

# Part 2: Extent of the Insurance Company's Right of Recourse in Marine Cargo Claims in UAE

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This article is the second in a two part examination of a recent court case concerning the extent of an insurance company's right of recourse against the carrier in marine cargo claims. Part I of this article was published in Law Update in May 2016 and can be found online at <https://www.tamimi.com/law-update/may-2016/insurance-company-right-of-recourse-against-carrier-in-marine-cargo-claims-part-1>.

As a reminder, in this case the court decided that both the insurers of the steel plates cargo ('Insurers') and the carrier were jointly liable to indemnify the receivers of steel plates cargo ('Receiver') based on a distinct legal basis. The Insurers were required to pay damages to the Receiver and, consequently, they 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 right of subrogation at the same time.

In Part I of this article, we stopped at the point where the Insurers filed a court case against the ship-owners in order to claim the amount they paid to the Receiver, pursuant to the previous proceedings (in which judgement was issued in favour of the Receiver against both the Insurers and the ship-owners) and to the execution claim filed by the Receiver against the Insurers.

To recap, the Insurers argued in the Court of First Instance in Dubai ('Court of First Instance') that the ship-owners are ultimately liable to pay to the Insurers the amount awarded to the Receiver, but the ship-owners had asked the court to stay the proceedings until the Cassation Court of Dubai ('Cassation Court') issued its final decision in the appeal filed in the previous proceedings. The ship-owners also argued that they were not the carrier under the bill of lading and should not be held responsible.

In the reinstated Court of First Instance proceedings, the Insurers argued the following:

- the proceedings should not be stayed in this case because the other Appeal Court of Dubai ('Appeal Court') had already decided on it based on the directives of the Cassation Court and that any further appeal should be rejected by the Cassation Court because the judgment was final;
- the same arguments raised by the Receiver before the Appeal Court should be followed so that the ship-owners are the carrier as per the bill of lading, as it was signed on its behalf, and the evidence provided, which shows that the charterers had appointed the agent, is based on an old e-mail issued by the charterers and has no value; and
- if the claimed damages are caused by the ship agent at the port of discharge then the ship-owners are responsible because they appointed the agent and he represents them in the delivery.

The Court of First Instance rejected the Insurer's case on the following basis:

- the judgment issued in the case filed by the Receiver obliged both the Insurers and the ship-owners to pay value of the short landed Cargo ('Claimed Amount');
- the judgment was not to pay the amount jointly or 50 per cent each equally (as the source of the

Insurers' obligation is different from that of the ship-owners);

- the Insurers may not claim from the other defendant the amount they paid to the plaintiff (Receiver) whether they pay the full amount or 50 per cent of it; and
- if the court rendered its judgment against the Insurers and the ship-owners jointly and severally (or 50 per cent each), then the insurance company may claim the amount so paid to the Receiver from the ship-owners.

The insurers filed an appeal before the Appeal Court against the ship-owners on the following basis:

- according to the Appeal Court judgement in the case filed by the Receiver, the shortage was confirmed; the Insurance paid the amount awarded to the Receiver pursuant to a direct settlement of AED 2,308,201.00 and then subrogated its rights;
- the payment made by the Insurers to the Receiver was subject to the settlement and the assignment by the Receiver to the Insurers and not the execution of the judgment by the Receiver; and
- the right of the Insurers to recover from the ship-owners is protected by the unjust enrichment of the ship-owners who are ultimately liable for the damages as a carrier.

The ship-owners argued that:

- they are not the carriers and are thus not responsible for the shortage;
- the shortage is not proven as there was only a wrong delivery by the agent of the charterers who issued the bills of lading; and
- the case is time barred after the lapse of one year from the cargo delivery date and 90 days in recourse action starting from the date of paying the awarded amount to the Receiver (insured).

The Appeal Court found the following:

- the Insurers paid the damages claimed by the Receiver on 22 Feb 2012, pursuant to the execution case filed by the Receiver; thus, the Receiver had subrogated all its rights to the Insurers;
- the decision of the Appeal Court – which concluded that the ship-owners and the Insurers are liable to mutually pay the Receiver – was upheld by the Cassation Court judgment;
- the liability of the ship-owners was confirmed and proven according to the above Appeal Court and confirmed by the Cassation Court judgment;
- as the Insurers filed the case on 4/10/2012, there is a legitimate excuse for the Insurers not to file the case before the liability of the ship-owners is confirmed;
- the Cassation Court did not conclude that the ship-owners are the carrier but rather it stated that the appeal judgment was wrong for not holding the ship-owners liable for the damages and returned it to the Appeal Court to reconsider the liabilities again;
- the relationship between the two defendants and the right of recourse of the Insurers to recover what has been paid did not emerge from the mutual liability of both defendants, but from a different source that is the subrogation/assignment of rights; and
- therefore, the Appeal Court in this case decided that the ship-owners should pay to the Insurers the Claimed Amount plus interest, at nine per cent annually, until full payment, in addition to legal

costs.

In our view, the above reasoning of the Appeal Court was intended to explain why the case could be filed pursuant to the subrogation letter; and to explain why the case is not time barred.

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

- When the Insurers were subrogated to the rights of the insured (Receiver), the Insurers takes the place of the Receiver in pursuing the case against the carrier (or who it believes to be the carrier or responsible for the damage). As the insured (Receiver) had filed the case against the ship-owners and the Insurers and the case has exhausted all levels of litigation, the rights to further pursue the claim could not be subrogated since the right was exercised by the insured himself and the case had become final.
- In a sense, the same case for damages against the carrier was filed twice, once by the receivers and the second time by the Insurers to whom the rights of the insured was subrogated. Therefore, these actions contravened the basic premise in UAE law that the same cause of action or case cannot be filed twice. The case has either to be filed by the Insurer or the insured from the beginning.
- This point was raised due to the fact that the Appeal Court judgment stated that the relationship between the two defendants and the right of recourse of the Insurers of what it paid to the Receiver did not emerge from the mutual liability of both defendants, but from a different source, which is the subrogation/ assignment.
- The case was filed by the insurers against the ship-owners after paying the court awarded amount pursuant to the execution case filed by the Receiver. It was argued that the subrogation was made up just to justify the recourse against the ship-owners and, accordingly, the appeal judgment should be revoked as the right of recourse of the Insurers of what it paid to Receiver did not emerge from the subrogation/assignment, as alleged.
- According to the above, the same case was filed twice, once by the Receiver and the second time by the Insurers to whom the right of the insured (Receiver) was subrogated. The insurers should have paid the indemnity to the Receiver and subrogated his rights against the party responsible for the damage.
- On the assumption that filing the case for the second time by the Insurers was allowed based on the subrogation, then the ship-owners would be entitled to raise all defences it may have against the Receiver including the time bar issue.
- If invoking the judgment of the case filed by the Receiver was allowed, then the case may not be based on the subrogation/ assignment, it is rather based on the right of recourse, which is not allowed in this case. This is due to the fact that the judgment was issued in a way that if either of the defendants pay the amount awarded, he may not claim the same from the other party as the source of the liability of both defendants (the ship-owners and the Insurers) is different (one from the contract of carriage and the other from the insurance policy).
- Concerning the legitimate excuse that the Insurers have that will suspend the time bar, the Insurers may not benefit from the legitimate excuse for suspending the running of the time bar as the delay of their filing the case against the ship-owners is not attributable to the confirmation of the court of the ship-owners' liability. Rather, it is attributable to the Insurers' refraining from paying the insured's claimed amount to the Receiver. The Insurance resisted its liability towards the receiver before the courts and wasted time instead of paying the insured amount to the receiver and taking over the case from the beginning, after obtaining the subrogation. The legitimate excuse must be a cause that is beyond the person's control. The Insurers must not benefit from this, thus time bar must be applied in this case.
- Alternatively, the Insurers could have protected themselves and avoided the case being considered time barred by applying to the same court hearing the case filed by the Receiver (to

oblige the ship-owners to pay whatever the judgment obliges the Insurers to pay), since it is open to make any application to the court by all parties against any other party.

The Cassation Court refused all arguments raised by the ship-owners in this appeal and confirmed the Appeal Court judgment on the following basis:

- The Insurers may claim the amount paid to the Receivers from the ship-owners even if such claim is based on subrogation. The case may not be considered as a previously concluded case because the dispute was not raised between the same parties, as the right of recourse was not subject to court consideration in the previous case filed by the Receivers.
- The Insurers had a legitimate excuse to file the recourse case against the ship-owners as carriers after one year had elapsed (time limitation to file the cargo damage claim) as they were unable to file the case until they became aware of the carriers' identity, in accordance with the Appeal Court judgment. In addition, the Insurers could not file the case of recourse against the ship-owners until they paid the insurance indemnity to the Receiver.
- The ship-owner was barred from raising the same arguments that were raised before the court during the previous case filed by the Receiver in relation to his liability, as the same issue has been previously concluded.

### **Conclusion:**

The Court of Cassation, in this instance, was flexible in its consideration of the application of the 'time bar' and in its analysis of legal principals and article of laws, as well as in applying the rules of justice. However, this is not always the case. In many insistences, the Cassation Court tends to strictly apply the rules of law as its role is mainly focused on ensuring and observing that the law is applied correctly by the lower level courts.