

ROTTERDAM GUARANTEE FORM LIMITATION 2017 (RGFL 2017)¹

(A)

The undersigned (B),

WHEREAS:

on the application of (C), hereinafter referred to as the applicant, to limit [his/her/its] liability in connection with (D) the *Rechtbank Rotterdam* (District Court Rotterdam) rendered the decision (E) that the applicant shall constitute a limitation fund;

in that decision the *Rechtbank Rotterdam* appointed (F) as *rechter-commissaris* (judge commissary; supervisory judge) to administer the distribution of the fund and appointed (G) as *vereffenaar* (liquidator) thereof;

DECLARES HEREBY IRREVOCABLY AND UNCONDITIONALLY THAT:

1. on first written demand of the above mentioned *rechter-commissaris* and *vereffenaar* jointly, or their (legal) successors or substitutes jointly, the undersigned will pay, within 14 (fourteen) calendar days from the date of the demand into a bank account in the joint names of the *rechter-commissaris* and *vereffenaar*, or of their (legal) successors or substitutes, as the case may be, any amount or amounts up to a maximum of:
 - (a) EUR (H); together with
 - (b) the Dutch statutory moratory interest calculated over the period from (I) to (J); increased further by
 - (c) the Dutch statutory moratory interest over this principal sum (a) and interest (b) from (J) until the date of actual and full payment under this guarantee ; and
 - (d) EUR (K), for costs of the proceedings.
2. the undersigned will also pay on demands for part payment under this demand guarantee by the persons referred to under 1;
3. this demand guarantee is governed by Dutch law; and
4. the undersigned submits to the exclusive jurisdiction of the *Rechtbank Rotterdam* for claims or disputes in connection with this demand guarantee;

[Place, date of issue demand guarantee][Name and details of authority of the person executing the document]

¹ As published by the Commissie Garantieformulier Aansprakelijkheidsbeperking van de Nederlandse Vereniging voor Vervoerrecht (Committee for Rotterdam Guarantee Form Limitation of the Dutch Transport Law Association) (Prof. M.H. Claringbould, T. Roos, W.P. Sprenger, T. van der Valk, H. van der Wiel) on 1 January 2017.

NOTES REGARDING THE SPACES (A) – (K) TO BE FILLED IN

(A) = Name of the vessel for which the fund is established.

(B) = Full name, address, place of domicile, and any other identifying data (e.g. trade register number/identifier) of the guarantor.

In connection with the requirement that the security offered must be adequate (compare Article 6:51 sub (2) DCC and e.g. President Rotterdam District Court 29 May 1998, *Schip en Schade* 1999/54 ‘Kavako’) the guarantor must be domiciled within the area in which the EU Regulation (1215/2012) or the Lugano Convention 2007 apply. The *rechter-commissaris* and *vereffenaar* should not be required to litigate elsewhere to enforce payment under the guarantee.

(C) = Full name, address, place of domicile of the person submitting the application for limitation of the liability that led to this guarantee being issued.

(D) = Description of the occurrence (with date) which led to the application for limitation of the liability.

(E) = Date and case number/identifier of the decision rendered by the *Rechtbank Rotterdam*.

(F) = Name of the *rechter-commissaris* referred to in the decision rendered by the *Rechtbank Rotterdam*.

(G) = Name and other details of the *vereffenaar* referred to in the decision rendered by the *Rechtbank Rotterdam*.

(H) = In numbers and words, the amount of the principal sum in Special Drawing Rights of the International Monetary Fund (IMF) converted into Euro’s at the IMF rate of exchange of the day on which the guarantee is actually executed. (Compare Article 8:759 DCC and Article 5 Royal Decree of 29 Nov. 1996, *Staatsblad* 1996, 587 read together with Article 642c sub (2) heading Dutch Code of Civil Procedure (DCCP))

Article 8:759 DCC and Article 5 Royal Decree of 29 Nov. 1996, *Staatsblad* 1996, 587 contain the phrase ‘converted into Dutch currency at the rate of exchange on the day on which the debtor complies with an order pursuant to Article 642c of the Code of Civil Procedure to make a payment or provide other security’. This form follows current practice of using the rate of exchange of the day of the signing of the guarantee. Some time may pass between the signing/sending and the receipt of the guarantee. At the moment of signing of the guarantee it will practically be impossible to determine the rate of exchange of the day of receipt of the guarantee.

(I) = The (start of the) day following the date of the occurrence giving rise to the claim. (Compare Article 8:757 DCC and Article 4 Royal Decree of 29 Nov. 1996, *Staatsblad* 1996, 587 read together with Article 642c sub (2) heading and under (a) and (b) DCCP.)

(J) = Three days from the date of signature of this guarantee. (Compare Article 8:757 DCC and Article 4 Royal Decree of 29 Nov. 1996, *Staatsblad* 1996, 587 read together with Article 642c sub (2) heading and under (a) and (b) DCCP.)

Article 8:757 DCC and Article 4 Royal Decree of 29 Nov. 1996, *Staatsblad* 1996, 587 contain the phrase ‘the day following the day on which the person who submitted an application for

limitation of his liability complied with the order imposed on him pursuant to Article 642c of the Code of Civil Procedure'. Some time may pass between the signing/sending and the receipt of the guarantee. For practical reasons this form follows current practice by using a period fixed at three days.

(K) = In numbers and words, the amount stated in the decision rendered by the *Rechtbank Rotterdam* to defray the costs of the proceedings.

NOTE OF EXPLANATION
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This form is drafted by the Limitation Guarantee Form Committee of the Dutch Association for Transport Law following a suggestion from the Rotterdam District Court. During the drafting of this form the following people served on the committee: Prof. M.H. Claringbould, T. Roos, W.P. Sprenger, T. van der Valk en H. van der Wiel. Mr Sprenger is a senior judge at the Rotterdam District Court; the others are advocates in Rotterdam. During the drafting, the Committee received helpful comments from P.H. den Haan and V. van der Kuil, both also advocates in Rotterdam.

This guarantee form contains the text of a (first demand) guarantee which may be used by the guarantor of a (legal) person who wants to limit his liability in connection with an occurrence with a seagoing ship or an inland navigation ship involving loss or damage.

Until now, in limitation proceedings security was offered on the basis of widely diverging guarantee texts, always giving rise to discussion. The need was felt therefore to draft a new standard form.

This form contains a first demand guarantee. In the past the limitation guarantees did not clearly indicate who could make a demand under it. In this new form it is clearly stated that the *rechter-commissaris* (perhaps best translated as judge commissary or supervisory judge) and the *vereffenaar* (liquidator) can jointly make a demand under the guarantee, and also for part payments. This is in line with Article 642c sub (4) Dutch Code of Civil Procedure (DCCP), which states that the fund is established in the joint names of the *rechter-commissaris* and the *vereffenaar*, and to the exclusion of the person limiting his liability.

The form gives the *rechter-commissaris* and the *vereffenaar* the possibility to make a demand under the guarantee for payment to a bank account in their joint names in case they so deem just and proper. They may inter alia so demand in the event it is decided that the person who wants to limit liability and who has arranged for the constitution of the fund is not entitled to limit his liability when it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. (Compare Article. 8:755 and 8:1064 Dutch Civil Code (DCC).) Article 642s sub (2) DCCP provides that when this decision is no longer subject to appeal, the security provided will lapse and a deposited amount will be paid out to him who made the deposit but not earlier than one month after the judgment has become final and the *vereffenaar* has given notice, in the manner set out in Article 642i DCCP, of the day this payment will take place. According to the legislative history of that provision this arrangement with regard to a deposited amount was enacted so to enable the creditors to attach the deposited fund before it is refunded. This form neutralizes the difference between constituting a fund by making a bank deposit and by providing a guarantee. Under the guarantee the guarantor can be obligated to pay out the amount of the fund into a bank account in the joint names of the *rechter-commissaris* and the *vereffenaar*, whereupon the creditors may effect an attachment on the fund so deposited for the recovery of their claims. The Committee does not express an opinion about the issue whether or not such an attachment provides effective relief for a creditor.

Art. 11 of the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, as amended by the 1996 Protocol, as well as art. 11 of the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI 1988) mention one single fund in the sum of certain amounts. In contrast, Dutch law (e.g. the former Article 8:755 DCC and, still, Article 642c and 642t DCCP) reckons with multiple funds (e.g. persons fund, property fund, wreck fund). Art. 12 of the Strasbourg Convention concerning the Limitation of Liability in Inland Navigation (CLNI 2012) (not yet in force) also allows the constitution of one or more funds. In order to obviate any complications in this respect and to allow the form to be used in as many cases as possible, any reference to either amounts together forming a fund or to several funds is avoided. Under circumstances – e.g. when several insurance

companies only want to guarantee certain claims covered by an amount within a fund, or by a fund to be regarded separately, or when the possible spill-over of personal injury claims (Art. 642t sub (2) heading and sub (c) DCCP should be taken into account – there may be reason to amend the standard text of the guarantee accordingly. However, this requires bespoke wording which the Committee cannot provide in a standard form.