this case too, 'the manner in which the clause came into existence' should not be a factor in the testing of an exemption clause.

The last circumstance ('*the extent to which the other party is aware of the purpose of the clause*') should, in my opinion, likewise not play a significant role in the testing of an exemption clause. A professional customer may be assumed to be aware of the purpose of an exemption clause. Put differently, it *should* be aware of the purpose of such a clause. If not, it must either ensure that it gains this awareness or accept the risk of being bound by an exemption clause it does not understand.

5 ENGLISH LAW

In England, exemption clauses are tested against circumstances that were or should have been known when concluding the contract. This moment of fixation is reminiscent of the testing provided for in Article 6:233 (a) of the Netherlands Civil Code (circumstances at the time of the conclusion of the contract), as opposed to testing as provided for in Article 6:248 (2) Netherlands Civil Code (all circumstances, therefore also those existing after the contract was concluded).

Pursuant to English law, some types of exemption clauses are by definition unacceptable. In other cases, exemption clauses are only acceptable if they pass the reasonableness test, pursuant to which an exemption clause is measured against a number of non-limitative criteria. The burden of proof that an exemption clause is reasonable rests on the supplier.

Although English courts in principle show restraint in dealing with exemption clauses concluded between parties with equal bargaining power, this restraint is not evident in the case law relating to ICT contracts. These cases show that English courts attach great importance to whether the supplier is insured or could have been insured.

The English approach to testing exemption clauses does not appeal to me. In particular, I disagree with:

- only testing at the time the contract was concluded (this is too limited because it fails to consider circumstances that occur after the contract was concluded);
- the burden of proof resting on the supplier (the starting point should be that the contractually agreed risk allocation will be respected and that the party wishing to have the clause set aside (the customer) must prove that that risk allocation is unacceptable in the particular circumstances); and the
- the influence of insurance/insurability (there should be no such influence).

6 CONCLUSION

Whether the invocation of an exemption clause is *unacceptable* on the basis of the principles of reasonableness and fairness should be decided using the circumstances set out in the Saladin/HBU judgment. In contracts between professional between professional parties, *extra restraint* is called for when applying this test.

The invocation of an exemption clause is, *as a general rule,* unacceptable on the basis of reasonableness and fairness in the case of the supplier's own wilful misconduct or conscious recklessness or that of its top level management. The invocation of an exemption clause in any other circumstances is *a contrario* (in principle) allowed.

In contracts between professional parties, and more specifically in ICT contracts between professional parties, the degree of culpability is the most important Saladin/HBU circumstance. The following circumstances are also of importance: the difference in technological expertise between the supplier and the customer, the nature and gravity of the customer's interest in proper performance by the supplier and the nature and gravity of the damage which the customer suffers as a result of the supplier's breach. The other Saladin/HBU circumstances should have little or no bearing on the fate of an exemption clause.

Parties are free to allocate risks. Contracting is allocating risks. Entering into exemption clauses is also allocating risks. Courts should respect this freedom as much as possible.