

ND 1956 175 SH (PAGENSAND)

The Swedish Supreme Court, 25 April 1956.

The Mälaren insurance company

(Stellan Graaf, attorney) versus

1 Johann Carsten Koeser, shipowner

2 Lübeck Linie Aktiengesellschaft

1) Cläes Palme, attorney, 2) Torsten Svensson, attorney)

While the "M/S Pagensand" was lying alongside a loading port, the second engineer removed the cover from a sounding pipe and then neglected to replace the cover properly. During the voyage, the cargo was damaged by water, which had poured in through the sounding pipe. This omission was regarded as having caused a defect, which involved an inherent unseaworthiness. Koeser, as the shipowner, and Lübeck Linie, as the time charterer and the party chartering out the vessel for the voyage, were obliged to pay compensation for the damage.

The question as to whether there was an obligation to pay was, in accordance with the parties' agreement, adjudicated under Swedish law. German law was considered applicable with regard to the legal limitation of the shipowner's liability.

Affirmation of the judgement issued by the Svea Court of Appeal dated 28 July 1954, ND 1954, p. 550 and Stockholm magistrates' court, ND 1953, p. 585.

Koeser and Lübeck Linie applied for a review of the judgement issued by the court of appeal, each claiming that His Royal Majesty, in reversing said judgement, had to affirm the magistrates' court's judgement.

Mälaren requested confirmation of the court of appeal's judgement, though waiving the claim for maritime lien.

The Supreme Court (Messrs. *Ljunggren, Sjöwall, Hagbergh, Digman and Nordström*) issued the following opinion: Mälaren and Lübeck Linie have agreed that the question of whether Lübeck Linie is liable for the damage which occurred, will be decided in accordance with Swedish law and that therefore the provisions of the Act relating to Sweden's joining the bill of lading convention will apply.

Investigation shows *that*, while the "Pagensand" lay at port in Stockholm during the period from 30 October to 1 November 1951 to load the cargo of paper in question, for which a bill of lading was issued on 31 October, the vessel's second engineer removed the cover to the port sounding pipe and then neglected to replace the cover properly, *that*, from the time the vessel left Stockholm on 1 November until she entered the Baltic Sea on 6 November, water had poured into the open sounding pipe, *and that* this was not discovered until the 8 November, or the same day on which the vessel put into a port of refuge.

The negligence in respect of sealing the sounding pipe caused a defect, which amounted to the "Pagensand" being inherently unseaworthy, unless it had been likely that the defect would have been remedied before there had been any risk of damage. Since, as the court of appeal has found, the facts presented in the case justify the conclusion that regular sounding through the sounding pipe was not conducted onboard the "Pagensand", it is

considered unlikely that the defect would have been rectified before there was any risk of damage.

Since the damage to the paper cargo had, therefore, been caused by inherent unseaworthiness and Lübeck Linie has not substantiated that reasonable care had been taken in respect of the "Pagensand's" seaworthiness at the start of the voyage, Lübeck Linie must, pursuant to applicable statutory provisions and the provisions of the bill of lading, be held liable for the damage.

His Royal Majesty finds that the question as to whether Koeser is liable for the damage should have been decided under German law. However, Koeser has declared his liability to be equal to that of Lübeck Linie, and so, on those grounds alone, he is jointly liable with Lübeck Linie to pay compensation to Mälaren.

With regard to the question as to which country's law should be applied in terms of the legal limitation of the shipowner's liability, the fact, cited by Koeser and Lübeck Linie, that Mälaren's claim is being heard by a Swedish court, does not provide any decisive grounds for applying Swedish legal principles in this respect; the same applies to the fact that, as a result of the agreement between Mälaren and Lübeck Linie, Swedish law was applied as far as the question of whether Lübeck Linie is liable for the damage which occurred. With regard in particular to the fact that the "Pagensand's" port of registry was in Germany, and German law was therefore the law of the flag – reference to which was, incidentally, made in the bill of lading – and that Koeser was domiciled in Germany and Lübeck Linie was a German company, his Royal Majesty finds that German law shall be applied with regard to the legal limitation of liability.

In accordance with the above stated assumption, Koeser and Lübeck Linie have paid the amounts claimed in the case, without comment. As a result, compensatory damages shall be fixed at these sums.

On the basis of what has thus been stated, his Royal Majesty justly affirms the court of appeal's judgement in the main case; however, since Mälaren has waived its claim for maritime lien before his Royal Majesty, the order relating thereto is vacated.