

REPLY BY THE NEDERLANDSE VERENIGING VOOR VERVOERRECHT (NVV) (DUTCH TRANSPORT LAW ASSOCIATION) TO THE CMI QUESTIONNAIRE OF 16 JANUARY 2020 WITH REGARD TO GENERAL AVERAGE SECURITY

Introduction

The Kingdom of the Netherlands is made up of four separate countries:

- the Netherlands
- Aruba
- Curaçao
- Sint Maarten.

Each of the countries has its own government that is responsible for the legislation applying in the particular country. However, within the country of the Netherlands there are two separate legal systems operating in:

- the Netherlands in Europe, and
- the Caribbean Netherlands (the islands of Bonaire, Sint Eustatius and Saba), the government of the Netherlands being responsible for the legislation applying in both jurisdictions.

Consequently there are five different legal systems existing within the entire Kingdom. These are all civil law systems, and much of the main statute law applying in the different jurisdictions is identical. Furthermore, Article 39 of the Statuut voor het Koninkrijk der Nederlanden (Charter for the Kingdom of the Netherlands) contains the so-called 'principle of concordance'. It provides:

1. Civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, industrial property, the notarial profession, and provisions concerning weights and measures shall be regulated as far as possible in a similar manner in the Netherlands, Aruba, Curaçao and Sint Maarten.
2. Any proposal for drastic amendment of the existing legislation in regard to these matters shall not be submitted to or considered by a representative assembly until the Governments in the other countries have had the opportunity to express their views on the matter.

With this principle in mind the courts of the different countries within the Kingdom tend to interpret the law in a manner that unifies the law of the countries and

jurisdictions as much as possible ('harmonious' or 'concordant' interpretation).

This reply is based on the law applying in the Netherlands in Europe. With regard to the topic of this CMI questionnaire the differences between the separate jurisdictions are minimal, and they are indicated where deemed necessary.

Questions

1. Does the law of your country contain provisions on general average?

Netherlands: Yes. Provisions of substantive law can be found in the Dutch Civil Code (DCC): Articles 8:610-8:613 (sea-going ships) and Articles 8:1020-8:1022 (inland waterway ships)¹.

Provisions of procedural law are contained in the Dutch Code of Civil Procedure (DCCP): Articles 638-642.

1.1. If so, does such law provide that contributing parties have to provide security in respect of such contributions?

Netherlands: No. There is no duty as such to provide security. However, the carrier may exercise a retentierecht (right of retention/possessory lien) on the cargo for the contribution in general average. Article 8:489 paragraph (2) DCC provides:

The carrier may exercise a right of retention over the goods under his control in connection with the contract of carriage, for what the receiver owes or will owe him for the carriage of those goods, as well as for what is owed or will be owed on those goods as contribution to general average. This right of retention shall lapse as soon as the carrier has been paid the amount over which there is no dispute and adequate security has been provided for the payment of those amounts over which there is a dispute or the value of which cannot yet be determined.

1.2. If so, are there statutory requirements for such security?

Netherlands: In a strict sense only in cases the security is put up for a release of the goods from a right of retention as set out in Article 8:489 paragraph (2) DCC quoted above. The only statutory requirement is that the security must be adequate. With regard to the 'adequacy' of security, Article 6:51 DCC provides:

1. Where a person is required by law to provide security, or where provision of security is a condition for any legal effect, the person providing security may elect between personal and real security.

¹ The legislation in Aruba, Curaçao, Sint Maarten and the Caribbean Netherlands (Bonaire, Sint Eustatius and Saba) does not contain provisions relating to inland waterway ships.

2. The security offered must be such that the claim and, if applicable, the interest on the claim and the costs are properly covered and that the obligee will be able to realize it without difficulty.
(...)

In cases where security in the form of a guarantee (or bond) is to replace another form of security (e.g. the right of retention, or an attachment on certain property), the requirement that the 'obligee [should] be able to realize [the security offered] without difficulty' is often interpreted to mean that the replacing security should be just as easy to realize as the security to be replaced.

1.3. If the law only requires security to be provided but no particular form, is it common in your country that cargo interests issue general average bonds and insurers issue general average guarantees?

Netherlands: Security (in exchange for a release from a right of retention) is usually requested by the adjuster on one of the different forms of bonds or guarantees in use in the market. The suggested text may of course be subject to negotiation in view of the requirements of Article 6:51 DCC quoted above.

2. Are there any wordings generally used in your country for such securities?

Netherlands: See the reply under 1.3.

3. Does the law of your country have any requirements for the validity of such security (like original signature, notarization, consideration)?

Netherlands: Except in cases of security to be provided by non-professionals, there are no particular requirements under Dutch law other than an agreement between the parties. But parties are of course well advised to check the signatures, the authority of the signatories etc., which may entail notarization. Consideration is not a concept in Dutch contract law.

4. Do such securities usually contain provisions on applicable law and jurisdiction?

Netherlands: They often do. Those providing the security will usually be advised to offer security with clauses referring to the law and jurisdiction to prevent discussion at a later stage. The applicable law and jurisdiction depend on the circumstances of the case, including where the right of retention is exercised (the place of discharge), the (jurisdiction clause in the) contract of carriage, and the place of incorporation of the parties providing security.

6 March 2020

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