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Clarification of sea carrier's liability for container-caused damages: extent of liability for subcontractors

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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 the extent of a sea carrier's liability for subcontractors.

Extent of sea carrier's liability for subcontractors

Sea carriers are liable for the errors and omissions of their subcontractors as per sections 262 and 275 of the Danish Merchant Shipping Act.

In the legal literature, the scope of the sea carrier's liability is described as follows:

> *On the other hand, the shipowner should not pay for helpers whose task and work cannot be said to be within what can be characterized as shipping operations - I am thinking here i.a. on technical assistance of various kinds which is necessary for shipping, but which itself cannot be regarded as an integral part of it.*[(2)]

In order to clarify the liability, it must therefore first be assessed how the circle of contract helpers for whom the shipping company is liable under the rules of the Danish Merchant Shipping Act must be delimited. This demarcation must be based on whether the activities carried out by the relevant co-contractors relate to the performance of shipping operations. The activity must have a closer functional connection with the shipping company's fulfillment of concluded transport agreements.

In cases where a shipping company purchases containers for use in carrying out sea transport, the question arises as to whether this activity can be considered to relate to shipping operations in such a way that the shipping company is liable for errors and omissions that can be attributed to the supplier of the container.

"Shipping operations", in this context, includes tasks and activities that are more than just what is understood by shipping operations in the typical sense (ie, the operation of the ship). A broader assessment must be made, where the value chain underlying the reason for the performance of the transport tasks, as well as the commercial conditions, are given weight.

Thus, if a shipping company's primary business is sea transport using containers, the acquisition of the containers for use in specific cases must be considered to form part of the shipping operations.

Mercantic

When assessing the scope of the liability, the starting point can be the judgment of the Danish Maritime and Commercial High Court in *Mercantic*.[(3)]

Facts

The case concerned liability for damage to cargo that occurred as a result of the cargo coming into contact with the ship's bunker oil due to a leak in the ship's oil tank.

Before the ship launched, classification society Bureau Veritas inspected the ship and pressure tested the ship's oil tank. Bureau Veritas found no defects in the ship, so the ship was launched. During a subsequent voyage, damage occurred to the ship's cargo as a result of the cargo coming into contact with the ship's bunker oil. The subsequent damage was due to a hidden shortage of the ship's oil tank.

Decision

It appears from the judgment's premises that:

> *even if the defect could be described as hidden in everyday speech, it cannot be described as a defect in the ship that could not have been discovered with due attention.*
>
> *There is an agreement between the parties that the error could be ascertained by an ordinary pressure test, and* ***when the shipping company chooses to rely on the pressure test carried out by the yard in the presence of Bureau Veritas without carrying out a corresponding test itself or witnessing it itself, the shipping company cannot be free for liability for the damage simply by reference to the fact that the fault is due to the shipyard.*** (Emphasis added.)

Comment

This judgment is interesting in two ways in relation to the sea carrier's liability for container damages. First, it establishes a very strict requirement for the carrier's duty to investigate. Second, the judgment simultaneously states that, as a rule, the carrier cannot be released from liability simply by referring to the fact that the damage is the fault of the sea carrier's subcontractor.

The limit for the inspection duty when delivering a ship and delivering a container will naturally be different given the proportionality between the consideration behind the duty and the financial risk when delivering two such different products. However, the judgment establishes that:

- there is a greater duty to perform due diligence; and
- it cannot be ruled out that the carrier will be liable for a container supplier's mistakes and negligence in the event of deficiencies or defects in a delivered container, even if the sea carrier has:
    - inspected the container by reasonable means prior to transport; and
    - failed to ascertain the hidden defect.

This legal position is supported by a consideration of reasonableness. When selecting its suppliers, it is the shipping company that can determine the requirements that the suppliers of containers must meet in relation to technical specifications, standards and error tolerances, among other things, including in relation to the price of the containers. Against this background, it would appear less well founded if the interest in the goods were to bear the risk of loss due to the sea carrier's acquisition and use of defective or defective containers, as the interest in the goods has no influence on the selection of container suppliers.

Muncaster Castle

The sea carrier's liability extends in English case law to actors who are not in a permanent employment relationship with it.[(4)] The *Muncaster Castle*[(5)] case is an example of this. Presumably, the same result would not be reached in Scandinavian law. However, it cannot be said with certainty how far the carrier's liability can be extended, especially as a strict rule applies to this within road transport (section 24(3)), under which the carrier cannot absolve themselves of responsibility by invoking defects in the vehicle they used for the carriage, or errors or negligence by the person from whom they may have rented the vehicle, or their subcontractors.[(6)]

Tuulikki

One of the leading judgments in Scandinavian law regarding the extent of the shipowner's liability is the *Tuulikki* judgment.[(7)] In this case, the Finnish court found that the shipowner in question was not liable for the yard's error and thus was not responsible for the damage to the goods that the error later caused. The judgment clarifies the extent of the shipowner's liability for subcontractors, including the extent of the shipowner's duty to perform due diligence in order to ensure that the ship is seaworthy prior to the performance of a given transport.

As the transport law-based liability also includes subcontractors and others for whom the sea carrier is responsible, the sea carrier is thus liable for hidden defects in containers to the extent that the container supplier is considered a subcontractor, unless the sea carrier can prove that the error or defect in the container is not due to errors or omissions.

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Endnotes

(1) Act No. 1505 of 17 December 2018.

(2) Brækhus, Sjur, Shipowner's liability for subcontractors, 2nd edition (1953), page 23.

(3) 1966, UfR 1966 529 SH.

(4) Falkanger, Thor and others, Maritime Law, 4th edition (2013), page 297.

(5) Judgment by the House of Lords in [1961] 1 Lloyd's Rep 57

(6) Falkanger, Thor and others, Maritime Law, 4th edition (2013), page 297.

(7) ND 1979 383 et seq.