Liability for damages due to export of toxic waste

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Introduction

In the mid-1980s a Swedish mining company exported more than 20,000 tonnes of toxic waste to Chile to be processed by a Chilean company. The waste contained lead, mercury, arsenic and other metals. The toxic waste was left unprocessed and unprotected by the Chilean company. In the 1990s the waste was allegedly used in building foundations and the piles of waste were used as a playground by children. The high arsenic levels have allegedly caused serious injuries and health issues to the local residents.

Subsequently, close to 800 Chileans sued the Swedish mining company for Skr90 million for the injuries caused by the toxic waste. The trial started in October 2017 after more than three years of preparatory proceedings. A decision is expected in early 2018.

Arguments

The plaintiffs claimed to have suffered from serious illnesses (including cancer and miscarriages) due to the toxic waste. They asserted that the Swedish company was negligent in its disposal of the waste and is therefore liable for damages. According to the plaintiffs, the negligence consisted of the company's knowledge of potential risks resulting from mishandling of the waste. The plaintiffs claimed that proof of negligence is to be found in a patent application that the mining company filed before the sale of the waste, in which it stated that its technology was the only technology available that could process the waste to safe levels.

Further, the plaintiffs argued that mining company representatives visited the buyer's plant and should have realised that the basic and under-dimensioned plant could never have processed the waste to any useful extent. However, the mining company failed to ensure or investigate how the waste would be disposed of. At the time of the sale, exportation of toxic waste was not regulated by law. The plaintiffs alleged that the mining company exported the toxic waste and hurried the process to avoid imminent regulation.

The mining company responded that the sale of the waste had been preceded by extensive analysis and consideration, meaning that it was not negligent. The only options open to the mining company were to either deposit the waste in a refuse dump or sell it to another company with the ability to extract residual arsenic. Further extraction was preferable and the waste was therefore sold to the Chilean company. Before the sale, relevant authorities in both Sweden and Chile were informed. The Swedish authorities noted that a permit was not required and therefore had nothing to recall. The Chilean authorities evaluated the waste and noted that it contained toxic substances, but that it was not hazardous to public health if handled correctly. The Chilean authorities also noted that the Chilean company had a permit to receive the material for further processing. The Swedish mining company subsequently concluded that the Chilean company was fit to receive the waste and process it further. All contact between the Chilean and Swedish company ceased when the last of the waste was delivered.

The mining company claimed that it did not act negligently, since the Chilean company had confirmed that it could further process the waste and that there were no requirements for the Swedish mining company once delivery was completed. Should it be found negligent, the mining company intends to claim that its actions were not the proximate cause of the damages and that based on numerous grounds it is not probable that the plaintiffs' injuries were caused by the toxic waste. When tests were performed on village residents near the waste (approximately 10 years after the waste was moved), only 10% showed high arsenic levels. Arsenic has a half-life of only a couple of days and the system is clear of arsenic a few weeks after exposure has ceased. The mining company suggested that there were other reasons for the plaintiffs' illnesses and injuries and that the toxic waste was not the proximate cause. It went on to list several potential reasons explaining how the plaintiffs could have been exposed to arsenic.

Legal questions

The case raises questions regarding private international law and choice of law. The tortious act occurred before the Rome II Regulation was implemented and therefore national international private laws applied. The plaintiffs argued that the damage was connected to Chile in such a way that Chilean law should therefore apply. The mining company, on the other hand, argued that Swedish law should apply since the alleged tortious act occurred in Sweden. The reason why the choice of law is important is the generous limitation period under Chilean law. If Swedish law is applied, a limitation period of 10 years after the tortious act would apply and the claim would be barred by the statute of limitation.

Exportation of toxic waste was allowed in the mid-1980s when the Swedish mining company exported the waste. The authorisation of the importing country's government was required and had been received. The Basel Convention had not yet been implemented and even if the Organisation for Economic Cooperation and Development had issued recommendations on the exportation of toxic waste at the time, it would not have been legally binding. The plaintiffs argued that the mining company tried to evade coming legislation preventing exportation and therefore hurried the process. Even if this is accurate, there would have been nothing to stop a company from taking advantage of existing legislation within the limits of the law.

The case also raises the question of proof and proximate cause relating to toxic waste. The plaintiffs have attempted to prove that there is a direct connection between the mining company's exportation of the waste and the injuries and illnesses that the plaintiffs have suffered. How strong the connection between the damage and the tortious act must be, and what proof regarding the mining company's knowledge that the plaintiffs must bring, is unclear. The time that has passed might be a factor worthy of consideration, since it could be argued that the mining company could not have foreseen that individuals in Chile would suffer injury and illness and bring a claim 30 years after the exportation of the waste.

Comment

The case is a liability suit where the potentially tortious act occurred more than 30 years ago. It poses the question of whether a company can be liable for environmental damage disclosed long after the tortious act and when the act was not illegal when it was carried out. If the plaintiffs are successful, the mining company – which had all relevant permits and exported the waste before regulations had been introduced – could still be held liable for damages decades later. If this should prove to be the case, it could imply that companies have a more extensive responsibility for such actions than previously established in the Swedish courts, meaning that companies cannot rely on actions that were legal when they were executed and entail no liability.

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