Logistics service providers must be clear on general terms and conditions

November 08 2017 | Contributed by AKD NV

AUTHOR

Stefanie Roose

Introduction

Many logistics service providers – such as terminals, warehouse keepers, freight forwarders and shipyards – use general terms and conditions in order to limit their risks. They often make use of several sets of standard terms and conditions, depending on the activities being carried out (eg, terminal handling, pick and pack, warehouse keeping, cross docking and freight forwarding services). However, a recent district court case should serve as a warning to these service providers of the severe risk that no standard terms will be regarded as validly incorporated.

Facts

The case involved an incident that occurred when a motor yacht had to be tackled from the water to a quay by a Dutch shipyard. While the yacht was hanging two metres above the water, the rear cable of the shipyard's portal crane broke. This resulted in the yacht falling, with the rear end of the vessel landing in the water and the front end landing on the quay, causing severe damage to the yacht.

The yacht owner and its insurers filed a claim, arguing that the shipyard was liable for the damage to the yacht. The shipyard argued that it could rely on exonerations of liability in several sets of standard terms and conditions.

The shipyard carried out various types of service, including (winter) storage, maintenance, repairs and the sale of yachts. The yard had referred to the HISWA General Conditions of Contracts, Sales and Deliveries in its letter of confirmation to the yacht owners. In addition, a reservation form referring to the HISWA General Conditions for Renting and Letting Moorings and/or Cradles (for Boats and Accessories) and the yard regulations had been signed on behalf of the owner. The owner argued that it had no knowledge as to which set of terms and conditions would apply here and that, therefore, none had been validly incorporated.

The yard also argued that it could rely on a sign that it had placed on its premises which stated that "the yard does not regard itself liable for possible damage arising from use of cranes or transport of vessels".

Decision

The district court found that the yard had referred to three different sets of general terms and conditions, each having a different scope. However, the yard could not prove that it had clarified to the yacht owner which of these sets it wished to apply to the various parts of the agreement. It would have been the yard's responsibility to do so, especially since the parties had not carried out business with each other before. The court held that as it was not clear to the yacht owner which set of terms would apply to which activities, none of the sets applied. In reaching this conclusion, the court

referred to the Dutch Supreme Court decision on this matter in *Visser/Avéro* (November 28 1997).

The district court also held that the shipyard could not rely on the sign that it had placed on the premises. It found that the yard had not proven that the yacht owner saw the sign and tacitly accepted the contents thereof. Further, the court held that invoking exonerations on the basis of a sign only is not allowable. The yard was therefore held fully liable for the damage caused to the yacht.

Comment

In this case, the district court correctly applied the leading Supreme Court case law. The case serves as a reminder to logistics service providers that they should clearly roadmap to their customers the sets of general conditions that they wish to incorporate regarding the various services that they provide. If this is not done correctly, the service provider will be left empty handed and exposed to unlimited liability in cases of terminal handling, warehouse keeping, freight forwarding and shipyard services. Under Dutch law, these service providers are not protected by mandatory statutory limitations of liability.

For further information on this topic please contact Stefanie Roose at AKD by telephone (+31 88 253 5000) or email (sroose@akd.nl). The AKD website can be accessed at www.akd.nl.
