1st February 2008
First Chamber
Nr. C06/082HR
MK/RM

IN THE NAME OF THE QUEEN

SUPREME COURT OF THE NETHERLANDS

Judgement

In the case of:

1. NILE DUTCH AFRICA LINE B.V.,
   Established in Rotterdam
2. STAKLEX SHIPPING CO. LTD,
   Established in Limasol, Cyprus,

PLAINTIFFS, defendants in the conditional/
incidental appeal

advocate: mr R.S. Meijer,

against

1. DELTA LLOYD SCHADEVERZEKERING N.V.,
   Established in Amsterdam,
2. PREMIUM TOBACCO INVESTMENTS N.V.,
   Established in Amsterdam,
3. the company pursuant Swish law
   M. MEERAPFEL SÖHNE A.G.,
   Established in Basel, Switserland
4. the company pursuant the laws of Cameroon
   CETAC, Established in Douala, Cameroon

DEFENDANTS in the appeal, plaintiffs in the conditional/
incidental appeal,
Advocate: mr. M.V. Polak.

Parties will hereinafter also be referred to as NDAL c.s. and Delta Lloyd c.s., or alternatively separately as NDAL, Staklex, Delta Lloyd, Tobacco, Meerapfel and Cetac.

1. The principal proceedings

Delta Lloyd c.s. by writ of summons dated 3rd April 2002 summoned NDAL c.s. before the Court of Rotterdam and have claimed, briefly summarized, to order that NDAL c.s. pay to Delta Lloyd, alternatively Meerapfel, alternatively Tobacco and alternatively Cetac an amount of € [illegible] with interest and costs.

NDAL c.s. have denied the claim.

The Court by interim judgement of 27th August 2003 ordered parties to submit further evidence.

To this judgement NDAL c.s. appealed before the Court of Appeal in The Hague.

By judgement of 30th August 2005 the Court of Appeal confirmed the judgement of the Court and has referred the case for further handling back to the Court of Rotterdam.

The judgement of the Court of Appeal has been attached to this judgement.

2. The proceedings in appeal (*Supreme Court*)

Against the judgement of the Court of Appeal NDAL c.s. appealed. Delta Lloyd c.s. lodged conditional/incidental appeal. The writ of summons and the defence submissions have been attached to this judgement and form part thereof.

Both parties have concluded to dismiss the appeal. The case has been explained by 'parties' advocates, for NDAL c.s. also by mr. N.T. Dempsey and for Delta Lloyd c..s also by E.J. Smilde, both advocates with the Supreme Court.

The conclusion of the Advocate General L. Strikwerda concludes to dismiss the principal appeal. The advocate of NDAL c.s. has by letter dated 8th June 2007 replied to this conclusion.

At the request of the Supreme Court the Advocate General has rendered an additional conclusion in respect of the provisional appeal by Delta Lloyd c.s. This additional conclusion boils down to dismissal of the conditional appeal.

3. Basis in appeal (*Supreme court*)

3.1 In this appeal the following can be taken as basis.

(i) Cetac as shipper booked with NDAL a carriage over sea 398 bales of tobacco from Douala in Cameroon to Amsterdam. Cetac has loaded the bales in four containers which were provided by NDAL to her. The containers have been carried by NDAL on board of the "NDS Provider" owned by Staklex.

(ii) For this carriage a clean Bill of Lading to order was issued to Cetac. The Bill of Lading has been laid down in a form issued by NDAL and was signed by the Master. This Bill of Lading mentions Cetac as shipper and Meerapfel respectively Tobacco, as notify address. It declares the Hague Visby Rules applicable and Dutch law. The cargo has been described in the Bill of Lading as "four twenty feet containers FCL/FCL disant contenir 398 balles de tabac en feuille". The Bill of Lading in respect to the container carriage contains the following conditions:

"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 container."

"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 (...)."

(iii) After delivery in Amsterdam against presentation of the Bill of Lading by Tobacco to Vinke & Co. B.V. the agent of NDAL and Staklex, the containers were carried by road to the factory of Meerapfel in Oudenbosch.

(iv) A part of the bales tobacco in two of the four containers was delivered with water damage. The surveyors of parties have concluded that the poor state of the two containers (holes as a result of erosion) are the cause of the water damage.

3.2.1. In the proceedings Delta Lloyd has by invoking the clean Bill of Lading issued to Cetac, claimed from NDAL compensation for the damage to the cargo carried. NDAL has not denied that the damage was caused by the poor state of the containers provided but has invoked as far in appeal is relevant, the exoneration mentioned in 3.1 under (ii) of the container clause in the Bill of Lading and the exonerations of article 4 sub 2, and under sub I (an act ... of the shipper) and under n (insufficient packing), Hague Visby Rules (hereafter: HVR).

3.2.2. The Court has, briefly summarised, held that the containers must be considered as part of the vessel subject article 3 sub 1 HVR and not as packing of the cargo. Therefore the duty of care flowing from article 4 sub 1 HVR also applies to the containers provided to the shipper. Pursuant article 3 sub 8 HVR the exoneration provision in the container clause is void. Accordingly the Court ordered NDAL to prove that Cetac (after eventual selection and inspection) was fully aware of the bad condition of the subject containers but nevertheless accepted same for the carriage of the subject cargo.

3.2.3. The Court of Appeal (different to the Court), has held that the containers do not form a part of the vessel, but must be considered as packing (sub 10). This however does not mean that NDAL c.s. can invoke article 4 sub 2, under n, HVR (insufficiency of packing) or on the container clause (sub 11). It is a fact that the two containers owned by NDAL were in poor condition because of the presence of holes resulting from corrosion and that this poor state was the cause of the damage (sub 12). This poor state of maintenance from which it does not follow that it was unknown to NDAL - or could not have been known – should have prevented NDAL to provide these containers to Cetac, especially bearing in mind the duty of care of NDAL as carrier in respect of the cargo. The invoking of the insufficiency of containers – caused by herself – can not at all times (in full) being honoured, the damage is not caused by a circumstance which a prudent carrier could not have avoided and the consequences of which he could have not be prevented. Furthermore an exoneration should be set aside in so far as the applicability in the given circumstance would be unacceptable pursuant principles of reasonableness and equity (sub 13).

The counter party of the carrier who uses containers provided by the carrier, should in principal not have to anticipate that afterwards it is held against him that this packing is not suitable because of the pour state caused by the carrier. This will only be different when the shipper – or any of the other person mentioned in article 4 sub 2 under 1, HVR – was aware of the pour state of the containers and despite this knowledge accepted the containers for carriage of the cargo. In that case it can lead to accept the own wrong doing of the shipper (sub 14).

4. Consideration of the ground in the principal appeal

4.1 Sub i.1 – part 1 does not contain a complaint but only an introduction – and is directed with a legal – and motivation complaint to the finding of the Court of Appeal that NDAL (in connection with her defences in 3.2.1) can not successfully invoke the unsuitability of the containers for the agreed voyage, since the damage is not caused by a circumstance which a prudent carrier could not have avoided and the consequences of which he could not have prevented. Following this part it proves from the wording chosen by the Court of Appeal, that his finding is based on the articles 8:21 and/or 8.:23 DCC.

By doing that the Court of Appeal has misjudged that these provisions are only related to contracts of carriages of goods which are not dealt with elsewhere (article 8:32 DCC). In this case it concerns a contract of carriage of goods by sea under Bill of Lading, for which the HVR contain a specific provisions. If the Court did not base himself on an error in law, then he has insufficiently motivated his finding.

4.2 The Court of Appeal has based his finding presently being disputed apparently on article 8:23 DCC. By doing that the Court of Appeal has misjudged that this provision pursuant article 8:32 is only applicable in respect of contracts for the carriage of goods which have not been dealt with elsewhere in Book 8 DCC. Contracts by carriage of goods over sea under a Bill of Lading are dealt with in article 8: 371, which in sub 3 under mentioned conditions import - briefly summarized – direct working to the HVR. These contain in the articles 3 and 4 a separate provision in respect of the liability of the sea carrier under bill of lading.

The liability regime laid down in these articles leaves, now it deals with uniform rules in the field of the international carriage of goods, no room for applicability of other rules of national law, such as limited working of reasonableness (article 6:248 sub 2 DCC) deduced exceptions (see Supreme Court 24th April 1992, number 14508, NJ 1992, 688). Although the complaint is justified, it can not lead to cassation. The decision of the Court of Appeal that NDAL can not invoke exonerations pursuant article 4 sub 2, under i and n, HVR and the exoneration clause in the Bill of Lading is correct on the grounds referred to hereunder.

4.3 Pursuant article 3 sub 1 HVR a sea carrier must before and on commencement of the voyage exercise due diligence to make the vessel seaworthy (under a), properly man, equip and supply the vessel (under b) and make holds, cooling- and freezing chambers and all other parts of the vessel in which goods are carried suitable (under c). The text of article 3 sub 1, preface and under c, HVR does not give an uniform answer to the question whether in a case as the subject case, were the carrier provides containers for shipment of cargo to the shipper, should be considered as a part of the vessel in which cargo is carried or whether it should be categorised as such. Also the history which is publicly accessible and published in 1979 by the Comité Maritime International (CMI) (The travaux préparatoires of the international convention for the unification of certain rules of law relating to Bills of Lading dated 25th August 1924, the Hague Rules and of the protocols of 23rd February 1968 and 21st December 1979, the Hague-Visby Rules) does not provide clarity in this respect. As it follows from the additional conclusion of the Advocate General under sub 7 and the jurisprudence and literature referred to, a uniform ruling opinion is missing in the circle of states being connected to the CMI. Under these conditions the ratio of a provision of uniform private law as article 3 sub 1 preface and under c decisive meaning should be given to the purpose and the tenor of the provision (see Supreme Court 29th June 1990, number 13672, NJ 192, 106; Supreme Court 14th July 2006, number C04/290, NJ 2006, 599).

4.4. The ratio of the due diligence obligation of the carrier of article 3 sub 1 preface and under a-c, HVR is that the ship should protect the cargo against perils of the sea, so that it is suitable to carry the cargo, also referred to as "cargoworthiness" of the vessel (see additional conclusion of the Advocate General under c). This imports that the carrier also has to exercise due diligence that specially designed containers for the carriage on board of the vessel provided by him are suitable to carry the cargo placed therein. This due diligence obligation imports that like the hold of the vessel, no water can penetrate in these containers. For this point of view support can also be found in article 16 sub 1 preface and under c of the United Nations Draft convention on the carriage of goods (wholly or partly) (by sea), version 13th February 2007, which is the equivalent of article 3 sub 1 preface and under c HVR which have been drafted to replace the HVR in due course, in which it has explicitly been provided that to parts of the vessel for which due diligence by the carrier must be exercised also extends to containers provided by the carrier. By, in the subject case, providing containers with corrosion holes allowing seawater to easily penetrate in the containers, NDAL, as sea carrier, had disrespected her duty of care. The provisions in article 3 sub 8 and article 4 sub 1 HVR carry with it that NDAL can not invoke the exonerations of article 4 sub 2 HVR and the exoneration clause in the Bill of Lading (see Supreme Court 11th June 1993, number 14969, NJ 1995, 235). For this reason also the other elements of the principal complaint fail.

5. Consideration of the conditional/incidental appeal

Now that the conditions under which the appeal lodged has not been fulfilled, this complaint no longer needs to be dealt with.

6. Decision

The Supreme Court:

Rejects the principal appeal;

Orders NDAL in the costs of these proceedings in appeal, until this judgement assessed on the side of Delta Lloyd c.s. on € 367.34 for disbursements and € 2,200,-- for salary.

This judgement has been rendered by the Vice-President J.B. Fleers as chairman and the lords E.J. Numann, A. Hammerstein, F.B. Bakels and W.D. H. Asser, and rendered in public by the lords E.J. Numann on 1st February 2008.

[authorised signatures]