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Shipping & Transport - Switzerland

Limitation of Liability in Sea Carriage Case

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May 27 2009

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Facts

The claimant, a seller of yachts, instructed the defendant to transport a pleasure yacht to Gabon by sea. The yacht was lashed on deck. In the port the vessel's lifting gear was unloading when a supporting belt slipped. The yacht fell on the deck and suffered major damage. The claimant sued the defendant for damages in the amount of €3.78 million. The sea carriage was governed by a contract of carriage by sea and a bill of lading, and both documents contained a clause stating that "on-deck shipment to be for shippers/recd risk and expense". After the dispute arose, the parties chose Swiss law to settle the dispute.

Decision

On appeal, the Supreme Court dismissed the claim for damages.⁽¹⁾ The court did not apply the Hague-Visby Rules as the case involved an on-deck shipment.⁽²⁾ Instead, the court based its decision on the Federal Act on Carriage by Sea,⁽³⁾ which incorporates the Hague-Visby Principles. According to the act, the sea carrier is generally liable for any loss of or damage to cargo or delayed delivery from the moment of receiving the cargo until its delivery.⁽⁴⁾ The limits of liability are the same as those set out in the Hague-Visby Rules.⁽⁵⁾ Liability is mandatory where a bill of lading is issued, but may be excluded in cases of on-deck shipment.⁽⁶⁾

The Supreme Court interpreted the clause "on-deck shipment to be for shippers/recd risk and expense" as a general exclusion of the carrier's liability, also comprising the loading and unloading which, according to the contract, had to be performed by the carrier. However, the particular risks of on-deck shipment (ie, exposure to the open sea) do not apply to loading or unloading. The insurance coverage included loading and unloading, and the court considered this to be an indication that the parties intended to exclude liability for these stages as well. However, this is not a valid argument as insurance coverage would need to be in place even in the absence of an exclusion of liability, as the statutory limits of liability would not cover the entire damage.

As the yacht was transported on deck, the Supreme Court held that an exclusion of liability was in line with the act. Furthermore, it concluded that in the absence of special rules, the limits of the exclusion of liability are set by the Code of Obligations, which does not allow an exclusion of liability for wilful misconduct and gross negligence.⁽⁷⁾ However, liability for auxiliary persons (eg, members of the crew) may be excluded, even if the auxiliary person was guilty of wilful misconduct or gross negligence.⁽⁸⁾ The Supreme Court held that in the present case, any liability of the carrier had been excluded and therefore the carrier was not liable for the damage caused by the crew that unloaded the yacht.

Comment

The decision demonstrates the general limits of the exclusion of liability under Swiss law. Provided that no particular rules (eg, international conventions or special statutory rules) provide to the contrary, these general limits apply. According to the Code of Obligations, the general limit for the exclusion of liability is wilful misconduct and gross negligence. For auxiliary persons, liability may be excluded for all negligence, provided that the liability does not arise from the conduct of a business carried out under an

official licence, as in the case of, for example, rail transport.⁽⁹⁾ Within these limits, liability may be excluded in both agreements and general conditions, provided that no special rules provide to the contrary.

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Endnotes

- (1) Supreme Court Decision of August 25 2008, 4A_88/2008; available in French at www.bger.ch.
- (2) See Article 1b of the Hague-Visby Rules.
- (3) SR747.30, available in German, French and Italian at www.admin.ch/ch/d/sr/sr.html.
- (4) See Section 103 of the act.
- (5) See Section 44 of the regulation to the act.
- (6) See Section 117(1) and (2) of the act. For on-deck shipments, Section 105a of the act (which corresponds to Article 4(5)(e) of the Hague-Visby Rules) is not applicable.
- (7) See Section 100(1) of the Code of Obligations.
- (8) See Section 101(2) of the Code of Obligations, with certain exceptions as set out in paragraph 3 of the same section.
- (9) See Section 101(3) of the Code of Obligations.

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