The Netherlands
Liability For Third Party Damage Resulting From Exploration and Production Activities

1. Introduction

The search for and development and production of oil and gas may cause serious damage, not only to the companies involved but also to others or to the environment. Where such external damage is occasioned, the question of liability arises: who has to compensate for the damage?

Under Dutch civil legislation it is generally the person committing an act that will be held liable for the consequences thereof such as third party damage. There are, though, some exceptions to this rule relevant to exploration and production activities and it is these exceptions that are the subject of this article.

This article starts with a paragraph on the principal parties in oil and gas exploration and production to concentrate thereafter on the question of third party liability.

2. Dutch Mining Law – operator and licence-holder

Dutch mining legislation (*mijnbouwwetgeving*) provides that aspect of Dutch legislation specific to the mineral extraction industry. Rules and regulations not expressly particular to the mineral extraction industry are found in other legislation, such as environmental and working conditions legislation.

The principal parties in Dutch mining legislation are the Licensee and the Operator.

Licensee

Article 6 of the Mining Act (*Mijnbouwwet*) prohibits the exploration and production of minerals without a licence. Such licence is held by a Licensee which may comprise a single company or a number of companies jointly. Each licence is only ever held by one Licensee, meaning that where there are several co-holders of a licence they are still regarded as a single Licensee. Accordingly, their individual interest in the licence is that of an undivided legal interest and a divided beneficial interest.

The beneficial interest of each individual co-holder in the rights and obligations obtaining from a licence is settled by means of internal arrangements among the co-holders, captured usually in a Joint Operating Agreement. It should be noted in passing that sometimes the respective co-holders' interests are only deductible by examination of a series of consecutive sale and purchase agreements due to the Joint Operating Agreement not being assigned after each transfer of the licence.

Operator

Activities to be carried-out under an exploration or production licence, such as the drilling of a well or the development of a field, may only be carried-out, or commissioned by, one of the co-holders of the relevant licence: the so-called Operator (*uitvoerder*), designated by the Licensee and approved as such by the Minister of Economic Affairs.

Dutch mining legislation states that there can only be one Operator per licence and that the Operator must be one of the co-holders. That said, sometimes, in The Netherlands, a co-holder other than the Operator undertakes certain activities as though it were the Operator. It is common in the industry to then call this party the 'de-facto-operator'. Such de-facto operatorship is however purely an internal arrangement between the co-holders and as such is not recognised under the Dutch mining legislation. Formally, a 'de-facto operator' is a contractor of the Operator.

The Operator is a creature of Dutch mining legislation, and it is not a recognised figure in other Dutch legislation.

3. Dutch Civil Code – third party liability

Rules on third party liability as they function in The Netherlands are to be found in the Dutch Civil Code (*Burgerlijk wetboek*). Formally this Code does not apply beyond twelve sea miles from the Dutch coast but, as mining installations for the exploration and production of oil and gas from underneath the Dutch part of the continental shelf are regarded as Dutch territory, the Dutch civil Code will apply to matters of third party liability arising from activities carried-out on such mining installations. The exception to this rule being third party damage resulting from said activities that is suffered on another State's territory. In such case the legislation of that other State will be applied.

Liability - general

The Dutch Civil Code at article 6.162 provides that:

> 'He who commits an unlawful act, that can be imputed to him, towards another person shall indemnify that person for the damage resulting thereof'

A claimant (other than in situations where liability has been contractually pre-agreed or where strict liability[1] applies) seeking damages from having suffered as a result of another's actions (either by commission or omission) is required to prove that:

1. the other person committed an unlawful act;
2. the other person did not have any justification for committing the unlawful act;
3. the unlawful act can be imputed to the other person; and
4. the unlawful act caused the damages as suffered by that person.

As we have seen earlier, exploration and production activities may only be carried-out by a duly appointed Operator or by that Operator's commissioned contractors. Therefore, in principle the only persons that could be held liable, pursuant to article 6.162, for third party damage caused by such activities are the Operator or its contractor whereby actual liability would depend on which of these two parties committed or omitted the act that caused the damage. The rules on strict liability though may alter this allocation of liability.

Strict Liability

Rules on strict liability may result in the Operator being severally and jointly liable for actions of its contractors, or the co-holders of a licence being severally and jointly liable for actions of the Operator or the Operator's contractors. Legal liability can shift from contractor to Operator or from Operator to Licensee in the following situations.

Damage caused by contractor

In certain circumstances the Operator may be severally and jointly liable for third party damage caused by actions of its contractors. The legal tests used to determine whether such joint liability might arise are:

[1] Strict liability (*risico/kwalitatieve aansprakelijkheid*): liability of a person resulting from its capacity (relationship to whom or to what the damage has been caused) regardless of fault on his/her side

a. were the commissioned activities part of the normal business activities of the Operator?
b. can the businesses of the contractor and those of the Operator be seen as one and the same business by the third party that suffered the damage?

If the answer to both these questions is "yes" then the Operator and the contractor are likely to be held severally and jointly liable for third party damage caused by the contractor. It is worth noting though that the Operator can only be made liable for damage caused by the contractor if the contractor itself is liable. In other words a claimant still needs to demonstrate that the contractor's actions fulfill the criteria of article 6.162 of the Dutch Civil Code.

Damage caused by a blow-out or by movement of the subsoil
Third party damage caused by a blow out or by movement of the subsoil[2] as a result of exploration or production activities rests with the Licensee and, if the Licensee comprises a number of companies (as described above), each co-holder is severally and jointly liable to compensate for the damage.

To establish the liability of the Licensee, a third party claimant only has to demonstrate that the damage as suffered is caused by a blow out or movement of the soil as a consequence of the activities of the Licensee. No other prove has to be provided by the claimant.

4. Implications and recommendations

As a result of the rules on strict liability an Operator may become severally and jointly liable for the actions of its contractors and the co-holders of an exploration or production licence for actions of the Operator or the Operator's contractors.

The (financial) implications of the Operator being held liable for actions of its contractors is usually sufficiently covered in the relevant commission contract. Liabilities (and indemnities) between the co-holders of an exploration or production licence though seem, in particular in The Netherlands, not always too well arranged. As a consequence any one of these co-holders may become liable for the entire amount of damages caused by the activities carried-out under such licence and not being able to recover any from its co-holders.

It is therefore recommended that co-holders of an exploration or production licence ensure that their liabilities and indemnities are properly accounted for by an agreement, such as a Joint Operating Agreement or a Licence Interest Agreement, signed by all co-holders of the licence and for such agreement to be assigned after each transfer of the licence. In this agreement the parties should set-out their liability regime, cross-indemnify each other for their pro rata share, and insure against any third party damage. Bi-lateral arrangements only, like a sale and purchase agreement or a farm-out agreement executed as part of a licence transfer, will not ensure that each co-holder of a licence will actually pay its share of third party damage caused by the search for and development and production of oil and gas.

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[2] This includes movements of the soil caused by hydraulic fracturing (fracking)