Part 1: Extent of the Insurance Company’s Right of Recourse in Marine Cargo Claims

Siri Hashem - Senior Associate
- Al Khobar

May 2016

In this case, the court decided that both the Insurance company and the carrier are jointly liable to indemnify the receivers based on distinct legal bases. The Insurance company was required to pay the damages to the Receiver and, subsequently, filed a recourse case against the carrier, as identified by the court, after obtaining a subrogation of rights from the Receiver. The recourse case was based on both the judgement and the subrogation at the same time.

The Case:

A cargo of steel plates was shipped on board a chartered under time basis vessel to Jebel Ali port for several receivers. After discharging the cargo at Jebel Ali port, it was delivered to the receivers designated in the bills of lading which were issued by the charterers. One of the receivers (the “Receiver”) found there was a shortage in the quantity of steel plates (the “Cargo”) delivered to him equivalent to a certain amount of money. The Cargo was insured under a marine insurance policy for the voyage from port of loading to the port of discharge stated in the bills of lading the Receiver held.

The Receiver filed a court case before Dubai Court of First Instance (the ”Court of First Instance”) in order to appoint an expert to examine the short landed cargo and the cause and to claim such loss against the sellers, ship-owners, the vessel and the insurers of the Cargo (the “Insurers”). The Court of First Instance appointed an expert who concluded the value of the cargo short landed which had happened due to the wrong delivery by the ship agent appointed by the charterers. The Receiver amended his statement of claim and requested the defendants to pay jointly and severally the value of the short landed Cargo (the “Claimed Amount”).

The Court of First Instance found that:

- The sellers shipped the cargo on board the vessel as per the description in the bill of lading and, therefore, they are not responsible for any short landed Cargo;
- The ship-owners are not responsible as they are not the issuers of the bill of lading which was issued by the charterers and, accordingly, not the carrier under the bill of lading;
- The Insurers are responsible to indemnify the receivers pursuant to the insurance policy covering the Cargo for the Claimed Amount plus interest at 9% per annum and cost; and
- The Court of First Instance rejected the case against the other defendants.

The Receiver filed an appeal before the Appeal Court of Dubai (the “Appeal Court”) on the basis that the judgment should include the other two defendants to pay the awarded amount jointly with the Insurers as the owners are the carriers under the bill of lading. The Insurers filed another appeal before the Appeal Court on the basis that the claimed damages are not covered by the insurance policy and that the interest should start counting from the date the judgment becomes final. Both appeals were joined in one hearing. The Insurers argued in their appeal that the judgment relied on an expert report which was incorrect in its

findings as the cargo was fully discharged at Jebel Ali but the shortage was due to the wrong delivery by the ship agent. The ship-owners argued that they are not the carriers under the bill of lading and that the case is time barred.

The Appeal Court found that according to the customs bill of entry, it is clear that the number of plates discharged at the port were as per the bill of lading and that there was the correct number of plates at the port and there was no short lading in the number of plates. The findings of the expert appointed by the Court of First Instance contradicted the bill of entry as there was no certificate of shortage issued by the customs. Therefore, the court adopted the customs bill of entry as issued by an official body and found that there was no short landing and, accordingly, all the defendants were found not liable. The court of First Instance judgment was cancelled accordingly.

The Receiver filed an appeal case before the Cassation Court of Dubai (the "Cassation Court") on the following basis:

- The delivery order attached with the bill of entry shows that the quantity of steel plates received was less than the quantity stated in the bill of lading and that there was a balance quantity of steel plates rejected by the Receiver as they did not form part of the shipment.
- The bill of entry did not state the specifications of the delivered steel plates which were mentioned in the appointed surveyor's report and the report issued by the court appointed expert.
- The judgement of the Appeal Court did not consider any of the documents submitted by the Receiver, such as the packing list, bill of lading, insurance policy, mate receipt, the surveyors report and the court appointed expert.

The Cassation Court accepted the appeal, cancelled the Appeal Court judgment and returned the case to the Appeal Court to reconsider the case and also concluded that:

- The Carrier was under an obligation to actually deliver the cargo to the receivers and to put it under their disposal in order to inspect it.
- If the cargo was damaged after the receipt by the carrier and before the delivery then it is considered to be caused during the passage unless the carrier was able to prove that the damage was not attributed to him or his employees but rather due to the act of the shipper or any other cause not related to him. The wrong delivery of the cargo, or part of which is considered to be a shortage of delivery, entitles the Receiver to claim indemnity against such shortage.
- The marine insurance policy was issued in connection with the bill of lading and the beneficiary should be the party who has interest to avoid the occurrence of the insured risk.
- The beneficiary under the insurance policy had the right to claim the indemnity under the insurance policy.
- If the court issues its decision not in conformity with the expert report then it must explain this.
- The court should have given enough reasoning upon which its decision was made.

When the case was returned to the Appeal Court, it considered the same points of the original appeals filed before. The Appeal Court found the following:

- The sellers are not liable as per the court appointed expert report because it delivered the cargo on board the vessel as contractually agreed and the short landing is not attributed to them.
- The owners are not liable because the bill of lading was issued by the charterers who signed the bill of lading and did not mention that they are the representatives of the owners.
- The Insurers are liable because the policy covers such loss and it was proven that the cargo left at the port did not belong to the shipment and did not hold any remarks.

The Insurers appealed the decision of the Appeal Court before the Cassation Court on the following basis:

- The Appeal Court did not consider the bill of entry issued by the Customs which proves that the cargo was discharged without any shortage. Such bill may not be refuted except by proving that it is forged.

- The Receiver tried to obtain a certificate from the port to prove the shortage but the port refused based on the customs bill of entry.
- The steel plates left at the port of discharge did not hold any remarks that show that they belong to another shipment and the court appointed expert did not mention on what basis he concluded that there was wrong delivery and not a failure on part of the shipper/seller to load the agreed shipment.

The Cassation Court refused the appeal and confirmed the Appeal Court judgment on the basis of the court appointed expert report.

The Receiver appealed the decision of the Appeal Court on the following basis:

The sellers must be jointly liable with the Insurers for the shortage because they failed to ship the total agreed cargo quantities. The court refused this point on the basis that the shipper, as per all reports issued at the port of loading and by the court appointed expert, shipped the total agreed cargo quantities.

The ship-owners must be jointly liable with the Insurers for the shortage because they are the carriers under the bill of lading which was signed by the agent on behalf of the master. The bill of lading did not state that the vessel was under charter and did not mention the name of the charterer or the owner, also the charterparty was not attached to the bill of lading.

The charterparty was referred to by the court appointed expert but only a photocopy was attached which the Receiver denied.

The Cassation Court found the following:

- Refused the argument that the Court of Appeal relied on the charterparty photocopy since the photocopy does not hold the signature of the Receiver and it is left to the court to accept the charterparty as valid evidence or to set it aside.
- The Appeal Court should not have adopted the expert report in its finding in relation to legal points, such as the identity of the carrier under the bill of lading, and the Appeal Court should have explained on what basis it found that the owners were not the carrier under the bill of lading. Thus, the Appeal Court judgment was cancelled on this part.

The case was returned to the Appeal Court to reconsider the parts of the judgment that were cancelled by the Cassation Court. The Appeal Court found that:

- The owners were the Carrier under the bill of lading and the master agent’s receipts, which were signed by this agent, stated the name of the ship-owners and that the freight is due under the charterparty. The defence raised by the ship-owners that they are not the carriers under the bill of lading and that the name of the carrier under the bill of lading is the charterers was not correct based on the master agent’s receipt and the bill of lading which mentions the name of the ship-owners.
- The bill of lading and the two mate receipts were signed by the master.
- The name of the agent at the discharge port, as per the docket submitted in the last hearing, identify the name of the agent. It is not true that either the named ship agent is the alleged ship agent or the charterers are the carrier. Also, the email sent by the charterers to the ship-owners pertaining to the appointment of the ship agent in the port of discharge was issued 13 months before the bill of loading date and thus it should be ignored.
- The master, as per the UAE Commercial Maritime law, represents the owner of the vessel.
- The carrier was responsible for the delivery of complete quantities of cargo and he is considered responsible for any short delivery (missing cargo).
- The case is not time barred and the Owners are liable to pay together with the Insurance the claimed amount.

The ship-owners filed an appeal before the Cassation Court on the following basis:

- The ship-owners are not the carrier under the bill of lading based on the arguments raised before. The bill of lading was signed and stamped by the charterers (for and on behalf of the master).
- The mate receipts which were signed by the master clearly state that the name of the ship-owners as ship-owners and the charterers as the shipping line.
- The ship agent at the port of discharge was appointed by the charterers as per an e-mail sent by the charterers to the ship-owners directly after delivery of the vessel to the charterers. The letter is one year older than the date of the shipment but this letter is a statement from the charterer to the ship-owners as to the names of the ship agents at different ports who represent them. The court could not find any relation between the Arabic and English names of the ship agent, but this is incorrect as there was no deference between the ship agent names.
- The shortage was caused by the wrong delivery by the ship agent who represents the charterer, therefore, the charter should be held liable for his agent's fault. The court did not consider the ship-owners supporting documents as they had submitted the evidence to prove that the vessel was under a charter.

The Cassation Court rejected all the arguments and confirmed the Appeal Court's judgment.

While the Cassation Court was considering the appeal filed by the shipowners, the Insurers filed a case against the shipowners in order to claim the amount paid by the Insurers to the Receiver, pursuant to the foregoing proceedings in which the judgement was issued in favour of the Receiver and the execution claim filed by the Recievers against the Insurers. This will be addressed further in Part II of this article.