

[translation]

9 December 2011

First Chamber

10/02161

[stamp] In the name of the Queen]

RM/IF

Supreme Court of the Netherlands

Ruling

In the case of:

FURTRANS DENIZCILIK TICARET VE SANAYI AS,
established in Istanbul, Turkey,
APPELLANT in cassation,
counsel: Mr R.A.A. Duk,

-v.-

AUGUSTA DUE SRL,
established in Rome, Italy,
DEFENDANT in cassation,
counsel: Mr R.S. Meijer.

Hereinafter, parties will also be referred to as Furtrans and Augusta.

1. Proceedings in the fact-finding instances

For the course of the proceedings in the fact-finding instances, the Supreme Court refers to the following documents:

- a. The judgment of 26 February 2010 rendered by the Judge in summary proceedings of the Amsterdam District Court in the case 452317/KG ZA 10-426 Pee/MB;
- b. The appeal judgment of the Amsterdam Court of Appeal dated 16 March 2010 in the case 200.058.676/01 SKG.

The judgment of the Court of Appeal is attached to this ruling.

2. The proceedings in cassation

Furtrans brought an appeal to the Supreme Court against the appeal judgment of the Court of Appeal. The notice of appeal in cassation is attached to this ruling and forms part thereof.

Augusta has moved that the appeal be dismissed.

On behalf of Furtrans, the case was further explained by its counsel Mr M.V. Polak and Mr D. Horeman, attorneys in Amsterdam, and for Augusta this was done by its counsel and by Mr D. A. van der Kooij, advocate of the Supreme Court.

The opinion of the Advocate-General L. Strikwerda is that the appeal must be dismissed.

3 . Assessment of the argument

3.1 In cassation, the following can be used as a starting point:

(i) On 7 December 2007, parties have entered into a contract pertaining to the building and delivery of a seagoing vessel that was already under construction, named the Stromboli M. In the contract, Augusta is referred to as "purchaser" and Furtrans as "contractor". The contract price amounts to €29,950,000.--. The contract provides that during the construction of the vessel, the ownership rests with Furtrans.

(ii) Augusta has made a down payment in the sum of almost € 3 million. The balance of the contract price is due on the occasion of delivery of the vessel to Augusta. This was scheduled to take place on 4 February 2010. However, Augusta did not take delivery of the vessel, and, in spite of demands, has not paid the remaining part of the contract price.

(iii) Augusta is the owner of other vessels, amongst which the seagoing vessel "Costanza M".

(iv) After having obtained leave by the Judge hearing summary proceedings of the Amsterdam District Court, Furtrans made a

conservatory arrest on 24 February 2010 of the "Costanza M", which was at that time in the port of Amsterdam, in security of its claim for Augusta's leaving the remaining balance of the contract price unpaid, estimated inclusive of interest and costs at €29,366,615.--.

(v) The arrest made by Furtrans is governed by the Convention for the Unification of Certain Rules of Law Relating to the Arrest of Sea-going Ships, signed in Brussels, 10 May 1952, Trb. 1981, 165 (hereinafter: the Convention).

3.2 In the summary proceedings, Augusta claims that the arrest referred to under 3.1 (iv) above be lifted, on the ground that, in as much as relevant for these cassation proceedings, the Convention does not allow the arrest, since article 3 of the Convention stands in the way thereof. On this ground, the Court of Appeal has allowed the claim in the appeal proceedings. Furtrans challenges this decision in cassation.

3.3.1 The purpose of the Convention, as is apparent from the very name thereof, is to provide a uniform regulation with respect to the conservatory arrest of sea-going vessels. The Convention provides that an arrest of a seagoing vessel may only be made in security for the maritime claims

enumerated in article 1, heading and under 1. Furtrans argues that its claim against Augusta constitutes a maritime claim, that is to say a claim arising from the construction of a vessel (article 1, heading and under 1 and (1)). The Court of Appeal has not given an opinion on whether this allegation was correct or not, and therefore in cassation it must be assumed to be valid.

Article 3 of the Convention stipulates which seagoing vessels may be arrested by the creditor of a maritime claim. In accordance with article 3 paragraph 1 that can be, in so far as relevant for this matter, the vessel on which the claim arose and any other ship which is owned by the person who was, at the time the maritime claim arose, the owner of that particular ship in respect of which the claim arose. In addition, article 3 paragraph 4 provides that if, in the event of a charter by demise it is the demise charterer who is responsible for a maritime claim arising on the vessel and not the owner, the creditor is allowed to arrest this vessel or any other vessel owned by the charterer, but that no other vessel of the owner may be arrested in security of this claim. The second section of article 3 paragraph 4 adds that this - the provision referred to in the first section of

article 3 paragraph 4 - also applies to all cases in which a person other than the registered owner is liable for a maritime claim (in the authentic French and English text respectively: "L'alinéa qui précède s'applique également à tous les cas où une personne autre que le propriétaire est tenue d'une créance maritime" and "The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship").

3.3.2 Furtrans relies on this last provision for the arrest made. It argues that Augusta is a person other than the registered owner liable in respect to the maritime claim as referred to in that provision and that therefore, it can arrest any other vessel owned by Augusta, under which thus also the "Costanza M" mentioned above in 3.1 sub (iv).

3.3.3 This argument was deemed unfounded by the Court of Appeal in paragraph 4.8 of its ruling. According to the Court of Appeal, the phrase "a person other than the registered owner is liable in respect of a maritime claim" used in the second part of article 3 paragraph 4, is deemed to mean an other person who can be considered equivalent to the (demise)

charterer referred to in the first part of article 3 paragraph 4, in the sense that this other person has the authority or the effective control over the vessel on which the claim arose and who, as such, is liable for the claim. Seeing that Furtrans has in this case kept the ownership of and the effective power over the constructed vessel, the "Stromboli M", Augusta is not an "other person" in this sense, according to the Court of Appeal. For this interpretation of the section of the article, the Court of Appela referred to the travaux préparatoires of the Convention.

3.3.4 The grievance is that the Court of Appeal's ruling is incorrect, shortly put because it should not have read this limitation into article 3 paragraph 4 of the Convention.

3.4.1 The argument is successful. The text of the Convention - which is fundamentally decisive in this matter - does indeed not support the restrictive interpretation given by the Court of Appeal. After all, the second paragraph of article 3 paragraph 4 reads that the first paragraph also applies to *all* cases in which a person *other* than the owner is liable for a maritime claim.

In itself it would have made sense to incorporate this provision already in article 3 paragraph 1 of the Convention or to make it the (main) provision in paragraph 4, while deleting the present first paragraph, but this does not mean that the text of the second part of article 3 paragraph 4 should be interpreted in any other way than in accordance with its ordinary meaning. Nor does the latter follow from the other context of that provision or from the subject or purpose of the Convention, which, in as much as relevant in this matter, is not more than to regulate when a conservatory arrest of a seagoing vessel may or may not be made. It follows from the travaux préparatoires that the second part of article 3 paragraph 4 was added later to the draft text of the Convention while at that same time the words "subject to the provisions of the fourth paragraph of this article" were inserted (see pages 317 and 339 of the travaux préparatoires of the Convention which are published by the Comité Maritime International). This explains the wording of article 3 paragraph 1 and paragraph 4, in as much as relevant here, and thereby confirms, in so far, what follows from the text of the Convention.

3.4.2 Contrary to the Court of Appeal's ruling, the

above interpretation is confirmed by the travaux préparatoires. It is true that the proposal to add the second part to article 3 paragraph 4, which was done by the Dutch delegation, was primarily explained by referring to the notion of the ship operator [reder] known under Dutch law, as the person who is principally liable for the maritime claims against the vessel and who does not necessarily have to be the owner of the vessel, but the explanation was not restricted to that. Having explained that this particular notion of ship owner includes more than the mere concept of the demise charterer as referred to in article 3 paragraph 4 (at that point in time still article 3 paragraph 5 of the draft Convention) and that therefore the proposed second part was to be added with the description "any other person than the legal owner", the spokesman of the Dutch delegation continued the explanation to the proposal by adding:

"The same applies to *all* cases where a person other than the legal owner is liable in respect of a maritime claim. Of course, there are many people who are not owners, and their position must be considered. Therefore the proposal in respect of paragraph (I) and (V) of article 3 is to add to paragraph (V) the words 'in respect of all cases where a person other than the legal owner is liable in respect of a maritime claim'. I do not think that this proposal of ours can do any harm to anybody who is not a legal owner, and therefore no harm will be done by adopting it." (travaux préparatoires, p. 341).

There is but one way to understand this statement and that is that this proposal - which was accepted by the other delegations - meant that an arrest may always be made if a person other than the legal owner is liable for the maritime claim and that in that event, the arrest may also be made of other vessels owned by him. This is also confirmed by the fact that simultaneous with the proposal for the present second part of article 3 paragraph 4, the Dutch delegation proposed to amend the wording of article 3 paragraph 1 such that it would read that it would always be possible to arrest the vessel on which the claim arose and any other vessel owned by the *debtor of that claim* (travaux préparatoires, p. 315). After all, that proposal boils down to the same as the wording of the proposed second part of article 3 paragraph 4 and because of its obvious redundancy it was withdrawn by the Dutch delegation, even prior to the deliberations on the draft Convention (cf. the travaux préparatoires, pages 315-317). It may also be pointed out - even though this can not play a role in the interpretation of the Convention - that the contents of the Convention were afterwards so summarized as well by the Dutch delegation members J.T. Asser and R.P. Cleveringa, who both state that the Convention makes it

possible to arrest vessels owned by the *debtor* of the maritime claim (in NJB 1953, p. 756 and 758, and Zeerecht, fourth and last edition 1961, p. 232, respectively).

3.4.3 As appears from the travaux préparatoires, during the deliberations on the draft, objections were raised to the possibilities to arrest which were created by article 3 paragraph 4. The objection related to, in so far as relevant here, the ample possibility to make an arrest of the vessel on which the maritime claim arose, when the debtor of the claim is not the owner of the vessel. In that connection it was proposed to set as requirement that arrest is only possible in the event the creditor has the right of recourse or recovery in respect of the vessel for example on the basis of a right *in rem*. It can be understood from the travaux préparatoires (p. 344-348) that this proposition was rejected because the Convention solely regulates the possibility of conservatory arrest and not the possibility to have recourse against the vessel or to exercise any such right (article 9 of the Convention, in the draft instrument still article 10; compare also article 1 heading and paragraph 2, and the first

words of article 3 paragraph 1). The rules of international private law determine that the latter possibility will be governed by applicable national law or uniform international law. In connection with a Norwegian proposal, the Dutch delegate Asser remarked for instance:

"La question de savoir si une créance peut donner lieu au droit de saisir des navires appartenant à un propriétaire ou à un tiers a déjà été réglée. M. Asser rappelle aux délégués les explications données à ce sujet par M. de Grandmaison, président de la commission de rédaction. Celui-ci a expliqué clairement que le cas visé par l'amendement norvégien est réglé par l'article 10 du projet et que cet article est suffisant pour apaiser les craintes norvégiennes à cet sujet." (travaux préparatoires, p. 347).

In accordance herewith article 3 of the Convention can be so explained that on the basis of the Convention an arrest is only possible if under the applicable law recourse against or surrender of the ship is a possible result of the arrest. Although to the letter of the Convention it is true that an arrest is also possible beyond this case, in that situation the arrest should really not be allowed to be made because there is no lawful interest, since there can be no follow-up. After all, according to the Convention the sole purpose of the arrest is to secure a maritime claim (compare again

article 9 and article 1, heading and under 2).

3.4.4 The above interpretation of article 3 is in conformity with the interpretation of the Convention as accepted in many other States (cf. F. Berlingieri, *Arrest of Ships. A Commentary on the 1952 and 1999 Arrest Conventions*, 4th ed. 2006, appendix II, question 7.2, p. 367-369). Seeing that this case is about uniform rules, agreed upon in an international convention, this carries weight in answering the question of interpretation which is in issue here.

3.4.5 In addition, this interpretation of article 3 is also in conformity with the comments made by the Dutch government during the parliamentary approval of the Convention. It was noted therein that the possibility to make an arrest of a sea going vessel for a maritime claim against a person other than the owner as accepted by the Supreme Court in HR 29 June 1979, LJN AC6656, NJ 1980/34 6 - if for the claim a right of priority exists on the basis of a specific statutory provision, in the case of that decision the article 318r of the Commercial Code as it applied then - will continue to exist under the Convention (Parliamentary Papers II, 1981-1982, 17 110 (R 1192), number 1-3, p. 6).

3.5 Assuming that the claim alleged by Furtrans is a maritime claim within the meaning of the Convention, (see above under 3.3.1), the above leads to the conclusion that Furtrans did have the possibility to make the arrest mentioned above under 3.1 (iv), provided that, under the applicable law, it has the right to enforce its claim against the "Costanza M". After all this ship belongs to Augusta who is the debtor of its claim.

3.6 The ruling of the Court of Appeal cannot be upheld. After referral, it will have to be investigated whether Furtrans' claim is indeed a claim resulting from the construction of a vessel, constituting, on the basis of article 1, heading and paragraph 1 and (1) a maritime claim within the meaning of the Convention and whether under the applicable law, Furtrans can enforce that claim against the "Costanza M".

4. Ruling

The Supreme Court:

reverses the decision of 16 March 2010 of the Amsterdam Court of Appeal;

refers the case for further consideration to the Court

of Appeal in The Hague;

condemns Augusta to pay the costs of the cassation proceedings, estimated on the part of Furtrans up to this decision at €483.13 for disbursements and at €2,600.-- for fees.

This judgment was rendered by the vice-President J.B. Fleers as chairman and the Justices A.M.J. van Buchem-Spapens, F.B. Bakels, C.E. Drion and G. Snijders, and was pronounced in public by Judge J.C. van Oven on 9 December 2011.

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[handwritten] J.C. van Oven

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Issued as authentic copy

The Registrar of the Supreme Court of The Netherlands

09 December 2011

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