

Abu Dhabi judgment on damaged to shipped goods

by Tariq Idais - t.idais@tamimi.com - Dubai International Financial Centre

March 2015

This article gives an overview of a recent lawsuit that was brought by an insurer (“Plaintiff”) against a vessel (“First Defendant”), the owners of the vessel (the “Second and the Third Defendants”) and the shipping agent (“the Fourth Defendant”) as carriers.

The Plaintiff insured a cargo of pipes, which were shipped by the First Defendant. However, 238 pipes of the cargo were damaged when they arrived at their destination. The judgment of Abu Dhabi Court of First Instance was issued in favour of the Plaintiff and against the Third Defendant only, but it was then reversed by Abu Dhabi Court of Appeal in December 2014. Al Tamimi & Company represented the Appellant (the Third Defendant) in the successful appeal.

Background:

On 26 September 2013 the Plaintiff brought an action against the Defendants seeking damages in the sum of USD 191,330 for the damaged pipes, AED 31,484 for the costs and fees of loss adjusters and 12% as legal interest from the date of the claim until the full payment is made.

The Nature of the Claim:

The Plaintiff insured a cargo of pipes which were shipped from China to Zayed Port in Abu Dhabi by the Defendants. When the cargo arrived at Zayed Port, 238 pipes were damaged. Moreover, the Plaintiff, as the insurer of the cargo, compensated and paid the insured (the consignee) for the damaged pipes. Therefore, the insured provided the Plaintiff with a subrogation letter which gives the Plaintiff the right to file a claim against the responsible parties for the damaged pipes and recover the compensation amount. The Plaintiff estimated its loss at USD 237,788; however, it managed to mitigate its losses by selling the damaged pipes in the amount of USD 46,458.

Accordingly, the Plaintiff filed an action with Abu Dhabi Court against the Defendants seeking compensation and asking the Court to order the Defendants to pay the sum of USD 191,330 in addition to 12% interest from the date of the claim until the full payment is made, as well as AED 31,484 as the loss adjusters’ fees.

The Plaintiff based its claim on the following Articles:

Article (275/1) of the UAE Maritime Commercial Law 198 which provides:

“The carrier shall be responsible for loss or damage sustained by the goods during the period from the time he takes delivery of the goods at the port of loading to the time he delivers the same to the person having the right to them at the port of discharge...”

Article (1030) of the Civil Transactions Law which provides:

“It shall be permissible for the insurer to take the place of the assured in respect of any indemnity paid to him for loss, in bringing the claim of the assured against the person who caused the loss out of which the liability of the insurer arose, unless the person who caused the loss was an ascendant or descendant of the assured, or his spouse, or somebody living in one household with him, or a

person for whose acts the assured is responsible.”

Article (398) of the UAE Maritime Commercial Law 198 which provides:

“The insurer shall be subrogated up to the extent of the payment of compensation that he has made to rights and claims which the insured may have arising out of losses included in the insurance.”

Abu Dhabi Court of First Instance:

Abu Dhabi Court of First Instance found the Third Defendants to be responsible for compensating the Plaintiff for the damaged pipes, and the Court reached its decision on the following grounds:

- The carrier shall be responsible for loss or damage sustained by the goods during the period from the time he takes delivery of the goods at the port of loading to the time he delivers the same to the person having the right to them at the port of discharge, unless it is proven that the said damage or destruction is not attributable to default of the carrier or those working under him or his representative (Article 275 of the UAE Maritime Commercial Law);
- It is established that the carrier by sea might be the owner, the charter or the operator of the vessel that signs, issues, stamps the bill of lading and undertakes to carry the goods from one port to another in consideration of freight. (Article 256 of the UAE Maritime Commercial Law);
- The bill of lading shall be the evidence of the contract of carriage, as it contains all the terms that determine the obligations of the parties, including the obligations of the carrier. Moreover, the bill of lading shall be deemed to be evidence of the particulars contained therein (including the name of the carrier) as between the carrier and the shipper and with regard to third parties. Also, it shall not be permissible to the carrier to prove the contrary of what is stated in the bill of lading against third parties including the consignee of the goods who is acting in good faith. (Articles 257 and 266 of the Maritime Commercial Law); and
- The bill of lading shows that the Third Defendant is the carrier that undertook to deliver the pipes to the consignee, as the said bill of lading was issued on the Third Defendant’s papers. (It is worth nothing that the bill of lading in this case was a clean bill of lading and there were no reservations endorsed by the carrier).

Accordingly, Abu Dhabi Court of First Instance rendered its judgment in favour of the Plaintiff and ordered the Third Defendant to pay damage to the Plaintiff in the amount of AED 702,181, in addition to a legal interest at the rate of 5% from the date the judgment becomes final and until the full payment is made including all expenses and fees.

Abu Dhabi Court of Appeal:

The Third Defendant filed an appeal to challenge the Court of First Instance’s judgment. The Third Defendant argued that the case of the Plaintiff shall be dismissed, as the Plaintiff filed his claim with the Court after the expiry of a period of one year from the date of delivery of the goods by virtue of Article (287) of the UAE Maritime Commercial Law.

Alternatively, the Plaintiff did not provide the Court with any evidence to prove that the pipes were damaged during the shipment of the goods.

Additionally, the pre-shipment survey report and the consultancy survey report that were submitted by the Plaintiff did not prove that the pipes were damaged during the shipment of the goods by the carrier.

Also, such reports confirmed that some of pipes were rusty, scratched, bent and some parts of the pipes were missing and broken before the shipment.

Moreover, although the presumption under Article (275) of UAE Maritime Commercial Law is that the carrier shall be responsible for loss or damage sustained by the goods during the period from the time he takes delivery of the goods at the port of loading to the time he delivers the same to the person having the right to them at the port of discharge, Article 281 of the said Law requires the recipient of the damaged goods to give a written notice to the carrier or his representative at the port of discharge before or during delivery of the damaged goods. Otherwise, it will be presumed that the goods have been delivered to him in the condition as set out in the bill of lading, unless evidence to the contrary is presented. Since the bill of lading was clean and did not contain any reservations, as well as the Plaintiff didn't submit to the Court any evidence that some pipes in the cargo were damaged at the port of delivery, the case should be dismissed for lack of evidence.

Abu Dhabi Court of Appeal accepted the Third Defendant's appeal, cancelled the Court of First Instance's judgment and dismissed the Plaintiff's case.

Abu Dhabi Court of Appeal ruled that it is established by Article (281) of the UAE Maritime Commercial Law that in the event that part of the goods is lost or damaged the recipient of the same must give written notice to the carrier or his representative at the port of discharge before or during delivery of the destruction or loss of the goods, otherwise it will be presumed that they have been delivered to him in the condition set out in the bill of lading until evidence to the contrary is given.

Furthermore, Abu Dhabi Court of Appeal pointed out that the pre-shipment survey report shows that some pipes were rusty, scratched, bent and some parts of the pipes were missing and broken before the shipment. The consultancy report that was submitted by the Plaintiff before Abu Dhabi Court of First Instance also does not confirm that the cause of the damage to the pipes was attributable to the Third Defendant ("Carrier") rather that it mentions the value of the damaged pipes.

Accordingly, the Third Defendant is not liable for the damage to the pipes.

Comment:

The presumption under the UAE Maritime Law is that the carrier shall be responsible for loss or damage sustained by the goods during the period from the time he takes delivery of the goods at the port of loading to the time he delivers the same to the person having the right to them at the port of discharge, unless it is evidenced that the said damage is attributable to force majeure factors or not attributable to default of the carrier or his workers and/or representatives.

Additionally, if the recipient of the damaged goods does not give written notice of the damage sustained to the goods to the carrier or his/her representative at the unloading port before or during delivery of the damaged goods, the presumption will be that the goods have been delivered to him in the conditions set out in the bill of lading, unless evidence to the contrary is presented or if the damaged goods have been inspected at the time of delivery in presence of the carrier or his representative and the person taking delivery of the good.

Therefore, if a clean bill of lading is issued by a carrier and the shipped goods by the carrier arrive at the port of discharge damaged, and yet the recipient of the damaged goods does not give written notice to the carrier or his/her representative at the unloading port confirming that the goods are damaged and/or lost, the assumption shall be that the goods arrived at the port of discharge in the conditions set out in the bill of lading (undamaged). Furthermore, the assumption that the carrier is responsible for the damage sustained to the goods under Article (275) of UAE Maritime Commercial Law, shall be vulnerable and rejected. Unless the recipient of the goods proves that the damage sustained to the goods is attributable to the carrier.

Notwithstanding the above, it is worth mentioning that the judgment of the Court of Appeal has

been appealed by the Plaintiff before the Cassation Court.