

# ECLI:NL:RBROT:2018:2108

Body The District Court of Rotterdam

Date of judgment 15/03/2018

Date of publication 15/03/2018

Case number 10/994550-15

Branches of law Criminal Law

Special features First instance - three-judge division  
Judgment in a defended action

Indication of contents

The director of a large shipping company has been sentenced to a fine of €50,000 and a professional disqualification of one year for infringement of the EWSR.

Four ships were shipped from the ports of Rotterdam and Hamburg to beaches in India, Bangladesh and Turkey for scrapping.

The ships have been designated as waste within the meaning of the Framework Directive/EWSR. There is no reason to change the definition of waste with regard to ships.

Sources [Rechtspraak.nl](http://Rechtspraak.nl)  
Enriched judgment

## Judgment

**District Court of**

**Rotterdam** Criminal

Law Team 1

Public prosecutor's office no.:

10/994550-15 Date of judgment:

15 March 2018 Judgment in a  
defended action

Judgment of the District Court of Rotterdam, three-judge economic division for criminal cases, in the case against the accused:

**[accused]** ,

born in Amsterdam on [date of birth] ,

registered in the Persons Database at the address:

[town/city] ,

authorised lawyer *mr.* H.W.A.A. de Jong , lawyer practising in Rotterdam.

## **1 Examination at the hearings**

Having regard to the examination carried out at the hearings held on 8, 14 and 15 February and 1 March 2018.

## **2 Indictment**

The defendant is charged with the offences set forth in the summons. The text of the indictment is attached to this judgment as Annex I.

## **3 Demand of Public Prosecutor**

The public prosecutors *mr.* E.C. Nieuwenhuis and *mr.* K. Broere have demanded: -

a judicial finding of facts regarding the primary charges in 1, 2, 3 and 4;

- sentencing of the defendant to serve a term of imprisonment of six (6) months, including two (2) months on probation, with a probationary period of two (2) years.

### **4. Assessment of the evidence <sup>1,2</sup>**

Briefly put, the accused is accused of having carried out the shipment of four ships - the Spring Bear, the Spring Bob, the Spring Deli and the Spring Panda - whether or not together with another person or other persons, in breach of the provisions of European Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (EWSR), or that he, whether or not together with another person or other persons, issued the instruction to do so or provided the actual leadership therein.

#### *4.1. Position of the defence*

*Principally*, the defendant must be acquitted of the offences he has been charged with, because the EWSR does not apply. After all, shipping-related waste is regulated by other international legal instruments. This is expressed in the provision in Article 1(3)(a) and (b) of the EWSR. This provision precludes the application of the EWSR to operational ships that are recycled.

*Alternatively*, it was argued that the ships referred to in the summons could not be classified as waste within the meaning of the EWSR. The four ships in question all underwent a lifetime extension in 2009, during which they were modernised, and as a result would be able to remain operational for at least another ten to twenty years. They held all the required certificates and they were in a good state of repair. The ships were used for both refrigerated and dry cargo and were in commercial service until the very last moment. Therefore, according to common opinion, it is not logical to apply the waste concept to these ships, which also represented millions of euros in value at the time of sale.

However, if it is assumed that an operational, certified and seaworthy ship can be a waste material, the dynamics of ship phasing-out should be taken into account. Factors such as the supply of cargo, the price of cargo, the demand for second-hand ships, the prices of second-hand ships, market expectations and developments in steel prices, recycling, etc., etc., all intermingle with one another. It is therefore not easy to identify the moment at which a decision to recycle a ship is actually taken. Particularly important are the statements made on this subject to the examining judge by the witnesses [employee S.], Dr. Mikelis and Prof. Van Calster. In view of all the constantly changing factors, uncertainties and ambiguities that surround the sale of an operational ship right up to the last moment, according to the defence, the qualification of a ship as waste material is determined by the moments at which:

- principally: the ship is delivered for recycling at a shipyard or a location intended for this;
- alternatively: ownership of the ship is transferred in accordance with the agreement, with a view to recycling;
- further in the alternative: the recycling agreement is signed/comes into being.

In all cases, this means that the accused must be acquitted. After all, the four ships at issue in this case were not in the area of operation of the EWSR at any of these three points in time.

**Further in the alternative** it has been argued that no disposal took place, and that there was no hazardous waste.

The defence has also taken the position that [accused] cannot be regarded as perpetrator. There is no evidence that the accused played a role in connection with the shipment of the ships that could be qualified as committing, abetting, commissioning or (a form of) actual management. The [accused], as a director of [accused legal person 1], only performed financial activities. He had nothing to do with the operational side of the [group]. The [accused] must be fully acquitted. More specifically, it has been argued with regard to the Spring Bear that the defendant cannot be regarded as perpetrator because he did not have power of disposition with regard to this ship.

#### 4.2. Position of the public prosecutors

The public prosecutors have demanded a judicial finding of fact for the principal charges against the defendant and rejection of all the defences put.

#### 4.3. Judgment

##### 4.3.1.

##### **Introduction**

The court states first and foremost that it is not so much the individual facts of this case that are in dispute. In essence, this criminal case concerns the question of whether these acts involve the export or shipment of waste within the meaning of the EWSR and, if so, who was involved in them in a criminally relevant manner. The court will therefore begin with a presentation of the applicable legal framework and then of the facts. It will then examine the question of whether an illegal shipment of the ships occurred as referred to in the summons within the meaning of the EWSR, will discuss the defences put forward in that context and will examine various specific aspects of the indictment. Finally, the individual role of the defendants in this criminal case will be discussed.

##### 4.3.2. **Legal framework**

The following are particularly relevant.

- On the grounds of Article 10.60(2) of the Environmental Management Act (Wet Milieubeheer - WM) it is prohibited to engage in any of the activities referred to in Article 2(35) of the EWSR. Violation of Article 10.60(2) of the WM is punishable under Article 1a(1) of the Economic Offences Act (Wet op de economische delicten - WED). If committed intentionally, this economic offence is a criminal offence under Article 2 of the WED.

- The scope of the regulation is defined in Article 1(1) and (2) of the EWSR. According to the third paragraph of this Article, the following are not covered by the EWSR:

- a. a) the offloading to shore of waste, including waste water and residues, generated by the normal operation of ships and offshore platforms, provided that such waste is subject to the requirements of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (Marpol 73/78), or other binding international instruments;

b) waste generated on board vehicles, trains, aeroplanes and ships, until such waste is offloaded in order to be recovered or disposed of.

(...)

- Pursuant to Article 2, opening words and in (1) of the EWSR, 'waste' means waste as defined in Article 1(1)(a) of Directive 2006/12/EC. This Directive has been replaced by Directive 2008/98/EC of 19 November 2008 (hereinafter referred to as Directive 2008). At the time of the offences in the indictment in 2012, Directive 2008 was applicable. According to Article 3, opening words and in (1) of Directive 2008, 'waste' means any substance or object which the holder discards or intends or is required to discard.

- As to the meaning of the term 'discard', the court refers to the settled case law of the Court of Justice of the European Union and in particular the judgment of 12 December 2013 (C-241/12 and C-242/12; Shell). From this, it follows that all the circumstances of the case must be taken into account when assessing whether the holder of an object or substance in question actually intended to discard it. In doing so, it is necessary to bear in mind the objective of Directive 2006/12 (now Directive 2008), namely that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. This means that the term 'discard' cannot be interpreted restrictively.

- According to Article 2, opening words and (35) of the EWSR, where relevant, illegal shipments are shipments of waste:

a. a) without notification to all competent authorities concerned pursuant to this Regulation; or

(b) without the consent of the competent authorities concerned pursuant to this Regulation; or

(...)

f) contrary to Articles 34, 36, 39, 40, 41 and 43, or

(...)

- Article 34 is contained in Title IV, Chapter 1 of the EWSR, which regulates exports to third countries of waste intended for disposal. According to the first paragraph of this article, the export from the Community of substances intended for disposal is prohibited. An exception is made in paragraph 2 for exports to EFTA countries.

- Article 36 is contained in Title IV, Chapter 2, Title 1 of the EWSR. It includes the provisions relating to exports of waste destined for recovery in countries to which the OECD Decision does not apply. Article 36 opening words and (1) prohibits exports from the Community of the following types of wastes destined for recovery in countries to which the OECD Decision does not apply:

a. a) wastes listed as hazardous in Annex V;

b) (...);

c) hazardous wastes not classified under one single entry in Annex V;

d) mixtures of hazardous wastes and mixtures of hazardous and non-hazardous wastes not classified under one single entry in Annex V;

(...)

#### 4.3.3. Statement of facts

##### 4.3.3.1. Structure of the [group]

In order to provide insight into ownership relationships and control with regard to the ships in question, the structure of the [group] in 2012, insofar as relevant, is briefly explained below. A schematic representation can be found on page 55 of the main file.

The shares in [accused legal person 2] were held by [accused legal person 1] [accused 2] was the general manager of [accused legal person 2]<sup>3</sup> [accused] and [accused 3] were, together with a number of others, directors of [accused legal person 1]<sup>4</sup>

The shares in [accused legal person 3], [accused legal person 4], [accused legal person 5] and [accused legal person 6] (the shipowners) were indirectly held as follows:

- the shares in [accused legal person 4], [accused legal person 5] and [accused legal person 6] were indirectly held by [accused legal person 2]<sup>5</sup> and thereby indirectly also by the sole shareholder of [accused legal person 2], [accused legal person 1]
- [accused legal person 1] was (through intermediary links other than [accused legal person 2] indirectly a holder of 50% of the shares in [accused legal person 3]<sup>6</sup>

In 2012, [accused legal person 4], [accused legal person 5] and [accused legal person 6] had as sole director Seatrade Management B.V.<sup>7</sup> The latter company has as its managing director and sole shareholder [accused legal person 2]<sup>8</sup>

[legal person 8] (based in Antwerp) booked in the market cargoes for a pool of ships. The Spring Bear, Spring Bob, Spring Deli and Spring Panda were part of this pool.<sup>9</sup>

##### 4.3.3.2. With regard to the ships

As has already been said, this case concerns four ships, namely the Spring Bear, the Spring Bob, the Spring Deli and the Spring Panda. These were so-called refrigerated vessels/reefers, all of which were built in 1984. Each of the ships had a registered owner, a beneficial owner and a commercial operator:<sup>10</sup>

	<b>Spring Bear</b>	<b>Spring Bob</b>	<b>Spring Deli</b>	<b>Spring Panda</b>
<i>registered owner</i>	[accused legal person 3] (until 5 June 2012)	[accused legal person 4] (until 3 May 2012)	[accused legal person 5] (until 27 May 2012)	[accused legal person 6] (until 1 June 2012)
<i>beneficial owner</i>	[accused legal person 2] (until 5 June 2012)	[accused legal person 2] (until 3 May 2012)	[accused legal person 2] (until 27 May 2012)	[accused legal person 2] (until 1 June 2012)
<i>Commercial operator</i>	[legal person 8] (until 5 June 2012)	[accused legal person 9] (until 3 May 2012)	[accused legal person 9] (until 27 May 2012)	[accused legal person 9] (until 1 June 2012)

##### 4.3.3.3. What happened to the ships?

All four ships were beached in 2012 and then scrapped. For the Spring Bear this was in Alang (India), for the Spring Bob this was in Chittagong Roads (Bangladesh) and for the Spring Deli and Spring Panda it was in Aliaga (Turkey).<sup>11</sup>

The route sailed by each of the ships - as far as relevant - can be summarised as follows:

Spring Bear: departure from Rotterdam on 15 April 2012, via Alexandria (Egypt), Hormuz Street, Fujairah (UAE) to Alang (India; arrival 6 June 2012).

Spring Bob: departure from Rotterdam on 19 April 2012 via the Suez Canal to Fujairah (UAE) and then to Sharjah and Khor Fakkan and back again to Fujairah. From Fujairah the ship sailed to Chittagong Roads (Bangladesh).

Spring Deli: departure from Rotterdam on 1 May 2012, via Hamburg (Germany), Antwerp (Belgium), Al Khums (Libya) and Malta to Aliaga (Turkey; arrival 3 June 2012).

Spring Panda: departure from Hamburg (Germany) on 9 May 2012, via Antwerp (Belgium), Al Khums (Libya) and Malta to Aliaga (Turkey; arrival 9 June 2012).<sup>12</sup>

During this voyage, Spring Bear transported fruit from Egypt to Iran. Spring Bob had no cargo during this voyage. During these trips, Spring Deli and Spring Panda transported cars from Antwerp to Libya.<sup>13</sup>

#### 4.3.3.4. *Timeline of events*

Prior to and during the voyages of the ships referred to above, a number of events occurred which the Court will describe below in chronological sequence. This first addresses a number of circumstances which concern multiple ships or Seatrade as such and then some specific points per ship.

#### **With regard to multiple ships or Seatrade as such February**

##### 2012

In an email of 2 February 2012, [accused 3] asked [accused 2], with a copy to [accused], how far he had got with the Spring investigation as discussed last week. [accused 2] sent the email of [accused 3] to [employee P.] (working for [accused legal person 9] , hereinafter: [employee P.]) and asked for input. [employee P.] replied, still on 2 February 2012, that there were still no firm offers, because they had not yet entered the market openly. In his response, [employee P.] addressed the marketability of the auxiliary engines and concluded his email with the statement "Can cautiously bring the message to the market, but then it will start getting around".<sup>14</sup>

Further emails were sent on 3 February 2012, including by [accused 2] to [accused 3] with a copy to [accused], concerning the sale of the auxiliary engines for use as units on container vessels.<sup>15</sup>

On 7 February 2012, Baltic Union Shipbrokers sent an email to [employee S.] (working as pool manager for [legal person 8] , hereinafter: [employee S.]).<sup>16</sup> This email has the subject 'scrapping of Spring class' and starts with the following remarks:

*We understand that you are considering the scrapping of your five ships in the Spring class. "We note that you have replaced all four generators on each ship with new systems, built in 2008/2009 and installed in 2009/2010. We understand that you hope to have created some more value on top of the basic scrapping price with these new machines. We have talked to a number of cash buyers of end-of-life ships who believe, although they acknowledge that the new generators are a positive selling point, that the price would only rise by USD 5 - 10 per metric ton of unladen vessel, i.e. USD 40,000 - 80,000 per ship (USD 10,000 - 20,000 per set of generators). The only somewhat more constructive buyer we found was GMS - Global*

*Marketing Systems which indicated verbally that it might be prepared to pay USD 100,000 / 150,000 per set in addition to the normal scrap price, provided that this buyer can acquire all 20 sets, i.e. all five<sup>17</sup> ships in one purchase'.*

A possible transaction with Global Marketing Systems was discussed in the email. Delivery would have to take place in Alang - Sachana - Mumbai, at the option of the buyer. The 'normal GMS scrapping agreement' would apply in such a case. [employee S.] forwarded this email to [accused] and [accused 3]. [employee S.] concludes the email with "I would like to hear the intentions regarding the timing of the deliveries so that we have a starting point for the discussion". [accused], still on 7 February 2012, forwarded the email in turn to [accused 2].<sup>18</sup> [employee S.] wrote in his email that Baltic Union Shipbrokers had issued an update on the possibilities and noted that the timing of the delivery would have a major impact on the issue of the unladen vessel price/tonnage.

In the minutes of the Fleet Management of 10 February 2012, under item 5 "Subjects", item "Cash Flow management", it was noted that the cash flow projects were not achieved in January - February. Due to a low level of revenue, fast payments to creditors could not be made.<sup>19</sup>

#### March 2012

On 9 March 2012, [accused 2] sent an email announcing that a day earlier the decision had been taken to start the 'phase out/scrapping of the Spring types'.<sup>20</sup> To this end, a communication group was set up called 'Spring phase out'. In that email, the members of this group were referred to as MS, VPS, RS, MJN, JHK, SLS. This involved [employee S.], [employee P.], [employee R.S.], [accused 2], [employee K.] and [employee L.]<sup>21</sup> (in this judgment, they will be referred to hereinafter at all times by their surnames). The email mentions the following action points: (i) complete the last LWT including the last container upgrades, (ii) prepare a list of all things to be taken off board and (iii) a possible change of flag for sale in connection with 'the position in ranking on North Sea Platform scrapping list'.

The positions of [employee S.], [employee P.] and [accused 2] have already been mentioned above. [employee R.S.], [employee K.] and [employee L.] were working for [accused legal person 9]<sup>22</sup>

Also on 9 March 2012, [employee K.] - after consultation with [employee P.] - emailed the captains and chief engineers of the ships that it had been decided that all Spring ships would be taken out of service in April. All orders/repairs/maintenance were stopped or cancelled and the vessels were to remain in service for as long as it lasted, albeit at a low cost level.<sup>23</sup>

On 12, 14 and 21 March 2012, emails were sent concerning the removal of items from the Spring vessels, including navigation equipment.<sup>24</sup> The removal of the spare ship's propellers was also ordered and Newlyme was told to examine and label the control systems of the refrigeration installations on board the Spring ships, with a view to dismantling.<sup>25</sup>

#### April 2012

On 4 April 2012, [employee K.] emailed to the email group 'Fleetteam Novas' a schedule for the withdrawal of the Spring ships from service:

*"Spring Bob Rotterdam*

*19/04 Spring Deli Rotterdam*

*03/05*



Spring Panda Rotterdam 10/05

Spring Bear Rotterdam 17/05"

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On the same day, [employee K.] also emailed [employee J.] (who, according to his emails, was working for [the group], presumably [accused legal person 9], hereinafter: [employee J.]<sup>27</sup>) about the certification of the ships:

*'It is expected that all rec. will be extended after class has been informed about the single voyage scenario. What we have to be alert to are the annuals that as such have an expiration date before which they have to have taken place (so no window any more). 28*

On 10 April 2012, [employee J.] also emailed about the removal of items from the ships, such as paintings, reproductions, portraits of Queen Beatrix, sextants and manual speed logs.<sup>29</sup> On 13 April 2012, email correspondence took place concerning the removal of the Freon.<sup>30</sup>

On 12 April 2012, [employee S.] emailed [accused 2], with a copy to [accused 3] among others, about the proceeds of a sale in the current state in Fujairah.<sup>31</sup>

*'The latest deals based on delivery in its current state at Fujairah reportedly cost about USD 15/lt. For a Spring type this would mean 15 x 8,000 = USD 120k lower gross proceeds. Savings would be made on agent costs on arrival in India, which would amount to approximately USD 30k. Moreover, it would probably save at least about 5 days of operational costs x 4 = 20k. This would make the net sales proceeds for the owner about 70k lower. Would it be worth 5 x 70k = 350k not to end up on the name and shame list ? Alternatively, would it be possible to change ownership quickly, for example in the Persian Gulf, before the ship sails to Alang? It would have to be a flag state that does not require inspections or anything else.*

*Is that possible, what would it cost? The Indian owner of the Viking Star is said to have switched from a flag state to the Comoros. We would, of course, need the name of the new owner because, as seller, he would have to enter into the contract with the scrappers. Please let me know your thoughts about this."*

[employee L.] responded to this email on 13 April 2012, in an email to [employee S.] and [accused 2], with a copy to [accused 3] :<sup>32</sup>

*'I have seen your calculations. Let's assume that we save: 7 days operational cost, 3 days sailing and at least 4 days waiting in Alang while we are making paperwork and formalities in order. This does not take into account more days if the schedule for beaching is unfavourable. For changing flag and setting up [new] companies we have to assume at least Euro 20,000 (USD 25,000) per ship.*

[employee S.] replied to this by email to [accused 2] and [employee B.] (general manager of [legal person 8], hereinafter: [employee B.])<sup>33</sup> with copy to, inter alia, [accused 3] :

*'So that would mean 2 x USD 4k + USD 25k = USD 33k extra cost, which reduces the difference to USD 37k per ship = 5 ships x 37 = total USD 185k investment not to end up on the list. Would you please substantiate/state whether that means that we are selling in the current state in Fujairah or not?" 34*

As a follow-up to this, [employee L.] sent an email to [employee S.], [accused 2] and [employee B.], with a copy to [accused 3], among others. :<sup>35</sup>

*'In addition to the following, we would like to remove the new refrigeration system controls of the Spring ships from the vessel and bring them ashore.*

*The latter cannot take place in Alang, customs and authorities do not allow it, but it is possible in Fujairah. Control units per ship USD 100,000. I just discussed the issue below with Vincent. If the ship is delivered to a new owner in Fujairah we can take the Freon off board in Fujairah. Recovered Freon sells for approximately USD 75,000 per ship. And of course the Freon can be reused in other ships of our fleet. We have very little time to set up a new company and change flags and we would lose even more days of operation before we could transfer the ship to its new owner."*

#### May 2012

On 8 May 2012, the Living Environment and Transport Directorate Inspectorate spoke to [accused 2] and [employee K.] by telephone and informed them that they had heard that the Spring Bear might be shipped to India for scrapping, and [accused 2] denied this. He indicated that he was familiar with the EWSR.<sup>36</sup>

[accused] requested ING's permission by email on 30 May 2012, with a copy to [accused 3] among others, for the sale of the Spring Deli and Spring Panda. On 31 May 2012, [accused] emailed [employee L.] and [employee S.] that ING had agreed to this.<sup>37</sup>

#### August 2012

In August 2012, [the group's] magazine stated that the reefer market was under pressure in 2012 and that the first quarter of 2012 did not meet expectations, which impeded cash flow. In order to create a healthy fleet, it was decided to recycle a number of ships, including those of the Spring class.<sup>38</sup>

#### **More specifically about the Spring Bear**

On 11 April 2012, [employee D.] emailed the Captain of the Spring Bear that the bunker plans had been changed. In his email, [employee D.] wrote:

*"We are currently sending your ship to Egypt to load for Iran (...) and then later to Alang Bay in India. The intention is that you sail with economical consumption and with just enough bunkers, since we need to arrive in India with bunkers for only about 4/5 days. (...)"*

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On 12 April 2012, the Captain of the Spring Bear emailed [employee H.J.] ('employee H.J.')

that on the last voyage from Rotterdam to India the ship would still be used for cargo transport and that he was not sure whether an annual inspection was necessary.<sup>40</sup>

[employee S.] emailed [employee L.] on 12 April 2012 that the Egypt-Iran cargo had been booked and asked how many bunkers the Spring Bear needed to safely reach the Persian Gulf and to reach Alang after Iran.<sup>41</sup> In response to this, further consultations were held by email about the quantity of bunkers.<sup>42</sup>

Crew members [1] and [2] stated as witnesses that they were on the Spring Bear on 14 and 15 April 2012 and that the captain of the Spring Bear had said that it was the intention to sail the ship from Rotterdam to India to be scrapped there.<sup>43</sup>

At the end of April and in the month of May 2012 there were many emails about the amount of fuel and lubricating oil on the Spring Bear and the possibilities to save fuel. The objective was to arrive with the smallest possible quantity in Alang, India.<sup>44</sup>

On 24 May 2012, [employee A.S.] (in-house lawyer employed by [accused legal person 9], hereinafter: [employee A.S.]<sup>45</sup>) sent an email to [employee S.] with copies to [employee R.S.], [accused 2] and [employee L.], among others, that she had been in contact with [involved legal person]. Consideration was given to the possibility of obtaining permission from RBS (the court understands the Royal Bank of Scotland) for a back-to-back sale in which context the mortgage would be cancelled one or two days before delivery. The possibilities were also discussed if the RBS did not agree.<sup>46</sup>

That same day, an email exchange took place between [accused 2], [accused], [employee S.], [employee A.S.], [employee R.S.] and [employee L.]. [accused 2] emailed that the shares of [accused legal person 3] and thus the property would be transferred to [involved legal person]. The ultimate purchaser would buy the vessel from [involved legal person]. [accused] indicated that he had spoken to 'MK' and agreed to transfer the shares for USD 1 million in vendor credit.<sup>47</sup>

On 25 May 2012, Baltic Union Shipbrokers sent the draft MoA to Mainstream Shipping and [employee S.] for comments. [employee S.] forwarded this email to [employee A.S.] and [employee L.] with a copy to [accused 2].<sup>48</sup>

On 30 May 2012, [employee H.J.] emailed the Captain of the Spring Bear that a transfer of management would take place at Khor Fakkan or Fujairah. He wrote about this:

*'This is a paper act required for the last voyage. (...) The reason for the transfer of management is just because of the paperwork; in practice nothing will change. We will remain your point of contact and the crew will stay on board until they reach their final destination.'*<sup>49</sup>

Later he emailed the Spring Bear crew that landing Freon in Fujairah is rather complicated and expensive. That is why the stock of Freon remained on board.<sup>50</sup>

[employee S.] emailed [MK] on 30 May 2012 with a copy to [employee A.S.] that the purchase of the shares in the Spring Bear was expected to be effected that day or the next day with retroactive effect from 24 May.<sup>51</sup>

An Agreement for the purchase and sale of shares was concluded between [involved legal person 2] and [involved legal person 3], dated 24 May 2012 (court: but in fact signed later), for the sale of the share capital in [accused legal person 3]. This agreement states a purchase price of USD 1,000,000.<sup>52</sup>

[accused legal person 3] and [accused legal person 9] signed a Termination Agreement, dated 1 June 2012. This states that [accused legal person 3] had notified [accused legal person 9] that the ship management agreement with respect to the ship had been terminated on 24 May 2012 and that from that date the ship had been placed under the control of [involved legal person]; [accused 2] signed on behalf of [accused legal person 9].<sup>53</sup>

A Memorandum of Agreement, dated 24 May 2012, was concluded between [accused legal person 3] and [involved legal person 4] for the sale of the Spring Bear. This agreement states a purchase price of USD 381.21 per ton, with a total price of USD 3,184,959.99. According to article 5, delivery was to take place in Alang with an expected delivery date between 1 and 15 June 2012. According to Article 21, the seller will assist in beaching the vessel at the scrapping yard indicated by the buyer.<sup>54</sup>

On 31 May 2012 [SL] emailed [accused] with a copy to [accused 3] a decision that had to be signed by [accused legal person 1] in connection with the transfer of shares from [accused legal person 3] to [involved legal person 3].<sup>55</sup>

On 3 June 2012, [employee S.] informed [employee L.], among others, with a copy to [accused 2] that the buyer had chosen Alang as the port of delivery.<sup>56</sup>

On 11 June 2012, [employee R.S.] sent the certificate of non-encumbrance for the Spring Bear on to [employee A.S.] , [employee L.] and [accused 2] with a copy to [accused].<sup>57</sup>

On 12 June 2012, [employee L.] emailed the captain of Spring Bear that the remainder of the purchase price had been received, the ship had been transferred and that the captain had to follow the buyer/agent's instructions to beach the ship. He asked the captain to let him know immediately when the ship had been beached.<sup>58</sup> The next day he informed [accused 2], [employee P.] and [employee S.] that the Spring Bear had been beached.<sup>59</sup>

### **More specifically about the Spring Bob**

On 10 April 2012, [employee L.] asked Bureau Veritas to postpone mandatory inspections for the Spring Bob. In his email, [employee L.] wrote:

*"The owner of the ship Spring Bob, which is managed by us, has decided to have the ship scrapped and to transfer it to the new owner within three months. ((...)) Due to the withdrawal from service and sale of the ship, [accused legal person 9], as manager of the ship, is contacting Bureau Veritas and asking it to consider and grant a three-month extension of the following matters (...)."*

Bureau Veritas agreed to this request, subject to conditions, also on 10 April 2012.<sup>60</sup>

On 13 April 2012, [employee K.] emailed a number of recipients that the Spring Bob would be taken out of service after Hamburg and that the last voyage to its final destination would take place without refrigerated cargo. It was therefore decided to dismantle the control system of the refrigeration system. According to [employee K.], this meant that after the unloading of the cargo in Hamburg on 16 April the ship would not be able to transport cargo requiring climate control.<sup>61</sup>

On 16 April 2012, an email was sent about the quantity of bunkers - fuel - the Spring Bob would need. This was initially based on the assumption of a voyage to Alang. In response, [employee L.] emailed the captain of the Spring Bob that the plans had changed and that the Spring Bob was now sailing directly from Hamburg / Rotterdam to Fujairah with perhaps a standard cargo for the Gulf and he asked for information about the minimum number of bunkers needed. In response, further email consultations were held on the amount of fuel the Spring Bob needed to reach its final destination.<sup>62</sup>

The Spring Bob left Rotterdam on 19 April 2012. [Pilot 1] stated as a witness that the captain and mate of the Spring Bob then told him that the Indian crew who would take over the ship would beach it in India for scrapping.<sup>63</sup> [Pilot 2] stated as a witness that the Captain had told him that it was the ship's last voyage.<sup>64</sup>

A Memorandum of Agreement, dated 30 April 2012, was concluded between [accused legal person 9] and [legal person 5 concerned] for the sale of the Spring Bob. This agreement states a purchase price of USD 415.30 per ton, with a total price of USD 3,233,289.08. According to article 5, delivery was to take place in Fujairah with an expected delivery date between 7 and 11 May 2012. Article 20 of the agreement stipulates that the ship is sold exclusively for guaranteed scrapping and recycling, on pain of compensation of USD 3 million.

The Harbour Master of Alang will issue a declaration on recycling.  
The agreement was signed on behalf of the seller by [accused 2].<sup>65</sup>

On 1 May 2012, [employee S.] emailed [employee A.S.] and [employee L.], with a copy to [accused 2], [accused 3] and [accused] among others, stating that agreement had been reached on the sale. The buyer's intention was to have the ship scrapped in Alang (India).<sup>66</sup>

Also on 1 May 2012, [employee A.S.] sent [accused] a draft letter to ING requesting permission to sell the Spring Bob.<sup>67</sup>

The last instalment of the payment for the Spring Bob was received on 25 May 2012. [accused 2] and [accused 3] were informed of this (in the form of a copy of an email from [employee O.], controller for [accused legal person 9] addressed to [employee S.] and [employee R.S.]).<sup>68</sup>

Delivery of the Spring Bob was delayed and finally took place on 26 May 2012. This was confirmed by [employee L.] by email to a number of persons, including [accused 2].<sup>69</sup>

### **More specifically about the Spring Deli**

On 19 March 2012, [employee J.] emailed the captain and chief engineer of the Spring Deli that the renovation program had been halted due to the owners' plans to decommission the Spring ships and that therefore only a minimum of maintenance had been carried out, unless the plans were to change again.<sup>70</sup>

On 22 April 2012, [accused legal person 9] emailed the captain of the Spring Deli about the sale of the spare propeller, that was being worked on.<sup>71</sup>

Regular emails about the bunkers were exchanged with the captain of the Spring Deli.<sup>72</sup> On 25 April 2012, [employee J.] (at the request of [employee K.]) emailed the captain of the Spring Deli in this regard:

*"As regards bunkers of fuel and lubricating oil, remember that we want to transfer the ships with a minimum of bunkers and lubricating oil, so please order accordingly, and if you need to sail with economical consumption, do so, let the auxiliary fans run if that helps to cut costs. It doesn't matter if there is a chance that one will break or that the engine will emit pollution. I am in contact with [legal person 8] on whether the reefer control can be removed on departure from Hamburg to Antwerp. This will become clear on 1 May."* <sup>73</sup>

This email was preceded by an email from [employee Z.] (hereinafter: [employee Z.] ):

*"For your part, I should like to make it clear to you that they should not count on a reserve for the reserve. Really sail on the minimum, because every ton still in there on arrival at the beach is a waste of money."* <sup>74</sup>

On 1 and 3 May 2012, emails were also sent by [employee Z.] and [employee T.] (hereinafter: [employee T.] ), with copies to [employee K.], [employee J.], [employee S.] and [employee P.], concerning the transfer of fuel from the Kashima Bay.<sup>75</sup> [employee T.] suggested transferring fuel from the Kashima Bay to the Spring Deli and Spring Panda and noted this:

*As usual, we will take samples of the fuel and have the samples analysed, although the ships will be handed over to the new owners shortly after using this fuel. After all, we still have to cross the piracy zone and prefer not to be confronted with delays due to problems caused by the fuel."*

In response to this, [employee Z.] emailed:<sup>76</sup>

*"Officially, the transfer of bunkers is not allowed in Chalkis. We understand that there is a risk involved in taking these bunkers and therefore we only transfer the bunkers to vessels that are going to be scrapped. We also understand your concern that these bunkers could cause the ship to get into problems in the piracy zone. (...)"*

[Pilot 3] has stated as a witness that he was a pilot on board the Spring Deli in Rotterdam on 1 May 2012 and that the captain then told him that this was the last trip of the Spring Deli and that it would eventually be taken to India to be scrapped there.<sup>77</sup> The same was said by the [chief officer], to customs officials.<sup>78</sup>

By agreement, dated 25 May 2012 - but presumably signed on or about 6 June 2012 - the Spring Deli was sold by [accused legal person 5] to [involved legal person 6]. The purchase price was USD 346 per ton of unladen weight of the ship and a total price of USD 2,792,220. Pursuant to Article 5, the ship was to sail under its own steam to an anchorage near the breaking yards in Aliaga, Turkey, and be delivered there with a delivery date between 1 and 11 June 2012. Article 17 stipulates, among other things, that the seller will beach at the place where the ship is to be scrapped. Article 20 of the agreement stipulates that the ship is sold exclusively for guaranteed scrapping and recycling. The agreement was signed on behalf of the seller by [employee A.S.].<sup>79</sup>

According to emails of 6 June 2012, there were still gas canisters containing Freon on board the Spring Deli when it arrived in Aliaga.<sup>80</sup>

On 7 June 2012, [employee L.] confirmed by email, to [accused 2] among others, that the Spring Deli had been transferred to the purchaser.<sup>81</sup>

#### **More specifically about the Spring Panda**

[Pilot 4] stated as witness that he was on board the Spring Panda on 6 April 2012 and that the captain told him that it was the last voyage of the ship because it was going to be scrapped.<sup>82</sup>

A Memorandum of Agreement, dated 29 May 2012, was concluded between [accused legal person 6] and [legal person 7 concerned] for the sale of the Spring Panda. The agreement mentions a purchase price of USD 346 per ton of the vessel's unladen weight, with a total price of USD 2,722,328. Pursuant to Article 5, the ship was to sail under its own steam to an anchorage near the breaking yards in Aliaga, Turkey, and be delivered there between 1 and 11 June 2012. Article 17 stipulates, among other things, that the seller will beach at the place where the ship is to be scrapped. Article 20 stipulates that the ship is sold exclusively for guaranteed scrapping and recycling. The Harbour Master of Aliaga will issue a declaration when the ship has been fully dismantled. The agreement was signed on behalf of the seller by [employee L.].<sup>83</sup>

On 16 June 2012 the Spring Panda was transferred to the new owner and after that the ship sailed onto the beach.<sup>84</sup>

#### **4.3.4. Conclusions as to whether the ships constituted waste and discussion of the defences put**

#### *4.3.4.1. Do the exclusion clauses of the EWSR apply?*

The court cannot follow the defence in its principal position taken.

The exclusion clauses in Article 1(3)(a) and (b) of the EWSR relied on by the defence exclude the operation of the EWSR in the context of the discharging ashore of waste generated by the ordinary operation of ships in so far as they are covered by the MARPOL Convention and waste generated on board a ship until discharged. This situation has not occurred here, since this is an entire vessel which, contrary to the arguments put by the defence, cannot be covered by the exceptions referred to above. This broad interpretation is not supported either by the letter or by the tenor of those provisions. The defence is therefore rejected.

#### *4.3.4.2. Are the ships waste within the meaning of the EWSR?*

The facts set out above lead to the conclusion that it was already the intention to have the Spring Bear, Spring Bob, Spring Deli and Spring Panda scrapped before each of these ships left the ports of Rotterdam and Hamburg. This was discussed since (at least) the beginning of February 2012. Baltic Union Shipbrokers presented its price proposals on 7 February 2012, based on scrapping on the beaches in India. Shortly afterwards, on 8 March 2012, a decision was taken that the ships would be taken out of service for scrapping. The email of [accused 2] of 9 March 2012 expresses this decision in such a way: it was decided that the ships would be 'taken out of service / scrapped'. To this end, a communication group was set up. Preparatory steps were also taken from March 2012 on to remove spare parts and other components from the ships, and this was also partly carried out.<sup>85</sup> On 10 April 2012, [employee L.] asked Bureau Veritas for permission to postpone inspections because 'the owner of the Spring Bob had decided to have the ship scrapped'. When the Spring Bob left the port of Rotterdam on 19 April 2012, the captain and mate told the pilot that the Indian crew who would be taking over the ship would be beaching it in India. It was therefore clear to them that a decision had been taken to scrap. The same applies to the captains of the other ships, who also told pilots or crew members that the ships were going to be scrapped. The email correspondence prior to and during the last trips of the ships also shows that the ships were going to be scrapped. There were a lot of emails about the amount of fuel, because 'every ton of oil still on the ship when it is beached would be a waste'. On 24 April 2012 - before the start of the last trip - an email was sent to the Spring Deli stating that they have to sail economically and 'if this causes an auxiliary engine to break, that would not be so bad'. The agreements by which the ships were finally sold are also clear: the ships will be scrapped.

It can be concluded from the above that for each of the four ships, the Spring Bear, the Spring Bob, the Spring Deli and the Spring Panda, at the time they left the ports of Rotterdam and Hamburg on 15 April 2012, 19 April 2012, 1 May 2012 and 9 May 2012 respectively, the intention existed within the [group] to dispose of these ships. Therefore, according to the Court of Justice's interpretation of the concept of 'discarding', the ships were at that time waste within the meaning of the EWSR.

The defence's defence that it is incomprehensible, according to generally accepted standards, that seaworthy, certified and insured ships that are operationally deployable and that represent a value of millions can be regarded as waste does not alter this conclusion. Although these circumstances, taken separately and in combination, may constitute an indication that no waste is involved, they are not decisive in determining whether a waste is involved.

As the Court of Justice held in the Shell judgment referred to above, the true intention of the holder must be given decisive significance and, as can be seen from that set out above, the intention was to dispose of the ships. The circumstance that three of the ships were still in commercial service and carried a cargo during part of the voyage to their final destination does not alter this.

Nor does the Court see any reason to seek alignment with the decisive moments advocated by the defence at which, in its opinion, a ship can be qualified as waste. This is because the dynamics of the phasing out of ships as outlined, which may have made it difficult to determine the moment at which the decision to scrap was taken, have not been demonstrated in this specific case. No indication can be found in the correspondence that alternatives to scrapping were still under consideration after the end of March 2012. There are subsequent email messages that talk about a change of destination, but these are about the place where the ship will eventually be delivered and scrapped (India or Bangladesh or Turkey). There is no indication in the file that this involved consideration of any option other than scrapping. The defence has also not made a plausible case for this. No valuation was performed for a sale on the second-hand market, as far as has been stated or shown, and there is no evidence that potential buyers were approached for the continued use of the vessels. Nor does it appear that within the [group] any further consideration was given to reconsidering the decision of 8 March 2012 to dispose of the vessels, to continuing to use the vessels or even to laying them up. None of the suspects gave any explanation about the decision-making and its implementation and the defence did not identify any concrete circumstances indicating that options other than scrapping were considered. The witnesses who made statements on this matter largely only stated in general terms that shipowners' intentions as to whether or not ships should be scrapped may change frequently.<sup>86</sup> Such general comments do not alter the contents of the file and the absence of any specifically argued or demonstrated alternative to the scrapping of the Spring Bear, Spring Bob, Spring Deli and Spring Panda.

Finally, the defence argued that the system of the EWSR and maritime law, as laid down in the UN Convention on the Law of the Sea (UNCLOS), inter alia, precluded a broad interpretation of 'the intention to discard' in relation to ships as used by the public prosecutors. The Court understands this position of the defence viewed in the light of its other statements to the effect that, with regard to ships, the concept of waste from the EWSR, as defined in the Directive 2008 (in the interpretation of which, according to the Court of Justice, decisive significance must be attached to the intention of the holder of the substance), is not applicable and that a different, more limited, interpretation is required.

The Court recognises that complications can occur when applying the EWSR and the 'waste' concept contained therein to ships. A major reason for this is that it is generally difficult to identify the holder's intention to dispose of a ship. For example, as in the present case, the fact that ships are still carrying cargo or changing ownership during their final voyage makes it difficult for regulatory authorities to define when a decision to scrap has been taken. The obligations arising from the EWSR can also be circumvented by making public the intention to scrap a ship only when that ship is (by that time) outside the scope of the EWSR. However, this does not mean that the EWSR and the waste concept used in it do not apply to ships.

It is clear from recital 35 in the preamble to the EWSR that the objective of the EWSR is also to ensure the safe and environmentally sound management of ship scrapping in order to protect human health and the environment.



It can be concluded from this that the regulation also covers ships, which also follows from the fact that ships are listed as waste in one of the annexes to the EWSR. It is also clear from recital 35 that it has been recognised that, with regard to ships, there may be a special situation in which a ship becomes waste within the meaning of Article 2 of the EWSR, while at the same time it continues to be classified as a ship under other international rules. In order to reach an effective and efficient solution to the problem of ship recycling, reference is made to the importance of cooperation between the International Labour Organisation (ILO), the International Maritime Organisation (IMO) and the Secretariat of the Basel Convention in establishing mandatory rules adopted at global level. This international cooperation has since led to the adoption of Regulation (EU) No 1257/2013, 20 November 2013 on ship recycling (which will come into force from 31 December 2018) and the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships of 2009, which has not yet entered into force. It follows explicitly from the recitals to the Ship Recycling Regulation that the transboundary movement for the purpose of recycling ships categorised as waste is regulated by the Basel Convention and the EWSR, except for ships falling under the scope of the Ship Recycling Regulation as defined in Article 2 of that Regulation.<sup>87</sup>

Against this background, the Court sees no reason to exclude ships from the scope of the EWSR or to limit its scope with regard to ships by a narrower interpretation of the waste concept. Bearing in mind the objective of the EWSR and the Directive 2008, namely that waste should be recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, the concept of 'disposal' should not be interpreted restrictively and there is no reason to believe that a different approach should be adopted in respect of ships.

This interpretation of the EWSR does not constitute an unacceptable restriction on international maritime law, as enshrined inter alia in the UN Convention on the Law of the Sea (UNCLOS). The two regulatory frameworks are compatible, as has already been stated in the Council of State ruling on the Sandrien (ECLI:NL:RVS:202: AE4310).

#### *4.3.4.3. Conclusion on the defendants' defence and rejection of their request to refer questions for a preliminary ruling*

The defences were rejected. The conditional request of the defence to refer questions to the Court of Justice for a preliminary ruling was rejected. There are no questions that could be asked that are relevant for the assessment of this case. The EWSR and the existing case law in this context are sufficiently clear for this purpose.

#### *4.3.5. Several specific elements of the charges*

##### *4.3.5.1. Shipment to India*

It is an established fact that the Spring Bear was shipped to a beach near Alang, India.

The Spring Bob was eventually beached in Bangladesh and the Spring Deli and Spring Panda ended up on beaches in Turkey. On the basis of the underlying

emails, the MOA concerning the Spring Bob and the communications from the captains of these three ships, it can be concluded that in respect of these ships too, the initial intention at departure was to sail them to India. In the light of the definition of the term "shipment" in the EWSR, which includes the shipment of waste destined for recovery or disposal that is *planned* to take place, there is legal and conclusive evidence that the shipment took place to India.

That not all the ships ended up there does not alter this: it is a question of India being the planned destination, at least at the time of departure.

#### *4.3.5.2. Waste for disposal or recovery*

According to the public prosecutors, the shipment is for the purpose of disposing of waste and they therefore conclude that the primary charge of exporting waste from the Community for disposal has been proved (Article 34 of the EWSR). They are basing this on the principle that the purpose of the shipment must be determined by the first operation the waste is to undergo after the shipment. In this respect, reference is made to the decision of the Administrative Jurisdiction Division of the Council of State of 21 February 2007 concerning the Otapan (ECLI:NL:RVS:2007:AZ9048). Because, before the dismantling of the ship's steel can commence, the asbestos, HCFCs and other hazardous substances must first be removed from the ship, the first operation is a disposal operation.

In order to assess whether the shipment is for disposal or recovery, the court will take the following as its starting point.

#### *Definitions*

In Article 3 of the Directive, the definitions of 'recovery' and 'disposal' are given in Marginal Numbers 15. and 19. respectively.

*15. "recovery" means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function. Annex II sets out a non-exhaustive list of recovery operations.*

*19. "disposal": means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations.*

#### *Evaluation criteria*

In judgments of the Court of Justice, two different principles have been formulated for determining whether a disposal or recovery operation has taken place.

- I. In its judgment of 3 April 2003 in Case C-116/01, the Court of Justice ruled that, in the case of a waste treatment operation consisting of several separate stages, for the purposes of the Regulation, the classification as a disposal operation or as a recovery operation within the meaning of the Directive should be made by taking into account only the first operation which the waste must undergo after its shipment.
- II. In its judgment of 27 February 2002 in Case C-6/00 and in its order of February 2003 in Joined Cases C-307/00 through C-311/00, the Court of Justice ruled that, in order to determine whether a disposal or recovery operation within the meaning of the Directive is involved, it is necessary to determine, on a case-by-case basis, whether the main purpose of the operation in question is to enable the waste to fulfil a useful function by substituting it for other materials which would otherwise have had to be used for this purpose, in which case the operation is to be considered a recovery operation.

The Court of Justice has not provided any criteria for determining when which principle should apply.

#### ***Vessel composition***

The reefer vessels in question, built in 1984, were sold with the aim of scrapping them and then reusing the steel, as follows from the underlying MOAs, among other things. These ships contain many tons of steel, among other things, ranging from a net tonnage of 7868 metric tons for the Spring Panda to a net tonnage of 8488.56 metric tons for the Spring Bear. Although only very brief research has been carried out regarding these ships, it can be generally assumed that such ships also contain substances such as asbestos and refrigerant, both of which are hazardous substances. More specifically, M.C. Vink, senior policy officer at the Human Environment and Transport Inspectorate (shipping), stated in this case that asbestos was used in seagoing vessels built before 2002.<sup>88</sup> This asbestos is found as cladding and insulation in or on (steam) pipes, boilers, turbines, exhausts, valves and gate valves in the engine room, pump room or boiler room, in machines, couplings and liners. According to Vink, refrigerants, chlorofluorocarbons, (H)CFCs are also used on board seagoing vessels. The most commonly used refrigerant is R-22. This refrigerant is located in the refrigeration system of the galley storeroom and in the air conditioning of the ship. In the case of reefers (refrigerated ships), the refrigerant is also used in the refrigerating/freezer system for the cargo, which can involve hundreds to thousands of kilograms. According to information from previous inspections, the Spring Bob contained a total of 1875 kilos of refrigerant R22 and the Spring Panda a total of 1832.5 kilos of refrigerant R22. The Spring Bear and Spring Deli would have had approximately the same quantities.

#### ***Judgment***

Unlike the public prosecutors, the Court of Appeal sees reason in this case, when assessing whether this was a disposal operation or a recovery operation, to seek a connection with the second principle formulated by the Court of Justice. The main purpose of the operations carried out on the vessels is to recover the many tons of steel for reuse/recycling. This operation, referred to in code R4 of Annex II to the Directive 2008, is a recovery operation and can be attributed decisive significance. Although the ships also contained considerable quantities of hazardous waste, including asbestos and (H)CFCs, which had to be disposed of, this cannot outweigh the overwhelming quantity of steel released for reuse. Moreover, in the case of the ships in question, unlike in the Otapan case cited by the public prosecutors, where there was a scrapping plan describing the sequence of operations, it is not possible to identify the first operation the ships underwent after shipment. It should be also be noted that, according to general opinion, the scrapping of ships is generally understood to be for the sole purpose of recycling steel, while relevant legislation and regulations also link the scrapping of ships directly to recycling.<sup>89</sup>

The court concludes that, in the present case, the ships can be regarded as waste intended for recovery. In view of this, the accused will be acquitted of the primary and alternative indictment of the export ban under Article 34 of the EWSR.

#### ***4.3.5.3. Hazardous waste***

The above conclusion does not alter the fact that, irrespective of the purpose of the shipment of the ships, substantial quantities of hazardous waste were also exported, including at least asbestos and (H)CFCs (both listed in Annex V to the EWSR).

As the shipment took place, or was planned to take place, to a non-OECD country, it was in breach of the prohibition set out in Article 36 of the EWSR. The fact that the exact amount of these hazardous substances cannot be determined, as argued by the defence, does not alter this.

With regard to the other waste mentioned in the summons (such as batteries, bilge oil, etc.), since the ships were still operational and had sailed onto the beaches under their own steam, and since it did not appear that all waste had been handed over in the meantime, it can undoubtedly be assumed that this waste was on those ships. However, as the case file does not provide any further insight into the size or composition of these waste materials and these waste materials do not affect the core of this criminal case, the court does not take a position on and does not arrive at a judicial finding of fact with regard to this.

Contrary to that argued by the defence, the definition given under code GC030ex890800 in Part II of Annex 3 to the EWSR (known as the Green List of waste) was not complied with, in view of the presence of the aforementioned hazardous (waste) substances.

In the light of the foregoing, the Court is of the opinion that the ships, as the sum of individual parts of non-hazardous and hazardous waste, must be regarded as hazardous waste which, due to the presence of various hazardous substances, cannot be classified under a single code in Annex V.

#### 4.3.6. *Roles of the various accused persons*

##### *Role of [accused 2], [accused legal person 2], [accused legal person 9] and the shipowners*

It follows from the explanation of the facts set out above that [accused 2], [accused legal person 2], [accused legal person 9] and the shipowners are, respectively, de facto directors and co-perpetrators of the illegal shipment of the ships. The following is considered in explanation of this.

- The capacity of being perpetrator, including the intention, of [accused 2] follows from the actions described above, which [accused 2] carried out partly by himself, partly by staff of the [group]. He did so while having knowledge of the EWSR. His role qualifies as that of de facto director.
- [accused legal person 2] must be deemed a co-perpetrator. The actions and the intent of [accused 2] are imputed to this company (managed by him), as these actions were within the sphere of this legal person.
- [accused legal person 9] must also be deemed a co-perpetrator. Staff of this company organised/co-organised the shipment of the four ships, which can be imputed to this company.
- The shipowners are each to be regarded as shipowner (within the meaning of the EWSR) in respect of their own ship. They disposed of them. They must therefore each be deemed a co-perpetrator in respect of their own ship.

##### *Role of [accused 3]*

was acquitted of the charges against him in a judgment of the same date on the grounds - briefly put - that the accused's involvement proved to be insufficient from the point of view of criminal law relevance.

##### *Role of [accused] and [accused legal person 1]*

As shown from the explanation of the facts set out above, there are various connecting factors with regard to [accused] that, in his capacity as CFO of [accused legal person 1], he was directly involved in the decision to sell and scrap the four Spring ships and in the financial settlement thereof with shareholders and banks.

No direct involvement can be established in the choice of the party to which the ships were sold, the place where the ships were delivered and scrapped, the route sailed to the final destination, with or without cargo, the question of which goods may have to be taken off board and the consideration of possibilities in the context of not ending up on the 'name and shame list'. Various email messages about these subjects were sent to [accused] for information (cc), as well as the draft Memoranda of Agreement. However, it cannot be established that he had actual involvement or control in this respect, other than being informed.

Unlike with regard to [accused 3], [accused] nevertheless appears to be sufficiently involved for it to be possible to deem that co-perpetration occurred, although the court acknowledges that the difference in the position of these two accused persons is limited. The difference, however, is that with regard to [accused], there is more evidence of his actual involvement in the shipment of the ships. [accused] was demonstrably directly and closely involved in the sale of the Spring Bear and the realisation of said sale, set up with a share transaction between [involved legal person 2] and [involved legal person 3] followed by sale of the ship by [involved legal person 3] to the party that took over the ship at the beach in Alang for scrapping. A sale that, in the context of the exchanged messages, only seems to have been aimed at preventing entry on the 'name and shame list' by reflagging the ship before it was handed over for scrapping. He was also actively involved in releasing the ships from mortgages in order to be able to transfer them, which was essential for the liquidation of the four Spring ships to be scrapped.

All in all, from the start of the investigation into the liquidation of the four Spring ships, in order to deal with the liquidity problems in February 2012, up to and including the execution of the transactions, [accused] was actually involved and made a fundamental contribution to this. In view of the above, [accused] can be regarded as a co-perpetrator of the criminal offences of which he is charged.

The aforementioned conduct of [accused] took place in his capacity as director of [accused legal person 1] and in the sphere of that legal person. For this reason, this conduct can be attributed to this company, so that [accused legal person 1] is also considered to be a co-perpetrator.

#### *Consideration of the relationship between [accused 2] and [accused]*

[accused 2] is managing director of [accused legal person 2] and [accused] is a director of [accused legal person 1], the shareholder of [accused legal person 2]. The Court acknowledges that it is quite conceivable that [accused] actually directed [accused 2], but there is no evidence for that conclusion.

#### *Consideration regarding the Spring Bear*

Finally, the following is considered regarding the involvement of [accused 2], [accused], [accused legal person 2], [accused legal person 1] and [accused legal person 9] in the shipment of the Spring Bear. The defence that these accused persons cannot be regarded as co-perpetrators in the shipment of this ship because they did not have control over it after the sale of the shares in [accused legal person 3] is unsuccessful. This was because there had already been an illegal shipment of the vessel before the shares were transferred. Moreover, the defence is also factually unfounded. The facts presented above show that, until the moment the ship was beached, the Spring Bear was controlled by [accused legal person 9].

In the words of [employee H.J.], the transfer of the shares was only a paper exercise.

#### 4.4 *Judicial finding of fact*

On the grounds of the foregoing, it has been lawfully and convincingly proved that [accused] committed the following offences under the charges in 1. as a final alternative, 2. as a final alternative, 3. as a final alternative and 4. as a final alternative, in such a manner that:

1.

[shipment of Spring Bear]

in the period from 15 April 2012 to 12 June 2012, in Rotterdam and Groningen,

jointly and in conjunction with others,

intentionally,

performed an operation as referred to in Article 2(35)(f) of the EC Waste Shipment Regulation,

by shipping a waste intended for recovery in violation of Article 36(1)(c) of said regulation,

to wit a ship named Spring Bear,

which ship was a hazardous waste not covered by a single entry in Annex V to the above Regulation (Article 36(1)(c)),

in which ship was present a quantity of

- asbestos and refrigeration system(s) (refrigeration unit(s)) containing hydrochlorofluorocarbons, each of which is a waste listed as hazardous in Annex V to that Regulation,

from the Netherlands to India;

2.

[shipment of Spring Bob]

in the period from 19 April 2012 to 17 July 2012, in Rotterdam and Groningen,

jointly and in conjunction with others,

intentionally,

performed an operation as referred to in Article 2(35)(f) of the EC Waste Shipment Regulation,

by shipping a waste intended for recovery in violation of Article 36(1)(c) of said regulation,

to wit a ship named Spring Bob,

which ship was a hazardous waste not covered by a single entry in Annex V to

the above Regulation (Article 36(1)(c)), in which ship

was present a quantity of

- asbestos and refrigeration system(s) (refrigeration unit(s)) containing hydrochlorofluorocarbons, each of which is a waste listed as hazardous in Annex V to that Regulation,

from the Netherlands to India;

3.

[shipment of Spring Deli]

in the period from 1 May 2012 to 29 May 2012, in Rotterdam and Groningen,

jointly and in conjunction with others,

intentionally,

performed an operation as referred to in Article 2(35)(f) of the EC Waste Shipment Regulation,

by shipping a waste intended for recovery in violation of Article 36(1)(c) of said regulation,

to wit a ship named Spring Deli,

which ship was a hazardous waste not covered by a single entry in Annex V to the above Regulation (Article 36(1)(c)),

in which ship was present a quantity of

- asbestos and refrigeration system(s) (refrigeration unit(s)) containing hydrochlorofluorocarbons, each of which is a waste listed as hazardous in Annex V to that Regulation,

from the Netherlands to India;

4.

[shipment of Spring Panda]

in the period from 9 May 2012 to 29 May 2012, in Groningen,

jointly and in conjunction with others,

intentionally,

performed an operation as referred to in Article 2(35)(f) of the EC Waste Shipment Regulation,

by shipping a waste intended for recovery in violation of Article 36(1)(c) of said regulation,

to wit a ship named Spring Panda,

which ship was a hazardous waste not covered by a single entry in Annex V to the above Regulation (Article 36(1)(c)),

in which ship was present a quantity of

- asbestos and refrigeration system(s) (refrigeration unit(s)) containing hydrochlorofluorocarbons, each of which is a waste listed as hazardous in Annex V to that Regulation,

from Germany to India;

Further or other charges have not been proven. The accused must therefore be acquitted of these.

Obvious clerical errors in the indictment have been improved. The accused was not prejudiced in his defence as a result.

## **5 Further explanation of the judicial finding of fact**

The indictment applicant included in 3 and 4, in relation to the Spring Deli and the Spring Panda respectively, as cumulative/alternative, the illegal shipment of these ships to Turkey without any notification and/or consent as referred to in Article 2(35)(a) and/or (b) of the EWSR. In light of the judicial finding of fact regarding the shipment of the ships to India, the only remaining reproach is that relating to the route the ships took after the change of destination, from India to Aliaga, Turkey. The date on which this changed destination came into the picture, and on which the decision to do so was taken, cannot be determined with sufficient certainty on the basis of the file. This also means that it is also not possible to determine where those ships were at that time and whether that location fell within the scope of the EWSR. For that reason alone, this part of the indictment cannot be proven and will be subject to acquittal.

## **6 Criminal liability with regard to the offences**

The proven acts constitute:

1.

**participation in the infringement of a regulation laid down in Article 10.60(2) of the Environmental Management Act.**

2 .

**participation in the infringement of a regulation laid down in Article 10.60(2) of the Environmental Management Act.**

3 .

**participation in the infringement of a regulation laid down in Article 10.60(2) of the Environmental Management Act.**

4 .

**participation in the infringement of a regulation laid down in Article 10.60(2) of the Environmental Management Act.**



There are no plausibly argued facts or circumstances for exemption from criminal liability.

The offences therefore result in criminal liability.

## **7 The criminal liability of the accused**

There are no grounds for exemption from criminal liability of the defendant.

The defendant is therefore criminally liable.

## **8 Reasons for punishment**

The penalty imposed on the accused is based on the seriousness of the offences, the circumstances in which the offences were committed and the accused's person and personal circumstances. In particular, account shall be taken of the following.

The accused, together with others, shipped four ships (initially) to India in order to have them scrapped, in violation of the provisions of the EWSR. Of the four ships, one was eventually beached in Alang (India), one beached in Mumbai (Bangladesh) and two beached in Aliaga (Turkey).

The accused played an essential role in the background in this. As CFO of [accused legal person 1] he was partly responsible for the financial results of the [group] and he had been directly involved in the financial settlement of the sale for scrapping of the four Spring ships.

The harmful effects of ship scrapping on the beaches of India and Bangladesh, in particular, on the environment and health are far-reaching. It is well known that beaching and scrapping a ship leads to pollution of seawater, groundwater and air. In addition to the steel and equipment on board, there is usually also a large quantity of hazardous substances on board, such as asbestos and refrigerant (R22) in this case. The working conditions are also atrocious. The ships are manually scrapped by untrained workers, who do not have the knowledge and expertise to recognise hazardous materials in order to take precautions and follow procedures, nor are they issued with sufficient protective clothing or auxiliary materials. Such scrapping practices lead to multiple deaths each year. In addition, the scrapping businesses in Bangladesh continue to make use of child labour.

The accused turned a blind eye to this problem, which he must certainly have been aware of as a board member of a large shipping company. In his considerations, he apparently only took account of the business interests of the companies for which he was responsible. The warning issued by the Environmental and Transport Inspectorate on 08 May 2012 to the co-defendant [accused 2], with whom the accused worked closely, also did not prevent him or his co-defendants from committing the offences.

Furthermore, no measures were taken to prevent, reduce or minimise any adverse effects on human health and the environment. In any case, there was no evidence of this, except for the fact that two ships were eventually delivered to Aliaga (Turkey), where the scrapping yards had facilities, or at least better facilities, to protect the environment and working conditions.

The accused's actions also distorted competition in relation to entrepreneurs who do comply with the regulations.

The defence has argued that the scrapping of ships on the beaches of India, Bangladesh and Turkey is a global standard practice and that, at least in the Netherlands, this is the first time that a shipping company and its board members have been prosecuted for shipping ships in violation of the EWSR. Although, strictly speaking, this does not detract from the criminal liability of the accused's actions, it is true that the shipment of ships to scrapping beaches has not previously been the subject of criminal proceedings in the Netherlands. As a result, the court will refrain from imposing a prison sentence, although it considers that such offences in themselves justify a long prison sentence. Instead, a fine will be imposed on the accused.

However, a fine in its own does not do justice to the seriousness of the facts. The accused will therefore also be disqualified from practising his profession for a period of one year. This is also an expression of the social importance that must be attached to ethical management. It can be expected of the accused as CFO of a large company, who also bears (final) responsibility for the management of the company, that in addition to the economic consequences of his decisions, he must also take into account the additional social consequences, such as in this case the negative consequences for the environment and the health of the workers in the scrapping yards.

The court has taken into account the fact that the accused does not have a criminal record.

Finally, account has been taken of the fact that the reasonable period referred to in Article 6 of the ECHR has been exceeded. The accused received an invitation to be heard as an accused on 14 May 2014. In view of this, the reasonable period therefore commenced on 14 May 2014. With regard to the adjudication of the case in the first instance, the basic principle is that the hearing of the case at court must be concluded with a final judgment within two years of the start of the period reasonably assessed, unless there are certain special circumstances. As no such special circumstances have been demonstrated to the court, and a judgment is being delivered today, 15 March 2018, it finds that the reasonable period has been exceeded by more than one and a half years. Due to this exceeding of the reasonable period, the court moderated the fine to be imposed by 10%.

All things considered, the court considers a fine of €50,000 and a professional disqualification for a period of one year, to be appropriate and necessary.

## 9 Applicable statutory requirements

Articles 23, 24c, 47 and 57 of the Penal Code, Articles 1a, 2, 6 and 7 of the Economic Offences Act, Article 10.60 of the Environmental Management Act and Articles 2 and 36 of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste have been taken into account.

## 10 Annex

The annex referred to in this judgment forms part of this judgment.

## 11 Decision

The court:

declares that it has not been proven that the accused committed the principal, alternative and further in the alternative acts referred to in 1, 2, 3 and 4 above, and acquits the accused of these;

declares that it has been proven that the accused committed the acts in the final alternative of which he is accused in 1, 2, 3 and 4, as described above;

declares not proven all further or other charges against the accused than those declared proven above, and acquits the accused of these;

establishes that what is declared proven results in the criminal offences referred to above;

holds the defendant criminally liable;

sentences the accused to a **fine of €50,000.00 (fifty thousand euros)**, in the absence of full payment and full recovery to be replaced by **285 days** imprisonment;

imposes as an **additional punishment** on the accused a **disqualification from the right** to exercise the profession of (direct or indirect) director, supervisory director, advisor or employee of a shipping company or any part thereof, **for the duration of 1 (one) year**.

This judgment was passed by:

*mr.* M.C. Franken, president,

and *mr.*s. W.P. Sprenger and N. Doorduijn, judges,

in the presence of *mr.* M. Koek, court registrar,

and pronounced in open court on 15 March 2018