

The necessity of notifying the insurers of the risks occurring during the effective term of the contract of insurance under the Maritime Commercial Law

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This article provides an overview of a judgment by Abu Dhabi Court of Appeal (Appeal Number 148/2021 Commercial) in relation to a maritime insurance claim.

The question before the Abu Dhabi Court of Appeal was to determine whether the Assured was under an obligation to notify the insurers of risks occurring during the validity of the Insurance Policy that would increase the risks borne by the Insurers within three days of the day the Assured becomes aware of said risk.

Al Tamimi & Company represented the insurers in this matter.

The background of the Claim:

On 08 May 2019, a general trading company (the 'Assured', 'Claimant') procured, via its insurance broker, a port risk insurance policy with an insurance company (the 'Insurer(s)', 'Defendant') to cover damages sustained by the Assured's drilling platform rig (the 'Rig') during its dismantling at Musaffah Port in Abu Dhabi for a period of 90 days commencing from 08 May 2019 to 06 August 2019. The insurance policy covers the total loss of the Rig, wreck removal, pollution and third party's liabilities (the 'insurance Policy').

The insurance value for the Rig amounted to US\$2,600,000 in case of complete and total loss, and an amount of US\$5,000,000 on all liabilities towards third parties, wreck removal value, and pollution.

Furthermore, the Insurance Policy included an express warranties clause which stipulated that: "Warranted no hot work unless approved by warranty surveyor and all relevant permits are obtained" (the 'Express Warranties Clause').

In concluding the Insurance Policy, the Assured agreed to adhere to the Express Warranties Clause under the Insurance Policy not to conduct any hot work on the Rig during the validity of the Insurance Policy, unless approved by a warranty surveyor and all relevant permits had been obtained.

At the end of July 2019, the Assured's broker requested to extend the Insurance Policy for an additional thirty days, until 5 September 2019. The Insurers' agent agreed to extend the Insurance Policy on the condition that the Assured would confirm that there were no known or reported losses on board the Rig as of 5 August 2019. The Assured confirmed that there were no known or reported losses sustained by the Rig as of 5 August 2019. Therefore, on 5 August 2019, the Insurance Policy was extended until 5 September 2019 (the 'Extended Insurance Policy').

The Assured's maritime insurance claim

On 28 August 2019, the Insurers were advised that the Rig sank on 17 August 2019 while it was being decommissioned, as a result of high tide. Therefore, the Assured submitted a formal claim towards wreck removal expenses. The Insurers conducted an investigation on the Assured's claim and found that a fire broke out on the Rig on 22 July 2019 twice (the 'Fire') which ultimately led to the sinking of the Rig on 17 August 2019.

The Assured's Statement of Claim before the Abu Dhabi Court of First Instance:

On 26 July 2020, the Assured filed an insurance claim before the Abu Dhabi Court of First Instance claiming that on 17 August 2019 and during the dismantling of the Rig at Musaffah Port in Abu Dhabi, the Rig sank as a result of high tide and was completely damaged, qualifying as a total loss. Therefore, the Assured claimed the sum of US\$7,600,000 for the total loss of the Rig, as well as for the liabilities towards third parties, wreck removal and pollution.

The Insurers' defence before the Court of First Instance:

The Insurers filed their defence with the Court and mainly argued the following:

1. the Assured had conducted hot work on the Rig on 22 July 2019 during the validity of the Insurance Policy but without obtaining approvals from the warranty surveyor nor from the relevant authorities (i.e. Abu Dhabi Ports) as stipulated in the Insurance Policy as a requirement;
2. the Fire broke out due to the hot works carried out on the Rig by the Assured and such fact was established in the criminal complaint file and the Abu Dhabi Ports' Report which were opened and issued in relation to the Fire;
3. the Assured breached its obligations as set out in the Express Warranties Clause under the Insurance Policy, as it had conducted hot works on the Rig without obtaining the approvals from the warranty surveyor and/or the relevant authorities;
4. the Assured was acting in bad faith, as it did not inform the Insurers about the Fire when it took place during the validity of the Insurance Policy;
5. the Assured was acting in bad faith due to the fact that it did not inform the Insurers about the Fire when the Assured requested an extension of the Insurance Policy, notwithstanding the fact that the Assured confirmed on the Extended Insurance Policy that there were "*no known or reported losses as of 5 August 2019*"; and
6. the Rig officially sank on 17 August 2019, as a result of the Fire that broke out on 22 July 2019.

Hence, the Assured's claim must be dismissed based on the basis it breached the Express Warranties Clause under the Insurance Policy and did not obtain the required approvals from the warranty surveyor and the relevant authorities prior to conducting hot works on the Rig.

Alternatively, this claim must be dismissed based on Articles 385, 388 and 389 of the Maritime Commercial Law (the 'Law'), as the Assured failed to inform the Insurers of the Fire on the Rig during the effective term of the Insurance Policy and/or when the Assured requested the extension of the Insurance Policy.

Article 385 (c) of the Law states:

“The insured shall be obliged as follows:

...to notify the insurer during the currency of the contract of any increase in the insured risks so far as he knows of the same.”

Article 388 of the Law states:

“1. It shall be permissible for the insurer to require that the contract of insurance be rescinded if the insurer has given him any incorrect particulars, even though there has been no fraud, or if he has deliberately remained silent about matters which he should have revealed, and such silence is such as to cause the insurer to underestimate the risks.

2. A court may order that the contract be rescinded even though the incorrect particulars or silence have not affected the damage sustained by the items insured.”

Article 389 (1) of the Law states:

“The insured must notify the insurer of circumstances occurring during the currency of the contract which are such as to increase the risks borne by the insurer within three days from the date that he knows of the same, not counting official holidays. If notification is not given within the said period, it shall be permissible for the insurer to cancel the contract”.

The Assured responded to the Insurers’ defence arguments that it is irrelevant if the losses sustained were because of the Fire or the high tide, since the Insurance Policy covers all port risks including fires. Furthermore, the Assured’s claim is based on the original Insurance Policy, as the insured risk occurred on 22 July 2019 during the validity of the original Insurance Policy and not during the validity of the Extended Insurance Policy. Therefore, the Assured was not acting in bad faith when it requested to extend the Insurance Policy. In other words, it is irrelevant whether the Assured informed the Insurers about the Fire at the time of extending the Insurance Policy, as the Assured’s claim had occurred before extending the Insurance Policy. Furthermore, the Express Warranties Clause under the Insurance Policy is invalid based on Article 1028 (c) of the Civil Transactions Law. Moreover, even if the Assured did not inform the Insurer about the Fire according to Articles 385 and 389 of the Law, the Assured will not lose their right to claim compensation under the Insurance Policy from the Insurers. Therefore, the Court should accept their claim.

Article 1028 (c) of the Civil Transactions Law provides:

“Any of the following provisions appearing in a policy of insurance shall be void: any printed clause not shown conspicuously, if it relates to any circumstance leading to the avoidance of the contract or the lapse of the right of the assured.”

The Abu Dhabi Court of First Instance’s judgment:

On 29 December 2020, the Abu Dhabi Court of First Instance handed down its judgment and decided to dismiss the Assured’s claim. The Court based its judgment on the following grounds:

- the Insurance Policy in the Express Warranties Clause stipulates that: *“Warranted no hot work unless approved by warranty surveyor and all relevant permits are obtained.”*
- the Assured failed to prove that they had obtained the relevant approvals or permits for the hot works;

the Fire broke out on 22 July 2019 predating the sinking incident by 25 days;

- the Rig sank officially on 17 August 2019 according to the Assured’s email dated 28 August 2019 which was submitted with the statement of claim;
- a permission was obtained on 01 August 2019 by the Assured to pump out water from the Rig according to Abu Dhabi Port’s Report in relation to the Fire;
- the Rig sank as a result of the Fire; and
- The Assured failed to inform the Insurers of the Fire within three days after its occurrence according to Article 389 (1) of the Law.

Thus, the Court decided to dismiss the claim, as the Assured failed to perform their contractual obligations under the Insurance Policy and did not inform the Insurers of the Fire by virtue of the Maritime Commercial Law.

The Court of Appeal

The Assured filed an appeal before the Abu Dhabi Court of Appeal challenging the Court of First Instance’s judgment. The Assured argued the following in its appeal:

1. the Assured informed its broker about the Fire over the telephone immediately after its occurrence. Therefore, the Assured requested the Court either to refer the matter to hear testimony from its broker or refer the matter to an expert to investigate if the Assured had in fact informed their broker about the Fire within three days or not;
2. there is no obligation imposed on the Assured to notify the Insurers of the insured risk (the Fire in this claim) within three days. However, the law requires the Assured to notify the Insurers only of potential risks that may occur during the validity of the Insurance Policy that would increase the risks borne by the Insurer within three days of their knowledge of said risks;
3. the Commercial Maritime Law did not place an obligation on the Assured to inform/notify the Insurers within three days of an insured risk’s materialisation. The Law did not stipulate or specify a certain timeframe for notification of the Insurers of an insured risk;
4. the Law does not provide that the Assured loses the compensation they are entitled to if it does not notify/inform the Insurers of the materialisation of the insured risk within a specified timeframe;
5. alternatively, and assuming that the Assured is under obligation to notify/inform the Insurers within three days of the Fire and the insured risk’s materialisation, the liability and/or penalty that is imposed by Article 389 of the Law, entitles the Insurers to rescind the Insurance Policy; and in case the Insurer does not enforce their entitlement/right and instead obtains a court judgment for rescission, then any violation of Article 389 (1) of the Law by the Assured does not release the Insurers from their obligations to compensate the Assured under the Insurance Policy. Furthermore, the court may not, of its own discretion, rescind the Insurance Policy which was correctly and validly concluded on 8 May 2019.

Therefore, the Assured requested from the Court of Appeal to accept its appeal and oblige the Insurers to pay the Assured the claimed amount. Alternatively, refer the claim for investigation and to hear the oral testimony of the representative of the Assured’s broker, in respect of whether he was informed/notified by the Assured of the Fire within three days or not, or appoint a marine insurance expert with the mandate of investigating whether within three days the Assured informed/notified their broker of the Fire.

The Insurers reiterated all their arguments which were raised before the Court of First Instance and confirmed that the appealed judgment was issued in accordance with the Law. Moreover, the Insurers

added the following arguments:

1. the Assured never informed the Insurers of the Fire;
2. the Assured had been denying the Fire and it only acknowledged the Fire after the Insurers submitted to the Court of First Instance a copy of the criminal complaint file in relation to the Fire;
3. the Assured admitted before the Court of First Instance previously that the Fire had no connection to the sinking of the Rig on 17 August 2019;
4. the Assured based its claim on the allegations that the Rig sank on 17 August 2019 due to the high tide and did not refer to the Fire in their claim at all;
5. the Assured provided evidence with its statement of claim to show that the Rig sank officially on 17 August 2019 and made an official claim regarding the sinking of the Rig on 17 August 2019 as a result of a high tide on 28 August 2019 via their insurance broker;
6. The Assured admitted on 5 August 2019, when they had requested to extend the Insurance Policy, that *"no known or reported losses occurred to the Rig as of 5 August 2019."*
7. in any case, the Assured is obliged by law to notify Insurers directly (and not its broker) within three days from the occurrence of insured risks and risks occurring during the validity of the Insurance Policy which would increase the risks borne by the insurers.

Therefore, the Insurers requested the Court of Appeal to dismiss the appeal and uphold the judgment of the Court of First Instance.

The Court of Appeal's judgment:

On 24 February 2021, the Court of Appeal decided to dismiss the Assured's appeal and uphold the Court of First Instance's judgment. The Court of Appeal found that the Court of First Instance's judgment was issued in accordance with the Law. Accordingly, the Court of Appeal adopted the findings of the Court of First Instance and referred to it as part of its judgment. Moreover, the Court of Appeal added the following reasons to its judgment:

1. the Assured are obligated to notify the Insurers of the Fire within three days of its occurrence, as it is not set out in the Insurance Policy that any entity other than the Insurer shall be notified;
2. furthermore, the Assured failed to notify the Insurers of performing hot works on the Rig which had increased the risks to be borne by the Insurers;
3. the intended notification under Article 389 (1) of the Law is the notification of the risks which appear during the effective term of the insurance contract and would increase the risks sustained by the insurers;
4. it is established that the Assured failed to prove that they had notified the Insurers of the hot works performed on the Rig, which were proven to have caused the Fire that led to the Rig sinking; and
5. the Assured were obligated under Articles 385 and 389 of the Law to notify the Insurers of risks occurring during the validity of the Insurance Policy which would increase the risks borne by the Insurers.

Hence, the Court of Appeal decided to dismiss the Assured's appeal.

Conclusion:

Although the Court of Appeal's judgment is appealable and that the Supreme Court may uphold or revoke the said judgment (if is appealed), it is advisable that the assured always acts in good faith with their insurers and informs them of the circumstances and risks which occur during the effective term of the

insurance contracts immediately. Otherwise, the assured's maritime insurance claims might be dismissed on a technicality based on Articles 385 and 389 of the Law.

Al Tamimi & Company's [Transport team](#) regularly advises on maritime insurance related claims. For further information please contact [Tariq Idais](#) (t.idais@tamimi.com).