RECOVERY OF AN INDEMNITY PREMIUM AND LIABILITY FOR DAMAGES IN COMBINED TRANSPORTATION

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Yapi Kredi Insurance Inc v Admiral Container Lines Inc (The Marti Prosperity)

Abstract

In principle, the bill of lading regulates the legal relationship between the carrier and the holder of bill of lading in the carriage of goods. The dispute between the parties here was whether the carrier would be held responsible for the loss and damage sustained as a result of a fire that had occurred in the vehicle carrying the insured cargo by road prior to its delivery to the consignee, following completion of the sea carriage.

The plaintiff insurance company initiated a law suit to recover of the indemnity premium. She claimed that the carrier caused a container cargo damage which was insured by them under a cargo insurance policy. On the contrary, the defendant sea carrier stated that the damage occurred during land transportation which she was not involved in the land transportation in any manner whatsoever. In addition, the carrier had not assumed any responsibility in this respect and therefore was not responsible for the damage.

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In this study, it will be assessed whether the sea carrier is responsible or not for the cargo damages regarding the subject case.

Key words: Cargo Insurance Policy, Recovery of the indemnity premium, Responsibility of Sea Carrier, Bill of Lading (Combiconbill), Multi Transportation, Liability for the Cargo Damages.

Öz

Prensip olarak, konişmento taşıyıcı ile taşıtan arasındaki malların taşınmasına ilişkin hukuki ilişkiyi düzenlemektedir. Burada taraflar arasındaki anlaşmazlık, deniz taşımacılığının tamamlanmasını müteakiben, sigortalı kargoyu karayoluyla taşıyan araçta, kargonun alıcıya teslimi öncesinde araçta meydana gelen yangın sonucunda karşılaşılan zarar ve hasar için taşıyıcının sorumlu tutulup tutulamayacağıdır.

Davacı sigorta şirketi tazminat primini geri kazanmak için bir dava açmıştır. Taşıyıcının, kendileri tarafından bir kargo sigorta poliçesi altında sigortalanmış olan konteyner kargo hasarına sebep olduğunu iddia etmiştir. Buna mukabil, davalı deniz taşıyıcısı ise, hasarın kara taşıması sırasında meydana geldiğini, kendisinin herhangi bir şekilde kara taşımasına dahil olmadığını belirtmiştir. Buna ilaveten, taşıyıcı bununla ilgili olarak herhangi bir sorumluluk kabul etmemiştir ve bu sebeple de hasar için sorumlu değildir.

Bu çalışmada, söz konusu davadaki kargo hasarları için deniz taşıyıcısının sorumlu olup olmadığı değerlendirilecektir.

Anahtar kelimeler: Kargo Sigorta Poliçesi, Tazminat priminin geri kazanılması, Deniz Taşıyıcısının Sorumluluğu, Konişmento, (Combiconbill), Çoklu Taşıma, Kargo Hasarı için Sorumluluk.

Introduction

The subject of the dispute in this case was recovery of an indemnity premium paid by the plaintiff insurance company to the insured, pursuant to the damage caused to the insured cargo and based on the cargo insurance policy. In principle, the bill of lading regulates the legal relationship between the carrier and the holder of bill of lading in the carriage of goods. The dispute between the parties here was whether the carrier would be held responsible for the loss and damage sustained as a result of a fire that had occurred in the vehicle carrying the insured cargo by road prior to its delivery to the consignee, following completion of the sea carriage.

The container containing the textile products was first transported from Bursa to Gemlik and delivered to the carrier by the shipper. The container was loaded onto the *Marti Prosperity* at Gemlik and shipped to Novorossiysk. Following discharge, the container was loaded onto a truck for the purpose of carrying it to the factory of the consignee company Petrenko. During this road

leg a fire broke out on the truck, leading to the total destruction of some of the goods, with the remainder being rendered unusable.

Even if the Combined Transport Bill of Lading (Combiconbill) had been used in the carriage (affreightment) contract it is obvious that, in this particular carriage, the transportation was not of combined type since the place of delivery was not specified in the bill of lading.

Facts

Harput Textile Industry and Trade Ltd (Harput Ltd), a company having its principal place of business in Bursa, Turkey concluded a carriage agreement with Marmaris Shipping Agency Inc (Marmaris), which is an authorised general agent of Admiral Container Lines Inc (Admiral Container Lines), a company having its principal place of business in Panama, for the transportation of polyester cotton printed fabrics that were sold to a company called Petrenko Marina Gennadievna (Petrenko) in Novorossiyk, Russia.

The goods comprised 1881 fabric rolls in 328 bags, and were insured by Liya Textile Ltd (Liya Ltd) with Yapi Kredi Insurance Inc (YK Insurance) on behalf of Harput Ltd under the Transport Goods Policy dated 9 August 2010.

The products were loaded onto the *Marti Prosperity* at Gemlik and were unloaded from the ship at Novorossiyk under the

Combined Transport Bill of Lading (Combiconbill). During the transportation from Novorossiyk to the place of destination, by way of the Novorossiysk-Ivanova highway, as a result of a fire outbreak on the truck, 387 fabric rolls were completely burnt and the remaining 1494 rolls were soaked and damaged by the fumes and smell of burnt fabric.

An agreement was reached upon the quantum of damages, which was determined by the cargo underwriter and based on the written approval of Liya Ltd. YK Insurance paid an insurance indemnity in the amount of US$112,875 to Harput Ltd - the seller of the products - on 30 December 2010.

The plaintiff YK Insurance filed a recovery action before the Istanbul Maritime Specialized Court against Admiral Container Lines for payment of the quantum of damages from the defendant, together with accrued interest from the date of payment and costs. YK Insurance argued a number of points, as follows:

- that following payment of the damages to the insured Harput Ltd, it had subrogated the rights of the insured
- that the carrier would be responsible for any loss or damage to the goods between the date of taking delivery from the shipper and the date of delivery to the consignee
- that the bill of lading issued by Admiral Container Lines was on the Combiconbill form and hence was in the nature of combined transport, thus covering liability for any damage that may occur

at each phase of the transportation, whether on land or sea legs of the carriage and

- that the damage had occurred whilst the goods were in the possession of and, hence, the responsibility of the defendant carrier.

The plaintiff submitted to the court the transport insurance policy, the bill of lading, customs declarations, the certificate of conformity, Lloyd's Survey Report, fire report, record of statement, the transfer receipt report, claims letters sent by the insured, a certificate of consent/release and the letter of recourse as evidence in support of its claims.

Marmaris, as the representative of Admiral Container Lines, requested that the action be dismissed on the following grounds:

- that the court was not authorised to handle the action
- that Admiral Container Lines was not responsible for the carriage as freight forwarder
- that the damage had not occurred on the sea leg but instead on the land leg of the carriage
- that Admiral Container Lines was not involved in the land transportation in any manner whatsoever
- that Admiral Container Lines had not assumed any responsibility in this respect and therefore was not responsible for the damage.

The defendant had submitted the survey report, the Sea Waybill instruction dated 6 August 2010 and the cargo manifest as evidence is support of its defence.

Expert determinations

Following collection of all the evidence, the court decided that experts needed to be appointed to conduct examinations into the evidence submitted. The board of experts consisted of a chemical engineer, a textile claims specialist and a maritime trade and insurance law specialist. In the report issued by the experts it was concluded that the material facts constituting the basis of the indemnity claim had occurred during the road transportation leg from Novorossiysk to Ivanova, that the defendant was not responsible for the road leg pursuant to the provisions of the bill of lading and, therefore, that the defendant was not responsible for indemnifying the plaintiff's claims.

Following the plaintiff's objections to the experts' report, the court decided to obtain an additional report from the same board of experts in view of the objections raised. However, the experts did not depart from their earlier view and concluded in their additional report that the defendant could not be held responsible.

Local court's decision

At the conclusion of the trial, the local court decided to dismiss the action[2]. The seller of the printed cotton fabrics, Harput Ltd, was insured by Liya Ltd against the transportation risks. Thus, according to the insurance policy, the insured was Harput Ltd and the policy owner was Liya Ltd. On this basis, 'insurance for the account of another party' was put into question.

For the marine insurance risks, the loss sustained by the insured is eliminated pursuant to Articles 1445 ff of the Turkish Commercial Code (TCC) No 6762. As for insurance for the account of a third party, the rights arising from such insurance belong to the insured pursuant to Article 1445 of the TCC. Upon receipt of the letter of claim dated 20 December 2010 from the policy owner Liya Ltd (stating that the damages payable by way of compensation should be paid to the insured Harput Ltd), the insurance indemnity of TL 167,320.00 was paid to Harput Ltd by YK Insurance on 30 December 2010.

In order to determine whether the plaintiff had capacity to sue, it was necessary to decide whether Harput Ltd had an insurable interest. An examination of the sales invoice and customs declaration of the goods revealed that the payment method was to be 'cash against goods' and the delivery method was CFR (Cost

[2] Istanbul, 51st Commercial Court of First Instance (Maritime Specialized Court) Folia Nos 2011/98 E and 2014/44 K (4 February 2014)

and Freight). CFR registration means that the expenses incurred in connection with the carriage of the goods to the place of destination and the freight are to be borne by the seller and the obligation of executing the contract of carriage must be fulfilled by the seller.

Thus, in CFR sales, the amount to be paid by the buyer - inclusive of freight - is determined by the seller. The phrase ‘cash against goods' included in the sales invoice and customs declaration means that the seller will receive the cost of the goods after they have been delivered. Therefore, the seller's benefit over the goods does not expire merely because payment for the goods has not yet been received in the context of the sale where the payment method is ‘cash against goods'. Therefore, the seller has an advantage, since the products are insured until the goods are delivered to the buyer.

This fact also appears in the established precedents of the Court of Cassation. Therefore, the insurance agreement executed in favour of the insured is a valid agreement pending delivery of the goods to the buyer. Pursuant to Article 1361 of the TCC, a plaintiff who has paid an insurance indemnity premium to the legal owner of the goods based on a valid insurance agreement is the successor of the rights of the insured. Hence, the court decided that the plaintiff had capacity to sue.

With regard to whether a defendant has capacity to sue, the seller is obliged to execute the contract of carriage pursuant to the delivery method included on the sales invoice and the customs declaration that delivery method is CFR. In this case there was no dispute between the parties that the insured Harput Ltd was the charterer of the contract of carriage. The bill of lading dated 11 August 2010, relating to the carriage constituting the subject-matter of the action was issued by Admiral Container Lines in its capacity as the carrier. Although, the defendant stated in its reply brief that Admiral Container Lines was the freight forwarder and for this reason no action could be initiated against it, this statement is not binding owing to the fact that Admiral Container Lines had signed the bill of lading in its capacity as the carrier, and had thereby assumed the carriage.

The goods were carried within a container and, therefore, the contract of carriage constituting the subject-matter of the action is a contract of carriage of general cargo, which is a type of contract of carriage. In the carriage of general cargo type, the bill of lading regulates the relation between the carrier and the charterer. Furthermore, according to the agency agreement, Marmaris was authorised to represent Admiral Container Lines in its capacity as general agent of the defendant carrier. Therefore, the court decided that Admiral Container Lines could be sued.

In addition, the defendant objected to the international jurisdiction of the court. However, it was noted that the statement of claim was served on the defendant on 25 March 2011 but the defendant did not submit it response until 3 June 2011, which was outside the permitted time for a response. Therefore, the objection to the jurisdiction was rejected since it was not submitted in due time.

In the evaluation of whether the action was commenced within the time period of one year,[3] it was held that the action was initiated in due time based on the date on which the bill of lading was issued and the date on which the fire had occurred, the latter having taken place on 29 August 2010. Thus, it is clear that the loss occurred prior to the delivery of the goods to the consignee.

The dispute between the parties was directly related to whether the carrier on the first (road and sea) leg of the transport was responsible for the loss sustained owing to the fire on the second (road) leg of the transport It was established that the textile products had first of all been taken from Bursa to Gemlik by road, a distance of some 30 km, having been stowed within the container and delivered to the carrier by the shipper pursuant to FCL (Full Container Load) records included in the bill of lading. Thereafter, the container was loaded onto the MV *Marti*

[3] This plea should be examined by the court ‘ex-officio' since it is in the nature of definite term as provided for in art 1067 of the TCC.

Prosperity at Gemlik and carried to Novorossiysk by sea and unloaded there before being loaded onto the truck which was subject to a fire breaking out and the goods being damaged.

Even if the Combiconbill form of bill of lading were to have been used in the contract of carriages - as it was in the transportation constituting the subject-matter of the action - the column for the place of delivery* is left blank in the bill of lading. The sign (*) included in the place of delivery, which was left blank, is explained making reference to the phrase: (Applicable only when document used as a combined transport bill of lading*) included in the form. It is obvious that the transportation was not of a combined type since the place of delivery was left empty in the bill of lading.

The defendant carrier had undertaken to carry the products from Gemlik to Novorossiysk. Had the subsequent road leg transportation also been assumed by the defendant, the name ‘Ivanova' should have been written in the place of delivery on the bill of lading. Although the route had been determined as being a very short distance by road from Bursa to Gemlik, by sea from Gemlik to Novorossiysk and a much further distance by road again from Novorossiysk to Ivanova in the transport goods insurance policy, it was argued that the defendant carrier was not responsible for the loss and that a decision should have been taken to dismiss the action since the defendant carrier has assumed and performed the navigation leg alone and was not responsible for the final road leg to effect delivery to the consignee in

Ivanova at a distance of approximately a day's drive away from the port.

Supreme Court's decision

Although the decision was appealed by the plaintiff, the Court of Appeal refused to grant the plaintiff's appeal and approved the local court's decision.[4]

Conclusion and evaluation

In relation to the procedure in the case, it should be emphasized that the defendant Admiral Container Lines is a foreign company resident in Panama and its headquarters or branch office is not located in Turkey. Therefore, although it was proposed that the cause of action should have been heard in the defendant's jurisdiction, ie in Panama, pursuant to the TCC and in light of the fact that the defendant had appointed a Turkish agent, the matter was dealt with in the local jurisdiction.

However, Article 5 of the conditions of the parties' contract, which was incorporated into the bill of lading used in the transportation, stipulates that: 'Disputes arising under this Bill of Lading shall be determined by the courts and in accordance with the law at the place where the carrier has his principal place of business'. Therefore, the action should have been initiated in Panama. Although

[4] Court of Cassation 11th Civil Chamber (2 December 2014) at 2014/11071 E and 2014/18534 K.

the claim was not commenced in Panama and the notice period for responding to the claim was not complied with by the defendant, this should not have led to the rejection of the defendant's application for the claim to be struck out as a result of late filing.

In relation to the timescale, in accordance with Article 1067 of the TCC the claim must be commenced no later than the first anniversary of the cause of action. Article 1067 states that: ‘If an application is not filed with the court within one year following the date on which the goods are delivered or deemed to have been delivered, the right to initiate an action to enforce liability against the carrier due to the loss of or damage to the goods is lost'. In the present case, the application was filed within the permitted timescale.

In relation to the merits, Article 1061 of the TCC governs the liability of the carrier. According to this provision: ‘The carrier is obliged to act as a prudent carrier in the loading, stowage, carriage, handling and unloading of the goods. The carrier is responsible for the losses which may arise from the loss of or damage to the goods during the period between the date on which they are received and the date on which they are delivered; provided that the loss or damage is caused by unavoidable reasons even if utmost endeavours are made'. Therefore, as a rule, the carrier is obliged to deliver the goods in the same condition as when it received them.

In the event that loss of or damage to the goods is discovered upon delivery, the consignee should ensure, prior to acceptance, that they have been inspected with regard to their condition by an officially appointed corporation or based on a court order pursuant to Article 1065 of the TCC, which states that: ‘Prior to the receipt of the goods sent, the consignee may have the said goods inspected by the master or officially appointed experts based on an order of a court or other authorized institutions. The other party is also caused to be present thereat if the same is possible'.

Furthermore, pursuant to Article 1066 of the TCC:

> The loss of, or damage to, the goods should be informed in writing to the person who is authorized to take delivery of them or the carrier or its representative at the port of unloading pursuant to the contract of carriage. If the loss or damage is not obvious externally, it is sufficient to send the notification within three days as of the said date. The loss or damage should be generally indicated in the notification. If the condition and position of the goods are determined based on a court order or by officially appointed experts at the moment at the latest as specified in the first paragraph in the presence of both parties, there is no need to send a notification. If the loss of, or damage to, the goods is not notified or determined, it shall be accepted that the goods are delivered by the carrier in the condition as written in the bill of lading or if a loss or damage occurs, the carrier will not be responsible therefore; provided that any contrary occurrence to these presumptions may be proven.

Therefore, any loss or damage should be notified before the goods are accepted.

In this case, no such determination or notification was made in accordance with the provisions of the TCC. However, such failures do not terminate the consignee's right to sue. If, however, any loss or damage is discovered, it will be assumed that such loss was caused by a third party for whom the carrier was not responsible. In this event, the burden of proof will be on the consignee to prove that the loss and damage occurred whilst the goods were in the possession of and under the responsibility of the carrier.

Finally, as explicitly stated in the local court's decision, the transportation consisted of two legs, being sea carriage and road transport. The plaintiff expressly agreed that the damage constituting the subject-matter of the action did not occur during the sea leg and, therefore, it was not in doubt that the goods were not damaged during their transportation on the *Marti Prosperity*.

The plaintiff alleged that Admiral Container Lines was responsible for the combined transport so that both the sea and road legs of the transportation should be considered as one ‘combined' form of transportation. The plaintiff asserted that the issuance of a so-called ‘combined transport bill of lading', which is one of the standard bills of lading used in the carriage of goods by sea, was the sole basis and ground for the liability of Admiral Container Lines. However, the

following provision was included in Article 1 of the general conditions incorporated into the bill of lading: ‘Notwithstanding the heading “Combined Transport”, the provisions set out and referred to in this bill of lading shall also apply, if the transport as described in this bill of lading is performed by one mode of transport only'. That is to say that such a bill of lading could be used even if the transportation were to cover only one mode of transportation.

Furthermore, in the explanation regarding the term ‘Place of Delivery (*)', the following passage appears in the bill of lading: ‘(*) Applicable only when document used as a combined transport bill of lading. In other words, if an agreement is reached by the parties on a combined transport or more than one transportation mode, the place of final delivery should also be written on the bill of lading'. The place of delivery was left blank on the bill of lading; only the port of loading was stated as ‘Gemlik' and the port of discharge was stated as ‘Novorossiysk'. The transportation in question was not undertaken as ‘door to door' also covering the land leg of the transportation. Instead, the transportation was clearly from port to port (Gemlik to Novorossiysk).

According to the plaintiff and as also specified in the experts' report, the damage occurred during the transportation of the container on the final road leg. Admiral Container Lines did not take any part in any manner whatsoever in the land transportation of the goods and did not assume any liability in this respect. Therefore, Admiral Container Lines was not liable for the damage caused to the goods as claimed by

the plaintiff. Therefore, as also approved by the Court of Appeal, the local court's decision was the correct and appropriate decision.