Young Maritime Lawyers Association Seminar

16 - 17 June 2017
Rotterdam

First and foremost, we would like to show our appreciation to our very generous sponsors. Without our sponsors it would not have been possible to organise this edition of the Young Maritime Lawyers Seminar!

WELCOME

Young Maritime Lawyers Seminar Rotterdam 2017

Dear All

Welcome to Rotterdam for the 12th edition of the YMLC! The organising committee is very excited to have you all here on behalf of our national maritime organisation, the *Nederlandse Vereniging voor Vervoerrecht*.

The 2016 edition of the YMLC in London was hard to follow, but we have done our best to continue to fine traditions of the YMLC and hope you will enjoy the conference and the events we have planned. We especially hope you will enjoy the experience on board of the historic cruise ship 'ss Rotterdam'!

We also wish to thank the contributing law firms and our sponsors for providing the financial support needed to organise this conference. In particular we would like to thank the *Nederlandse Vereniging voor Vervoerrecht* and also AKD N.V. for allowing us to use their beautiful offices for the seminar on Friday. We are also very appreciative of our speakers and moderators, who have offered us their time and insight in order to make the YMLC 2017 a success.

The organising committee hopes you have an instructive conference and that you find ample opportunity to reconnect with colleagues and friends and to make new acquaintances!

Warm regards

The 2017 Organising Committee
Charlotte van Steenderen
David van Bemmel
Tessa Mentink
Iris Regtien
Sophie Stein

FOREWORD

Young Maritime Lawyers Seminar Rotterdam 2017

Dear participants

As President of the Dutch Transport Law Association I welcome you to the Young Maritime Lawyers Conference 2017. With the first conference hosted in London in May 2006, you will now be enjoying the 12th edition of this event.

This annual event was conceived late in 2005 by the national maritime law associations of Belgium, France, Germany, the Netherlands and the United Kingdom. Younger members felt that some things needed to be stirred up as the associations were suffering from an aging membership and particularly for an aging executive.

The concept is still simple. Have young maritime lawyers organize something for themselves; rotate the venue between the countries of the participating associations; and make sure the participants get to experience some of the idiosyncrasies of the different legal systems applying in these maritime countries. All in the traditional spirit of the associations mother organization, the Comité Maritime International.

I would particularly like to welcome our foreign guests to this event, but also to the working city of Rotterdam. A city with a roll up your sleeves attitude. A city with an eye for landmark architecture. A city with the largest port in Europe but with still a lot of breathing space. Our organizing committee has chosen venues for this event where you can enjoy Rotterdam from considerable height and on the water. I hope you enjoy your stay, and see reason to visit us again in the future. All roads may lead to Rome, but all sea lanes lead to Rotterdam.

Taco van der Valk
President Dutch TLA

INTRODUCTIONS…

Young Maritime Lawyers Seminar Rotterdam 2017

Maritime litigation 4.0 in the Netherlands: full speed ahead.

Emily Dérogee-van Roosmalen is a member of the daily board of the Dutch Transport Law Association (NVV). She has been active in the maritime scene of Rotterdam since 1975 – from being involved in ship financing to being a maritime lawyer – and has been involved in many maritime related activities such as being chairman of the maritime arbitration institute, 'Transport and Maritime Arbitration Rotterdam-Amsterdam' and being director of Dutch Legal Network for Shipping and Transport. Emily was secretary to the editorial board of Schip en Schade (the Dutch maritime and transport law reports) and a member of the board of the Schadee Foundation.

For Emily the most important clause of a contract is the jurisdiction clause: "Home is not only where the heart is; but also where you find justice". Times are changing rapidly in our world, be it maritime or otherwise (f.i. the EU). Courts and ADR institutes cannot stay behind and they do not in the Netherlands. Next to presenting the Dutch possibilities of ADR, some questions will be raised as to legal implications of a possible Brexit for contracts under English law.

Willem Sprenger is a senior judge in the Rotterdam District Court, in particular in the Maritime Chamber. Willem Sprenger joined the Rotterdam Court in 2011, after having been a lawyer for over twenty years. He deals with court cases concerning all aspects of shipping, transport and commercial law and he has been involved in various reported Court cases. In his speech Willem Sprenger will focus on topics of modernization in civil procedures in shipping, transport and commercial matters in the Netherlands.

PROGRAMME

Young Maritime Lawyers Seminar Rotterdam 2017

Friday 16 June 2017

11:30 – 12:30: Registration and Lunch @ **AKD N.V.**

12:30 – 13:20: Official opening and introductions by guest speakers

13:20 – 15:00: Case study

15:00 – 15:20: Refreshment break

15:20 – 17:00: Case study (continued…)

17:00 – 17:15: Closing remarks

17:15 – 17:30: All aboard the KRVE 71 at the water taxi stop below AKD

17:30 – 18:00: Transport to hotel on board the KRVE 71

18:00 – 18:30: Check-in @ **ss Rotterdam** and/or break

18:30 – 18:45: Return to KRVE 71

18:45 – 22:00: Tour of the Rotterdam Port and drinks & dinner on board the KRVE 71

22:00 – 02:00: After dinner drinks and party **@ ss Rotterdam**

02:00: End of the official programme ☺

Saturday 17 June 2017

8:00 – 9:15: Breakfast

9:30 – 10:00: Welcome to day 2 @ The Sky Room (**ss R'dam**)

10:00 – 13:00: Landmark cases (short break included)

13:00 – 14:00: Official closure & lunch

VENUES AND CONTACT INFORMATION

Young Maritime Lawyers Seminar Rotterdam 2017

Hotel
ss Rotterdam
3e Katendrechtsehoofd 25
3072 AM Rotterdam
+31 (0) 10 297 3090

Friday – seminar location
44th Floor
AKD N.V.
Wilhelminakade 1
3072 AP Rotterdam

Drinks & Dinner
KRVE 71
All aboard at the water taxi stop below AKD!

Friday evening entertainment
The Ambassador Lounge on board of the ss Rotterdam

Saturday – seminar location
The Sky Room on board of the ss Rotterdam

Taxi Services
Rotterdam Taxi Centrale RTC: + 31 (0) 10 462 6060
Water taxi: +31 (0) 10 403 0303

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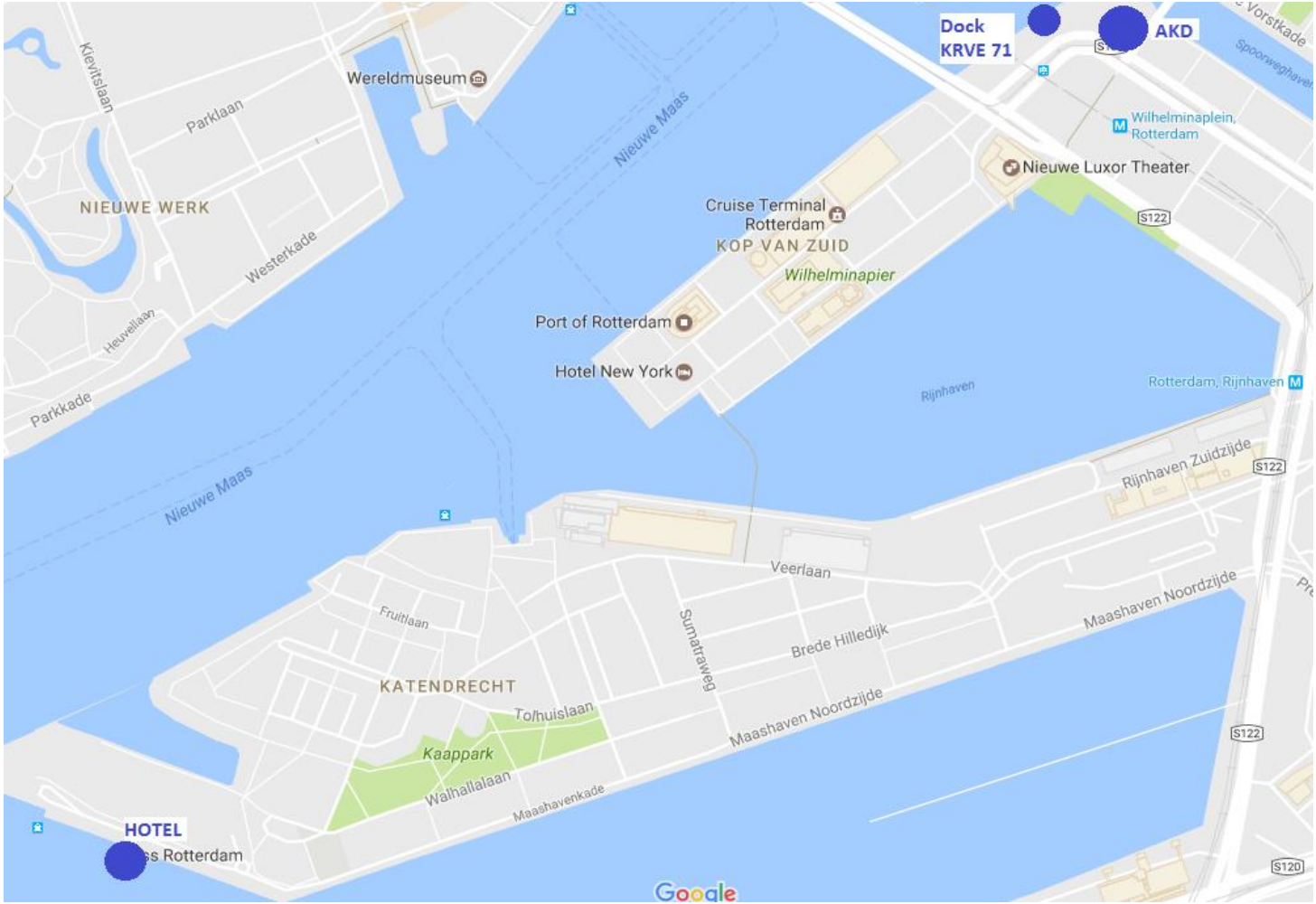
Dock
KRVE 71
AKD
Wereldmuseum
Klevitslaan
Parklaan
NIEUWE WERK
Westerkade
Heuvellaan
Parkkade
Nieuwe Maas
Wilhelminaplein,
Rotterdam
Nieuwe Luxor Theater
Cruise Terminal
Rotterdam
KOP VAN ZUID
Wilhelminapier
Port of Rotterdam
Hotel New York
Rijnhaven
Rotterdam, Rijnhaven
Rijnhaven Zuidzijde
S122
Veerlaan
Fruitlaan
Sumatraweg
Brede Hilledijk
Maashaven Noordzijde
KATENDRECHT
Tolhuislaan
Kaappark
Walhallalaan
Maashavenkade
HOTEL
S120
Google

FRIDAY: CASE STUDY

Young Maritime Lawyers Seminar Rotterdam 2017

FEDOSENKO'S DISASTER

At 3,910 MTS, the m/v "**O**" is not a large vessel, but sturdy enough. An innovative Dutch yard built her under English class for a German KG ("**Owners**"). A technical intendent from Brest in France oversaw the building process, whilst often listening to Jacques Brel. "O" flies the Latvian flag, odd enough, and is commanded by the Ukrainian Captain Fedosenko ("**Fedosenko**").

"O" is under charter with an English trader of agricultural goods ("**Charterers**") through London shipbrokers ("**Brokers**"). The Vessel was chartered to Charterers by means of a GENCON 1994 charterparty, without any pertinent amendments. On 2 May 2014 the vessel receives orders from her Brokers for the following journeys from Stralsund (DE) to Hamburg, Hamburg to New Holland (UK), New Holland to Hamburg and then back to Sutton Bridge in the UK. After the vessel's return to Sutton Bridge a journey to Brake on the German river Weser is scheduled.

On 9 May 2014 at 08:35 hrs "O" receives her voyage orders which read as follows:

"DEAR MR. FEDOSENKO. PLS CONFIRM RECEIPT OF THESE VOYAGE INSTRUCTIONS. PLS NOW LIFT THE ANCHOR AND PROCEED FROM ANCHORAGE TO THE LOADING PORT OF SUTTON BRIDGE.

LOADING INSTRUCTIONS FOR SUTTON BRIDGE/HAMBURG ARE:

- CARGO: A CARGO OF APPROXIMATELY 3300/344 MTONS BULK WEATH SAID TO STOW ABOUT 45' PER METRIC TON. PLS NOTE THAT THE LOAD PORT RESTRICTION IS FOR 5.6M (PLS VERIFY THIS WITH THE HAMBURG AGENTS BEFORE LOADING. PLS LOAD BEST POSSIBLE INTAKE OF CARGO.

- LOADPORT: 1 GOOD AND SAFE BERTH HAMBURG WHERE THE DFT RESTRICTION IS SAID TO BE 5.6M.

- DISPORT: 1 GOOD AND SAFE BERTH ALWAYS AFLOAT SUTTON BRIDGE.

- FREIGHT: PER LOADED METROIC TON FIOT TO MASTER'S SATISFACTION AND CHARTERERS EXPENSE.

- B/L TYPE: CONGEN BS/L. KINDLY ENSURE THAT THE C/P DATE 23.4.2014 IS INSERTED IN THE RELEVANT BOX IN THE B/L.

BS/L TO BE MARKED "FREIGHT PAYABLE AS PER C/P".

ANY NECESSARY REMARKS CONCERNING THE CARGO QUALITY/CONDITION ARE TO BE PLACED ON THE BS/L AND MATE'S RECEIPT AND MUST BE DETAILED.

- AGENTS: **********

- SCHEDULE: 1 DAY LOAD. 2.5 DAYS TO SUTTON BRIDGE. 1 DAY DISCHARGE AT SUTTON BRIDGE. VOYAGE OF 2.5 DAYS TO HAMBURG. 1 DAY DISCHARGE.

- BUNKERS: WE WILL ADVISE BUNKERING INSTRUCTIONS IN DUE COURSE BEFORE DEN HELDER.

- COMMENTS: ANY DAMAGE TO CARGO/VESSEL MUST BE REPORTED TO IMMEDIATELY IN WRITING HOLDING THE NECESSARY PARTY FULLY RESPONSIBLE FOR ALL COSTS AND CONSEQUENCES ARSISING THEREFROM. ANY SUCH INCIDENTS MUST BE REPORTED TO US IMMEDIATELY IN ORDER THAT WE CAN TAKE THE NECESSARY PROTECTIONARY MEASURES.

- REMARKS: VESSEL'S HOLD TO BE PERFECTLY CLEAN AND DRY AND FREE FROM RESIDUES OF FORMER CARGOES TO SHIPPER'S SATISFACTION BEFORE COMMENCEMENT OF LOADING.

PLS GIVE DAILY NOTICE OF ETA TO DISPORT AGENTS.

WE WISH YOU AND THE CREW A PLEASANT VOYAGE."

"O" leaves Hamburg in bad weather. Despite the above orders, bunkering instructions never arrive. Low on bunkers, Fedosenko decides to steer the vessel towards Den Helder (NL) and continues to the Marsdiep tidal race. As it happens, clotted residues in the vessel's near empty tanks cause the vessel's main engine to break down when it just entered the Marsdiep's rather swift tide just before neap tide.

"O" is now afloat without power and rudder within Dutch territorial waters between Den Helder and the Wadden island of Texel and is on an Easterly drift towards the shallow and treacherous Waddenzee. Fedosenko sends out an emergency signal. The signal is picked up by a towage and salvage company from Vlieland (one of the Dutch Wadden islands) who rushes

towards "O". Without further agreement a line is attached and the vessel is brought under tow to the port of Den Helder. Apart from a decent "we'll send you a bill" the Vlieland company is off to be home in time for supper. Fedosenko is quite relieved and informs Brokers per designated email, which email fails to be delivered probably due to the bad weather. Fedosenko decides to give instructions to bunker at Den Helder.

The further journey goes as planned and "O" reaches Sutton Bridge on schedule and just in time. In Sutton Bridge harbour the vessel's C/E does a routine change of certain fuses and emails start pouring in. Amongst which the following two:

1. dated 9 May 2014 11.15 hrs.

"DEAR MR. FEDOSENKO. PLS. CONFIRM RECEIPT OF THESE BUNKERING INSTRUCTIONS. PLS. PROCEED TO OUDESCHILD, TX FOR BUNKERING AT DEDICATED SUPPLIER. BUNKERING AS PER C/P ON CHARTERER'S CHARGES."

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2. dated 10 May 2015 16.00 hrs.

"DEAR MR. FEDOSENKO. WE HAVE NOT RECEIVED CONFIRMATION OF RECEIPT OF OUR EMAILS . PLS. CONFIRM AND GIVE NOTICE OF ETA ASAP.
++
PLEASE BE ADVISED THAT THERE HAS BEEN A CHANGE OF DISCHARGE PORT FOR THIS VOYAGE AS M/V "O" WILL NOW LOAD AT "NEW HOLLAND" INSTEAD OF SUTTON BRIDGE DUE TO TIDAL RESTRICTIONS."

A shocked Fedosenko immediately searches a telephone box and calls Brokers. During a heated debate, Fedosenko is informed that **1)** the vessel was bunkered for a sum approx. EUR 30.000,-- in excess of the costs of bunkering at Oudeschild, Texel and it is confirmed that **2)** "O" should have moored at New Holland some time ago. Brokers are advised that Fedosenko is now at the NAABSA port of Sutton Bridge.

Both Owners and Charterers are informed and the "O" is to proceed discharging at Sutton Bridge after all.

After discharge in Sutton Bridge, "O" departs for Hamburg on schedule. During cargo hold cleaning a boatswain notices irregularities in the vessel's cargo hold floor, just against the mid cargo hold strong beam. The

classification society is informed and the vessel is ordered to steer towards Harlingen (NL) to dry dock for inspections.

In the meantime a bitter discussion ensues between Owners and Charterers. Owners refuse to hand over logbook data and Charterers claim access to the said data under the c/p.

As soon as "O" arrives at Harlingen, the vessel is boarded by policemen, a bailiff and a number (five) of the vessel's logbooks (dated from March 2013 until the present date) and other necessary documentation are attached and removed from the vessel.

And Fedosenko? He pours a drink.

QUESTIONS

After the arrival of the "O" and resulting bitter dispute between Owners and Charterers, culminating in the attachment of the vessel's logbook data and other necessary documentation, an impasse is reached. Owners and Charterers both instruct lawyers to assist them with the dispute. You are presented with the case and are requested to answer the following questions through application of your national law:

1. What claims do you expect to arise out of the casualty? What is the nature of these claims? Which law applies to the claims and in which jurisdiction should they be brought?

2. According to your domestic law, can the services rendered by the towage and salvage company from Vlieland be qualified as salvage operations? Would you consider this salvage operations to be rendered on the basis of salvage contract? If so, which law would apply to the towage/salvage contract? Is there a distinction between the two?

3. According to your domestic law, would Charterers be allowed to attach the logbooks and other data? Which principles would apply to the attachment of the evidence?
    a. If attachment of the documents would not be possible according to your domestic law, is there another way in which Charterers can obtain the documentation?

b. If the main proceedings are arbitral proceedings, would these proceedings qualify as main proceedings under which the attachment of the logbooks and other data would remain valid?
c. Would it be possible for Charterers to arrest or attach other assets owned by Owners?

4. Is it possible to change the discharging port of the "O" from Sutton Bridge to New Holland on such short notice? Who would be considered liable for possible extra costs arising due to the change in the port of discharge?

5. Who is liable for paying the considerable surplus costs of bunkering at Den Helder rather than in the nominated port for bunkering, Oudeschild, according to your law?

PANEL

Moderator(s): Willem Sprenger / Taco van der Valk
Speakers:

- Netherlands: Daan Komen and Lisanne van Baren
- Belgium: Ruud de Houwer and Iwein Moorkens
- Germany: Johannes Klotz and Philipp Terhoeven
- France: Charlotte Peignon and Ansam El Okbani
- United Kingdom: Sarah Holsgrove and Tom Bird

SATURDAY: LANDMARK CASES

Young Maritime Lawyers Seminar Rotterdam 2017

Moderator: Willem Boonk, Smallegange

NETHERLANDS

Judgment of the Hague Court of Appeal of 1 March 2016
- m/v MTM NORTH SOUND -
Speaker: Stefanie Roose

Appeal proceedings between Vopak Terminal Vlaardingen B.V. and the owners of the vessel "MTM NORTH SOUND". Vopak and Inter-Continental Oils & Fats PTE Ltd concluded a 'storage and handling agreement' subject to which Vopak would discharge and store 'Distilled Coconut Fatty Acid' ("DCFA") at Vopak's terminal in Vlaardingen. Inter-Continental and Vopak agreed to the applicability of the General Conditions for Tank Storage in the Netherlands ("VOTOB-conditions"). Inter-Continental concluded a charter party for a shipment DCFA to be discharged at Vopak's terminal. During the discharging operations an incident occurred. The pressure in one of the vessel's tanks became too high during blow back operations and the vessel became seriously damaged. The owners of the vessel initiated proceeding based in tort against Vopak to take recourse for the damage to the vessel.

One of the central questions in this case was whether VOPAK could rely on the (exclusions and limitations of liability in the) VOTOB-conditions towards the owners of the vessel in its defense against the tort claim. Relevant questions were:

- Did the chief mate have the authority to accept the applicability of these conditions on behalf of the owners of the vessel? What was the role of the captain in this respect?
- Did the 'storage and handling agreement' have third party effects towards the owners of the vessel?
- Was Vopak able to rely on the Dutch Civil Code? Was Vopak a storage keeper ('bewaarnemer') within the definition of the Dutch Civil Code?

The Court of Appeal held Vopak liable and concluded that Vopak was not able to rely on the VOTOB-conditions towards the owners of the vessel. During Saturday morning's session the reasoning of the Court will be

explained. It would be interesting to see what the outcome of this issue would be in other jurisdictions.

Judgment of the Court of Appeal of Arnhem-Leeuwarden of 27 September 2016

- m/v Harns -

Speaker: Alicia Zwanikken

Appeal proceedings between the Owners and cargo interests of the m/v Harns. The vessel was meant to carry 8,400 MT of monoammonium phosphate from Morocco to Mexico on board the vessel 'The Harns' in August of 2009. The ship-owners had decided to take the shortest possible route, which led through a wildlife preserve where the vessel stranded. With the help of professional salvers 800 MT of cargo was jettisoned to refloat the vessel. In addition to this loss, a part of the cargo turned out to be damaged by seawater. The inadequate planning of the voyage was established to be the cause of all damage. The cargo interests claimed damages for the lost and damaged cargo from the ship-owners and renounced liability for 1) remuneration of the salvers and 2) a contribution in general average.

In its judgment of 27 September 2016, the Dutch Court of Appeal of Arnhem-Leeuwarden confirmed that the ship-owners were liable for the damage suffered by the cargo interests and the cargo interests were not obliged to contribute in general average. On the main issues the court decided as follows:

(1) A paramount clause referring to the Hague rules means that the Hague Rules apply and not the HVR;
(2) In accordance with art 5 Rome I the 'law of the country where the place of delivery as agreed by the parties is situated' was applied;
(3) Because Mexican law was the law applicable, the HVR did apply, despite the explanation of the paramount clause;
(4) As the inadequate planning of the voyage was found to be fundamental, the vessel was found to be unseaworthy before/at the beginning of the voyage ex art. III.1(a) HVR;
(5) As the ship-owners had dominion over evidentiary material, some of the weight of the burden of proof is shifted unto them;
(6) The ship-owners were not entitled to a contribution in general average as such an obligation would be 'null and void' ex art. III.8 HVR.

BELGIUM

Judgment of the Belgian Supreme Court of 26 September 2016

- ms "RAMONA" -

Speaker: Seb Couvreur

In its Judgment of 26th September 2016 in re ms "RAMONA" the Belgian Supreme Court decided that in order to qualify as a maritime claim pursuant to article 1 (1) (k) of the 10th May 1952 Brussels Arrest Convention a bunker delivery to a sea-going vessel needs to be based on (i) an obligation that either the charterer or the ship-owner has taken upon him or (ii) that can be attributed to them pursuant to the "concept of trust".

This judgment confirmed the position the Supreme Court had taken in its Judgment of 30th June 2016 in re ms "ANNETTE ESSBERGER".

Both judgments of the Supreme Court represent an important shift in Belgian arrest case law which had for decades upheld its doctrine in re "OMALA" and "HEINRICH J" according to which – and based on a literal reading of article 3 (4) of the Arrest Convention - a Claimant can always arrest the vessel to which his maritime claim was related even if the Owners of the vessel were not the debtor of the claim.

In the wake of the collapse of OW BUNKER, physical bunker suppliers (subcontractors of OWB) who had delivered bunkers on board the vessels, have sought to use the "OMALA" and "HEINRICH J" - doctrine to arrest ships and to secure their claim by submitting to the Arrest Judge that "a person other than the registered Owner of a ship" as provided for in article 3 (4) of the Arrest Convention means any person even if it is a person not involved in the operation of the ship.

After countless arrest proceedings in Belgium, the Supreme Court has now repositioned itself and clarified the position under Belgian law. Still, even after these recent judgments the saga continues…

Judgment of the Belgian Court of Appeal (Ghent) of 5 December 2016

- "mts TRAMONTANE" -

Speaker: Stefan Loos

On 12.03.2012 the mts Tramontane, loaded with 476 mt sulphuric acid, stranded on a sandbank after allegedly avoiding a collision with another vessel on the river Scheldt. The overall value of the vessel plus the cargo was € 340.000,00. The ms Noord West had come to aid the mts Tramontane and claimed a reward.

The case focuses on two issues: (1) Can this aid be qualified as a salvage operation under the International Convention on Salvage of 1989 and (2) How should the reward of the salvor be fixed?
Even though the parties agreed that this operation qualified as a salvage operation the court reiterated the conditions of a successful salvage and the conditions for the salvor to receive a reward.

The parties disagreed on the amount of the reward - the mts Tramontane initially offered a reward of € 1.000,00 whereas the ms Noord West claimed a reward of € 51.000,00. The court brings to mind the conditions to fix the reward and after considering the success of the operation and the value of the value at risk the court fixes the reward on an amount of € 25.000,00 (7,5%).

As marine salvage operations are commonly performed under a Lloyd's Open Form this case has to be considered as a rare case on salvage operations and rewards in the Belgian jurisprudence.

FRANCE

Judgment of the Cour de Cassation of 17 February 2015

Speaker: Sigrid Preissl

The question whether a jurisdiction clause in a bill of lading can be invoked against a third party receiver was for many years a hot issue, gave rise to heated debates among scholars, opened battlefields for lawyers who challenged jurisdiction of foreign courts and occupied already overloaded French courts.

In recent years it has become a rather colder issue, as the French Supreme Court's position became stable and predictable following a change of vision dating back to 2008 inspired by EU law ("Coreck Maritime", November 11th 2011).

In its decision rendered on February 17th 2015 the French Supreme Court ruled that it is not necessary to establish the existence of a consent to accept a jurisdiction clause under article 23 of the EU Regulation 44/2001 if the third party to the bill of lading succeeds into the rights and obligations of the shipper under the applicable national law.

In the matter submitted to the Court, the applicable national law according to the bill of ladings terms was English law which, according to an affidavit, provides that the consignee succeeds into the rights of the shipper. Thus, the jurisdiction clause referring litigation to the High Court of London was found valid.

The position adopted by the Supreme Court – which was predictable - is however regularly challenged by lower courts trying to resist to the Supreme Court's and European Court of Justice's case law as well as by scholars.

Judgment of the Cour de Cassation of 22 September 2015

- the "HEIDBERG" -

Speaker: Mona Dejean

On 22 September 2015, the Cour de cassation delivered an important decision in what is probably the most chronicled case on limitation of liability in France.

On 9 March 1991 the Heidberg, when leaving the port of Bordeaux destroyed an oil jetty belonging to an oil major company. The owners of the Heidberg claimed that they were entitled to limit their liability under the 1976 London Convention. The oil major company, which had suffered a loss 25 times greater than the amount of the limitation fund, claimed that the owners had committed a fault depriving them from their right to limit.

From 1993, a long series of decisions were rendered, including several decisions of the French Supreme Court. These decisions, the first of which were among the first Court decisions applying the 1976 Convention in France, were widely reported and illustrated the evolving trend of French case law in applying the limitation Convention.

The recent decision of the Cour de cassation has finally put an end to this long running story and held that the owners of the Heidberg were entitled to limit their liability under the 1976 Convention.

GERMANY

Judgment of the German Federal Court of Justice (BGH) of 26 July 2016

Speaker: Dr. Jenny Buchner

The German Federal Court of Justice (BGH, judgment of 26 July 2016, VI ZR 322/15) rendered a judgment in July 2016 which sheds new light on the liability of pilots under German law. The judgment is of great interest to the maritime community since the vast majority of maritime accidents in German waters do involve pilots.

Pursuant to German law (Section 21 Seelotsgesetz) the pilot is liable vis-à-vis the owner of the vessel which he assists for damages caused with intent or by gross negligence. Accordingly, the court's decision of July 2016 provides for a guiding interpretation of the pilot's liability for "gross negligence".

The law on its face requires the shipowner to prove that the pilot acted grossly negligent. This has been a very difficult task so far as the requirements to establish gross negligence by a pilot were extremely strict. The recent judgment by the German Federal Court of Justice indicates, however, a new approach, firstly in that only one severe mistake committed by the pilot might suffice to establish gross negligence. Secondly, the Court found that while the shipowner has to prove the pilot's severe mistake it is then upon the pilot to exonerate himself by establishing that he did not act subjectively grossly negligent.

Judgment of the Higher Regional Court Hamburg of 2 March 2017

- MOL COMFORT -

Speaker: Jette Gustafsson

In summer 2013 the container vessel MOL COMFORT broke in two during a voyage from Asia to Europe and sank, with 4,382 laden containers.

German courts were at the forefront of the judicial evaluation of the incident and already in 2014 judgments declared the accident to be due to an error in design of the ship, contractual carriers not being at fault. Whilst the first conclusion is still valid, new facts and an expert report now led the German jurisdiction to revise the former ruling that contractual carriers are not liable for lost cargo. In its judgment of 2 March 2017 (file number 6 U 86/16) Hamburg's Higher Regional Court has confirmed a previous Regional Court ruling that contractual carriers are liable because the crew could have recognized the unseaworthiness caused by the faulty design of the ship, given serious buckling of the hull which could not be explained by the cargo loads on board. This failure by the crew could fall under the concept of error in navigation but under German law, nautical fault does not automatically release the contractual carrier from liability.

Further, the decision contains important rulings on liability limitations both individual - based on the contract of carriage - and global – pursuant to the London Limitation Convention 1976/96 as well as on the applicability and the prerequisites of the container clause.

This final and binding decision is a landmark because it will have a great impact on the scope of the contractual carrier's liability in general.

UNITED KINGDOM

Judgment of the Supreme Court (Lord Mance, Lord Clarke, Lord Sumption, Lord Hodge and Lord Toulson) of 10 May 2017

- OCEAN VICTORY -

Speaker: Alex Hudson

[2017] UKSC 35 – 10 May 2017

Important decision by which the Supreme Court:

1. Confirmed the correct approach to maritime safe port warranties
2. Considered issues of limitation of liability and subrogated claims where there is co-insurance.

In October 2006, The "OCEAN VICTORY" ran aground and later broke apart at Kashima, Japan. As a result of the casualty, claims were brought against the time charterers for over USD 137 million. The claimants' case rested on their assertion that Kashima port was unsafe and thus time charterers were in breach of a contractual safe port warranty.

The dispute was heard by the English High Court in 2013, the Court of Appeal in 2015 and the Supreme Court in 2017, the key issues being:

1. Was there a breach of the contractual safe port undertaking? More particularly, consideration was given to:
   a. The definition of a safe port;
   b. Whether a combination of two weather conditions faced (swell from "long waves" and a severe northerly gale) was an "abnormal occurrence" thereby negating the safe port warranty.
2. Whether sub-charterers would be able to limit their liability in respect of any claim from the subrogated insurers, Gard;
3. Whether subrogated insurers Gard, were entitled, pursuant to their subrogated rights, to bring a claim against sub-charterers for breach of the safe port undertaking.

Judgment of the Court of Appeal (Lord Moore-Bick, Lord McFarlane and Lord Briggs) of 13 April 2016

- the "GSF ARCTIC III" -

Speaker: Andrew Stevens

[2016] EWCA Civ 372, [2016] 2 Lloyd's Rep 51 (see also first instance decision: [2014] EWHC 4260, [2015] 2 Lloyd's Rep 190)

English landmark cases on the law of contractual damages and how to interpret contractual terms – and there are many – are often maritime or offshore energy cases.

Transocean reveals some of the fault-lines in and between many of the well-known landmark cases on construing contracts and on excluding or limiting liability for "consequential loss". The High Court and the Court of Appeal came to lie on different sides of the divides.

In this case, the owner of a drill rig, hired on the LOGIC form, was in breach of certain terms relating to the state the rig should have been in. The key question was whether the hirer's overheads or expenses when hiring the rig (aka "spread costs" – e.g. costs of hiring in sub-contractors or equipment to be able to use the rig the hirer was paying for) could be recovered as damages.

- -Should the hirer be able to recover these as reliance losses? Would it otherwise be a bad bargain with no remedy for direct losses where the owner is in breach?
- -Or can the owner rely on an exclusion clause to limit its liability for these losses?
- -What if the exclusion clause refers to "consequential loss", a term known in English law as meaning indirect losses? Should the court interpret the exclusion clause against the owner and allow recovery of the direct losses?

We hope to see you all at the 13th edition of the YMLC in Belgium next year!