The "NDS Provider"

The Netherlands Supreme Court - Hoge Raad

Nile Dutch Africa Line B.V, Rotterdam, the Netherlands ("NDAL") v. (1) Delta Lloyd Schadeverzekering N.V., Rotterdam, the Netherlands ("Delta Lloyd"), (2) Premium Tobacco Investments N.V., Amsterdam, the Netherlands ("Tobacco"), (3) M. Meerapfel Söhne A.G., Basel, Switzerland ("Meerapfel") and (4) CETAC, Douala, Cameroon ("Cetac") - **The "NDS Provider"**

Dutch Supreme Court: J.B. Fleers, E.J. Numann, A. Hammerstein, F.B. Bakers, W.D.H. Asser; Advocate General; NJ 2008, 505; SES 2008, 46; 1 February 2008

CARRIAGE OF GOODS BY SEA UNDER BILL OF LADING: HAGUE VISBY RULES: LIABILITY FOR DEFECTIVE CONTAINERS SUPPLIED BY CARRIER: PACKAGING OR PART OF THE VESSEL? INTERPRETATION OF TREATIES UNDER DUTCH LAW

SummaryThe Dutch Supreme Court ("DSC") held that the purpose of the duty of care that is placed on the carrier in Art. III r.1 (a), (b) and (c) of the Hague-Visby Rules (HVR) is to ensure that the vessel protects the cargo from perils of the sea, so that the vessel is fit to carry the cargo. This means that the carrier must ensure that containers that it provides to the shipper for carriage on board of the vessel should also be fit to carry cargo in. It follows from this duty of care that, in the same manner that applies to the hold of a vessel, no water should be able to enter into those containers. By providing rusty containers with holes in them which allowed seawater to enter the containers, the carrier had breached its duty of care. By Art.III r.8 and Art.IV r.1 HVR the carrier could not benefit from the exclusion clause contained in its bill of lading and the exceptions contained in Art.IV r.2 HVR. Furthermore, the DSC held that Dutch national law may not be applied when interpreting a treaty that contains uniform international law.

Case Note by Nigel Margetson, Advocaat in the Dordrecht law firm of Margetson & Margaetsn

Facts

The shipper Cetac entered into a contract with NDAL for carriage by sea of 398 bales of raw tobacco from Douala in Cameroon to Amsterdam. Cetac loaded the bales into four containers that had been put at its disposal by NDAL for use during the carriage. The containers were carried by NDAL on board of the m.v. "NDS Provider" which vessel was owned by Staklex.

A clean bill of lading made out to order was issued to Cetac for this carriage. The bill of lading was on NDAL's form and had been signed by the Master. This bill of lading named Cetac as the shipper and NDAL and Meerapfel as notify addressees. It provided that the Hague-Visby Rules (HVR) applied, as well as Dutch law. In the bill of lading the cargo was described as four "20' containers FCL/FCL disant contenir 398 balles de tabacs en feuille" ("20' containers FCL/FCL said to contain 398 bales of leaf tobacco"). The bill of lading contained the following provisions concerning containers:

Container stowage a) The Carrier shall be under no liability in the event of loss of or damage to any of the goods, directly or indirectly caused by (…) unsuitability or defective condition of the containers.

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Container clauses (FCL only: Line's owned containers (…)Shipper load, stow and count. Contents, quantity and quality not checked by Master and/or agents. Container is being put at the disposal of the merchant by the carrier. Merchant to pay rental for the use of the container (…)."

After delivery of the containers in Amsterdam against presentation of the bill of lading by Tobacco to Vinke & Co. B.V., who were acting as agents of NDAL and Staklex, the containers were carried over the road to Meerapfel's factory in Oudenbosch.

Several of the bales of tobacco from the four containers had been damaged by water. The parties' surveyors came to the conclusion that the bad condition of the containers (holes resulting from rust) was the cause of the water damage.

In this case Delta Lloyd, based on the clean bill of lading that had been issued to Cetac, demanded compensation from NDAL for the loss that it had suffered due to the cargo damage. NDAL did not deny that the damage was caused by the defective condition of the containers that it had provided for the carriage, but to escape liability, it invoked the exclusion of liability clauses contained in its bill of lading, quoted above, and the exceptions contained in Art.IV r.2 HVR namely, (i) (an act or omission of the shipper) and (n) (insufficiency of packing).

The question that the DSC had to decide was whether the Court of Appeal had correctly held that NDAL could not escape liability by relying on Art.IV r.2 (i) and (n) HVR and the exclusion of liability clause contained in the bill of lading. In answering this question the DSC also discussed how the HVR should be construed.

Judgment

a. Are containers packaging or a part of the vessel?

The DSC held that the court of appeal's decision that NDAL could not escape liability by invoking the exclusion of liability clauses contained in its bill of lading or by relying on Art.IV r.2 (i) and (n) HVR was correct for the following reasons.

By Art.III r.1 HVR the carrier is obliged before and at the beginning of the voyage to exercise due diligence to a) make the ship seaworthy, b) properly man, equip and supply the ship; c) make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

The words of Art.III r.1 HVR do not answer the question if, in a case such as this one, containers that were put at the disposal of the shipper by the carrier for the carriage of goods should be considered to be a part of the vessel in which the cargo is carried or whether they should be treated in the same way as if they were a part of the vessel.

Also the Travaux Préparatoires published by the Comité Maritime International (CMI) in 1997 (the Travaux Préparatoires of the International Convention for the Unification of certain rules of Law relating to Bills of Lading of 25 August 1924, the Hague Rules, and of the protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules) do not shed any light upon this point.

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The case law and literature cited by the Advocate General in his advice to the DSC made clear that also within the group of states whose Maritime Law Associations are members of the CMI, there is no agreement regarding the correct interpretation of this clause. In these circumstances, when interpreting a clause of substantive private international law such as Art.III r.1 HVR, decisive importance must be given to the purpose and intent of that clause (see DSC 29 June 1990, NJ 1992, 106; DSC 14 July 2006, NJ 2006, 599).

The purpose of the duty of care of the carrier set out in Art.III r.1 is that a vessel should protect the cargo from the dangers of the sea, so that it is suitable to carry cargo, also known as its "cargoworthiness". This means that the carrier should also ensure that containers that have been provided by him specially for carriage on board of the vessel should also be suitable to carry the cargo that has been placed into those containers. This duty of care entails that, in the same manner as with the holds of a vessel, it should not be possible for water to enter those containers.

This interpretation is supported by the fact that Art.III r.1 HVR corresponds with Art.16.1of the United Nations' draft Convention on the Carriage of Goods [wholly or party] [by sea], version 13 February 2007. That convention is intended to replace the HVR in due course. Art.16.1 of that convention explicitly provides that the parts of the vessel to which the carrier's duty of care extends include containers that the carrier has provided.

In this case, by providing containers for the carriage of goods which had holes in them caused by rust as a result of which seawater could easily enter the containers, NDAL has breached the duty of care of a carrier of goods by sea. By Art.III r.8 and Art.IV r.1HVR, NDAL could not escape its liability by invoking the exceptions contained in Art.IV r.2 HVR or the exemption of liability clause contained in the bill of lading (see DSC, 11 June 1993, NJ 1994, 235).

The appeal to the Supreme Court failed and NDAL was ordered to pay the costs of the proceedings.

End of the Supreme Court's judgement with regard to question a).

b. Should Dutch national law be applied when interpreting Art.III and IV HVR?

In discussing a different part of the Court of Appeal's judgement the DSC held that Art. 8:371 Dutch Civil Code (DCC) declared the HVR directly applicable. Articles III and IV HVR govern the liability of a carrier of goods by sea under a bill of lading. The liability regime contained in Articles III and IV HVR are uniform rules in the area of the international carriage of goods. This means that there is no room for the application of other rules of national law, such as exceptions to liability derived from the requirements of fairness and reasonableness as provided in Article 6:248 of the Dutch Civil Code – see further in Comment below

Comment

Re a:) Are containers packaging or part of the vessel? This decision is important because the DSC has held that containers are not packaging but should be treated in the same manner as a part of the vessel in which goods are carried. There was no clarity on this point before.

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Re b) Should Dutch national law be applied when interpreting Art.III and IV HVR? Reasonableness and fairness are leading principles of Dutch law. The principles are so important that they have been written into the Dutch statute which contains rules of law for contracts (book 6 of the Dutch civil code) Art. 248 of book 6 DCC can be translated as follows:

1) A contract does not only have the legal consequences agreed between the parties, but also those that follow from the nature of the contract, the law, custom or the requirements of what is fair and reasonable. 2) A rule that has been agreed between parties in a contract does not apply if, in the given circumstances, standards of reasonableness and fairness would make it unacceptable for that rule to apply.

Article 6:248 DCC means that a Court will not enforce agreements made between parties if, in the circumstances of the case, by the standards of reasonableness and fairness, that would be deemed to be unacceptable. It is used not only in interpreting contracts, but also when applying rules of law. It means that in certain circumstances, parties cannot rely on the words of a contract or on the words of a treaty or other document.

In this case ("NDS Provider") the DSC has now clearly stated that the Dutch law and its principles of reasonableness and fairness may not be applied when interpreting international treaties. The DSC had given a decision on this point before, but some doubt still existed in some quarters. Now, there is no longer any room for doubt (for a further discussion of this point see the case note of K.F. Haak under the judgment as published in the Nederlandse Jurisprudentie as NJ 2008/505).

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