APPLICABILITY AND APPLICATION OF THE HAGUE-VISBY RULES IN THE NETHERLANDS

Interpretation of the paramount clause, the seaworthiness obligation and the error of navigation exception

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Kidde de Mexico S.A.ea v Scheepvaartonderneming Harns CV (*The Harns*)
Dutch Court of Appeal of Arnhem-Leeuwarden 27 September 2016 (S&S 2017, 27)[1]

Summary

The Hague (-Visby) Rules' liability regime plays an essential role in the carriage of goods by sea. Nevertheless, and possibly because of the regime's importance, both its applicability (either as international convention, national law or contractually) and its application are a source of continuing discussion. In its decision of 27 September 2016, the Dutch Court of Appeal of Arnhem-Leeuwarden made some interesting additions to the debate. First of all, and unlike the English Court of Appeal in *The Superior Pescadores*,[2] it held that the Hague-Visby Rules (HVR) and Hague Rules are not the same and that a reference to the Hague Rules cannot be regarded as a choice for the HVR, which leads to the latter's direct applicability. Secondly, it held that a vessel that does not have the necessary nautical documentation on board before she sails from the port of loading cannot be regarded as seaworthy and, under these circumstances, a carrier is not entitled to rely on the error of navigation defence. The court also confirmed that a carrier cannot submit that the vessel was seaworthy at the relevant time and that due diligence was exercised to provide a seaworthy vessel without due substantiation, in other words, supporting evidence.

In view of the fact that the HVR is an international convention, which is to be interpreted autonomously,[3] the decision is not only relevant to Dutch jurisprudence but may also be useful in other jurisdictions.

Facts

The underlying facts of the case can briefly be summarised as follows. During the carriage of a consignment of 8400 mt of monoammonium phosphate (ie the cargo) from Jorf Lasfar, Morocco to Altamira, Mexico, the MV *Harns* stranded on the Silver Bank off the coast of the Dominican Republic on 12 August 2009. With the assistance of professional salvors, the vessel was refloated after the jettison of 800 mt of cargo. As a result of the stranding, another part of the cargo was wetted and delivered in a damaged condition. In addition, the cargo interests had to pay a considerable remuneration to the salvors and were thereafter requested to pay a general average contribution.

Research showed that the vessel's stranding was the direct result of inadequate voyage planning. It was established that the vessel had sailed on the geographically shortest route, which unfortunately went directly through the wildlife preserve, known as the Silver Bank, where the vessel, unsurprisingly, stranded. The cargo interests claimed that the owners of the *Harns* were liable for the damage suffered and costs incurred. They also rejected the demand for general average contribution. When it became clear that an out of court solution was not possible, the cargo interests commenced proceedings before the District Court of Noord-Nederland, the court of the district where the shipowners have their registered place of business.[4]

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[1] Van Traa Advocaten represented the cargo interests in this case.

[2] *Yemgaz FZCO & Ors v Superior Pescadores SA (The Superior Pescadores)* [2016] 1 Lloyd's Rep 561.

[3] Vienna Convention on Treaties art 31(1)(a).

[4] The Court had jurisdiction pursuant to art 2 of the Brussels I Regulation (EC No 44/2001).

Decision

In its judgment of 27 September 2016, the Dutch Court of Appeal of Arnhem-Leeuwarden, composed of maritime judges of the Court of Appeal of The Hague,[5] confirmed the decisions of the District Court of Noord-Nederland.[6] The shipowners were liable for the damage suffered by the cargo interests and the cargo interests were not obliged to contribute in general average.

The main issues that the court had to decide concerned: (1) the interpretation of the paramount clause included in the bill of lading covering the carriage; (2) the question of whether the shipowners had complied with their duty to exercise due diligence to provide a seaworthy vessel before and at the beginning of the voyage within the meaning of Article III-1 HVR and/or whether the shipowners could rely on the error in the navigation defence; and (3) the relationship between general average and the HVR. These issues are discussed in more detail below.

The judgment in *The Harns* was not appealed to the Supreme Court, probably because the issues were substantially factual in nature. The Dutch Supreme Court is only allowed to decide on questions of law.

Interpretation of the paramount clause

The cargo interests' claim was based on the bill of lading as signed by the vessel's master. Curiously, although the carriage took place in the summer of 2009, the bill of lading was issued on the Congenbill Edition 1964. This form contained the following paramount clause:

> This Bill of Lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to Bills of Lading contained in the International Convention, dated 25th August, 1924 and which is compulsorily applicable to the contract of carriage herein contained.

The country of shipment, Morocco, is a party to the Hamburg Rules and does not mandatorily apply the 'International Convention, dated 25th August, 1924' (the Hague Rules). Mexico, the country where the cargo was to be discharged, incorporates the HVR in its legislation and applies the same mandatorily to incoming shipments, but is not and has never been a party to the Hague Rules. Whereas cargo interests, in most cases, argue that a reference to the Hague Rules has to be interpreted as a reference to the HVR in order to benefit from the higher limitation introduced by the Visby Protocol, in this matter they argued that the reference to the Hague Rules could not be read as a reference to the HVR and that, as a result, the paramount clause should not be given any effect.

It was argued that, in the absence of a valid choice of law clause, Moroccan law was to apply to the contract of carriage as the law of the place that was most closely connected with the voyage (Article 4 of the Rome Convention[7]). If this argument succeeded, the shipowners would not be able to rely on the error of navigation defence, as no such exclusion is included in Moroccan law/Hamburg Rules. The shipowners, on the other hand, submitted that the choice for Mexican law had been successfully made as the criteria of the paramount clause had been complied with because Mexican law mandatorily applies the HVR. In the alternative, it was argued that the HVR were directly applicable in view of the reference in the paramount clause to the Hague Rules, which should be considered as a choice for the HVR (Article X HVR).

Unlike the English Court of Appeal in *The Superior Pescadores*,[8] it was held by the Dutch court that the HVR and Hague Rules are similar, but not identical.[9] The ratification of the Visby Protocol leads

[5] The maritime judges of the Court of Appeal of The Hague are the highest ranking maritime judges that deal with factual matters. In view of the importance of the law for the proper functioning of the maritime industry on the one hand and the peculiarities of maritime law on the other, a chamber with specialised maritime judges was installed at the District Court of Rotterdam. By Statute of 22 June 2016 (which entered into force on 1 January 2017), the Dutch legislator has given this Court exclusive jurisdiction in maritime matters within the Netherlands. As a result of the Dutch procedural system, appeals against the decisions of the District Court of Rotterdam will have to be filed with the Court of Appeal of The Hague (or directly with the Supreme Court for questions of law).

[6] District Court of Leeuwarden (19 December 2012) S&S 2013, 96; ECLI:NL:RBLEE:2012:BY8442; and District Court of Noord-Nederland (25 June 2014) ECLI:NL:RBNNE:2014:3145.

[7] The Rome Convention still applied as the Rome I Regulation (EC No 593/2008) had not yet entered into force.

[8] *Yemgaz FZCO & Ors v Superior Pescadores SA (The Superior Pescadores)* (n 2).

[9] District Court of Leeuwarden (19 December 2012) ECLI:NL:RBLEE:2012:BY8442. Similarly, District Court of Middelburg (28 July 2004) S&S 2005, 85 (*Jin Feng*).

to an accession to the Hague Rules but, in the court's opinion, only to the wording as amended by the Protocol (and not to the original Hague Rules). The fact that the Visby Protocol dates back to 1968 and the bill of lading form chosen for this carriage was the 1964 edition (rather than more recent forms issued in, for example, 1978, 1994 or 2007) may well have played a part in this decision.[10] It does not make sense to read the paramount clause as a reference to a convention that did not yet exist. The decision, however, for cargo interests was no more than a Pyrrhic victory. Agreeing with the district court, the Court of Appeal was of the opinion that Mexican law (including the HVR), as the law of the place of discharge and the consignee's place of business, was most closely connected with the voyage for the purpose of the Rome Convention, and hence applicable.

Application of the HVR's liability system

The HVR's liability system, in essence, provides that: (1) the carrier is obliged to exercise due diligence to provide a seaworthy vessel (including a capable crew as well as fit and safe holds and refrigeration units) before and at the beginning of the voyage (Article III-1 HVR); and (2) properly and carefully to handle, stow, load, discharge, keep and care for the cargo, also during the voyage (Article III-2 HVR). The latter obligation is expressly made subject to the provisions of Article IV HVR, which include various exceptions of liability.

In *The Harns*, there was no discussion that the damage suffered by cargo interests was caused by the vessel taking a wrong route. In their attempt to escape liability, the shipowners argued that the incident was the result of mistakes by the master in the voyage planning and that they were therefore entitled to rely on the error of navigation defence (Article IV-2a HVR).

In its judgment, the Court of Appeal indicated that, in order to comply with the seaworthiness obligation set out in Article III-1 HVR, the carrier had to make sure that adequate and up-to-date nautical charts and publications, including sailing directions (also confusingly called 'pilots'), which contain more specific information on navigational hazards in the area of the intended voyage, were available on board.[11] In particular, when the shipowners delegated voyage planning to the master, he must, according the court, also be able to use this documentation.[12] For example, when an electronic chart system is used on board, the master must know how to apply it and whether, in addition to such charts, sailing directions have to be consulted.

The relevant nautical charts and sailing directions that should have been used in the planning of the voyage did explicitly indicate that the Silver Bank area was inadequately surveyed and that there were several shallow spots. In fact, this was clearly stated on the small-scale chart and in the relevant sailing directions (the latter even said: 'Silver Bank has not been closely examined and it is not advisable to attempt to cross it').

This raised the question of why the route had been adopted, and whether the relevant documentation had been available when the voyage was planned. These questions became even more pertinent when information obtained from public sources revealed that both the *Harns* and other vessels managed by the same shipowners had in previous years been reprimanded for lack of accurate voyage plans and the absence of necessary nautical documentation revealed during port state control (PSC) inspections. No clear explanation was provided by the shipowners when questioned about this record. Also, in spite of the fact that the master had stated in writing that several charts had expired shortly before the voyage, the shipowners persisted in stating that there was an up-to-date electronic chart system on board, but no supporting evidence was presented.

[10] As such, the decision may also be distinguished from the English Court of Appeal's decision in *The Superior Pescadores*. In that case the court indicated that it was an odd conclusion that a paramount clause in a contract made over 30 years after the implementation of the Hague-Visby Rules, was still to be taken as incorporating the 1924 Hague Rules, rather than the 1968 Rules. In view of the choice for the bill of lading form, the parties may well have had a special reason to refer to the Hague Rules rather than to the Hague-Visby Rules.

[11] The obligation is also set out in SOLAS ch 5 r 27: 'Nautical charts and nautical publications … necessary for the intended voyage, shall be adequate and up to date'.

[12] SOLAS ch 5 r 34: 'Prior to proceeding to sea, the master shall ensure that the intended voyage has been planned using the appropriate nautical charts and nautical publications for the area concerned …'.

The Court of Appeal confirmed the district court's decision that the seaworthiness obligation of the shipowners had not been complied with. It held that the necessary documentation was not on board the vessel before and at the beginning of the voyage and that this failure had caused the damage. The contention of the shipowners that they were entitled to rely on the error of navigation defence was dismissed. The seaworthiness duty (Article III-1 HVR) is an overriding obligation, which takes precedence over the error in the navigation exception (Article IV-2a HVR).[13]

Interestingly, the Court of Appeal was unwilling to hold that the error of navigation exception could not be relied upon by the shipowners, even if they had complied with their seaworthiness obligations. The cargo interests' arguments that the error in the navigation exception is to be interpreted narrowly and covers only incidental mistakes rather than deliberate actions, and, moreover, has become outdated,[14] were dismissed. The court clarified that faulty voyage planning may be regarded as an error of navigation, but whether this protects the shipowners from liability must be determined on the basis of the specific circumstances of any case, including the shipowners' involvement in the choice of route.

Questions also arose about the division of the burden of proof, which division in practice often determines the outcome of the dispute. Although the burden of proof does not strictly follow from the HVR's wording and may be regarded as a matter of national procedural law, it is generally applied rather similarly.[15] In principle, cargo interested parties have to prove that damage is caused to the cargo in the period between the moment that the cargo was loaded on board and discharged from the vessel at the place of destination.[16] It is then up to the carrier to rebut the assumption of liability by showing that he can rely on one of the listed exceptions of liability set out in Article IV-1 and IV-2 HVR. When cargo interests subsequently show that the carrying vessel was unseaworthy before and at the beginning of the voyage, the carrier is not liable after all if he can prove that he exercised due diligence to provide a seaworthy vessel before and at the beginning of the voyage.

In the subject matter, the shipowners and their P&I Club tried to frustrate investigations into the cause of the stranding. No permission was given to cargo interests for a nautical investigation on board, requested documentation was not provided and during the legal proceedings the reports of the surveyors instructed by the shipowners were not presented. In the application of the burden of proof, the court sanctioned the shipowners for this behaviour. It quickly assumed that the cargo interests had shown that the vessel was unseaworthy before and at the beginning of the voyage and gave the shipowners the possibility of providing counter-evidence that they had complied with their obligations to exercise due diligence to provide a seaworthy vessel. As such, the Court of Appeal confirmed previous case law[17] that when the available evidence is in the dominion of one of the parties, this party cannot simply play hide and seek, which was exactly what the shipowners appeared to be doing, but must provide sufficient evidence to support its allegations. The burden of proof is not reversed, although some of the weight of the burden of proof is transferred to the other party.

General average

Finally, the cargo interests sought and were granted a declaration that they were not obliged to contribute in general average. It was argued by them that, because the shipowners were liable for the incident from which the damage resulted, the shipowners were not entitled to a general average

[13] See also Dutch Supreme Court (10 June 1993) *NJ* 1995, 235 (*Quo Vadis*).

[14] As argued by S Girvin *Carriage of Goods by Sea* (Oxford University Press 2011) 470; L Weitz 'International maritime law: the nautical fault debate' (1998) 22 *Tulane Maritime Law Journal* 581, 587. The exception is not included in the Hamburg Rules or Rotterdam Rules.

[15] See also N J Margetson 'Belangrijke ontwikkeling met betrekking tot de bewijslastverdeling onder de Hague (Visby) Rules en Engels recht' (2017) *NTHR* 50–59, in which article inter alia the decision of the English Court of Appeal in *The Volcafe and Others v CSAV* ([2016] Civ 1103) is discussed.

[16] This is the period of the carrier's responsibility (art 1 under the HVR). However, inroads have been made to this period in case law. See eg the English case *The Jordan II* [2005] 1 Lloyd's Rep 57.

[17] Inter alia Dutch Supreme Court (1 December 2000) *NJ* 2001, 45 (*Sigillo/TTS*).

contribution from cargo interests either.[18] The argument was accepted by the court,[19] which confirmed the prevailing opinion in Dutch case law and legal literature that a provision that seeks to make cargo interests liable for costs incurred as a result of the carrier's breach of the seaworthiness obligation is 'null and void', pursuant to Article III-8 HVR.[20] The shipowners had argued that the cargo interests were not entitled to raise this defence in the proceedings on the merits and were to await proceedings in which the court is requested to confirm the general average adjustment. This argument was dismissed. The court made it very clear that defences to a claim for a general average contribution can be raised in proceedings in which the shipowners' liability for cargo damage is considered.

Comment

The discussion on the paramount clause is yet another example of the ambiguities that can arise when no clear choice is made by the contracting parties for a particular regime. It shows that the interpretation of a paramount clause in a standard form may lead to discussion and to an unintended and potentially undesired outcome. To prevent this, a clearly drafted choice of law clause should be inserted in the contract of carriage.

The court's decision that faulty voyage planning by the master can be regarded as an error in navigation, provided that due diligence has been exercised for the vessel's seaworthiness, is in line with the wide interpretation given to the exception in preceding case law. It shows once again that the error in navigation is a strong defence for shipowners, especially as it will in most cases be very difficult, if not impossible for the cargo interests to prove that the shipowners have breached their seaworthiness obligations. If the Rotterdam Rules ever enter into force, the deletion of this exception will probably have a serious impact.

The court's application of the burden of proof is to be welcomed as, to some extent, it corrects the imbalance in the availability of evidence between the shipowners on the one hand and the cargo interests on the other. Although the parties are obliged to give each other reasonable facilities for inspecting and tallying the goods (Article III-6 HVR), and as a matter of Dutch law also to investigate the cause of the damage (Article 8:495 Dutch Civil Code), in practice the carrier is often unwilling to allow any investigations at all. The Court of Appeal's decision is a clear sign to carriers that they cannot get away with merely stating that they have complied with their seaworthiness obligations and that cargo interests will have to prove that they have not. It should be noted, however, that the cargo interests in *The Harns* had the opportunity of supporting their arguments with some factual information and documentation, including the PSC evidence regarding the lack of accurate voyage plans and the absence of the necessary nautical documentation on previous voyages. In this respect, it remains to be seen whether the decision will assist cargo interests in situations in which they do not have any circumstantial evidence.

The decision that the shipowners were not entitled to a general average contribution confirms the position taken in previous Dutch case law that general average and liability are not to be kept entirely separate, which is in line with the approach adopted in many other countries.[21]

[18] Article 8:389 of the Dutch Civil Code provides that a general average contribution should be regarded as depreciation of the property in respect of which it is due.

[19] Court of Appeal of The Hague (17 December 2013) *S&S* 2014, 55 (*Maasdijk*). For these confirmation proceedings on the relationship between general average and fault respectively see also J A Kruit *General Average, Legal Basis and Applicable Law: The Overrated Significance of the York-Antwerp Rules* (Parish Legal Publishers 2017) 127–29 and 168–82.

[20] Inter alia Dutch Supreme Court (10 June 1993) *NJ* 1995, 235 (*Quo Vadis*).

[21] See Kruit (n 19) 168–71.