SHIPPING & TRANSPORT - NETHERLANDS

Burden of proof remains with shipowner in proving terminal operator liability

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Introduction

The loading and unloading of cargo from ships is a key element in the transport chain. Such operations are carried out by terminal operators (also known as 'stevedore'), which employ large cranes to carry out loading and unloading. Ships are sometimes damaged during these operations.

This raises the question of whether – and on what grounds – a terminal operator can be successfully held liable for such damage.

A recent Rotterdam District Court decision (30 October 2019, ECLI:NL:RBROT:2019:8469) upheld the standard of liability established in Dutch case law, confirming that the burden of proof lies with the shipowner when it comes to demonstrating terminal operator liability.

Background

Generally, terminal operators conclude service agreements only with large shipping lines, with these agreements covering (among other things) the terminal operator's liability. However, when it comes to individual shipowners and barge owners, in most cases there is no contractual relationship.

As a result, claims for compensation arising from damage sustained during terminal handling operations have a non-contractual basis and are based on a wrongful act (Articles 6:162 and 6:170 of the Dutch Civil Code).

Thus, the relevant question is whether the terminal operator has violated the standard of due care.

The Dutch Supreme Court previously defined this standard of care for terminal operators in 1953 in a case involving damage to the vessel Nicolaos Pateras (HR 6 March 1953, NJ 1953/791).

In its decision, the Supreme Court held that a shipowner which voluntarily submits a ship for standard mechanical unloading is considered to be aware of and familiar with the presence of a certain danger. Thus, the shipowner is deemed to have agreed to the possibility that damage to the vessel may occur during operations, provided the stevedore has exercised a reasonable level of due care. The mere fact that damage has occurred during operations does not constitute a wrongful act by the stevedore.

In the past decade, Dutch courts have again started to apply the Nicolaos Pateras test in several cases involving terminal operator liability. The outcome of these cases has been varied. Debate has generally focused on the evidence submitted to support allegations that the terminal operator did not exercise reasonable care. After assessing the evidence provided by the shipowner, the courts have subsequently either awarded or rejected the claim.

Facts

The Rotterdam District Court recently confirmed the standing case law after a vessel operator brought legal proceedings against a terminal operator.

A grab crane was operated by a terminal operator employee during the vessel's discharge operations. Soon after discharge was completed, it was noted that there was damage to the vessel's

hold.

The vessel operator claimed that the damage must have been caused by the crane grab touching the floor of the hold.

Decision

The Rotterdam District Court held – in line with the aforementioned Dutch case law – that the simple fact that damage had occurred was insufficient to constitute a wrongful act by the terminal operator.

Since the discharge involved the usual mechanical unloading operations, the crane operator would be deemed to be at fault only if it had not exercised reasonable care. The burden of proof in this situation was on the vessel operator. In making its decision, the Rotterdam District Court explicitly referred to the Nicolaos Pateras case.

In this case, the vessel operator had failed to sufficiently substantiate its claim that the damage had been caused by the grab crane. For this reason, the court rejected the claim.

Comment

Remarkably, the actual circumstances were never fully established in the Rotterdam District Court case: it was not even clear that the damage had actually occurred during unloading. As mentioned, in such an event, a terminal operator would in general not be liable.

However, in most other cases it would at least be certain that the damage had occurred during loading or unloading operations. As previously stated, the terminal operator is then liable only for damage to a vessel if the shipowner demonstrates that it did not exercise reasonable care.

In showing a lack of reasonable care, the shipowner must provide evidence (eg, by means of survey reports or witness statements). The terminal operator may be allowed to provide counter evidence.

Thus, the question of whether a terminal operator is liable for damage to a vessel greatly depends on the facts and circumstances of the case, together with the available evidence.

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