AN ACT OF GOD - FORCE MAJEURE?

It was a storm that ravaged Europe on the 18th January 2007. Storm warnings were released just days before and wind speeds reached 120 kmh. Containers stored on quays in Antwerp and Rotterdam literally took flight, creating huge risks for both shipping and terminals.

In contemplating a recourse claim for loss or damage, a client of the terminal must consider how it can overcome the defence of force majeure, or Act of God, on which the terminal will seek to defend the claim.

BELGIUM

The general principle under Belgian law is embodied in articles 1147 and 1148 of the Civil Code, which state: “the defendant will be held liable to pay damages for non-performance of an obligation, unless damage is proven to be due to an outside cause” and: “damages are not due, when the defendant was prevented from performing an obligation by Act of God”.

In this case, the Supreme Court of Belgium ruled that an Act of God can only result from an event that is independent of any human intervention, and that the defendant remains at fault if it could, or should, have foreseen the Act of God and did not take appropriate measures to prevent the damage.

Jurisprudence suggests that declared winds of up to 120 kmh, or even 130 kmh, are not considered exceptional and that resultant damage to containers stacked four or five high - not in blocks but free standing - may not constitute force majeure or Act of God.

This means that if the failure in performance is caused by the defendant’s gross negligence or intent, the defendant will be liable. Dutch law however, does not define gross negligence, and the concept has to be considered in the light of the circumstances in each case.

The Dutch Supreme Court has ruled that, in order to constitute gross negligence, a terminal must have acted reprehensibly, to the extent that this could be considered intentional. Poor judgment as to the gravity of a storm will therefore, not amount to gross negligence and force majeure will apply.

CONCLUSION: AN APPRECIATION OF FACTS

These examples highlight the absence of consistent criteria. Each storm damage claim should be assessed on a case by case basis. The court will consider, among other things, the applicable contract, the forecasted weather conditions and the manner in which the containers were stored. Contractual parties may wish, going forward, to specify in the contract the circumstances in which Act of God can be invoked.

THE NETHERLANDS

Under Dutch law (article 6:47 and 6:75 Civil Code) a contracting party is liable for every failure in performance of an obligation, unless the failure is not attributable to it.