

## Appointment of maritime court surveyors in the Netherlands

*Also where the jurisdiction for the proceedings on the merits lies outside the Netherlands*

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Those familiar with the handling of maritime incidents – such as collisions, groundings, oil spills, the loss overboard of cargo, salvage cases, personal injury cases, etc.– know that an investigation into the possible cause and/or consequences of the incident is often desirable. Onsite (onboard) investigations, the collection of information and documentation and the hearing of Master and crew is often at the top of every party's list. In the Netherlands instructing maritime court surveyors to investigate an incident can be effected fairly quickly and often cost-effectively.

### The Project *Setting course for Permanent Maritime Court Surveyors*

Whilst Dutch law already offered some legal basis – in particular in case of (suspected) cargo damage – to have one or more court surveyors appointed, *inter alia* omissions were noted in the existing legal framework to quickly and effectively appoint maritime court surveyors in all types of maritime incidents.

A working group was created (at the assignment of the Maritime Chambers of the Rotterdam Court, the Dutch Transport Law Association and the Rotterdam School of Law) which was to investigate and report (shortly put) on the possibilities for the Rotterdam Court to appoint independent nautical and/or technical surveyors to

perform surveys into the cause, nature and scope of damage caused on board of vessels and by vessels. This includes damage suffered due to technical deficiencies in parts of the ship (such as its machinery, etc.).

On 04 April 2019 the working group *Setting course for Permanent Maritime Court Surveyors* published its final report in which it makes a number of suggestions for the expansion of the possibilities of appointing maritime court surveyors within the existing Dutch legal framework.

The working group found that in practice there was a need for 4 different types of maritime surveyors (with different competencies and assignments):

- the maritime court surveyor 'complete';
- the maritime court surveyor 'coordinator';
- the maritime court surveyor 'in writing';
- the maritime court surveyor 'court hearing'.

### *The maritime court surveyor 'complete'*

The maritime court surveyor 'complete' will board the vessel to investigate the matter along with the appointed party surveyors shortly after a maritime incident.

This court surveyor can ask the Master to be shown certain items, to be provided with (evidence) material and he can hear the Master and crew. Whilst statements by the Master and crew do not have the status of an official judicial hearing, such freshly taken statements prove useful in practice.

With permission of the parties the court surveyor can bring an additional expert with him who has certain specific knowledge, for instance of the main engine.

Where a party refuses to cooperate with the court surveyor, there can be sanctions.

Following completion of his work, the court surveyor is to issue his final survey report to the Rotterdam Court.

### *The maritime court surveyor 'coordinator'*

An investigation by a maritime court surveyor 'complete' can take long and can in given cases also be costly. For this reason, a maritime court surveyor 'coordinator' can also be requested for. Such type of surveyor has the same competencies as the court surveyor 'complete', but with a more limited assignment. This type of court of surveyor will also go on board to collect (written and oral) data, where necessary to take samples and, to take statements, etc. However, this type of court surveyor will not draw any conclusions and will not perform any further investigations but will hand over all collected material to the involved parties and their surveyors along with a report of the followed process. This therefore concerns mainly a fact-finding mission.

### *The maritime court surveyor 'in writing'*

The maritime court surveyor 'in writing' is the traditional court surveyor who is appointed in the course of a (maritime) court case where the court needs advice from one or more experts.

In such running cases, there will often already be survey reports by the party surveyors on which they parties will have responded.

By judgment, one or more experts will then be appointed (normally after the parties have submitted their views on the to be appointed expert(s) and the questions to be submitted to and answered by them).

In practice, the appointed expert arranges a meeting with the parties and their own experts to discuss the case, gather further information and, where this is still possible, for an onsite visit. But mainly, the appointed expert assesses the submitted file and survey reports.

Upon completion of his investigation, the expert shall forward his findings in the form of an own expert report to the court and the parties, after which the parties may take written statements in which they may once again comment on the issue.

### *The maritime court surveyor 'court hearing'*

This type of court surveyor can be appointed in running court cases prior to a (scheduled) court hearing.

The court will appoint one or more experts calling on them to attend the court hearing and to report orally at the hearing. For example, in a collision case, the appointed expert can be asked to advise at the hearing how the (AIS) data should be interpreted.

This type of expert will not issue a report but will give answers to questions from the court and involved parties. Following the hearing, the court registrar will issue a process-verbal of the hearing to which also the appointed expert can respond.

## Ex parte proceedings

The petition to appoint one or more maritime court surveyors, is lodged with the injunction judge of the Rotterdam Court (Maritime Chambers) who can give his/her decision on the petition fairly quickly (sometimes still the same day) also during the weekend and public holidays. The petition can be done on *ex parte* basis, meaning that the opposing party is in principle not heard on the lodged petition.

## Case law

Following the release by the working group *Setting course for Permanent Maritime Court Surveyors* of its final report, several maritime courts surveyors have already been appointed in different maritime cases of which I will mention the below 2 published cases.

### Rotterdam Court, 20.03.2020

Seatrade Group N.V. were the time charterers of a vessel owned by Mi-Das Line S.A. and bareboat chartered by Fresh Carriers Company Limited.

At the end of February 2020, the vessel – carrying reefer containers laden with fruit – sailed from Peru via Dover to the Dutch port of Flushing. During the voyage damage to the main engine occurred causing the vessel to slow down and be delayed by at least a week. That could have consequences for the cargo's shelf life and Seatrade had already been held liable for possible cargo damage. Therefore Seatrade wanted to investigate the cause of the engine problems and the resulting delay.

Seatrade applied to the injunction judge of the Rotterdam Court and requested the appointment of a maritime court surveyor 'coordinator' to go on board the vessel to put the questions (set out in the petition) to the Master and crew and to collect information and documentation (as set out in the petition) being.:

- the ship's particulars;
- the crew List;
- copies of the deck logbook (all pages between South America and Flushing);
- copies engine room logbook (all pages between South America and Flushing);
- the main engine particulars (including running hours-type of fuel-lubrication oils);
- the main engine maintenance history (including running hours) over last two years;
- a copy of the Main Engine spare part inventory – last update of spare part inventory;
- an inventory of the Main Engine spares on board at the time of departure;
- to take photos of the Main Engine damaged parts and the repairs as carried out.

The request was granted (decision of 20.03.2020)<sup>1</sup> with the limitation that the provision of the Main Engine maintenance history would be limited to the last three months and with instruction that if original data would be removed from board the court surveyor would need to return it on board within 36 (thirty-six) hours. The injunction judge held that if the shipowner would not

<sup>1</sup> ECLI:NL:RBROT:2020:3282.

cooperate with the court survey, the injunction judge could be contacted by telephone, who would then decide based on the then known information and possibly after hearing (representatives of) the shipowners whether to go onboard (himself/herself).

## *Rotterdam Court, 30.04.2021*

Shipowners Ocean Liberty Marine Limited (further: "OLM") had time chartered their vessel out to Louis Dreyfus Company Suisse S.A. (further: "LDC") which voyage chartered the vessel out to ST Shipping & Transport Pte. Ltd. for the carriage of coal from Amsterdam to India. When departing Amsterdam the vessel became damaged.

The fixture recap between OLM and LDC incorporated the NYPE C/P terms including its arbitration clause:

*17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at London, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial shipping men. English Law to apply.*

Whilst, therefore, the proper jurisdiction for disputes lay outside the Netherlands, this left intact the possibility to apply to the injunction judge of the Rotterdam Court for the appointment of a maritime court surveyor 'complete' to investigate the matter.

LDC requested the injunction judge *inter alia* to:

- a) order an inquest into the cause of the incident;
- b) appoint a maritime court surveyor to perform the investigation;
- c) allow the court surveyor to collect all documents which he considered to be relevant in respect of the cause of the incident;
- d) order OLM to fully cooperate with the court surveyor, which will in any case involves giving the court surveyor access to information requested by the court surveyor and to the vessel, and further to the Master and crew;
- e) determine that the court surveyor may ask questions to the Master and crew, and to include the answers in his report and to record any refusal to reply or provide documentation;
- f) appoint a judge who is available for a hearing and, where necessary, to take a decision if disputes arise between the court surveyor and the persons or parties involved during the investigation;
- g) allow the party surveyors to be present during the investigation if desired.

The request was granted (decision of 30.04.2021)<sup>2</sup> with denial of the above sub c request, the latter for the following reason:

*The request to allow the expert to collect all the documents which he considers relevant for his examination shall be rejected. This request has not been*

<sup>2</sup> ECLI:NL:RBROT:2021:4230.

sufficiently determined, also in view of the fact that OLM has already made a significant amount of information available, as transpired at the court hearing. Although it is conceivable that the expert needs more information, there is no room for the requested 'carte blanche' which does not correlate either with any exhibition obligations under Dutch or English law. It must be assumed that further documents will be made available in the context of the arbitral proceedings. Here the injunction judge takes into account that if the court surveyor needs documents and does not receive those and which he needs quickly in connection with the investigation, he may contact the appointed judge.

This shows that one should clearly and individually identify the requested documents (as was done in the above Seatrade case).

## Conclusions

The Netherlands have always been considered as a favourable jurisdiction to obtain security for claims by arresting assets such as vessels, bunkers, cargo and bank accounts.

In addition, the Netherlands are to be considered as a favourable jurisdiction to fairly easily obtain evidence in maritime incidents.

At Caland Advocaten we have experience with such cases, both on the defending side and on the requesting side.



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