CASE NOTE

DOES LIMITATION OF CLAIMS FOR COSTS IN RESPECT OF REFLOATING OPERATIONS REQUIRE A WRECK REMOVAL FUND?

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The Riad/The Wisdom and *The Margreta/The Sichem Anne*
Dutch Supreme Court (2 February 2018), ECLI:NL:2018:140 and ECLI:NL:2018:142

On 2 February 2018, the Dutch Supreme Court dealt with the issue of whether liability for recourse claims in respect of raising and removal of vessels and their cargo can be limited by setting up a property fund. In two separate cases, the Dutch Supreme Court answered this question negatively: a wreck removal fund must be formed according to Dutch law in order to be able to limit liability for such claims.[1]

Factual background

Both cases concern the aftermath of a collision. Chronologically, the first collision took place on 13 October 2008, when the inland barge *Riad* was hit by the seagoing vessel *Wisdom* on the river Oude Maas. Following the collision, the *Riad* and her cargo of ferrochrome sank. The Dutch State removed the *Riad* and her cargo. The *Riad* was considered a total loss. The cargo, however, was relatively unharmed and valuable. In order to have the cargo released, the cargo interests paid the Dutch State an amount of just under €600,000 for the removal costs. The parties interested in both the *Riad*'s cargo and in the *Riad* itself held the owners of the *Wisdom* liable for their damages and costs. The owners of the *Wisdom* subsequently applied for limitation of their liability at the Rotterdam District Court, where their application was granted. The hull and machinery underwriters of the *Wisdom* set up the property fund. The *Wisdom*'s P&I club set up the wreck removal fund.

The owners of the *Wisdom* argued that a large part of the *Riad*'s cargo claims should not be accepted in the wreck removal fund. They argued that these claims were recourse claims for the amounts as paid by the parties interested in the *Riad*'s cargo to the Dutch State for the release of the cargo. The owners of the *Wisdom* stated that such claims belonged rather in the property fund. If that line of reasoning were to be followed, the total amount of claims submitted to the wreck removal fund would probably be so low that the majority of the fund would ultimately be returned to the *Wisdom*'s P&I club. The total amount of claims in the property fund would, however, increase, resulting in the dilution of the claims of creditors in the property fund. As a consequence, a substantially lower total amount would be recoverable for parties interested in the *Riad*'s cargo and the owners of the *Riad*.

The second collision occurred between the MV *Sichem Anne* and the inland container vessel *Margreta* on 11 January 2009. The *Margreta* was left stranded. She needed to be refloated by third parties, who were paid salvage awards. The parties interested in both vessels held each other liable for damages and costs. Both parties set up property funds. The parties interested in the *Margreta* submitted claims to the *Sichem Anne* for compensation of the salvage awards paid to third parties for the refloating of the *Margreta* and her cargo. This case also prompted the question of whether recourse claims for salvage can be limited by setting up a property fund.

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[1] *Riad/Wisdom* ECLI:NL:HR:2018:140, Dutch Supreme Court (2 February 2018) and *Margreta/Sichem Anne* ECLI:NL:2018:142, Dutch Supreme Court (2 February 2018).

Legal framework

The Netherlands is a state party to the Convention on Limitation of Liability for Maritime Claims 1976, as amended by the Protocol of 1996 (LLMC).[2] Article 2(1) of the LLMC sets out the types of claims for which limitation is possible. Amongst these claims are those in respect of the raising, removal, destruction or the rendering harmless of a ship which has been sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship (Article 2(1)(d) LLMC) and those in respect of the removal, destruction or the rendering harmless of the cargo of the ship (Article 2(1)(e) LLMC).

Article 18(1) of the LLMC entitles state parties to exclude the application of Article 2(1)(d) and (e) of the LLMC. The Netherlands has opted for this reservation and has determined in national legislation that parties should put in place an additional wreck removal fund in order to limit liability for such claims.[3] The main consideration of the Dutch legislators to opt for the reservation under Article 18(1) of the LLMC was that waterways should be free from obstacles and parties incurring costs for such purpose should not be forced to divide the property fund with other parties involved. As shipping needed to remain manageable and insurable, the Dutch legislators have created the possibility of limiting liability for wreck removal costs under Dutch law by means of the constitution of a wreck removal fund.[4]

In general, a wreck removal fund needs to be established in case limitation for costs in respect of the raising and removal of vessels and their cargoes. Examples of claims that fall under this description are claims for wreck removal costs incurred by the waterway manager under the Dutch Wrecks Act (*Wrakkenwet*),[5] claims for costs of locating, marking and removing wrecks under the Wreck Removal Convention[6] and claims for personal injury or death or for loss of or damage to property sustained during wreck removal operations.[7] As a corollary of the Dutch reservation under Article 18(1) of the LLMC and the introduction of the 'Dutch' wreck removal fund and the applicability of Dutch law to this wreck removal fund, it has been held by Dutch courts that claims that should be lodged against the wreck removal fund also include related claims for reasonable costs to prevent or minimise damage that might be expected as a result of the event giving rise to liability, reasonable costs incurred in assessing the damage and liability and reasonable costs incurred in obtaining extra-judicial payment (section 6:96 of the DCC). Other claims can only be limited by the constitution of other funds (ie passenger, personal injury or property funds).

In both the *Riad/Wisdom* and the *Margreta/Sichem Anne* collisions, the creditors argued that the claims for costs in respect of raising and removing the vessels and their respective cargoes as lodged by the parties filing for such claims should not be claimed in the wreck removal fund. They argued that such recourse claims should be lodged against the property fund. Such claims would no longer qualify as claims falling within the scope of Article 2(1)(d) and (e) of the LLMC (claims in respect of the raising, removal, destruction or the rendering harmless of a ship/its cargo), as they concern recourse claims, i.e. claims also qualifying as claims within the scope of Article 2(1)(a) of the LLMC. It was argued that, in order to limit liability for these claims, a property fund should suffice.

Decision

In its judgments of 2 February 2018, the Dutch Supreme Court held that costs in respect of the raising and removal of a vessel and the cargo are costs in respect of raising and removal in the sense of Article 2(1)(d) and (e) of the LLMC, and remain so, regardless of the grounds for the claim as made in the fund. More specifically, the claims of the *Riad* and its cargo interests for costs that were paid to the Dutch Government in order to release the cargo still fall within the scope of 'claims in respect of the raising, removal, etc.', which is also the case when such claims are filed as recourse claims and also when such costs have been incurred by a party other than the waterway authorities. The same applies for claims submitted by the

[2] The Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims of 19 November 1976 entered into force in the Netherlands on 23 March 2011. As the limitation proceedings in the two referenced cases were already ongoing when the Protocol entered into force, only the original convention applied.

[3] Articles 8:750 para 1 jo 8:752 para 1(d) and (e) jo 8:755 para 1 (b) Dutch Civil Code (DCC).

[4] Parliamentary Papers, 1986–1987, 19 769 (R 1317), nr 3, p 16–17.

[5] Parliamentary Papers, 1986–1987, 19 768, nr p 11; and Tweede Kamer, 1987–1988, 19 768 enz., nr 8, p 8.

[6] Article 8:656 para 3 DCC.

[7] Parliamentary Papers, 1986–1987, 19 768, nr p 11.

parties interested in the *Margreta* for compensation of the salvage awards paid to third parties for the refloating of the *Margreta* and her cargo.

In summary, when claims fall under the regime of Article 2(1)(d) and (e) of the LLMC, they stay within that regime. Recourse claims for costs in respect of raising and removal can also fall under the definition of claims for which property funds can generally be set up (Article 2(1)(a) of the LLMC). However, that does not mean that setting up a property fund suffices for a party seeking to limit its liability. When a state has opted to make the reservation of Article 18(1) of the LLMC and provides for the possibility of a wreck removal fund in national legislation, costs for raising and removal can only be limited by setting up such a wreck removal fund. This specific regime pursuant to the reservation then takes precedence over the general regime of the LLMC.

Furthermore, the Supreme Court held that Article 3(a) of the LLMC, which dictates that it is not possible to limit liability for salvage remuneration claims, does *not* apply to recourse claims. That recourse claims are excluded from Article 3(a) but are considered to fall within Article 18, with reference to Article 2(1)(d) and (e) of the LLMC may, at first sight, appear to be contradictory. However, this can be explained by the different wording in the provisions; Article 2 of the LLMC's scope is wider as it provides for 'claims in respect of', whereas Article 3 of the LLMC reads 'claims for'. An application of Article 3(a) of the LLMC's scope to claims of the salvor is also in line with the exception's ratio that salvors should not be discouraged by the possibility that a limitation of liability applies. Such ratio does not play a role in case of recourse claims.

Commentary – looking ahead

The Supreme Court's decisions appear to be a positive development for creditors. The total amount of claims in the property fund will not be increased with recourse claims regarding the raising and removal of vessels and their cargo. Collision debtors can limit their liability for such costs by establishing a separate wreck removal fund in the Netherlands.

It should be noted that the reservation of Article 18(1) of the LLMC applies to claims in respect of, inter alia, the raising and removal of ships that are sunk, wrecked, stranded or abandoned. Such claims fall within the scope of Article 3 of the LLMC. Therefore, such claims will not be limited if brought by the salvor directly. It remains to be seen, however, whether recourse claims for salvage awards regarding vessels that were not sunk, wrecked or stranded at the time of the salvage fall outside the reservation of Article 18(1) of the LLMC, and still can be limited only by a property fund.

It should also be noted that plans are currently underway to remove the possibility of limiting liability for wreck removal costs in the Netherlands altogether. The Dutch government has opened a consultation for an amendment of the law for wreck removal.[8] If these plans develop into law, limitation of liability for claims in respect of raising and removing ships and cargo will in principle no longer be possible in the Netherlands, as well as in cases when such costs have been made as recourse claims or for the release of cargo. Thus, for the time being, it remains possible for shipowners to limit their liability for wreck removal costs in the Netherlands.

[8] See the draft legislative amendments regarding the liability for wreck removal costs published on 18 December 2017 https://www.internetconsultatie.nl/aansprakelijkheid_wrakopruiming.