

# Not a Ship Arrest but a Cargo Arrest

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## Introduction

It is well established that a consignee in a bill of lading has the right to arrest a vessel where the vessel's owner or carrier fails to deliver the cargo under that bill of lading to the discharge port. However where the lawful cargo owner is not the consignee under the bill of lading, it is not entitled to arrest a vessel. In this article, we review a recent case (Judicial Order 80/2021 concerning provisional attachment 2/2021) in which Al Tamimi & Company, successfully represented a lawful cargo owner, who was not the consignee under a bill of lading for petroleum products, valued at over USD 8,000,000.

## Background

A Yemeni purchaser (**Cargo owner**) and a UAE seller (**Time Charterer**) entered into a sale and purchase contract (the **Contract**) for 30,000 MT (+/- 10% at the Seller's option) of Motor Gasoline 92 RON. Subsequently, 30,273.194 MT of motor gasoline under the Contract (the **Cargo**) was loaded onto a Vietnamese-flagged product tanker (the **Vessel**) after the Cargo Owner fully paid for the Cargo against the Defendant's invoice of AED 23,038,061.24 (**Invoice Amount**).

The problem arose when the Defendant, the Time Charterer of the Vessel, issued a set of bills of lading stating that it was the consignee of the Cargo. This was the result of clerical error. To rectify the error, the Defendant agreed to have the complete set of bills of lading endorsed to the Cargo Owner before discharge operations at Hodeidah Port (**Discharge Port**). However, the Vessel was not granted port clearance, and while waiting for the port clearance to be granted, demurrage of more than AED 20,000,000 accrued - which the Cargo Owner fully paid. In view of the risk of more demurrage accruing, the Cargo Owner instructed the Defendant to direct the Vessel to be discharged in Fujairah instead of the Discharge Port (**Instructions**).

Instead of complying with the Instructions, the Defendant terminated the Contract and tried to sell the Cargo by way of ship-to-ship operation in Oman to a third party (**Unauthorised Sale**). In light of the impending Unauthorised Sale, the Cargo Owner instructed Al Tamimi & Company to immediately arrest the

Vessel while it was taking bunkers at Fujairah anchorage. However, due to a number of factors outside the Cargo Owner's control, the Vessel left UAE territorial waters. We tracked the Vessel's movement and found that it had arrived at Sohar Port ostensibly to complete the Unauthorised Sale.

The Defendant continued to rebuff all the Cargo Owner's demands of delivering the Cargo, and declared its intention to sell the Cargo while offering to share the sale proceeds with the Cargo Owner. However, this course of action would have deprived the Cargo Owner of the profit margin arising from a price hike in the petroleum products, which occurred during the Port Clearance Wait.

## The Legal Problem

Ordinarily, the circumstances presented above would fall within the ambit of Article 188(4) of Royal Decree No. 35 of 1981 promulgating the Maritime Law of Oman, which provides that:

*"[e]very claim or right or debt the source thereof is attributed to one of the following reasons shall be considered a maritime debt: ... Contracts relating to the transporting of goods on a ship under a charter party, bill of lading or otherwise."*

However, the subject of the claim in the present case did not qualify as a maritime debt (in almost all jurisdictions) because the Cargo Owner was not named as consignee, but was only a notifying party in the bill of lading. In these circumstances, it was unlikely the Omani Courts would grant a vessel arrest on cargo mis-delivery grounds.

## The Legal Solution

Consequently the Cargo Owner arrested the Cargo on board the Vessel on the basis of Article 372 of the Royal Decree No. 29/2002 promulgating the Omani Law of Civil and Commercial Procedure which provides that:

*"[t]he movable property owner and any person having material right therein or right to detain the same may request for levying precautionary attachment on the said property with the person who possesses it"* ("**Cargo Arrest Application**").

In the Cargo Arrest Application, the Cargo Owner argued that it had title to the Cargo and documents evidencing the Invoice Amount and the Cargo Owner's payment of the same (invoice, remittance advice, and exchange of correspondences with the Defendant) were submitted. In fact, a reading of the correspondence exchanged between the Cargo Owner and the Defendant would show that the Defendant did not challenge the Cargo Owner's title and lawful ownership of the Cargo even though the Defendant pursued the Unauthorised Sale.

While the Vessel was preparing for the Unauthorised Sale, we successfully obtained a precautionary attachment order from the Sohar Court of First Instance. The court order was forwarded to the port authorities, and the coast guard immediately ordered the Vessel to abort the ship-to-ship operation which. The coast guard subsequently confiscated the Vessel's documents, which had the effect of a vessel arrest.

The Cargo Owner then commenced arbitral proceedings as required under Omani law as the Cargo Arrest Application was made in support of a substantive claim. The substantive claim had to be resolved via arbitration as agreed under the Contract. Further, the Cargo Owner in the arbitral proceedings, sought a declaration of title to the Cargo, an order for redelivery of the Cargo, damages arising from the Defendant's refusal to perform the Instructions, overpaid demurrage and all sums incurred but not due to the Defendant, arising from or in connection with the Contract.

As a result of these actions, and the demurrage that was still accruing (which was for the Defendant to bear) and potential legal costs, the Defendant approached the Cargo Owner to settle the matter, and

agreed to transfer the Cargo to the Cargo Owner.

## **Summary**

Although a vessel arrest was not obtained, we successfully obtained an attachment order over the Cargo – which we believe is a first in Oman. Oman is neither a party to the International Convention on the Arrest of Seagoing Ships of 1952 nor to the International Convention on the International Convention on the Arrest of Ships of 1999. However, the outcome of the litigation had the effect of an arrest as the Vessel could not leave port or discharge the Cargo.