

Storm damage in the shipping industry – who pays the bill?

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A severe storm yesterday lashed Belgium, Germany, the UK and the Netherlands. The transport business was seriously disrupted. Schiphol Airport was closed and in the port of Rotterdam, shipping containers were reported to have toppled. Experience learns that damage will most likely also have been caused to vessels and/or the cargo carried on board. During a storm earlier this month, vessels broke loose of their moorings and drifted around, whereas containers were lost over board.

The question will then arise whether such damage can be claimed from or alternatively whether liability for the damage can be rejected successfully by the parties interested in the property causing damage. Who is going to foot the bill and bear responsibility for the damage caused?

Frame

Whether liability arises for damage caused by a storm first of all depends on the applicable legal regime and the contractual relationship, if any, between a claimant and the party responsible for the property that caused the damage.¹

Liability for collision damage

Under Dutch law collision liability is channelled to the vessel's registered owner. If the collision has been caused by the fault of his vessel (*'schuld van het schip'*), the owner is responsible for the damage caused. However, if the collision has been caused by a fortuitous event, if it is due to force majeure, or if there is doubt as to the causes of the collision, the loss shall be borne by the persons who have suffered the same. Vessel owners often try to seize this 'force majeure'-argument to fend off liability in collision cases that occurred in stormy weather. It is then argued that the collision is not the fault of the vessel, but is due to the storm which was beyond the owner's control. It is not self-evident that such argument will succeed. According to Dutch case law, this depends on the circumstances of the matter. Relevant considerations in this respect revolve around the question whether the weather phenomena encountered were to be expected at that place and time and whether the vessel owner took sufficient measures to prevent these weather phenomena having an effect on his vessel (e.g. was the vessel's mooring configuration sufficient?).

Liability for cargo damage

Cargo carried on board sea going vessels will often be subject to a Hague or Hague-Visby Rules type of liability regime, whether or not by contractual application. Under such regime, the carrier is firstly obliged to exercise due diligence to provide a sea worthy vessel (including a capable crew as well as fit and safe holds and refrigeration units) before and at the beginning of the voyage. Secondly, he is compelled to properly and carefully handle, stow, load, discharge, keep and care for the cargo, also during the voyage. The obligations of the second category are expressly made subject to various exceptions of liability. One of these exceptions, the 'perils of the sea' exception, is often invoked by carriers when cargo damage is caused by heavy weather. But when is heavy weather so bad that it entitles a carrier to escape liability? The Dutch Supreme Court is of the view that the weather has to be exceptionally bad before it can be qualified as a 'peril of the sea'. In addition, in order to rely on the exception, it must be shown that the damage was caused by the

¹ Under Dutch law, property that causes damage cannot be liable itself. Instead, a claim has to be made against the party who is responsible for the property.

heavy weather indeed and not by another cause, like insufficient stowage on board, or the carrier's failure to exercise due diligence before and at the beginning of the voyage.

Conclusion

Whether damage caused by vessels as a result of the storm can be claimed or alternatively whether liability for such damage can be rejected successfully will depend on the circumstances of the particular case, including the contractual relationships, if any. Due fact finding and sound legal advice may well make the difference to the question whether financial damage is suffered when the storm has long calmed down.