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Consequential Damages under Dutch and German Law

Consequential or indirect loss is loss which is not a direct result of the event which causes the damage. This article discusses and compares the concept of consequential loss under Dutch and German law.

1. Introduction

This article is about consequential damages under Dutch and German law. This issue of the European Journal of Commercial Contract law already contains an article on consequential loss under English law which is a common law legal system. The addition of a discussion of consequential damages under Dutch law and German law will provide an interesting comparison of legal systems. Dutch law and German law are discussed because they are based on relatively modern civil codes. The discussion of Dutch law concerns the statutory contract law (section 2.1) and a case concerning an agreement between a buyer and a seller with an exclusion of liability for consequential loss (section 2.2). Section 2.3 contains closing remarks on Dutch law. German law is discussed in section 3. Section 3.1 contains a discussion of German statutory law. German contract law is discussed in section 3.2. Section 3.3 contains closing remarks on German law. The conclusion of this article is contained in section 4.

2. Dutch law

The Dutch word for consequential damages is *gevolgschade*. Sometimes the expression 'indirect damages' is used. Hereinafter I will use the English expression 'consequential damages'. There is no definition of consequential damages in the Dutch Civil Code ('DCC'). Also it is not common to see a definition in contracts or insurance policies. There is very little Dutch literature on consequential damages.[1] There is no accepted definition of consequential loss under Dutch law.

2.1. Dutch statutory law

Pursuant to Article 6:96(1) DCC financial loss consists of incurred loss and loss of profit.

Under Dutch law, liability is established if there is a causal connection between the act which caused damages and the damages. The measure of causal connection is the so-called *conditio sine qua non* connection. This means that if there is a condition without which the damage would not have occurred, then liability is established. The *conditio sine qua non* causal connection cannot be used to attribute liability because it could lead to very remote causes being unfairly attributed to the person who caused the damage. Instead the so-called doctrine of reasonable attribution is used.[2] It is codified in Article 6:98 DCC. Article 6:98 DCC provides:

> The only damages which are eligible for compensation must be connected to the event which led to the debtor's liability in such a way that, taking the nature of the liability and the nature of the damages into account, the damages can be attributed to that event.

Examples of the nature of the damage are death, injury, financial loss and damage to property. Examples of the nature of the liability are fault-based liability, liability based on the law and contractual liability.

According to Tjon Tjin Tai, direct damages are damages which are eligible for compensation in accordance with Article 6:98 DCC. Indirect damages are damages which are not eligible for compensation in accordance with Article 6:98 DCC and consequential damages may or may not be eligible for compensation in accordance with Article 6:98 DCC.[3] It will therefore depend on the body of case law which has been developed around Article 6:98 DCC whether consequential damages can be recovered or not.[4]

2.2. Dutch contract law – an example

An example of a definition in Dutch general terms and conditions is clause 13.4 of the Metal Union conditions of 1 January 2019.[5] Clause 13.4a excludes liability for consequential damages which are defined in clause 13.4a as:

> Consequential damages include, but are not limited to, damage resulting from the interruption of business operations , loss of production, lost profits, fines, transportation costs, and travel and accommodation expenses.

* DOI 10.7590/187714625X17688990979925 1877-1467 2025,European Journal of Commercial Contract Law
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1 Examples of fairly recent publications are Tjon Tjin Tai, 'Directe schade in het contractenrecht' (2007) MvV 226-231 (hereinafter referred to as 'Tjon Tjin Tao 2007'), *Asser/Sieburgh 6-I*, No 383d (hereinafter referred to as 'Sieburgh 2020') and Nigel Margetson, 'A Practical Note on Drafting Exclusion Clauses' (2022) EJCCL 62-69 (hereinafter referred to as 'Margetson 2022').

2 The doctrine of reasonable attribution replaced the doctrine of 'adequacy' in the 1970's. The doctrine of adequacy is also referred to as the 'reasonably foreseeable' standard. It means that the person who committed the harmful act is only liable for the damages which could normally be expected to result from that harmful act.

3 Tjon Tjin Tai 2007, para 4.

4 For a brief discussion of that law, see Margetson 2022, 63.

5 Metaalunievoorwaarden 1 January 2019.

In the case which led to the judgment of the 's-Hertogenbosch court of appeal of 14 January 2025[6] the seller sold the buyer a machine for the production of stub axles. The buyer and seller agreed to the Metal Union conditions of 1 January 2019. The machine did not perform as it should have and had to be upgraded. In legal proceedings in first instance the buyer demanded compensation for damages consisting of loss of use of the machine, extra salaries and expertise costs. The district court held that those damages did not constitute consequential damages and partially awarded the buyer's claim, including a part of the claim for loss of use. The district court did take the agreed Metal Union conditions into account.

On appeal the seller argued that the district court was wrong in deciding that the claimed damages did not constitute consequential damages. The court of appeal rejected that argument and held:

> It is not unusual for such an exemption for consequential damages to be included in these types of commercial transactions. *Consequential damages*, like direct damages, is not a term of art, *but can rather be considered damages that have no direct causal connection with the breach of contract. Consequential damages, as indirect damages*, must therefore be distinguished from *direct damage to the machine and the components produced with it, as well as reasonable costs to ensure that the machine complies with the requirements of the agreement and reasonable costs to determine the cause and extent of the damages, as well as reasonable costs to prevent and_mitigate the damages*. A machine that cannot be used in a manner consistent with the buyer's expectations, in this case aimed at the production of stub axles, simply does not meet the reasonable requirements to be made of it and therefore results in direct damage within the context of that intended production, either because production cannot take place at all or only to a limited extent (…) and requires additional labour. This also includes the costs of the expert who was engaged to determine the cause of the damage. (emphasis added, NJM)

This judgment makes clear that there is no consensus in the Netherlands regarding the definitions of consequential damages and indirect damages. The court of appeal uses the expression 'indirect damages' as a synonym for 'consequential damages' whereas Tjon Tjin Tai uses 'indirect damages' to indicate damages which are not eligible for compensation in accordance with Article 6:98 DCC.

The court of appeal defines 'consequential damages' as damages that have no direct causal link with the attributable breach. Therefore, the direct damage to the machine and the components produced with it, the reasonable costs to upgrade the machine so that it complies with the requirements of the agreement and the reasonable costs to determine the cause and extent of the damages, as well as reasonable costs to prevent and mitigate the damages constitute direct damages which are not excluded by the exclusion for consequential damages in the Metal Union conditions.

The decision of the court of appeal does not seem to be contrary to the exclusion clause in the Metal Union Conditions which defines consequential damages as 'the interruption of business operations, loss of production, lost profits, fines, transportation costs, and travel and accommodation'. The judgment makes clear that consequential damages are damages which have no direct causal connection to the breach of contract.

2.3. Dutch law – closing remarks

Direct damages have a direct causal connection with the event that caused them. For example, fermentation in a tank of molasses in a factory which causes the tank to explode.[7] There is a direct link between the fermentation and the explosion.

Consequential damages do not have a direct link with the event that caused them. There are at least two links in the chain of events. If the exploding tank causes damage to the factory, resulting in a loss of production of the factory, there is an indirect link between the fermentation and the loss of production. The chain of events is: fermentation – explosion of the tank – damage to the building – loss of production.

Consequential damages can be a result of an unlawful act (tort) or a breach of contract. An example of consequential damages caused by an unlawful act is a person who is unlawfully injured in a traffic accident, which renders him unable to work and results in a loss of income. An example of consequential damages arising out of breach of contract is the sale of a faulty car which breaks down on the way to the airport causing the buyer to miss his plane and having to buy a new ticket.

The question is: when can consequential damages be recovered? The answer will depend on Article 6:98 DCC and/or the content of the contract.

In contracts it is important to clearly define what constitutes 'consequential damages' and what constitutes 'direct damages' in order for an exclusion clause to be effective.

3. German law[8]

In German consequential damages are called *mittelbare Schäden* or *Folgeschäden* (indirect damage or consequential damages). According to Rohde 2024, although contracts governed by German law often limit liability for direct damages, German law, case law and legal lit-

6 ECLI:NL:GHSHE:2025:61.

7 This example is based on the judgment of the Supreme Court of the Netherlands of 16 May 2008, ECLI:NL:HR:2008:BC2793,

8 This section is largely based on Thorsten Rohde, *Schadensbegriff im M&A Kontext*, published online at <https://rohdebaier.de/en/schadensbegriff-im-ma-kontext/> on 5 January 2024 (hereinafter referred to as 'Rohde 2024') and Wolfgang Wurmnest, Chapter 6 in Joachim Zekoll and Gerhard Wagner (eds), *Introduction to German Law* (third edition, Alphen aan den Rijn: Wolters Kluwer 2019) (hereinafter referred to as 'Wurmnest 2019').

erature do not distinguish between direct and indirect damages.[9]

3.1. German statutory law

Pursuant to § 249 of the German Civil Code ('GCC') a person who is obliged to pay damages must restore the situation that would have existed if the circumstance requiring compensation had not occurred. § 252 GCC provides that damages include lost profits.

A claim for damages requires that the loss has been caused by the event which leads to liability. The German law of damages distinguishes between two sorts of causation: *Haftungsbegründende Kausaliteit*, which is the causality that establishes liability, sometimes referred to as the *conditio sine qua non* for the loss,[10] and *haftungsausfüllende Kausaliteit* (the causal connection between the violation of a legal right and the ensuing damages). *Haftunsausfüllende Kausaliteit* covers the actual question of calculating the amount of damages to be paid.[11]

As is also the case under Dutch law, the *conditio sine qua non* is only be used to establish liability. Liability is attributed in accordance with the doctrine of *Adäquate Kausaliteit* (adequate causation).[12] Wagner describes adequate causation as:

> … a wrongdoer is liable for a certain loss only if the act that leads to liability is in general, and not only in very peculiar and unlikely circumstances which must remain out of consideration in the usual course of things, capable of resulting in this loss.

According to Wagner, regardless of how the adequate causation theory is defined, it is aimed at excluding such causes of liability which are entirely beyond the expected cause of things.[13]

3.2. German contract law

The highest German federal court is called the Bundesgerichtshof (hereinafter referred to as BGH). The judgment of the BGH of 8 June 1994 concerns the application of a clause in a trust agreement limiting the trustee's liability to direct damages. The BGH held that since neither the law nor case law nor literature provide criteria to distinguish between direct and indirect damages, the distinction must be derived from the wording of the contract.

The judgment of the BGH of 21 March 2002[14] concerned the applicability of a limitation of liability clause (clause X) in a contract for the sale and purchase of an apartment. In that contract the seller's liability for culpable breach of contract is limited to direct damages. The BGH held that the clauses in the contract were in fact general terms and conditions. This means that the German courts are obliged by German law to assess the allowability of those terms and conditions.[15] Regarding the allowability of clause X, the BGH held that it was invalid (*unwirksam*) because it did not withstand a content review according to Section 9 of the General Terms and Conditions Act.

3.3. German law – closing remarks

The concept of consequential damages does not exist under German statutory law. Contractual limitation of liability to direct damages will have to be regulated in a contract which must clearly define what is meant by 'consequential damages' and 'direct damages'. Such a limitation of liability clause in general terms and conditions will be subject to scrutiny by German courts and, as is seen above, may be held to be invalid.

4. Conclusion

The Dutch law and German law of consequential losses are very similar. The exclusion of consequential loss will largely depend of the wording of the contract and the allowability of the contract clauses. If there is no allowable contractual exclusion of contractual loss then under Dutch law damages will be awarded in accordance with the 'reasonable attribution' theory and under German law they will be awarded in accordance with the 'adequate causation' theory. Contrary to English law, there is very little literature and case law regarding consequential damages under German and Dutch law.

9 Rohde refers to the judgment of Bundesgerichtshof ('BGH') of 8 June 1994, file number VIII ZR 103/93 which is discussed hereinbelow.

10 Dr Tobias Wagner, 'Limitations of Damages for Breach of Contract in German and Scots Law – A comparative Law Study in View of a Possible European Unification of Law' (2014) 10(1) Hanse Law Review 73-97 (hereinafter referred to as 'Wagner 2014) 82-83.

11 Wagner 2014, 82.

12 Under Dutch law the adequate causation theory was replaced by the 'reasonable attribution' theory in the 1970s.

13 Wagner 2014, 83.

14 File number VII ZR 493/00.

15 See the discussion of German law in NJ Margetson, 'The Operation of Knock-for-Knock Clauses under English, Dutch and German Law' (2025) EJCCL 16-24.