SHIPPING & TRANSPORT - DENMARK

Direct action, choice of law and time limitation

31 July 2019 | Contributed by WSCO Advokatpartnerselskab

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Introduction

The European Court of Justice (ECJ) previously decided that a jurisdiction clause agreed between an English insurer and its (then bankrupt) Swedish insured did not bind a Danish plaintiff claiming directly against the insurer (for further details please see "Jurisdiction clause agreed by insurer and insured does not bind injured party claiming directly against insurer").

This decision implied that the Danish plaintiff could instigate legal proceedings in Denmark where the harmful event occurred, or where the plaintiff was domiciled, if the national law applicable to the question of direct action granted a right to claim directly against the liability insurer of the insured tortfeasor (Article 11(2) of the recast EU Brussels Regulation (1215/2012)).

Section 95(2) of the Danish Insurance Contracts Act provided a legal basis for direct claims against the insurer. Therefore, in its follow-up decision of 9 October 2017 in the same dispute, the parties had tasked the Danish Supreme Court with deciding the law applicable to the direct action claim. The decision was noteworthy, as the court analysed the choice of law question of direct action independently from the choice of law principles relating to the contract of insurance and *lex loci delicti* (ie, the law of the place where the tort occurred).

To recap, the Supreme Court applied a flexible choice of law test developed under Danish case law termed the 'individualising test'. The test contained a number of particulars of the case, including:

- where the harmful event occurred;
- the plaintiff's domicile;
- whether the insured tortfeasor had carried out business activities in Denmark when the damage occurred;
- whether the insurer's domicile had been foreign; and
- the proper law clause in the insurance contract.

Proceeding on the particular facts of the case, the Supreme Court found that the direct action claim enjoyed strongest proximity to Denmark. Danish law, including Section 95(2) of the Insurance Contracts Act, was therefore applied to the question of direct action. The Supreme Court therefore found that the plaintiff had rightfully instigated legal proceedings in Denmark (for further details please see "Significant Supreme Court decision considers choice of law principles applicable to direct action claims").

On 6 June 2019 the Maritime and Commercial High Court examined a similar direct action claim against a Dutch freight liability insurer on 6 June 2019 in a carriage of goods by road (CMR) dispute involving a bankrupt carrier and a Danish manufacturer of cigarettes.

Facts

On 1 August 2011 a tobacco manufacturer and a Dutch carrier entered into a framework agreement for the international carriage of goods by road. On 15 September 2011 the carrier issued a CMR waybill in exchange for 1,386 cartons containing cigarettes. The goods were to be carried from a plant in Hungary to the point of delivery in Denmark.

Upon delivery of the goods in Denmark on 19 September 2019, the manufacturer noted a shortage of 756 cartons, approximately 3.6 million cigarettes.

Although subsequent investigations revealed that there had been no breach of the trailer's integrity, investigators discovered evidence of the illicit use of the masterkey password on the trailer's movement log during a night's rest on a Danish highway. The carrier notified its liability insurer of the alleged theft by email on 20 September 2011.

On 21 September 2011 the manufacturer instigated proceedings against the carrier in England, which the UK Supreme Court ultimately dismissed for lack of jurisdiction on 28 October 2015. In the meantime, on 18 September 2012 the carrier filed for bankruptcy.

In the event of an insured's bankruptcy under Danish law, the injured party subrogates into the assured's claim against the company to the extent that the claimant has not been compensated by the estate (Section 95(2) of the Insurance Contracts Act). The carrier's liability insurance was concluded on terms that included, among other things, a Dutch proper law clause and a Dutch jurisdiction clause.

On 25 October 2016, following the case dismissal from the English courts, the manufacturer instigated proceedings in Denmark against the Dutch insurer for an unlimited shortage claim of €678,021.91 under Article 29 of the CMR Convention (alternatively, a CMR claim for 38,775.81 special drawing rights). At this point, the Dutch insurer had merely been notified of the initial claim by its insured carrier, but had not been included in or advised of the English legal proceedings.

The Danish proceedings were instigated well beyond the applicable time limit under the CMR Convention and the three-year limitation for ordinary claims under the Danish Limitations Act. However, under Section 29(5) of the Insurance Contracts Act, the insured carrier's notification to the insurer of its claim suspended the time bar applicable up to one year from when the insurer had rejected it.

However, the applicability and effectiveness of Sections 29(5) and 95(2) of the Insurance Contracts Act presupposed that:

- Danish law applied to the question of the direct action; and
- the manufacturer could rely on the insured carrier's 19 September 2011 notification.

At the crux of the dispute was whether:

- the direct action claim enjoyed Danish jurisdiction; and
- Danish law applied to the question of direct action.

The Maritime and Commercial High Court examined these points as a preliminary question. Second, the court was faced with deciding whether the manufacturer, by way of subrogation, could rely on the insured carrier's initial notification to the insurer.

Preliminary dispute

With regard to jurisdiction, the manufacturer argued that it had been domiciled in Denmark and that the loss had occurred in Denmark (Article 13(2) of the recast EU Brussels Regulation). Further, Danish law should apply to the direct action dispute as the loss had occurred in Danish jurisdiction en route to its point of delivery in Denmark. Disputing the claimants view on jurisdiction and choice of law, the Dutch insurer submitted that the direct action claim be dismissed by reference to Article 15(3) of recast EU Brussels Regulation. Further, the insurer argued that Dutch law should apply given that:

- the insurance policy included a proper law clause to the benefit of Dutch law; and
- both the insurer and the insured carrier had been domiciled in the Netherlands.

In its preliminary decision on jurisdiction, the court decided that the dispute enjoyed strongest proximity to Denmark and that Danish law was to apply to the question of whether the manufacturer could bring direct action proceedings against the Dutch insurer in Denmark.

The court found that a jurisdiction clause agreed between the insured carrier and its insurer could not be relied on against the claimant manufacturer.

Substantive dispute

Proceeding on the court's choice of law analysis in the preliminary dispute, the Dutch insurer argued that Danish law should apply to the entirety of the dispute and that the bankrupt insured's notification pursuant to Section 29(5) of the Insurance Contracts Act could not be relied on by a subrogated plaintiff.

Disputing the insurer's view, the manufacturer principally argued that the court should not subject

the time limitation dispute to Danish law (*lex fori*). On the contrary, the manufacturer argued that the choice of law in respect of direct action was separate to the choice of law applicable to the limitation dispute. Given that the manufacturer derived all rights from the insured carrier, the question of whether its claim should be struck out hinged on the insurance contract and Dutch law. The manufacturer argued that the insurer had not proven that, according to Dutch law, the claim had been time-barred. Alternatively, if Danish law was to apply on the substantive dispute – which the manufacturer disputed – the insured carrier's notification to its insurer on 20 September 2011 had suspended the time limit for up to one year calculated from when the insurer rejected the insurance claim (Section 29(5) of the Insurance Contracts Act). The insurer had undisputedly not rejected its insured carrier's claim. As it derived all rights from the bankrupt insured carrier, the subrogated manufacturer argued that under the Insurance Contracts Act and the Limitations Act, the claim had not become time-barred.

In its decision on the substantive dispute, the court reasoned that:

> *proceeding on the above mentioned preliminary ruling* [on jurisdiction and choice of law applicable to the question of direct action] *the remainder of the dispute must too be decided under Danish law, including the question of whether the claim is subject to time limitation.*

Deciding in favour of the Dutch insurer, the Maritime and Commercial High Court found that the manufacturer had stepped into the shoes of the insured carrier against the liability insurer simultaneously with the bankruptcy on 18 September 2012 (Section 95(2) of the Insurance Contracts Act). Given that the manufacturer had stepped into the shoes of the insured carrier, the three-year time limitation commenced on the date of loss (ie, on 19 September 2011).

However, the court found no basis in the wording of Section 29(5) of the Insurance Contracts Act or its explanatory note which supported the manufacturer's reliance on the insured carrier's notification of the incident to the insurer. The court found that pursuant to the wording of Section 29(5), an insured's suspension of time by way of notice applied only to the relationship between the insured carrier and the insurer. This conclusion enjoyed support in Supreme Court case law (UfR 2018.1506 H).

The claim had therefore become time-barred on 19 September 2014 prior to the manufacturer's application to the Danish courts. The court therefore rejected the manufacturer's claim.

Comment

The Maritime and Commercial High Court's decision is noteworthy for two reasons. First, for the purposes of Danish insurance law, the court found that under a direct action claim pursuant to Section 95(2) of the Insurance Contacts Act, an injured party cannot rely on a bankrupt insured's notification to its insurer for suspension of time.

Second, international freight lability insurers may have to take note of the potential implications of the court's choice of law rationale. Although the manufacturer's claim against the insurer failed, the court's reasoning seems to build on the premise that the choice of law outcome applied not only to the question of direct action, but also to the substantive dispute, including the limitation issue.

The court seemingly accepted that if the choice of law test on direct action was executed to the benefit of Danish law, the dispute must be subject to that law in its entirety, including Danish time limitation rules.

By comparison, in a 2017 case the Supreme Court found that the direct action dispute enjoyed strongest proximity to Denmark (for further details please see "Significant Supreme Court decision considers choice of law principles applicable to direct action claims"). The question of direct action was therefore subject to Danish law (ie, the Supreme Court's premise seemed to indicate that the choice of law outcome did not necessarily apply in respect of the question of insurance terms, coverage and questions of time limitation under the policy).

The premise relied on by the Maritime and Commercial High Court in this matter, if not appealed, may seem ripe to impede the effectiveness of some insurance policies between liability insurers and international carriers, including proper law provisions and time limitation under a policy. This implication could perhaps be alleviated if the court's test to the benefit of Danish law, including the suspension of time by notice under Danish limitation law, applied only to direct action claims themselves. This would imply that the question of whether the substantive claim was time-barred could have been subject to a secondary test under Dutch law. Whether the decision provides flexibility for this latter construction remains doubtful, as the court seems to have applied the choice of law test *en bloc*.

For further information on this topic please contact Jesper Windahl or Rósing Rasmussen at

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