Civil law as basis for interpretation in cases of allocation of responsibility for environmental damages

13 January 2020 | Contributed by Advokatfirman Lindahl

AUTHORS

Linda Hallberg

Sara Eronn

In a case concerning the distribution of the cost of remediation of polychlorinated biphenyls (PCBs), the Land and Environment Court of Appeal refused compensation to an operator from a polluter for remediation costs (MÖD 2019:3 of 4 March 2019). As part of its overall assessment, the court considered the contractual agreements agreed on in the transfer of the contaminated property.

Facts

A Swedish company, Company A, previously conducted operations on a property through its subsidiary, Company AA. During the operations, PCBs were used and caused pollution on the property. At the time of discontinuing the operations, some remediation of the property was carried out. However, a then-acceptable level of PCB remained in the ground.

When Company A sold the subsidiary, Company AA – and the polluted property within – to Company B in 2002, it was agreed that Company A would not be held liable for remediation costs caused by any exploitation of the property by Company B or any future buyer as follows.

> *Company B [or the future buyer] hereby undertake to indemnify the Seller against all liabilities, costs, claims, losses, damages and expenses (including any professional fees and expenses) incurred by the Seller or any company within the Company A Group which occurs as a result of any exploitation of, rezoning of, change of use or development (that would each entail more stringent environmental requirements or higher remedial standards or measures) of the real property [property designation], unless the Purchaser or its Affiliates would have breached applicable Environmental Laws, had the Purchaser or its Affiliates not taken such measures.*

In 2007 Company B sold Company AA and the property to Company C. The parties agreed that the buyer should indemnify the seller or any current or former company within the Company A group in the same extent as agreed when Company B acquired the property from Company A.

Company C disposed the property by transferring the shares in Company AA to Company D, a subsidiary within the same group as Company C. The property transfer was regulated through a contract note, which stated that Company D was to take over the rights and obligations that run on the shares in Company AA from Company C. The representatives of Company C and Company D at the time of the transfer of shares in Company AA to Company C and D, respectively, were basically the same.

Company D had a cargo dock built as part of an adaption for its tenants, which involved fairly extensive groundwork, including a necessary remediation of PCBs.

Third-party agreements

In Swedish law, a third-party agreement is an approved legal figure. Parties may, through a third-party agreement with binding effect, grant rights to a third party. However, it is not possible to agree on obligations for third parties through third-party agreements. In the case at hand, the court found that there had been a binding third-party agreement between Company B and Company C that

granted rights of indemnification to Company A. In its judgment, the court considered Company D responsible for the agreement through the transfer of obligations that run on the shares in Company AA from Company C.

Legal responsibility to remediate environmental damages

According to the Environmental Code, in simplified terms, those who have conducted or contributed to a polluting activity (ie, the operator) may be liable for remedying a polluted area. Both current and former operators are targeted by the liability rules concerning pollution.

Who is considered an operator?

The term 'operator' is usually defined as the subject that has legal and factual opportunities to intervene in a business. The term is broad and may include parent companies with a certain measure of control over a subsidiary's operations and the exploiter that carries out exploitation work on contaminated land.

In the present case, Company D was therefore considered the operator due to the exploitation works carried out on the property.

Allocation of responsibility

According to Environmental Code, if several operators are responsible, their liability as to remediation will generally be joint and several. What the jointly responsible operators have paid will be shared between them as appears reasonable in view of the extent to which each has contributed to the environmental damage and the circumstances in general.

In the case at hand, Company D had carried out remediation measures on the property at a cost of Skr17 million and claimed compensation from Company A based on the rules of joint liability and distribution of payment between jointly responsible operators. The companies agreed that Company A had caused the pollutions alone. However, Company A disputed the claim, stating (among other things) that the company under the liability clause from the 2002 transfer agreement would not be held liable for the remediation costs.

Decision

The court stated that the following starting points were relevant when assessing how to share payments made by jointly responsible operators in this case:

> *Company C has acquired the property knowing that it could be contaminated by PCBs. In a third-party agreement that benefits Company A, Company C has undertaken to indemnify Company A in respect of, among other things, costs for remedying due to Company C's own development of the property. By assuming responsibility for such remedying costs, Company C has assumingly been able to acquire the property for a lower price than if no indemnity undertaking had not been exhibited. Company C's liability under the indemnity undertaking has been transferred to Company D in connection with the transfer of the property to this company. During its acquisition of the property, Company D had the same knowledge of the pollution situation and the indemnity undertaking as Company C. The ground work carried out by Company D as part of a tenant adjustment of the property has meant a development of the property within the meaning of the indemnity undertaking.*

After an assessment of reasonableness, taking the above into account, the court found that Company A was not liable for any claimed costs regarding the remediation of the property.

Comment

This decision is an example of a court allocating the responsibility for remediation costs under the rules on joint and several liability in the Environmental Code through an assessment of reasonableness based on the prevailing circumstances of a case. It demonstrates that a civil law agreement (eg, third-party agreements) can be deemed a relevant circumstance and considered by a court when making its assessment of reasonableness regarding how costs for environmental damage should be distributed among joint and several liable operators. The decision also illustrates the importance of ensuring that indemnity clauses are clearly worded and consistent with law and practice.

For further information on this topic please contact Linda Hallberg or Sara Eronn at Advokatfirman Lindahl by telephone (+46 40 664 66 50) or email (linda.hallberg@lindahl.se or sara.eronn@lindahl.se). The Advokatfirman Lindahl website can be accessed at www.lindahl.se.

The materials contained on this website are for general information purposes only and are subject to the disclaimer.