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COMMENTARY CASE-LAW

JUDGMENTS OF THE ROTTERDAM COURT (C/10/621544)

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1 COMMENTED JUDGEMENTS

In case C/10/621544 between the skipper of the ms DAYA and Armaris Bevrachtingen BV ('Armaris'), the Rotterdam Court - Trade and Port Team - made the following rulings:

- ✓ Interlocutory judgment dated 28 September 2022, and,
- ✓ Final judgment dated 18 October 2023

2 RELEVANT LEGAL ARTICLES

- ✓ Applicable law: article 2.1. CMNI; article 29.2. and article 29.3. CMNI;
- ✓ Liability: article 3.1 and 3.3 CMNI - article 6.2 and article 6.4. CMNI - article 16.1 CMNI - article 18.1 and article 18.2. CMNI - article 19 CMNI ;
- ✓ Damage and compensation: article 19 CMNI - article 20 CMNI - article 21 CMNI - article 23 CMNI article 25.1. CMNI.

3 FACTS AND PRECAUTIONS

The Dutch barge ms DAYA transported a construction part from Bratislava (Slovakia) to Papenburg (Germany) under a voyage charter agreement with charterer Armaris. The latter was responsible for the loading and stowage of the construction part on board of the ms DAYA.

On her passage through the lock at Regensburg (Germany), the lock master stopped the ms DAYA as he judged that the cargo was apparently loaded too high in relation to the height of the wheelhouse. As a result, there would have been insufficient unobstructed view from the wheelhouse, as required (locally) by Article 1.07 paragraph 2 of the Binnenschifffahrtstrassen-Ordnung.

In those circumstances, in Regensburg the ms DAYA was banned from further voyage. As a result, the charterer had to transfer the cargo in Regensburg to the ms CON AMORE to continue the voyage and deliver the cargo to its final destination.

Armaris claimed damages from the DAYA including crane, port, pilotage, commission, additional freight and agency costs as well as costs related to the dismantling of the structural part and for missing the delivery deadline. In turn, ms DAYA claimed payment of its outstanding freight invoices from Armaris.

The competent Court of Rotterdam rendered a global decision in two judgments. In its interlocutory judgment of 28 September 2022, it ruled on the applicable law and on the liability of resp. the carrier and the charterer. In its final judgment of 18 October 2023, it further ruled on the damage aspect.

4 THE JUDGMENTS UNDER THE MICROSCOPE

4.1 THE INTERLOCUTORY JUDGMENT OF 28 SEPTEMBER 2022

4.1.1 JURISDICTION AND APPLICABLE LAW

The jurisdiction of the Dutch court was not in dispute. The Rotterdam Court was contractually designated as having exclusive jurisdiction and competence to hear disputes between the ms DAYA and Armaris.

Furthermore, in the voyage charter agreement, the parties declared the CMNI applicable to the cross-border fluvial transport from Bratislava to Papenburg. Pursuant to Article 2.1 CMNI, the Convention would have applied in any event. In the present case, Dutch law operates additionally pursuant to Articles 29.2 and 29.3 CMNI. In that regard, the applicable law was not a subject of debate either.

4.1.2 LIABILITY

The Rotterdam Court ruled in its interlocutory judgment that ms DAYA, as the carrier, had failed to fulfil its obligation to deliver the goods to the consignee in the same condition and quantity at the destination within the specified time (article 3.1 CMNI). Indeed, the voyage had ended prematurely on the Danube at Regensburg, where the construction part was necessarily transferred to another vessel at the initiative of the charterer. In other words, the ms DAYA did not deliver the cargo received to its final destination in Papenburg, as contractually provided, according to the Rotterdam Court.

In addition, the first judge stated that the ms DAYA was not suitable to take delivery of the cargo, could not have carried out the intended voyage, nor was the vessel equipped with the necessary equipment and crew in accordance with applicable regulations (article 3.3 CMNI).

Indeed, the vessel route was subject to the Binnenschifffahrtstrassen-Ordnung, which in Article 1.07 paragraph 2 contains a concrete provision regarding the clear view from the wheelhouse. The ms DAYA, given the maximum height of the wheelhouse combined with the height of the cargo, did not comply with these locally applicable regulations on the Danube: there was apparently a blind spot in front of the bow that was more than permitted. The fact that Armaris as charterer loaded and stowed the cargo on board the ms DAYA does not detract from this, according to the Rotterdam Court. The ms DAYA was aware or at least should have been aware of the applicable government regulations and the loading and clear visibility conditions stipulated therein.

As Armaris had complied with its information obligation (Article 6.2 CMNI), according to the court, ms DAYA should have known that the vessel was apparently unfit to take on and carry out the voyage in concreto. Irrespective of the finding that ms DAYA theoretically did have sufficient forward visibility with her periscope.

Moreover, the court found that Armaris had indeed complied with its obligation to properly load and stow the construction part (Article 6.4 CMNI), despite ms DAYA's belief that it had not. It therefore rejected

ms DAYA's reliance on the liability exemption for improper loading (Article 18.2(b) and (c) CMNI). The invocation of the exemption because the cargo was carried on deck in an open hold (Article 18.1 CMNI) also failed, partly because the concrete damage did not result from the mode of transport.

On this basis, the court held the ms DAYA exclusively liable under Article 16.1 CMNI for the 'damages' suffered by Armaris.

Following the liability debate, the parties engaged in further discussion about the nature and scope of the damages claimed and the compensation to be paid (cf. Title IV.2.X). This discussion point is important and relevant to the present commentary. We therefore abstract from the substantive liability discussion, but focus on the analysis of the first court's (own) interpretation of Articles 19 ev. CMNI.

4.1.3 COMPENSATION

First, a few observations:

(i) the damages claimed by Armaris were below the limit of liability as per Article 20.1 CMNII. Thus, there was no dispute regarding any limitation of liability.

(ii) The parties (and the court) agreed that Armaris' damages did not constitute delay damages. Therefore, Article 21.3 CMNI and the method of calculation set out therein also does not come into play in the present case. However, we will revert on this point.

Despite everyone sharing the view that there was no question of any loss or damage to the goods being carried, the Rotterdam Court nevertheless lent a very curious interpretation to Article 19 and following CMNI.

The ms DAYA argued that Armaris' damages were purely *consequential*, where Armaris defended that the costs it incurred as damages were related to the (erroneous) actions of the ms DAYA for which it was liable. According to Armaris, the costs incurred caused a loss of value of the cargo carried, specifically a difference in the so-called '*expected value*' and the '*arrived value*', both upon delivery. In other words, '*loss of value*' as a form of damage to the cargo thus. In this way, Armaris used the anchor point provided in Article 19.2 CMNI to support its claim for damages, even though in this case there was no actual physical damage to the carried construction part.

Strangely enough, the court went along with Armaris' argument to some extent, as it allowed the set-off (compensation) of its damages against the outstanding freight invoices of the ms DAYA on the basis of article 6:127 of the Dutch Civil Code, without (yet) judging on the nature of the damages and whether they could be claimed at all under the CMNI. However, in our opinion, compensation is only possible between established and reciprocal debts between the same parties. By granting compensation, the court in its interlocutory judgment indicated de facto and de iure that Armaris was entitled to damages as claimed by it.

On top of that, the first judge gave us a peculiar reading of article 19.2 CMNI. To apply this article, however, there must be damage '*to*' the goods. Material, physical damage, in other words.

In this case, however, there is no damage to the carried construction part.

In addition, the court ruled that in case of damage to the cargo, the damage must be calculated by comparing the *actual* value of the cargo delivered with the *expected* value that the cargo should have had upon delivery at the destination if properly transported (randnr. 4.15). In doing so, according to the court, the expected value corresponded to the shipment value *plus* transport costs.

Surely it is extremely strange how the Dutch court arrived at this anomalous reasoning and definition. Its view or reading of the 'value' of cargo is nowhere to be found in the CMNI. Nor does one find any substantiation for it in the relevant professional literature or case law.

All the more remarkable is the court's interpretation now that Article 19.3. CMNI itself unmistakably determines the value of the goods to be retained according to "*to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of goods of the same kind and quality at the place of delivery*". Nowhere does one detect a reference to the "*expected value*" of the *damaged* good when it has arrived undamaged (and thus in accordance with Article 3.1 CMNI "in the same condition in which they were handed over"). Article 19.3. CMNI does stipulate market price or exchange price as the (only) relevant criterion.

The Rotterdam Court in this case thus totally ignores the nevertheless clear compensation provisions and principles in the CMNI. The carrier is liable for damage '*by loss or by damage to the goods*' ... (Article 16.1. CMNI). '*Damage'* is clearly defined as '*damage to the goods'*. In the present case, there is no 'damage', loss or delay. By seemingly treating some of Armaris' costs as 'damage' to the cargo, the first court bypassed the issue of 'consequential damage' under the CMNI. More than that, it applied criteria to damages that went against the specific provisions of Article 19.3. CMNI.

Comparing different values to arrive at a so-called 'loss of value' of the cargo is also out of the question. This is because the loss of value has no connection whatsoever with the *physical* material damage ('damage') to the cargo being carried.

A treaty and its terms must always be interpreted in good faith in accordance with the ordinary meaning of the treaty's terms in their context and in the light of the treaty's object and purpose (Article 31.1. Vienna Convention - Vienna Convention on the Law of Treaties, Vienna, 23-05-1969).

The way Armaris interpreted the provision of Article 19.2 CMNI is contrary to its reading and ratio legis. "Damage to the goods" cannot be extended to damage "*concerning / relating to / concerning*" the goods. The other authentic texts of the CMNI also clearly speak of damage "*to*" the goods ("*Beschädigung der Güter", "dommage aux marchandises*", *"schade aan de goederen"*).

Consequential damages are thereby excluded as compensation under the CMNI. On this, the legal doctrine unanimously agrees upon this (W. KORIOTH, Haftungsausschlusse, - befreiungen und - begrenzungen nach CMNI aus deutschrechtlicher Sicht, in X., FESTSCHRIFT RESI HACKSTEINER. A voyage through the Law of Inland Schipping, Eleven, 131; I. KROOS, "Article-by-Article Commentary CMNI"*, Law and Interpretation*, I. Inland Navigation, 71-72; C. HÜBNER, "La Convention de Budapest relative au contrat de transport de marchandises en navigation intérieure", DMF, 2000, 972 ; W. VERHEYEN, "Reimbursable damage in transport law", in: K. Bernauw et al (ed.) Free on Board. Liber Amicorum Marc. A. Huybrechts, Antwerp: Intersentia 2011, 739 and 740; M. DE DECKER, European International River Law, 2098 and 2129).

Thus, under the CMNI, the carrier is *only liable to pay* compensation for physical and material damage (see also Olg. Hamburg 21 November 2013, Z.f.v. 2014, no. 3; Olg Hamburg 5 December 2013, *Transp. R.* 2014, 228; Kh. Antwerp 21 May 2015; *unp.*;). This delimitation is incidentally in line with similar arrangements in the COTIF-CIM and the CMR Convention.

The CMNI does not allow that the ordinary meaning of the term 'damage' or 'damage' in their context and in the light of the object and purpose of the Convention would also imply (i) damage *not* inflicted on the cargo carried or (ii) related costs. This is expressly not the case. Moreover, this principle is grafted onto the liability regime in Article 16 CMNI, which provides that the liable carrier must be liable for compensation for loss or damage *to* goods. This clear demarcation is not open to free interpretation, as the Rotterdam District Court did in its interlocutory judgment.

In addition, Article 23 CMNI illustrates what is meant by 'damage to cargo'. Article 23.1. CMNI namely states:

> *"The acceptance without reservation of the goods by the consignee is prima facie evidence of the delivery by the carrier of the goods in the same condition and quantity as when they were handed over to him for carriage."*

There is therefore "damage", being damage *to* or loss *of* the goods, when they are not delivered in the same condition and quantity. One then considers whether the loss of or damage to the goods is visible or not visible (Articles 23.3 and 23.4. CMNI).

Related costs (direct or indirect) do not constitute visible or invisible *damage* to the goods (*NB. On 5 September 2018, the Rotterdam Court ruled that the damage assessment based on Article 19 CMNI does not include loss of profit* (ECLI:NL:RBROT:2018:7350, *S&S* 2018/130)).

The fact that contradictory determinations must be made to the cargo at the destination in order to arrive at a damage assessment excludes, by definition, related costs, as claimed by Armaris in the present case, from the concept of damage as referred to in the CMNI (Articles 23.2, 23.3 and 23.4 CMNI). They cannot in any way be related to visible or invisible damage.

Further, the CMNI, in Article 19.3. CMNI of 'market value, exchange value or normal value of the goods at the place of delivery'. These terms are sufficiently clear in themselves. It is difficult to understand how the Rotterdam District Court, in its interlocutory judgment, concluded to the 'consignment value plus

transport costs' as a criterion of compensation. Article 19.5. CMNI clearly stipulates that the above does not affect the right of the carrier to the freight for the agreed transport. To the extent that the 'expected value' would be the consignment value plus the transport costs, this contradicts the fact that the transport costs must be paid to the carrier in any case (Art. 19.5. CMNI). Thus, the claimant receives (at most) the market value, the exchange value or the usual goods value at destination. The 'expected value' is thus not a relevant term, not an applicable criterion and a non-existent principle under the CMNI.

However, in its final judgment dated 18 October 2023, the Rotterdam District Court did embroider on the principles of its interlocutory judgment. This too deserves analysis.

4.2 The final judgment of 18 October 2023

In its final judgment, the Rotterdam Court joined Armaris in finding that the claimed cost items are not in themselves consequential damages because they are related to and directly benefit the carriage and are thereby causally related to the ms DAYA's breach of its core obligation to deliver the cargo to the consignee at destination.

It remains noteworthy in this regard that the first judge himself cited that Armaris was entitled to assume that the construction part would be delivered within the usual time - despite the parties not having agreed on a concrete unloading term - and was therefore entitled to rely on the fact that the delivery would not be delayed due to the non-compliance of the regulations applicable to the ms DAYA (nr. 2.6.). However, the parties and the court previously agreed that there was no 'delay damage' in this case (cf. nr. 4.20 interlocutory judgment). This point of view thus seems contradictory.

In addition, the first court persisted in its compensation principles regarding the so-called 'expected value' at delivery, the 'arrived value' and the comparison between those two (marginal 2.8.). In doing so, it identified the 'expected value' as the actual value of the construction part on the one hand and the 'arrived value' as the 'expected value minus the costs incurred by Armaris to get the cargo to its destination' on the other hand. According to the court, these costs depressed the *cargo value*, without the need for physical damage. It found support for itself there in an idiosyncratic interpretation of Article 19.1. CMNI, specifically that in case of damage to the goods, the carrier is (only) liable for the decrease in value. In the same breath, the court stated that it did not, however, regard the costs claimed by Armaris as 'consequential damage'.

Surely this understanding is hard to sustain.

It cannot be stressed enough that consequential damage and other costs allegedly incurred to deliver the cargo at destination do not constitute visible or invisible damage to the goods (Article 19 *in conjunction with* Articles 23.3 and 23.4. CMNI). Only physical, material damage to the goods is decisive. In the present case, the cargo was delivered undamaged.

According to Armaris, the related costs were *a consequence* of the ms DAYA's failure to deliver the goods to their destination. Consequential damage, therefore. The court went along with this. Indeed, it linked

the immaterial nature of Armaris' claim to Article 19 CMNI which, in terms of calculation method, is nonetheless concretely tied to either total loss of goods (paragraph 1) or partial loss of or damage *to* the goods (paragraph 2), respectively.

Any depreciation of the goods transported takes into account only the assumption of loss of or damage *to* the cargo. This is in line with both Article 16.1. CMNI which provides that the carrier is liable for *'loss of or damage* to' the goods and Article 3.1. CMNI that requires the carrier to deliver the goods to their destination *in the same condition*. Even if costs were incurred to get the goods there. While the ms DAYA did not deliver the goods to the final destination, the goods were delivered undamaged, complete and in the same condition as handed over, despite the fact it happened after transshipment to another barge. At destination, the consignee effectively accepted the cargo without reservation.

Finally, the first court ruled that the ms DAYA, as the liable carrier, would not have been entitled to the entire freight. However, this is contrary to the ratio legis of Article 19.5. CMNI: the carrier is entitled to the freight as provided for in the contract of carriage. Especially in this case now that the goods were delivered at destination. Admittedly not by the ms DAYA, this does not deprive her of claiming the full freight.

5 CONCLUSION

There is a lot to be said about the Rotterdam Court's view and interpretation of the CMNI's damages and compensation principles.

Both judgments contain a lot of grounds of appeal. That is why the ms DAYA filed appeal. The liability issue will also come up again in the appeal proceedings.

Therefore, the judgment of the Hague Court of Appeal in this case will be a judgment in principle that we, as specialized lawyers, look forward to with great interest.

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