

‘Can I Arrest a Ship in the UAE as Security for Foreign Substantive Proceedings?’

Omar N. Omar - Partner, Head of Transport & Insurance - Insurance
o.omar@tamimi.com - Dubai International Financial Centre

Adam Gray - Senior Associate
a.gray@tamimi.com - Dubai International Financial Centre

In this article, we consider vessel arrest in two different scenarios: firstly, where the creditor must bring court proceedings in a foreign jurisdiction, and second, where the creditor must commence arbitration in a foreign jurisdiction.

Establishing Jurisdiction

We proceed on the assumption that a creditor can arrest a vessel for a maritime debt under UAE law and that the UAE Court considers itself seized of jurisdiction to grant such arrest. However, although the UAE Courts may have jurisdiction under Federal Law No. 26 of 1981 (the “Commercial Maritime Law”) to order the arrest of a vessel, jurisdiction may not automatically extend to hearing the substantive claim.

Article 21(3) of Federal Law No. 11 of 1992 (“the Civil Procedure Law”) confers jurisdiction upon the UAE Courts where a claim concerns obligations concluded or performed in, or the execution of the obligation was conditioned in, or the incident giving rise to the claim occurred in, the UAE. Article 21(7) provides for jurisdiction of the UAE Courts to hear claims where the defendant is domiciled or resident in the UAE.

Article 21(2) of the Civil Procedure Law stipulates that the UAE Courts shall have jurisdiction to hear a claim against a foreign defendant who has no domicile or residence in the UAE where the subject-property is in the UAE. The Arabic interpretation of the word ‘property’ is understood to extend to a vessel within the territorial waters of the UAE.

In addition to the circumstances set out in the Civil Procedure Law above, the UAE Courts will have jurisdiction to hear the substantive claim after granting a vessel arrest in the following instances, as prescribed by Article 122 of the Commercial Maritime Law:

- If the claimant has a usual place of residence or head office in the UAE.
- If the maritime debt arose in the UAE.
- If the maritime debt arose during a voyage during which the arrest was affected on the vessel.
- If the maritime debt arose out of a collision or assistance over which the Court has jurisdiction.
- If the debt is secured by a maritime mortgage over the arrested vessel.

Once an arrest has been granted, an arresting party must file a substantive claim before the applicable UAE Court within eight calendar days from service of the arrest order against the ship. What constitutes service differs between the Emirate courts. If a foreign dispute resolution clause applies, the arresting party must still file an application on or before the eighth calendar day to seek confirmation or verification by the UAE Court of the arrest. The same day the arresting party must also either file submissions on the merits of the claim or to request to stay the substantive proceedings pending a foreign court judgment or arbitral award.

Failure to file such an application within the eight-day deadline will give the arrestee the right to apply to the UAE Court for the lifting of the arrest. Additionally, a fresh arrest application by the arresting party

would be required, including corresponding court fees, in order to re-arrest the ship.

Foreign Court Proceedings

The general practice of the UAE Courts is to disregard a foreign litigation jurisdiction clause where the UAE Courts have jurisdiction according to UAE law and when the claimant/arresting party seeks to proceed with UAE litigation.

For example, in the instance of a dispute arising from a maritime mortgage, Article 122(e) of the Commercial Maritime Law stipulates that the UAE Courts have jurisdiction over mortgages without specifying whether those mortgages are foreign-registered or UAE-registered. The UAE Courts have typically interpreted this article to confer jurisdiction upon the UAE Courts in respect of disputes arising from all mortgages, whether UAE or foreign registered. The UAE Courts have accepted jurisdiction regardless of the presence of a foreign governing law and jurisdiction clause, for example when the contract stipulates that it is governed by English law and that disputes shall be heard in the sole jurisdiction of the High Courts of England and Wales.

Whether the UAE Court in the concerned Emirate disregards the parties' jurisdiction clause largely depends on whether the claimant seeks a stay of UAE proceedings or not. In our opinion, the practice of the UAE Courts appears to be that it will accept a request by the arresting party to stay UAE Court proceedings if the arresting party evidences commencement of foreign court proceedings in accordance with the parties' contractual agreement. The UAE Court will only assess whether the evidence of foreign litigation is sufficient proof that the parties are resolving the dispute as per the contractual agreement. It will not look to seize jurisdiction at that point. Incidentally, the UAE Courts do not typically determine the question of jurisdiction at the outset of the claim, but will only consider jurisdiction at the time of handing down judgment.

However, if the claimant seeks to resolve the dispute substantively through the UAE Courts, according to UAE law the UAE Courts are likely to accept jurisdiction if jurisdiction is conferred on it under UAE law. Where jurisdiction is not otherwise conferred upon the UAE Courts, the UAE Court will dismiss the claim for lack of jurisdiction at the time it delivers judgment. The attitude of the UAE Courts to accepting jurisdiction can be described as broad and amenable.

If a foreign litigation dispute resolution clause is disregarded, the defendant can contest jurisdiction in its defence submissions or can file a grievance (challenge) to the court on the grounds of jurisdiction. However, as explained above, where the UAE Court has jurisdiction pursuant to UAE law, regardless of the jurisdiction clause, the defence and grievance are likely to fail. Additionally, neither the defence nor the grievance would provide prompt relief because the grievance usually takes 2-3 months to conclude and the question of jurisdiction is only considered at the time of judgment.

Equally, if the defendant wishes to frustrate foreign court proceedings, it could seek to have the merits heard before the UAE Court. However, such a scenario may pose problems for a claimant if an anti-suit injunction is sought by the defendant through the courts of the jurisdiction agreed to in the contract, such as the English Courts for example.

Notwithstanding the above, the biggest deterrent for claimants/arresting parties arresting vessels bringing claims in foreign courts is the difficulty encountered at the execution stage through the UAE Courts. Without reciprocal enforcement agreements in place between the UAE and the foreign jurisdiction where the action is pursued, attaining recognition and enforcement of the foreign court judgement before the UAE Courts is likely to be problematic. Accordingly, the arresting party may fail to procure an enforceable foreign judgment which it can actually execute against the arrested vessel, nullifying the purpose of the vessel arrest and rendering the foreign judgment ineffective.

Reciprocal enforcement agreements are in place between the UAE and Gulf states in addition to other Arab States within the Arab League. However, no bi-lateral agreement exists between the UAE and England and

Wales where many maritime matters are adjudicated. Furthermore, recent decisions of the Joint Judicial Committee set up by Decree 19 of 2016 suggests that it is now unlikely that a foreign court judgment will be recognised and enforced in onshore Dubai through DIFC Court reciprocal enforcement mechanisms.

Foreign Arbitration

Where an arbitration agreement exists between the parties, the process of arresting a vessel as security for a foreign arbitration claim is similar, procedurally, to a foreign court action. As with a foreign court action, where there is a maritime debt as defined by the Commercial Maritime Law, the UAE Court will still automatically assume jurisdiction to arrest the vessel, regardless of a foreign arbitration clause in the parties' agreement. Importantly, there are two implications where a foreign arbitration clause exists that result in increased prospects of success for claimants wishing to secure its foreign claim.

Firstly, the UAE Courts will not disregard a foreign arbitration clause even if they would otherwise have jurisdiction to hear the claim under the Civil Procedure Law and Commercial Maritime Law. This is because the UAE Courts tend to recognise the overarching agreement of the parties to arbitrate, as opposed to litigate, a dispute. To disregard a foreign arbitration clause where the UAE Courts would otherwise have jurisdiction would be to deny the parties the right to arbitrate, a right recognised in Article 203 of the Civil Procedure Law. Consequently, parties wishing to secure a foreign arbitral claim can be confident that the UAE Court will not intervene in the jurisdiction of the foreign arbitral institution to hear the merits of the claim.

Secondly, where the foreign arbitration is conducted in a State that is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 enforcement of the foreign arbitral award in the UAE tends to be straightforward (subject to applicable State reservations in the text of the Convention). Therefore, generally speaking, and subject to the arresting party adhering to the Civil Procedure Law before referring to foreign arbitration, arresting parties are unlikely to encounter difficulties in executing their foreign arbitral awards against the secured vessel or substitute security.

Conclusion

Where the claimant/arresting party arrests a vessel in the UAE in order to secure a foreign litigation claim, it is likely to be able to maintain the UAE arrest for the duration of the foreign court proceedings until final foreign judgment, on the condition that it satisfies the UAE Court, within eight calendar days from the arrest, that foreign litigation has been properly commenced.

However, unless there is a bi-lateral convention for recognition and enforcement of foreign judgments in place or the executed verdict is issued by a GCC or Arab League member state, execution of a foreign judgment against an arrested vessel in the UAE Court is likely to be, at the very least, difficult. This means arresting parties should consider whether arresting a vessel in the UAE to secure a foreign court action is likely to yield the desired result at the UAE execution stage. In considering enforcement prospects, arresting parties should also be cognisant that substantive claims may be heard before the local courts if the UAE Courts have jurisdiction under UAE law, notwithstanding the foreign jurisdiction clause.

Where a party arrests a vessel to secure its foreign arbitration claim, the arresting party is able to sustain a vessel arrest pending procurement of a final foreign arbitral award subject to compliance with the Civil Procedure Law. It will be able to do so without the risk of the UAE Courts dismissing the foreign arbitral award and claiming jurisdiction itself, or of encountering difficulties executing the foreign award against the vessel due to the UAE Courts' ratification of the New York Convention.