INSURANCE - DENMARK

Recharge of sum insured: whose duty and what are the consequences of failing to do so?

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Introduction

In a recent ruling on the recharge of the sum insured in a project liability insurance policy, the Danish Building and Construction Arbitration Board ruled that the obligation to recharge was incumbent on the policyholder (adviser), regardless of whether the client had requested it or not.

The board also found that an agreement on limiting the consultant's liability to the sum covered by the project liability insurance has limited significance if the consultant has neglected their duty to request the recharge. The ruling is extraordinary as it is the first regarding the recharge of the sum insured.

This article examines the ruling and highlights the conditions that parties should be aware of when refilling.

Facts

The case (TBB2020.198) concerned a county (BH) which entered into an agreement with two consultants (TR) on the provision of technical assistance and advice in connection with the rebuilding and expansion of an already existing and functional hospital.

The construction cost was calculated at Dkr280.4 million and the total consultancy fee was Dkr25 million. It was stipulated in the contract between the client and the consultants that the consultants' liability was limited to cover the sums specified in the contract. The contract also stated that the sum insured was Dkr10 million and that:

> *[t]he insurance must be able to be refilled once during the project period or the subsequent liability period.*
>
> *Before finally taking out project insurance, the client submits the insurance offer for review and approval.*

The conditions for the project liability insurance stated the following with regard to the sum covered: "DKK 10.00,000 - in case of property damage and / or loss and in total for the period with 1 refill."

During the construction period, BH believed that TR had caused delay. Further, BH believed that TR had been to blame for design deficiencies that BH had wanted TR to remedy. Therefore, BH filed a claim that TR should pay approximately Dkr35.6 million in compensation, to which TR claimed acquittal. TR made an independent claim that BH should pay approximately Dkr10.5 million for unpaid fees.

Decision

The arbitral tribunal found that BH had proven that the delay had been caused by circumstances under TR's control. However, the amount of compensation depended on the arbitration court's understanding of the agreed limitation of liability.

In that regard, the arbitration court found that 'recharge' must be understood to mean that:

> *[i]n cases where the agreed sum insured has been used or almost used to cover claims, an extension of the cover can be agreed (taken out) between the policyholder and the insurance company, so that the*

original cover amount is restored.

According to the arbitration court, this means that the policyholder can take out reimbursement in relation to the insurer.

In the case of project liability insurance, the consultant takes out the insurance and the quoted parts of the contract (above) must mean that there is an obligation for the consultant to take out the insurance and recharge the sum insured. Further, the arbitration court found that a request from the developer for replenishment does not change the adviser's duties in this regard.

Next, the arbitral tribunal found that the limitation of liability lapses if the adviser neglects to take out the insurance or if the adviser neglects to recharge the sum insured. In that case, the client may file a claim as if insurance had been taken out and the sum insured had been recharged.

If the consultant requests recharging, this must be done at the right time. With regard to this, the arbitral court stated that recharging can be made only when the amount of cover has – or almost has – been used to cover damages (or claims), but the limit cannot yet have been reached.

In addition, recharging cannot take place with effect for damages (or claims) already made known to the adviser at the time of the request for refilling.

At the time of the liability damage, 20% of the sum covered had been used. The arbitration court held that there had been no obligation at this time to request a recharge. After the damage occurred, it was impossible to apply for reimbursement with effect for the claim already raised. Therefore, the client's claim was limited to the applicable and agreed limitation of liability, which corresponded to the sum insured (without reimbursement).

Key takeaways

The ruling demonstrates the significance of an agreed limitation of liability, as the client cannot simply uphold their claim for compensation for the total loss. The liability for damages is limited to the agreed amount.

In addition, the following can be deduced from the ruling on the recharging of project liability insurance:

- consultants have a duty to request a recharge (if necessary);
- failure to comply with this obligation implies that the client is treated as if it had been fulfilled;
- refilling can take place when the insured sum is almost used. Thus, recharging cannot take place when only 20% of the insured sum has been used; and
- recharging will not affect damages or claims of which the policyholder already has or should have knowledge.

The content of the ruling is no surprise, but the ruling nevertheless provides useful guidelines on the recharging of sum insured as there are no other rulings on this issue. The ruling applies to all players in the construction industry, including contractors, consultants, property developers, insurers and insurance brokers.

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