



Application of a jurisdiction clause contained in a marine liability policy in respect of direct claims of an injured party under sec. 95 of the Danish Insurance Contracts Act

From a Danish Perspective | 11 June 2015

Agenda

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01. Danish legislation and case law on direct actions

Section 95 in the Danish Insurance Contracts Act

- Due to **section 95**, the injured party can make a direct claim against the insurer
- Due to **section 95 (2)**, the injured party **steps into** the insured's shoes in case the insured enters into insolvency proceedings
 - “The injured party further steps into the insured's rights against the insurance company if the injured party's claim for compensation is comprised by the insured's insolvency proceedings, compulsory proceedings or debt-restructuring. To the extent the injured party's claim has not been covered, the full claim for compensation may be raised against the company. In the cases mentioned under section 95(1) the insurance company shall without undue delay inform the insured that it has received a claim for compensation.”
- Direct action in Danish legislation for certain types of claims: accidents caused by automobiles and dogs (!)

To Step into the Shoes of the Insured

- What does it mean from a Danish perspective?
 - Normally, that the injured party has the same rights against the insurer as the insured
 - However, in High Court judgment [U.2011.2425V](#), the court found that the injured party had better rights than the insured
 - According to the insurance contract, the insured was his own insurer for DKK 10,000
 - Nevertheless, the injured party got **full compensation** as the court found that this was the correct, literal construction of section 95 (2)

To Step into the Shoes of the Insured

- Legal position now clarified by the Supreme Court, U.2013.2705H. The injured does not have better rights than the insured.

“----- However, the expression does not imply in case of the tortfeasor’s insolvency proceedings, compulsory proceedings or debt-restructuring that the insurance company is prevented from making the same objections towards the injured party as well as towards the tortfeasor -----.”

02. Choice of jurisdiction

Jurisdiction Clauses in Insurance Contracts

- Mandatory jurisdiction rules in insurance matters in Articles 8 to 14 in the Brussels I Regulation
- However, in maritime insurances, the above Articles can be derogated from due to Article 13 and 14
- Consequently, as regards maritime liability insurances, P&I insurances, the insured and the insurer may derogate from the provisions in the Brussels I Regulation

Jurisdiction Clauses in Insurance Contracts

- Article 11 (2) of the Brussels I Regulation. “Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted”
- But these rules are not mandatory, article 13.
- Some academics and practitioners are of the opinion that as the injured party’s right to a direct claim follows from the Insurance Contracts Act, then jurisdiction clauses cannot influence the direct claim
- This is moreover in accordance with the doctrine of privity of contract.

03. Judgment of 22 December 2014 from the Maritime and Commercial Court, Denmark, regarding jurisdiction

The Facts of the Case

Skåne Entreprenad Service AB (“Skåne”) was bareboat charterer of the tugboat, Sea Endeavour I (“the Vessel”)

- Skåne used the Vessel for transporting sugar beets from the port of Assens to the port of Nakskov

During one of the carriages, the Vessel caused damage to the port of Assens

- Skåne entered into bankruptcy proceedings, which is why the port of Assens could not obtain full compensation from Skåne

Skåne had taken out a Charterers P&I insurance and the cover was provided by Lloyd’s of London

- The port of Assens brought a direct claim against the insurer in accordance with section 95 (2) in the Danish Insurance Contracts Act

The Jurisdiction Clause in the Insurance Contract

“Choice of Law and Jurisdiction

This insurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the courts of England and Wales”

The arguments of the Parties

- The insurer argued that the Danish court did not have jurisdiction due to the insurance contract being subject to English law and jurisdiction
- The port of Assens argued that the jurisdiction clause was of no relevance for the injured's claim and referred moreover to the principle of privity of contract

The Judgment of the Maritime and Commercial Court

- The jurisdiction clause did not violate the mandatory provisions on jurisdiction in the Brussels I Regulation
- The port of Assens stepped into the rights of the insured against the insurer and these rights included the clause on choice of law and venue in the insurance contract
- Thus, the Maritime and Commercial court rejected jurisdiction.
- Case now under appeal to the High Court.

04. Conclusion

Conclusion

- The Maritime and Commercial Court has given a clear signal as regards direct claims
- When an injured party brings a direct claim for compensation against the insurer, all terms and conditions, as written into the insurance contract, have effect
- A conflict with article 11 (2) of the Brussels I Regulation?
- It is relevant to mention that the question has not (yet) been decided by the Danish High Court
 - but in my opinion likely that it will be upheld, see the Supreme Court case U.2013.2705H
- Guidance from cases regarding subrogation

Subrogation in Jurisdiction Clauses – unclear Legal Position

Gert Straetmans, Enforcement of International Contracts in the European Union, 2004:

“Within the scope of the Brussels I the decision can probably be extended to the general statement that the party to whom a claim is subrogated is bound by the jurisdiction clause between the parties to the original contract.”

European Court of Justice, 7 February 2013, C.543/10:

“It follows that the jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract. In order for a third party to rely on the clause it is, in principle, necessary that the third party has given his consent to that effect.”

Von Appen v. Voest Alpine, Queen’s Bench Division (Commercial Court), 1996, C.L.C. 1807:

“subrogated rights to sue derived from the transferred rights under the contract and were governed by that contract. ---- The effect of subrogation was to transfer Voest’s right to make claims under the subcharter party to their insurers. Those rights were limited by the terms of the sub-charter and were accordingly subject to the arbitration clause.”

05. Considerations regarding the Maritime Conventions

Maritime Conventions allowing Direct Actions

- 1992 Civil Liability Convention
- HNS Convention
- Bunkers Convention
- Wreck Removal Convention

Normally specific jurisdiction rules in national implementation – as opposed to “ordinary” claim for damages as in the Assens case

Considerations regarding maritime conventions

- Wreck Removal Convention, article 12.10 (in force in Denmark on 25 April 2015)

“Any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner’s liability. In such a case the defendant may invoke the defences (other than bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. Furthermore, even if the registered owner is not entitled to limit liability, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the wilful misconduct of the registered owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant. The defendant shall in any event have the right to require the registered owner to be joined in the proceedings.”

6. Questions?



Thank you for your attention