

Contract of carriage by sea is not contract with protective effect in favour of other shippers

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Facts

Decision

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Facts

The applicant had ordered the transport of two cylinders by ship. Rails were stowed next to the cylinders on the deck of the ship. The respondents were the shippers of these rails. During the transport, the rails shifted and caused damage to the cylinders. The carrier's terms and conditions contained an arbitration agreement.

The applicant was of the view that the contract of carriage by sea between the respondents and the carrier was a contract "with protective effect in favour of third parties" – namely, other shippers – so that the arbitration clause also applied in the relationship between the applicant and the respondents. Before starting arbitration proceedings, the applicant applied to the Hamburg Higher Regional Court (as the first-instance court) to have it confirm the admissibility of arbitration proceedings.

Decision

Although the court, in its decision of 12 August 2019 (6 Sch 2/19), confirmed that, in principle, under German law an arbitration agreement can also be made in favour of third parties, and also by a contract "with protective effect in favour of third parties", it decided that a contract of carriage by sea is not a contract with protective effect in favour of other shippers. The shipper's obligations relating to proper and safe packaging and labelling were meant to primarily protect the carrier, not other shippers. Further, since it is unapparent to a shipper how many other shippers have goods transported with the same ship, what kind of goods these are and what value they have, the shipper's liability would otherwise be unmanageable and thus unreasonable.

Comment

German contract law is generally more favourable to persons seeking damages than tort law would be. The concept 'contract with protective effect for third parties' was developed by German case law in order to allow damages under contract law in certain situations where tort law did not seem appropriate. The basis of such claims would be a 'supplementary interpretation' of the contract, which calls for prudent handling. The court's judgment, dismissing the idea of a contractual link between two shippers of the same carrier does, therefore, seem convincing.

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