

Court rules that jurisdiction agreement in bill of lading cannot be set aside due to "international character" of dispute

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Introduction

On 9 September 2021, the Supreme Court of Denmark determined whether legal proceedings against a Danish shipping company, which had contracted to carry containers from China to Copenhagen, could proceed in Denmark irrespective of the fact that the claimant and the shipping company had agreed that the dispute should be heard exclusively by the UK High Court. The Supreme Court decided that the dispute had such an international character that the jurisdiction agreement between the parties could not be set aside under section 310(1) of the Merchant Shipping Act, since the EU Recast Brussels Regulation⁽¹⁾ applied.

Facts

A Danish importer booked the sea carriage of a container from Shanghai to Copenhagen with a Danish freight forwarder, which subcontracted the carriage to a Danish shipping company. The agreement between the freight forwarder and the shipping company was entered into in Shanghai by the parties' respective Chinese subsidiaries. The shipping company's Chinese subsidiary, acting as agent, issued a non-negotiable waybill, which identified the freight forwarder as consignee. The port of loading was Shanghai, and the port of discharge was Copenhagen. The waybill included the following choice of law and jurisdiction clause:

26. Law and Jurisdiction For shipments to or from the U.S. any dispute relating to this bill of lading shall be governed by U.S. law and the United States Federal Court of the Southern District of New York is to have exclusive jurisdiction to hear all disputes in respect thereof. In all other cases, this bill of lading shall be governed by and construed in accordance with English law and all disputes arising hereunder shall be determined by the English High Court of Justice in London to the exclusion of the jurisdiction of the courts of another country. Alternatively and at the Carrier's sole option, the Carrier may commence proceedings against the Merchant at a competent court of a place of business of the Merchant.

During the voyage, the vessel encountered rough weather and lost three containers in the Mediterranean Sea. The freight forwarder was held liable by the importer and its cargo insurers, which brought legal proceedings against the freight forwarder in Copenhagen.

The freight forwarder issued proceedings against the shipping line before the same court and claimed it was not liable. The shipping line submitted that the proceedings should be dismissed, as it had been agreed that the dispute should be decided in London, which was undisputed by the parties. However, pursuant to the Merchant Shipping Act, the freight forwarder argued that the case could be heard in Denmark irrespective of the jurisdiction agreement because:

- both the freight forwarder and the shipping line were Danish companies domiciled in Denmark;
- the claim had arisen out of a contract of carriage with an agreed place of delivery in Denmark;
- the agreement was governed by the Merchant Shipping Act and its rules on jurisdiction, which implies that there was jurisdiction in Denmark (as these rules can only be departed from if there is a jurisdiction agreement that the Danish court recognises pursuant to the EU Recast Brussels Regulation); and
- the EU Recast Brussels Regulation was inapplicable, as the dispute was not an international case, having no international qualities and no particular connection to London.

The shipping company submitted that the jurisdiction agreement in the waybill should be recognised under the EU Recast Brussels Regulation, as the case was international in nature. In support, the shipping line submitted that:

- the container had been shipped from China;
- the contract of carriage had been entered into in China and the waybill had been issued in China by the Chinese shipping line's subsidiary to the Chinese freight forwarder's subsidiary; and
- the container had been lost in the Mediterranean Sea.

Decision

The Supreme Court of Denmark decided that the jurisdiction agreement between the parties could not be set aside under section 310(1) of the Merchant Shipping Act, since the EU Recast Brussels Regulation applied due to the dispute's "international character". The reasoning was as follows:

It follows from the Jenard-report from 1968, in the Schlosser-report from 1978 and from the European Court of Justice that the applicability of the recast EU Brussels Regulations on jurisdiction clauses presupposes that the present dispute has an "international character". It follows from the European Court of Justice case law that even though both parties are resident in the same EU-state, the case can have "international character" if the circumstances which the dispute arises from has occurred in an EU-state or third part state thus disputes regarding the international jurisdiction of the court, cf. C-281/02 (Owusu), premise 23-26

and C-237/10 (Lindner), premise 30.

[The shipping company] and [the freight forwarder] are both professional companies which operates within the field of international transport of freight and the present dispute between the parties regards lost freight during transport from Shanghai to Copenhagen. According to the bill of lading the agreement of transport was concluded between two Chinese companies, [the freight forwarder's subsidiary] and [the shipping company's subsidiary], last mentioned acting as agent for [the shipping company].

On this basis the Supreme Court of Denmark after an overall assessment finds that the present dispute between [the shipping company] and [the freight forwarder] has such an "international character", that the recast EU Brussels Regulation is applicable, including article 25 regard jurisdiction agreements.

Comment

The Supreme Court so altered the decision by the High Court of 25 February 2020, according to which the claim could have been heard in Denmark.

Section 310 of the Merchant Shipping Act states that court proceedings can be brought against sea carriers in Denmark in cases where the sea carrier receives goods for carriage in Denmark or delivers goods after the completion of the carriage in Denmark. However, section 310 does not apply if a jurisdiction agreement that excludes Danish jurisdiction has been entered into pursuant to the EU Recast Brussels Regulation.

It follows from the Supreme Court's decision that legal proceeding regarding claims for damaged goods – where legal proceedings are filed in Denmark according to the Merchant Shipping Act – can have "international character", even when both the consignee (as stated in the bill of lading) and the shipping company are Danish companies.

Post-Brexit, it can be assumed that the EU Recast Brussels Regulation does not apply in future court proceedings regarding the validity of jurisdiction agreements that refer disputes to UK courts. Such court proceedings could be filed in Denmark even though the case has "international character" if the place of delivery is in Denmark or the carrier's receipt of consignment takes place in Denmark.

For further information on this topic please contact [Jesper Windahl](mailto:Jesper.Windahl@wsco.dk) at WSCO Advokatpartnerselskab by telephone (+45 3525 3800) or email (jw@wsco.dk). The WSCO Advokatpartnerselskab website can be accessed at www.wsco.dk.

Endnotes

(1) 1215/2012/EU.