

Collision Liability under Kuwaiti Maritime Law

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When a ship collision occurs the parties are faced with evaluating risks, including loss of life and loss of assets, and consequent damages to the environment.

In Kuwait, liability for ship collision is governed by the Kuwait Maritime Law No. 28 for the year 1980 ('The Maritime Law') and the Kuwait Civil Law No. 67 for the year 1980 ('The Kuwait Civil Law').

Article 227/1 of the Kuwait Civil Law says:

"Every person who by his faulty act has caused harm to another person shall be liable to reparation regardless of whether he was perpetrator or incitor and abettor."

Consequently, there are three main pillars for the application of liability for ship collision at Kuwaiti Law:

- An act,
- Damage,
- A causal link between the act and the damage.

If there is an incident involving a maritime collision in Kuwait, these three pillars must be present to oblige the defendant to compensate the aggrieved party. Furthermore, the person claiming damages has the burden to prove that these three main pillars are present, and that the defendant is liable for damages caused by the ship collision.

What is a Collision?

Article 223 of the Maritime Law defines a collision:

1 - Where a collision occurs between mercantile ships or between mercantile ships and inland navigation boats the compensation accruing in respect of the damage caused to ships, items and persons on board the ship shall be settled in accordance with the provisions of this Chapter, regardless of the waters where the collision takes place.

(2) The foregoing provisions shall also, where no material collision happens, apply to compensating the damage caused by one ship to another, to items or persons on board such ship, if such damages resulted from the movement of the waves because the ship was manoeuvring or failed to manoeuvre or because of failure to observe the laws or regulations.

In short, a 'maritime collision' is defined under Kuwaiti Maritime Law as the occurrence of a physical impact between two floating establishments (whether this impact was material or not). The rules of collision apply when calculating the damages caused by one vessel to another.

It has been established by case law that the rules of collision are excluded in all cases where the vessel collides with a fixed object such as a pier. It is assumed that the collision takes place between two floating

objects and at least one of them will be a vessel regardless of its size, and it does not matter whether the vessel was in motion or anchored.

Articles 224, 225, 227 and 228 of the Maritime Law assist in determining the liability arising from a collision:

Article 224: Where the collision is a result of a force majeure, or where there is doubt as to its cause, each ship shall bear the damages she sustained; this provision applies where the ships or one of them were at anchor at the time of the collision.

Article 225: Where the collision is a result of the fault of any of the ships, such ship shall be bound to pay such damages which resulted from the collision.

Article 227 :The liability stipulated in this Chapter shall apply where the collision was due to the pilot's fault, even though pilotage is mandatory.

Article 228: A fault may not be assumed in regard to liability arising from collisions.

It is clear from the above articles of the Maritime Law that proof of fault is essential. The burden of proving the fault for the collision lays with the claimant in the lawsuit brought by him for compensation. The claimant must show that the defendant has breached the general rules for proving fault of the defendant, whether by taking a wrong action, or by neglecting to follow the laws in Kuwait concerning the regulation of sailing on the seas. Further, the claimant must prove a causal link between the fault and the damage which is claimed.

Types of Collision

Collisions arising from unexpected or doubtful reasons:

Article 224 of the Maritime Law does not differentiate between collisions arising from unexpected reasons (e.g., an act of God or war) and those collisions which occurred for 'doubtable reasons'. As long as the exact cause of the collision cannot be established, the incident will be considered to have occurred by reason of a 'force majeure'.

A collision arising from a force majeure includes any unexpected accident that cannot be prevented and which has caused damage. In the case of force majeure, the defendant must prove that he was not at fault and that he had taken all the precautions required to prevent the accident under the circumstances of the case.

A collision will be deemed to have happened for doubtful reasons when the court finds that the data provided to explain the collision does not prove a force majeure, or does not prove the existence a fault of any of the vessels, or a common fault that has caused the accident. In the case of 'doubtable reasons', each vessel shall bear the damage caused to her as if the incident was exactly as if it was a force majeure case.

Collisions arising from an individual fault of one of the vessels:

Article 225 of the Maritime Law clearly states that if the collision occurred due to the fault of one of the vessels, the party at fault will be liable to the other party to the maritime collision. Further, the party at fault will be liable towards any third party, and will be responsible to compensate the third party for the damage which occurred due to the vessel which caused the maritime collision.

Collisions arising from a common fault:

Dividing the damage in case of a common fault:

Article 226/1 of the Maritime Law stipulates that *'in case of a joint fault, the liability of each ship shall be assessed commensurately with the fault committed; however, where it is impossible due to the circumstances to assess the percentage of the fault of each ship, or where it appears that the fault was of equal degree, the liability shall be apportioned equally'*.

In drafting Article 226/1 of the Maritime Law, it would appear that the Kuwaiti legislators determined the apportionment of liability for each ship involved in the maritime collision based on the legal principle as stipulated in Article 227/1 of the Kuwait Civil Law, which states that each person should be responsible for the damage he had caused.

However, it is often hard to determine liability in cases where there are multiple faults on the part of each party to the maritime collision. It may be the case that all these faults combined have caused the damage, or that a specific fault has caused a higher percentage of damage than the other faults. The legal principle at Kuwaiti Law requires a causal link between the fault and the damage, and not between the fault and the incident, which resulted in the damage. The Kuwaiti Court will determine the division of responsibility for each party based on the seriousness of the fault and the court will examine each fault in accordance with the general rules of civil liability determined by Kuwaiti Law.

It should be noted that, if the court fails to determine the proportion of faults that occurred from each vessel, and if the court cannot determine the percentage of liability attributable to the specific fault and the contribution to causing the damage, it will conclude that the award of damage should be equally divided between the vessels.

Third party's claim for the material damages sustained from the collision:

In the case of a maritime collision in which damage may be sustained to the cargo or luggage which has been carried by the vessel, Article 226/2 of the Maritime Law outlines the ability for a third party to file a civil case.

Article 226/2 of the Maritime Law stipulates that *'the ship at fault shall be liable, but not jointly, according to the percentage stipulated in the preceding paragraph, to third parties for damages suffered by ships, goods, luggage or other property belonging to the seamen, passengers or any other person on board of the ship'*.

Therefore the third party should file its compensation claim for losses or damages sustained to cargo or luggage only against the actual carrier according to the agreed contractual conditions between the third party and the actual carrier. The third party does not have the right to file its suit against the vessels involved in the collision jointly.

Compensation for the personal injury sustained from the collision:

Article 226/3 of the Maritime Law stipulates that *'The liability shall be joint where the damage was the result of the death or injury sustained to persons on board of the ship; where a ship pays more than her share she shall have a right of recourse against the other ships'*.

Therefore, in the case of death or injury, the aggrieved party has the right to commence proceedings jointly against the vessels involved in the collision.

The Court having Jurisdiction over

Collision Lawsuit

Article 231 of the Maritime Law sets out several options for the claimant to commence civil proceedings and in the event of a ship collision:

An applicant may initiate proceedings before any of the following courts:

- The court of the defendant's domicile or the court having jurisdiction over the place wherein lies any of the ship's exploitation centres;
- The court of the area wherein an attachment was effected on the defendant's ship which caused the damage or, where permissible, on another ship belonging to him, or the court of the place where attachment could be but was not affected because the defendant produced a guarantee or other security;
- The court of the place where the collision happened, where it happens in ports, wharfs or inland waterways.

The litigants may agree to initiate proceedings before a court other than the foregoing or to refer the dispute to arbitration.

Therefore, claimants have more than one choice to file its case before one of the courts aforementioned and alternatively, the parties may agree to refer the matter to the arbitration.

It is important to note that the limitation period to file a lawsuit regarding maritime collision is two years from the date of the incident ,

The Evidence Acceptable to Prove a Collision

In maritime collision cases, it is important to note that two processes will take place in the immediate aftermath regarding the collision sustained. There will be a civil action dealing with the compensation claims for the damages sustained, and alongside the civil proceedings, a criminal investigation shall take place covering the investigations into liability for the collision.

The criminal investigation is undertaken by the Kuwait General Prosecution. The General Prosecutor will conduct the investigations into the circumstances of the incident and identify the responsible party who caused the damage due to his fault. Whereas the prosecutor is not specialized in the maritime field, the prosecutor will rely upon the survey reports which are carried out in respect of the collision. The criminal prosecutor may also appoint an expert to submit his opinion on the circumstances of the collision.

The civil process will be started when an injured party file his case before the Kuwaiti court's seeking compensation for the losses sustained to him. The civil court will investigate the material and moral losses sustained which shall be proved by the claimant and shall determine the compensation in accordance with the sufficient documents submitted by the parties. Article 9 of the Kuwait Evidence Law applies to civil and commercial matters which are dealt with before the Kuwaiti Civil courts and the provision states that :

"Official documents are binding evidence to all people, including matters made by the public officer within the limits of his mission or signed by the concerned parties in his presence, unless indicated as falsified via legal route.

Article 8 of the Kuwait Evidence Law defines the documents which shall be considered 'official documents':

Official documents are what a public officer or a person assigned to public service has obtained on his hands from the concerned parties, in accordance with the legal conditions and within the limits of his powers or his competency.

It should be stressed that in accordance with the above provisions, the court will give priority to 'official documents' issued from governmental entities rather than any other documents which may be submitted by the parties to support their defences.

Conclusion

In the light of the above, we advise that a party involved in a maritime collision should try to obtain survey reports which are issued from governmental authorities and/or be keen to conduct a joint survey undertaken by the parties involved in the collision (i.e vessel and vessels). This is important because both the General Prosecutor in criminal proceedings and the Kuwaiti civil courts investigating the basis of the compensation and defining the act, the damage and the causal link between them, usually rely on the conclusions of the official survey reports carried out regarding the collision.

It is also important to note that the conclusion of criminal proceedings, the General Prosecutor will impose a fine on the vessel at fault in case that she caused material damages, and in such case the party who has suffered harm shall be entitled to claim for compensation from the party responsible for this act in later civil proceedings.

In order to prove loss arising from the maritime collision, it will be important for a claimant to collate the original invoices that determine the losses sustained by the claimant in determining the amount of the compensation, and to make reference to the survey reports issued by the governmental authorities in connection with the criminal investigation into the maritime collision. If no official survey report is available, it is recommended that the claimant submit a joint survey report undertaken by the parties involved in the collision (i.e., vessel and vessels) as evidence.