**JUR4303-01 SPRING 2015**

The case may at first sight appear simple but the topic surrounding the effects of fios to the mandatory liability rules is partly complex and also unresolved. It is not extensively covered in the syllabus but still fairly in-depth in Falkanger/Bull page 325 et sec. Of relevance here is also ND 1988.288 Linvik, discussed at pages 326-327 in the book. In addition ND 1992.386 Garden is of significance as it (as well as Linvik) illustrates sharing of liability relating to the master’s failure of monitoring loading operations in connection with fios. Since the topic is partly unresolved, good skills of reasoning must be rewarded. This concerns both Q1 and Q2.

Q1

The case does not invite to a discussion of choice of law and jurisdiction. The idea is that the MC clearly is applicable; the case concerns inter-Nordic trade and the shipowner is Norwegian, and may therefore be sued here.

If the candidate nevertheless were to discuss these topics further, the following is mentioned: the case does not give any information about how choice of law/jurisdiction may have been agreed in the charterparty and with the bill of lading referring to the terms of the charter. If the case had concerned carriage of general cargo (liner service) these questions would have been obvious: venue according to section 310 and scope of application according to section 252. The corresponding topic for inter-Nordic voyage chartering and tramp bills of lading is not obvious in the same way: section 310 only concerns general cargo so that even if the Code is made mandatory for inter-Nordic voyage chartering (section 322.2) and tramp bills of lading (section 325), it could of course be that venue is agreed to a different place and with corresponding effects to the choice of law. Particularly in Q2 involving recourse claims under the charter, such a problem/topic could exist. But again, the case does not invite to this type of discussions.

Regarding the question of liability there are various factors of relevance:

The mandatory liability rules in sections 274 onwards apply both under voyage chartering and tramp bills – under chartering because of inter-Nordic trade, section 322.2, and under bills in the hands of third parties, section 325. Therefore it may perhaps be perceived as a “mock-information” that the case introduces a third party receiver, but this information still has some bearing on the fios assessment, particularly under Q2.

If the fios topic had not been introduced it is clear that the shipowner would have been liable for the entire damage; he would have been liable for the fault by the stevedores (deficient securing of cargo) as well as for the corresponding fault by the master, see e.g. MC section 131. It even transpires from the fact that the master suspected that the securing was not strong enough.

The question then becomes: what are the effects of fios? A key point here is the relationship between the mandatory rules relating to the period of responsibility (section 274) and the shipowner’s/carrier’s servants (section 275), and the effects of loading operations (normally belonging to the shipowner, section 326) being by agreement allocated to the charterer/shipper and being actually performed by the charterer/shipper (their servants). The problem of whether the mandatory period of responsibility is circumscribed by fios, alternatively whether the carrier is not vicariously responsible for such servants, is fairly well discussed in Falkanger/Bull (above), and both solutions must be considered acceptable. But what the candidate here ends up with is clearly not the end-answer to the case. To illustrate:

a) One reaches the conclusion that sections 274, 275 (cf. section 325.3) are not circumscribed by fios, in other words that the shipowner is responsible for failure by the charterer’s/shipper’s servants – and clearly also for the master’s fault (the master in that case misconceived the legal effect of fios by relying on the charterer/shipper bearing the full risk of insufficient securing). If one ends up with this standpoint the shipowner becomes fully liable. It may however be worth reflecting on what the effect would have been if ownership to the cargo had not been transferred to a third party; in that case it seems inconceivable that the charterer (under the MC’s mandatory rules in inter-Nordic chartering) could claim damages for faults committed by his own servants, see also Falkanger/Bull page 327 (1) for the parallel fault by the receiver’s servants. This type of reasoning has some bearing on the logic surrounding a possible recourse right in Q2.

b) One reaches the conclusion that fios “survives” in the sense that the receiver cannot claim damages for fault by the cargo-side (charterer, shipper, receiver) because these operations are not performed by servants of the shipowner (section 275), alternatively that the shipowner cannot be considered as having the cargo in his custody (section 274) during these operations. In that case the good candidate should see that the receiver would need some type of warning that loading, stowing, securing takes place for this account/risk, something which the case leads up to in that the bill of lading refers to the charterparty terms, and also in that the receiver actually performs discharging (is thereby at least familiar with the “free out” part of fios), see also Falkanger/Bull page 327 (3).

But with such a result as under b) the question remains as to the role and monitoring duty of the master. Again there is room for various solutions.

The “hard-boiled” view would go in the direction of emphasising the fios wording in Gencon clause 5 whereby “lashed and/or secured” is expressly placed on the cargo side – possibly supplemented by the view that the master’s duty to monitor stowage for the sake of ship safety obviously cannot be delegated away, but that the case makes it clear that there was no such danger involving the ship itself; only relating to the cargo.

The less hard-boiled view would be that the master in any event has a duty to monitor stowing and securing, as reflected i.a. in MC section 131, and that he therefore should have intervened in what he suspected to be insufficient securing. And if one were to take the hard-boiled view on the basis of construction of contract (above), the fact that the master suspected a risk of cargo damage would presumably in any event mean that he was under a duty (based on loyalty or general diligence) to warn in order to avoid damage from occurring.

What solution the candidate reaches may therefore be quite open. The case indicates sharing of liability and that will be a viable option, for example 50/50 or 60/40. Those familiar with case-law will know that in the Linvik case(above) liability was shared; partly the shipper’s faulty stowage, partly the master’s seaworthiness/monitoring duty – but there the failure of monitoring concerned ship-safety to a larger extent than in our case. Also in ND 1992.386 Garden liability was shared; that case did however not concern mandatory liability but the construction of Gencon 76 clause 2, which contained a provision to the effect that stowage belonged to the shipowner’s responsibility (Gencon 94 has removed this part of clause 2 on the footing that fios constitutes the normal situation, cf. clause 5).

The question is therefore potentially complex and good skills in reasoning should be rewarded. If a candidate hasn’t picked up the fios at all, in other words that it is, without more, established that the shipowner is liable also for the servants of the charterer/shipper, a “secondary topic” may be whether the master’s failure in not warning of the risk of cargo damage, may be seen as nautical fault, which it clearly cannot; that fault is committed before departure (initial unseaworthiness) and concerned only the cargo (commercial fault).

Q2

Again the case does not open for a discussion of jurisdiction and choice of law. These points could have been filled out in in box 25, cf. clause 19 of the charter, but that is not the case. A good candidate may perhaps “object” that such information is lacking; whether the charterer was sued in Denmark under the Danish Maritime Code etc. That type of remarks must obviously be accepted but it is expected that the candidate fairly quickly embarks upon the substantive question, based on Norwegian MC.

The substantive: what conclusion one arrives at here may to some extent depend on the answer to Q1, but first some overriding considerations: the point with recourse (indemnity), whether under the charter or under MC, is that the shipowner may have good grounds for being finally placed money-wise as if the liability rules of the charter had governed: If he is made subject to more onerous liability vis-à-vis third party bill of lading holder, than he would have been vis-à-vis the charterer, this “surplus” liability should perhaps be imposed on the charterer. But this type of reasoning is somehow short-circuited in our case since the liability of the shipowner would have been mandatory also under the charter, because of inter-Nordic trade. Some further reflections should therefore be made, also under the assumption that the shipowner may be liable, wholly or partly, under Q1:

a) One has reached the conclusion of full liability because fios cannot set aside the mandatory rules, sections 274, 275. Here the good candidate will see that even though section 274, 275 “survives” fios, liability vis-à-vis the receiver and the charterer may nonetheless turn out differently, because the charterer hardly can claim damages for damage caused by its own servants, see Q1 a) above. In that sense the shipowner might be in a position to claim recourse. The question then becomes how Gencon clause 10, alternatively MC section 338,3, shall be construed in that respect. Without going into details the following may be sketched: The MC aims at recourse for increased liability following from the terms of bills of lading, not increased liability following from mandatory legislation, hence the provision does not seem to fit well. It will at least require fairly detailed reasoning to adopt MC 338,3 to our case where (the construction of) mandatory rules comes into play. But the recourse provision in the Code is none-mandatory. Gencon clause 10 may seem more appropriate as a basis by the alternative “… terms … of such bills of lading impose or Result In The Imposition Of more onerous liabilities … than those assumed … under the charterparty.” It may be that a purposive construction of this clause points in the direction of a recourse right. The point is not here to state any firm solution. Candidates who see this type of topic and are able to say something sensible about construction, should obviously be generously rewarded.

b) One has reached the conclusion of wholly or partly liability because of the master’s failure of monitoring, cf. Q1 b). Here a recourse right can hardly be conceived of. It is hard to see how such a failure to monitor (fault on the shipowner’s side) should turn out differently vis-à-vis the charterer than the receiver. Whatever argument in favour of the shipowner would probably be along the following line: had the charterparty governed, including the favourable clause 2, without the mandatory inter-Nordic legislation in voyage chartering, it could perhaps be said that issuance of bills of lading had resulted in “the imposition of” (clause 10) more onerous liability rules than under the charter as such. But since in our case is a question of mandatory liability rules also under the charter, this line of argument appears artificial; when the shipowner accepts to perform a voyage in inter-Nordic trade he must also be presumed to know the legal position. This latter part is mentioned for the point of completeness. It is not to be expected that candidates shall enter into such hypothetical scenarios as part of the construction of the recourse provisions.

Generally the question must be described as difficult and candidates must be rewarded for merely seeing the question of recourse relating to increased liability resulting from issuance of bills. If candidates were not to pick up the significance of fios under Q1, and in that way impose full liability on the shipowner based on vicarious liability also for faults made by the charterer’s servants, it will probably be difficult to then get a grip on the topic here in Q2. The key point will then be whether the candidate reasons well based on the premise he/she puts for the liability for which recourse is claimed. Put differently, candidates should not be punished twice over (both in Q1 and in Q2) for not properly grasping the fios topic.

Q3

This is expressed as a control question but still touches upon such a core element in the syllabus that it should be capable of functioning as a genuine adjusting factor, for example if the candidate were to “fail” on the most central fios topic above. It is considered unnecessary here to set out the content of the nautical fault exception.

Trond Solvang