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Clarification of sea carrier's liability for container-caused damages: visible and hidden defects on containers

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This article is part of a series that describes some of the issues that the Danish Merchant Shipping Act's various liability regimes raise in practice, including issues in relation to the extent of liability for subcontractors and product liability for these types of damages.[(1)] In particular, this article focuses on visible and hidden defects on containers.

Visible defects on containers

If a container is affected by visible defects that cause damage to the goods, the sea carrier will, under section 262(2), be responsible or liable on a heightened basis. Visible defects can include:

- rust;
- holes;
- leaks;
- odours and moisture; and
- any other conditions that can be ascertained by an immediate inspection of the container by reasonable means.

If it is assumed that the defects were visible prior to the performance of the transport and that the carrier could have discovered the defects through an investigation carried out with reasonable means, the sea carrier will, as a starting point, be liable under section 262(2) for damage to the goods. This legal position was clarified in the following case, decided on by the Danish Maritime and Commercial High Court on 30 August 2013.[(2)]

Facts

LB is a designer and seller of home and lifestyle products. In August 2010, LB bought a consignment of goods in India. LB hired a Danish freight forwarder to handle the entire transport of the goods from India to LB's company in Denmark, which is located in Nibe.

The freight forwarder subcontracted the performance of the sea transport to a German shipping company. The sea transport was carried out under a bill of lading, from which it appeared that it was a type of transport known as "shipper's load, stow weight and count/full container load".

When the consignment was delivered to LB's company in Nibe at the end of September 2010, a significant part of the goods had been damaged by water. On this basis, LB held the freight forwarder responsible for the damages.

During the subsequent inspection of the container, it was found that the container was in very poor condition: it had holes and its doors did not shut. An attempt had been made to patch the container with duct tape.

Decision

On the basis of the inspection, the Court assumed that the damage to the goods had occurred after the goods had been stowed in the container, and that the damage had been caused by water ingress due to faults in the bottom layer of the container and the gaskets at the door opening. It was also assumed that the defects had to have been present when the container had been delivered from the shipping company.

There were thus visible defects that could have been discovered by an inspection with reasonable means prior to the performance of the transport. On this basis, the Court found that the freight forwarder was responsible for the damages incurred in relation to LB.

The freight forwarder had claimed during the case that the shipping company had to bear the liability for the damage to the goods, as it had delivered a defective container. The Court observed in this regard:

> *[The forwarder] was assumed by [LB] to be responsible for the entire transport, including booking a container. After this and according to the content of the parties' agreements, the responsibility for whether the delivered container was actually used for the transport rests, as a starting point, on the [forwarder], including* ***in the form of measures for a prior inspection.*** (Emphasis added.)

On this basis, the Court acquitted the shipping company of liability for the damage that had occurred.

Comment

The Court's judgment states that the carrier is subject to a heightened investigation obligation. At the same time, the judgment highlights the carrier's responsibility or liability for ensuring that the container delivered and used for the transport is suitable for carrying out the transport in question. It is thus supported by Danish case law that the sea carrier is subject to increased liability for visible defects on containers.

The judgment also clarifies that the carrier is subject to a duty to perform due diligence in order to clarify whether a container is suitable for carrying out the sea transport in question. If there are visible defects, the sea carrier will thus be liable on a stricter basis for damages that may occur as a result of the visible defects on the container.

Further, the judgment points to a legal position where failure to perform due diligence must be considered to constitute a material breach

of a contract, which is consistent with the legal literature. Against this background, it can be assumed that, according to Danish case law, the sea carrier will, as a starting point, be liable for damage to goods caused by defects in the container, if these defects could have been discovered by reasonable means, under the proper care of the sea carrier's due diligence obligation prior to the performance of the transport.

Hidden defects on containers

It is assumed in the section above that the sea carrier's own containers under section 262 of the Act are considered an (integrated) part of the ship and thus form part of the sea carrier's obligation to deliver a seaworthy ship.

Section 262(2) of the Act only applies to damage caused by "original unseaworthiness", which means the unseaworthiness that is present at the start of the voyage. If, for example, a failure in the refrigeration system in a container occurs after the transport has begun, the sea carrier's liability will not be regulated under the rule in section 262(2) of the Act.

It follows from section 276(2) of the Act that the carrier is liable for losses as a result of unseaworthiness if such unseaworthiness is a result of the person concerned themselves or someone they are responsible for not having taken due care to ensure that the ship was seaworthy at the start of the voyage. This provision, like section 262(2) only applies to damage caused by "original unseaworthiness".[(3)]

If the sea carrier can prove that the container's defects first occurred during transport, the sea carrier's liability will be regulated by the general liability standard – that is, sections 274 and 275 of the Act – as opposed to section 262(2) of the Act.[(4)]

Thus, if there are hidden defects in the container, the sea carrier will be able to claim container liability on the basis of the liability based on transport law, under which the sea carrier is responsible for the damage that has occurred, unless it can be proven that the damage that has occurred is not due to the carrier's error or neglect, or the error or neglect of someone for whom the carrier is responsible. This legal position was clarified in the following case, decided on by the Danish Maritime and Commercial High Court on 23 January 2008.[(5)]

Facts
The case concerned the question of whether a freight forwarder was liable for the total damage to a batch of frozen garlic that had occurred during its transport from Los Angeles, United States, to Vejle, Denmark. The freight forwarder had hired a Taiwanese shipping company to handle the sea transport and the transport was carried out with the shipping company's own refrigerated container.

Decision
The Court found that it was reasonable to assume that the container had not worked as it should in terms of its temperature and was thus defective. The shipping company had failed to comply with the plaintiff's requests for additional documentation to clarify the temperature conditions during transport. On this basis, the Court found that it could be assumed that the damage had occurred while the goods were in the forwarder's contractual custody and that it had not been proven that the damage was not due to the carrier's mistakes or negligence, or the mistakes or negligence of anyone for whom the carrier was responsible.

Comment
The judgment was decided on the basis of section 15 of the General Conditions of the Nordic Association Of Freight Forwarders 2000 (the NSAB 2000), but it was put forward by the plaintiff during the case that the liability for damages for the total damage incurred would be the same if the legal basis in the case was constituted by the Act. This assumption is correct, as both regulatory bases establish a heightened liability for the sea carrier, which is constituted:

- in the NSAB 2000, by an objectified liability; and
- in the Act, by a presumptive liability.

Based on this case, it can be assumed that it is the responsibility of the forwarder to prove that the damage was not due to the forwarder's – or the shipping company's – fault or negligence. Since the shipping company could not prove that the refrigerated container was not defective, the freight forwarder and the shipping company were liable for the damage that occurred.

The judgment thus points in the direction of a legal position under which the sea carrier is liable for damage resulting from the use of defective refrigerated containers for transport, even if the defects were hidden, unless the shipping company can prove that the damage was not due to the temperature of the containers not functioning as they should.

The judgment does not address the shipping company's obligation to check the container and the significance of whether the sea transport is carried out with a container that belongs to the sea carrier.

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Endnotes

(1) For the first article in the series, see "Clarification of sea carrier's liability for container-caused damages: introduction".

(2) S-24-11 and S-9-12.

(3) Falkanger, Thor and others, Maritime Law, fourth edition (2013), page 302.

(4) Bredholt, Jørgensen and others, Comments on the Danish Merchant Shipping Act, fourth edition (2012), page 394.

(5) S-19-03.