

Cargo claims in the UAE – from Coverage to Recovery

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Overview

1. Cargo coverage disputes in the UAE
2. Cargo recoveries in UAE
3. Cargo recoveries in KSA
4. Cargo and Cyber risks – a developing area...



Maritime Codes of the GCC

- Relative uniformity in all GCC States (exception of KSA)
- Various maritime codes enacted in the early 1980s:
 - Maritime Kuwait Law 28 of 1980
 - Bahrain Law 23 of 1982
 - Qatar Law 15 of 1980
 - UAE Law 26 of 1981
 - Oman Law 35 of 1981
- Maritime Codes enacted between 1980-82
 - Loosely based on Hague/Hague Visby Rules
 - Kuwait is the only signatory to Hague Rules



UAE Marine insurance landscape

- **Is the Middle East becoming more litigious?**
 - Changing perception within Middle East companies
 - Increase in national and international law firms and lawyers
 - Does it remain ‘cargo friendly’?

- **Specialised courts and tribunals**
 - EMAC (Emirates Marine Arbitration Centre)
 - DIFC

1. Cargo coverage disputes in the UAE

- **Type and period**

- Single voyage or open cover
- Cover to remain in place without interruption
- Maritime Code provisions regarding marine insurance to apply if during course of transit goods are carried by river, land or air

- **Insured value**

- May not exceed market value at place of shipment, plus transportation costs and (save for UAE) expected profits

- **Abandonment of cargo**

- No news of vessel for 3 months
- Vessel becomes unseaworthy and no onward carriage for 3 months (6 months in Oman)
- Goods are lost or damaged to the extent of $\frac{3}{4}$ of their value

Institute Cargo Clauses

- **ICC(A)**
 - All risks cover
 - Requires fortuity / accident
 - Causation not required
- **ICC (B)**
 - Nominated perils cover
 - Significant limitations: no cover for theft
 - Loading / unloading limited to ‘total loss’
 - Requires causation
- **ICC (C)**
 - Catastrophe cover (limited nominated perils)
 - Small number of serious risks (seawater ingress excluded)
 - Requires causation

Duration and conditions of ICC cover

- **Transit clause (warehouse to warehouse)**

- Until delivery to final warehouse or place of storage
- Until delivery to warehouse or place of storage nominated by Assured
- Upon expiry of 60 days following discharge at final port

- **Onward transportation:**

“If, after discharge....the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance....shall not extend beyond the commencement of transit to such other destination”

- **Hanjin Shipping collapse**

- Delay caused by the insolvency of the carrier
- ICC (A) 1982 verses ICC (A) 2009

Liability issues

- **Insurer is not liable for:**

- Inherent defect
- Insufficient packaging
- Ordinary shortage
- Losses not material loss sustained by goods, e.g. loss of market
- Fines and confiscation
- Compensation due to arrest or a guarantee submitted to lift an arrest

- **Application of Institute Clauses**

- Not as per 'English law and practice' (save for possibly KSA)
- Fall-back position as per UAE Civil Code

Interpretation of insurance contracts – can you rely on the terms of the policy?

- **Jurisdiction**
- **Arbitration Agreements**
- **(Foreign) governing law provisions**
- **Formal requirements for incorporation: exclusions, warranties and conditions precedent to liability**
- **Contractual interpretation under UAE law**

Duties of good faith

- **Pre-contractual duties**
- **Importance of the proposal form**
- **Post-contractual duties of good faith**
- **Rescission / avoidance – Court ratification required**

2. Cargo recoveries in UAE

- Insurers right of subrogation (Article 1030 of the UAE Civil Code)



Recovery claim against the carrier

- **Carrier**

- Shipowner, charterer and operator
- Liability continues until delivery to consignee

- **Seaworthiness**

- Must exercise due diligence in making vessel seaworthy
- Onus of proof is not initially on the carrier

- **Duty of care**

- Carrier must use all necessary care in loading, stowing, stacking, arranging, carrying, protecting and discharging

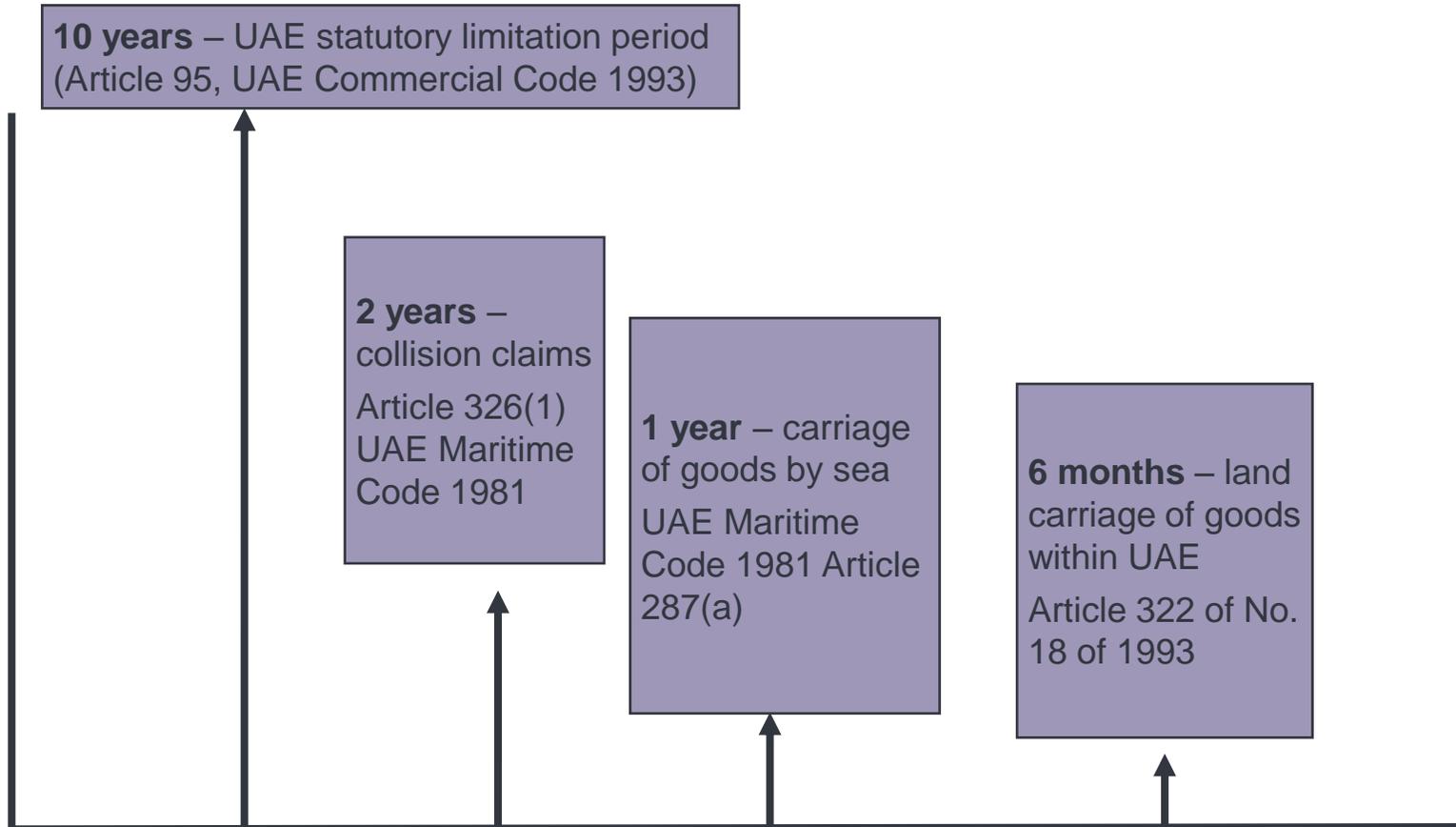
Recoveries cont.

- **Carrier's defences (Article 275)**
 - Similar list to Hague / Hague Visby
- **Limitation of liability (Article 276)**
 - AED 10,000 (USD 2,700) per package or unit; or
 - AED 30 (USD 8) per kilogram; or
 - Declaration of value
- **Time bar**
 - Notification of damage within 15 days of deliver (Kuwait, Oman and Qatar only)
 - 1 year from date of delivery or date of intended delivery

Major pitfalls

- Missing the time limit
- Suing the wrong party
- Failing to get security
- Suing in the name of the wrong party
- Suing under the wrong contract
- Suing in the wrong place
- Applying the wrong International Convention or set of Standard Conditions

Missing the Time Limit

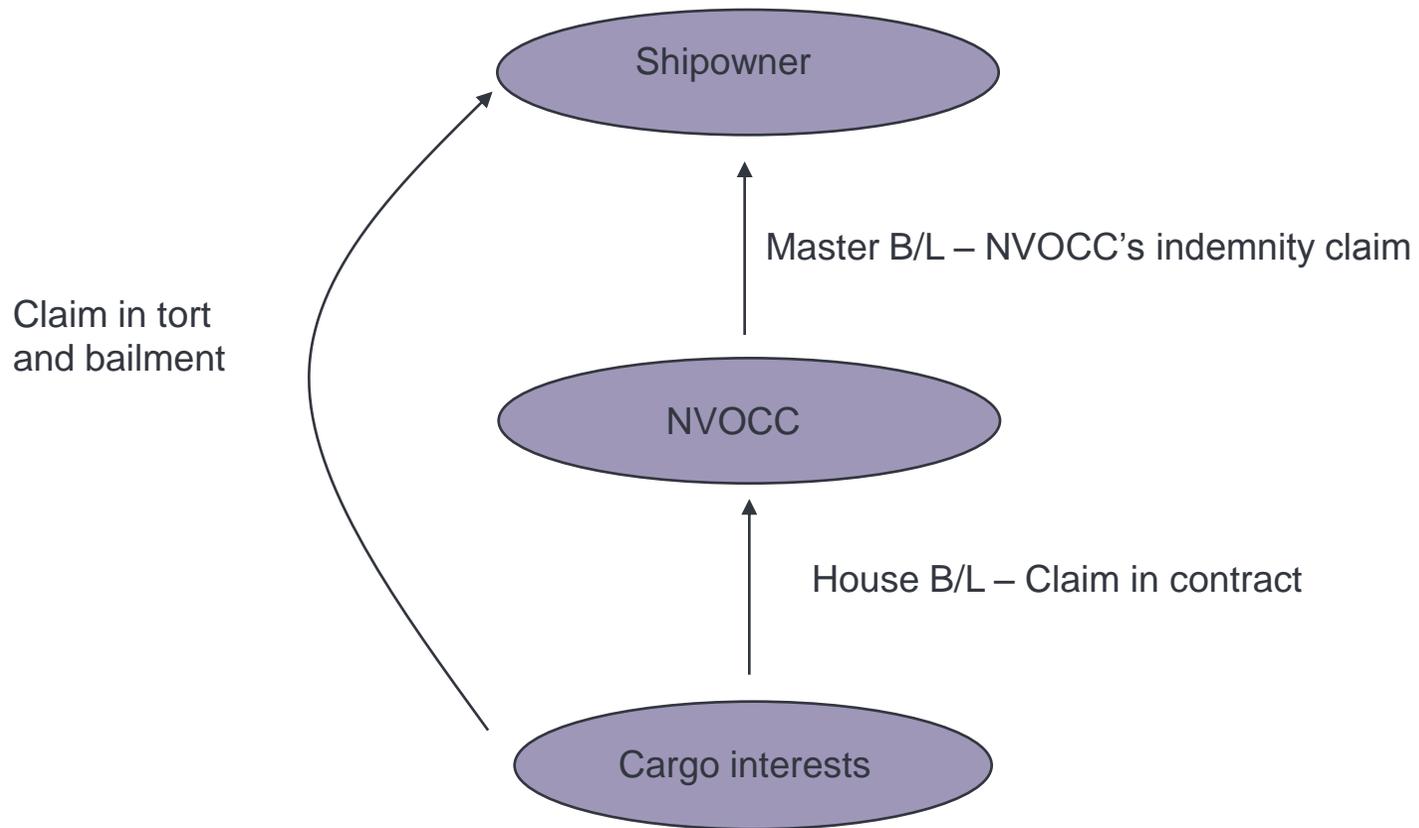


Suing the Wrong Party

- Claims in contract
- Claims in tort
- Claims in bailment



Suing the Wrong Party



Failing to Get Security

- Obtaining security at early stage
- Arrest
- Precautionary Attachments



Arrest procedure

- **Ex parte application**

- Power of Attorney (notarised, legalised and authenticated where needed)
- Written application and supporting documents, including Arabic legal translations
- Court fee
- Counter security (at Court's discretion)

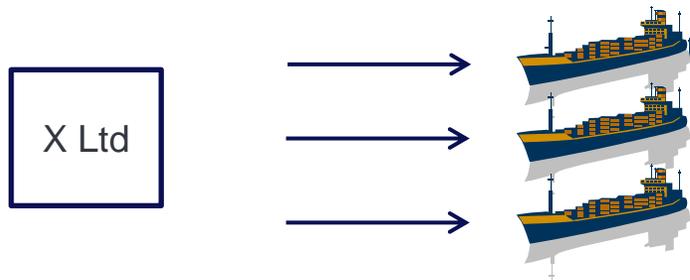
- **Substantive proceedings within 8 days or arrest lapses**

- UAE court seizes jurisdiction
- Security for foreign proceedings

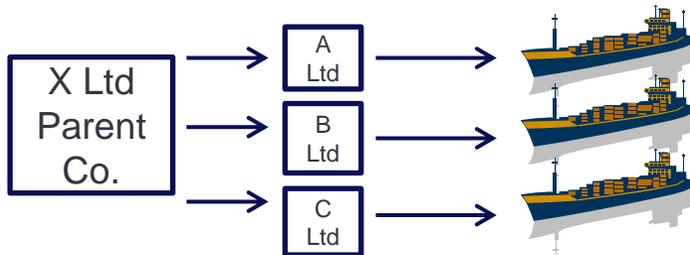
- **Lifting the arrest**

- Local bank guarantee OR cash
- P&I Club LOUs not accepted (at this stage of proceedings)

Sistership / Associated ship arrest



- **YES**. Save for categories M, N and O (i.e. ownership and mortgage disputes). The ship must have been owned by the debtor when the “maritime debt” arose.



- **NO**. Reluctant to lift corporate veil unless very strong evidence of common beneficial ownership (even then not guaranteed)

3. Cargo recoveries in the KSA



Sources of law

- Commercial Court Law (1931) = essentially Ottoman Commercial Code of 1850 (with all references to interest excluded!) That in turn based on French Commercial Code 1807; of which Maritime Law Section was based on “Ordonance de la Marine” of 1681; which in turn derived from the 15th century “Consolato del Mare” and the 13th century “Laws of Oleron”
- So not exactly well suited to today’s modern shipping world!

Sources of law (cont'd)

- Carriage of Goods by Sea Rules, Ministerial Resolution No 01/12 19 Muharram 1434 H corresponding to 3 December 2015 G (“Saudi COGSA”)
- Other laws with some relevant to shipping : Seaport & Lighthouses Law (1974); the GCC Rules & Regulations for Seaports (1985) and Saudi Regulation for Ship Mortgages (1955)

Commercial Court law

- Not a party to the Hague / Hague-Visby or any other International Convention relating to carriage of goods by sea
- KSA domestic legislation not comprehensive
- A few important points for today :
- Basic assumption : carrier responsible for all loss / damage to cargo
- Defences :
 - force majeure
 - : inherent vice
- Burden of proof : on carrier once loss / damage proven (e.g. shortage based on discharge port tallies but recognises trade allowance of 0.5%)
- No package limits in statute or Shari'a law

Saudi COGSA

- Limited application as it:
 - (a) only applies to Saudi licenced carriers / freight forwarders; and
 - (b) is a Ministerial Resolution, it sits low in the hierarchy of the laws
- Liability – carrier not liable due to on of the following:
 - (a) default on the part of the shipper or cognisee or any of their agents
 - (b) force majeure
 - (c) inherent vice or latent defects
 - (d) shortage due to the nature of goods (evaporations etc)
 - (e) extraneous cause outside the control of the carrier preventing him to perform the contract of carriage

Time bars

- **Under the Commercial Court law:** In the KSA the time limit is 3 lunar months from the delivery date if the damage occurred in the Kingdom and 1 lunar year if it occurred outside the Kingdom
- These time limits also apply to claims under tort against a third party and to recovery actions
- **Under the Saudi COGSA:** 365 days from when the goods were delivered, or should have been delivered, or from when they were lost

Arrests in the KSA

- Not a signatory to the 1952 International Convention Relating the Arrest of Seagoing Ships, the 1999 International Convention on the Arrest of Ships nor the International Convention on Maritime Liens and Mortgages of 1993
- However, Safe-guards are put in-check by domestic law and private practice, such as section two of the 1931 Commercial Court Law (“CCL”) and the Enforcement Law of 2013. (“ER”)

Ships susceptible to arrest

In General

- Ships sailing a predetermined course to KSA, whilst anchored in its territorial waters, are subject to the national jurisdiction of the KSA courts regardless of the ship's nationality or flag. Sister ships can be arrested but associated ships cannot be arrest.

Exceptions

- Military and official ships, governmental owned ships and ships used in port support services. Further, ships flying a Saudi flag can only be arrested by a Saudi national.

Right to arrest

- Under the general rules of the KSA civil liability, debtors are presumed to be personally liable for their own private assets
- A creditor will have the right to attach the assets of his debtor if he succeeds in proving that he has a credible claim against the defendant and has a legitimate indication that the defendant might dissipate his assets
- In general, a ship can be arrested for any claim which the claimant has against the owner of the ship or the “guilty” ship, provided the claim is proven, on the face of it, to be serious

Procedure for arrest

- Similar to the UAE but the courts enjoy full discretionary powers to determine whether an arrest order is granted and the level of security
- The arresting party is are required to deposit monetary security in the form of a banker's draft or cashier's cheque or a bank guarantee with the court (NB: the amount is at the complete discretion of the court).
- Necessity to commence substantive suit within 10 days of the arrest (which can include commencing arbitration elsewhere and substantive suit simply to ratify arrest, hold security and stay proceedings)

Wrongful arrest

- Wrongful arrests are rarely compensated by the courts due to the principle of judicial immunity and the prudence assumption on the end of debtors
- It can be possible for debtors to recover actual and direct damages if they can prove that the arresting creditor has acted in an abuse of law and falsified the information or documentation submitted with the request for an arrest

4. Cargo Cyber risks – a developing area...



Fairplay > [Safety & Regulation](#)

Hackers took 'full control' of container ship's navigation systems for 10 hours

Tanya Blake, editor, Safety at Sea | 22 November 2017



The alleged cyber attack on the box ship lasted 10 hours. Credit: Getty Images

Cyber Definitions

- Affirmative coverage
 - Insurance policies that expressly include coverage for cyber risk
 - E.g. "*Insurers shall pay any Loss resulting from a Claim related to a Cyber Event*" (cf. D&O – cyber liability)
 - Certain marine cyber buybacks offer affirmative coverage
- Non-affirmative (or silent) cyber:
 - Implicit cyber exposure where policies do not expressly include or exclude cyber risk

Marine Cyber coverage

- Marine policies are traditionally concerned with physical loss or damage
- Marine insurers do not generally offer affirmative cyber coverage
- In non-marine insurance the focus has been on data breach and its consequences
 - loss of data, remediation of corrupted data, cost of customer notifications, PR expenses, fines and penalties, business interruption losses etc
- There are fewer examples of cyber incidents in the marine space:
 - Port of Antwerp / Maersk / Clarksons / Oil rig attack off Africa
 - German container vessel

CL 380 10/11/03

*1.1 Subject only to Clause 1.2 below, in no case shall this insurance cover loss damage liability or expense **directly or indirectly caused by or contributed to by or arising from** the use or operation, **as a means for inflicting harm**, of any computer, computer system, computer software program, malicious code, computer virus or process or any other electronic system*

What does CL 380 mean for Insurers

- Introduced against the backdrop of Y2K and Twin Towers
- Burden of proof on insurers to demonstrate an exclusion applies
- Potentially differences between local and reinsurance policy responses
- CL 380 not tested before the English or UAE Courts as far as we are aware (to date)

UAE Perspective

- CL 380 or similar wording incorporated into some Cargo policies in the region
- Operation of Exclusions
- Causation and evidence in UAE coverage disputes...
- Potential gaps if CL 380 is in reinsurance but not direct policy or *vice versa*

390

Partners

2000

Legal
professionals

3600

Total staff

50+

Offices and associated
offices in 24 countries

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