VAN STEENDEREN MAINPORTLAWYERS

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International Law Seminar – Presentation Summary

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Preliminary remarks

I have the pleasure of working in the environment of one of the biggest ports of the world, the Port of Rotterdam. In 2006, 377 million tons of cargo passed through the port of Rotterdam, again 2% more than in 2005 and a new record. To put this number into perspective: this is almost as much as the numbers two, three and four in Europe – Antwerp, Hamburg and Marseille – combined.

The Rotterdam Port is one of the busiest in the world with some 100,000 ships movements of sea-going vessels and 300,000 ships movements of inland navigation vessels taking place.

This vibrant and stimulating economic area also needs qualified and experienced lawyers focussing on shipping, logistics and commercial law to safeguard an orderly environment for the business community. That's what we are here for.

Over the last couple of years our firm has seen an increased demand for advice on physical distribution contracts. These so-called PD-contracts are not only an easy answer to the shippers' and cargo interests' desire for a one-stop-shop were it comes to the outsourcing of their logistic services.

On the other hand, the shipping agents or freight forwarders were eager enough to extend their role by broadening out the services they provide. Where the more old-fashioned freight forwarder used to arrange for transportation only, these days they have done justice to their role of the supply chains' architect in the broadest sense. Nowadays many freight forwarders play a key-role in the supply chain management of the worlds manufacturers.

The following issues are of interest for companies shipping goods on a daily basis throughout the world, more specifically *to* or *through*, amongst others, the Netherlands.

- Why have the Dutch been predominant in international trade for decades? Is it not for the geographical position of the Port of Rotterdam as a *mainport* to Europe, then it is because the Dutch have always been acting like chameleons. Not only by fact, but also by Act. This will be demonstrated with my remarks on multimodal transportation and the risk management to it.

- *IT, or not to be*? That's the question of my second topic. What are the legal consequences of the full coverage of your logistic chain by a sophisticated IT monitoring system which provides you with real time information 24/7?

- *I wanna be an NVOCC*. Some do's and don'ts for these protected species will be dealt with last.

Physical Distribution – Risk Management in Forwarding

The modern forwarding agents do not only direct the logistic chain, but they take care of customs formalities, warehousing, order picking, re-labelling, information exchange and management with regard to the goods, shipment of course and even invoicing to the customers of their principal. In some cases the forwarding agent also takes care of the transportation itself.

All these services require sophisticated software, not only for the proper control and supply chain management of the forwarder itself, but also to provide the cargo interests with up-to-date, if not real-time information on the location and status of the goods. Sometimes the principals negotiate direct access to this software to place the orders for delivery on basis of a just-in-time concept.

"*From a legal perspective however, these sort of service level agreements - since that's what they are often called in fact showing the one concern of the cargo interests, namely top level logistic services - often appear to be a multi-headed dragon", says Jasper Groen. "After all, once a consignment appears missing or damaged, the inevitable question arises which regime dealing with liability applies. Then it appears that the facts may be decisive, instead of the parties directing responsibilities over the specific situation*."

If for example the goods are stolen during the period of warehousing, the parties are at more liberty to divide responsibilities and limitation of liabilities for that part of the logistic chain. This is different for example where goods appear damaged during ocean carriage under Bill of Lading, which is subject to many mandatory regulations.

So the legal, or perhaps in better words, the contractual balance must be different for cases where goods disappear during international transportation by road or by sea. Under these circumstances the mandatory regulations of the CMR-Convention, or the Hague Visby Rules respectively, apply. Then the carrier is not allowed to limit its liability to a level below these mandatory rules. It takes not too much imagination that it is exactly for this reason that a PD-contract or service level agreement needs to

clearly define and separate the various means of transportation and other services provided, as well as the responsibilities and the regime applicable thereto.

So the important question that needs to be answered **before** instructing an agent in the Netherlands; what will be his capacity, a carrier or a forwarding agent and what is the extent of his mandate?

Normally an agent aims to represent its principal, without binding himself to any sort of liabilities. That can be done in the name and by order of the principal, on who's behalf contracts of carriage are concluded with other third parties. The legal concept that applies hereto is agency or.

Understanding the legal concepts involved with forwarding, is important to determine the capacity of the forwarder. Under Dutch law the contract to forward goods is a contract whereby one party (the forwarder) binds himself toward the other (the principal) to enter, for the benefit of the latter, into one or more contracts of carriage (art. 8:60 DCC). Once loss or damage arises, the forwarding agent has no other obligation towards his principal then to facilitate its principal to be able to claim directly for compensation of damages against the third party carrier involved.

However, to the extent that the forwarding agent himself performs the contract of carriage, which he in fact undertook to enter into, he himself is deemed to be the carrier pursuant to that contract (art. 8:61 DCC).

Besides being able to determine the role and capacity of the forwarder, another aspect showing the importance of the careful drafting of PD-contracts, is the Dutch *'chameleon or network-system'*. Imagine, Dutch law is applicable (by choice or statutory) to the overall contract of carriage or forwarding contract, the legal regime will transform along with the means of transportation. Like the mandatory Hague-Visby Rules apply to the short sea carriage from the United Kingdom to Rotterdam, the Netherlands, while the CMR Convention (mandatory as well and to which the Netherlands are a contracting state) covers the onward transportation by road to the German *'hinterland'*. You rather wouldn't like to answer the question what limitation of liability is in force to the benefit of the carrier when the cargo is damaged at the stevedore's terminal.

The Dutch did not choose for the principle of one overall regime dictating the rules for the entire logistics chain, like the UNCTAD or ICC-Rules for combined transportation. With regard to a contract of multimodal transportation, the legal regime for that particular part of the carriage will apply (art. 8:41 DCC).

The alternative uniform system may provide for clarity in the relationship between the forwarder and his cargo interest principal. However, the forwarder may get caught in the middle and end up with the risk of recourse considering possible differences in the extent of his liability towards his principal, the latter as claimant under a combined transport Bill of Lading, and the extent of liability of the carrier under another legal regime applicable to the part of the transport where the damages have occurred.

Therefore, since in the Netherlands the network-system applies and as you have seen from the above example, careful drafting PD-contracts, requires making a clear distinction of the exact scope of the various means of transportation and the regime

applicable thereto, and whether for example the transfer carried out through a local terminal falls within the scope of sea carriage or under the regime of international road haulage.

Risk Management and the role of Information Technology

Another aspect that should not be underestimated is the influence of the software and automation used for what is often called a “Tracking & Tracing”-system. Nowadays when sending over a document by DHL, the Air Way Bill number allows to check upon the whereabouts of the shipment 24/7.

However, case law is available in the Netherlands showing that this increased level of control and monitoring software, can result in an increased burden of proof for the carrier.

In a case against DHL the High Court of The Hague ruled in favour of cargo interests’ claim, shifting the burden of proof to the carrier[1]. The facts of this case, and more specifically the Tracking & Tracing-system of DHL, learned that the consignment of computer equipment involved, disappeared during warehousing at DHL’s premises, without an irregularity being noticed through this monitoring system. Where normally cargo interests have to prove gross negligence or wilful misconduct of the carrier in an attempt to break through the limitations of liability, the court now decided that it was DHL with the most factual information readily available about the assumed theft and that it should therefore demonstrate to the contrary to avoid liability. The more considering that there was no indication whatsoever on the possible involvement of any third-party.

And yet there is another case, initiated against the carrier TNT that the Rotterdam High Court decided over and which was published recently[2]. In this case TNT was instructed by Siemens for the transportation of ‘tactical equipment’ from the Netherlands to Germany. TNT took delivery of the goods from Siemens, upon which TNT re-sorted them at its Dutch hub for onward transportation. Although the Tracking & Tracing-system showed the departure from this hub, the consignment never reached its destination. Though it involved quite valuable goods, cargo interests faced a carrier aiming to rely on its limited liability, amounting to € 138,-- only, pursuant to the CMR Convention.

However, in this case the Rotterdam Court followed the tendency set earlier by the Court of The Hague. It considered that a Tracking and Tracing-system was in place providing for an extensive control over the logistics chain, whilst TNT’s only actual effort has been that it interviewed its drivers, who were not to report on any irregularity. Further, there was again no indication whatsoever hinting on the involvement of any third-party, reason for which the involvement of TNT’s personnel was assumed, and thus gross negligence or wilful misconduct on TNT’s side was prima facie accepted. Consequently TNT was allowed to counter this assumption, as a carrier disposing over all the factual information, in an attempt to prevent unlimited liability.

[1] S&S 2003, no. 104.
[2] S&S 2006, no. 138.

Allow me to give you one advice before determining the extent of negligence on the carriers' side. First determine who's act or privity is involved. After all, it is the Dutch Supreme Court that has ruled in the case of the "Serra"[3] that where, for example in general conditions it is meant the carrier's gross negligence prohibits to rely on limited liability, the carrier's gross negligence is meant. And the carrier is not the driver etc. but the corporate body or legal entity, stated in the transport document. It is under this consideration that e.g. a forklift driver is not easily accepted to have represented the company he works for.

Risk Management for NVOCC's

Acting as a Non Vessel Operating Common Carrier, the NVOCC may be liable in its capacity as carrier towards cargo interests. At the same time the NVOCC acts as a shipper as well, instructing the actual carrier. So in fact an NVOCC faces a double set of responsibilities from a legal point of view.

I shall give you a horrifying example of what may happen:
Imagine that the consignment that you have shipped for your principals as a "shipper" on the forwarders house B/L. On basis of your clients' information, the cargo is generally and briefly described by you for the ocean carriers' B/L as *manganese*. During the oceancarriage a fire breaks out and it soon transpires the fire started in "your" container. After some investigations it appears that this product has caused a 'small' fire on board a brand new 10,000 TEU container liner. You may end up being liable as a "carrier" to your principals, and as a "shipper" towards the oceancarrier.

Please consider the potential liability of a shipper which pursuant to article 8:397 DCC must compensate the carrier for the damage the latter has suffered from the materials or goods that the shipper (NVOCC) has put at the disposal of the oceancarrier for transportation purposes. The only escape is then to plead that the damage has been caused by a fact which a prudent shipper has been unable to avoid or prevent. And I tell you, this is a sincere burden of proof to be successful at. The shipper must show that he has taken all measures reasonably possible to prevent the damages.

In addition a duty rests upon the shipper to adequately provide the carrier with information and documentation concerning the goods shipped. Failing which, pursuant to article 8:395 DCC, he is to compensate the carriers' damages.

And moreover, what sort of limitation exists for a shipper that fails to properly inform his carrier on the exact and complete nature of the goods? So in this case, get your information right and take out as much insurance as possible. And if not, I hope as the only remedy that the NVOCC operates through a minor incorporation of shared capital.

I thank you for listening.

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[3] NJ 1995, no. 389.