

Arresting a Ship in the UAE: When the dispute should be referred to Arbitration

Tariq Idais - Senior Associate

t.idais@tamimi.com - Dubai International Financial Centre



This article is an overview of a Dubai Court of Cassation judgment (appeal number 444 for the year 2017/Commercial) in relation to a ship arrest in circumstances whereby the parties had contractually agreed that any dispute between the parties should be referred to arbitration.

The distinct issue before the Court was whether substantive arbitration proceedings must be commenced by a Claimant before or shortly after it had obtained an arrest order for ship arrest, if the parties had contractually agreed to refer all the disputes to arbitration.

Al Tamimi and Company represented the ship owning company (the “Defendant”) in this matter.

Background

A ship building company (“Claimant”) entered into shipbuilding agreements with a ship-owning company (the “Defendant”) in which the Claimant undertook to build a number of ships for the Defendant. Thereafter, the Defendant granted the Claimant a first preferred ship mortgage over one of its ships (the “Mortgaged Ship”), in the sum of USD 40,000,000, plus interest at the rate of 6.5% per annum, as a security for the cost of building the ships.

The Nature of the Claim

On 18 July 2016, the Claimant obtained an arrest order (“Arrest Order”) in the Dubai Court of First Instance over the Mortgaged Ship which was at Dubai Drydocks at the time of arrest (the “Arrested Ship”). The Claimant based the application for an Arrest Order on the terms of the First Preferred Ship Mortgage

Agreement. Furthermore, on 27 July 2016, the Claimant brought a substantive claim before the Dubai Court of First Instance against the Defendant requesting that the Court validate the Arrest Order over the Ship ("Validity of Arrest Order Claim"). In addition to the validation of the Arrest Order, the Claimant claimed the sum of USD 95,489,569 for its alleged fees in connection with building the ships and additional legal interest at the rate of 12% from the date the claim was made until full payment.

The Defendant's Arguments and the Claimant's Responses

The Defendant argued that the substantive claim and the Arrest Order should be dismissed based on the fact that the Dubai Court of First Instance did not have jurisdiction to hear the claim, as it was agreed in the shipbuilding agreements that the parties should refer any dispute relating to or arising out of, the agreements to arbitration governed by English Law and the English Arbitration Act 1996. Furthermore, the Defendant argued that the shipbuilding agreement in relation to the Arrested Ship included an arbitration clause, and since the original alleged debt arose from the shipbuilding agreements, the Dubai Court of First Instance would not have jurisdiction to hear the claim.

Additionally, the Defendant argued that the arrest order must be dismissed, as the Claimant should have commenced arbitration proceedings before arresting the ship in question and/or commenced arbitration proceedings within Eight days of executing the Arrest Order over the Arrested Ship in accordance with Article 255 of the UAE Civil Procedures Law and in compliance with the arbitration clause in the shipbuilding agreements.

The Defendant further argued that the Claimant should have filed an application with the Court requesting the Court to validate the Arrest Order over the Arrested Ship and to stay the proceedings in the UAE, until a final award was issued in the arbitration proceedings. Lastly, because the Claimant did not file arbitration proceedings in England, and instead, filed the substantive claim in the UAE along with the Validity of Arrest Order Claim, the Defendant believed the Arrest Order should be denied.

The Claimant responded to the Defendant's arguments by stating that its claim was based on the terms of the First Preferred Ship Mortgage Agreement, and not based on the terms of the shipbuilding agreements. Furthermore, the Claimant confirmed that the Mortgaged Ship was in fact a form of security for the cost of building other ships and therefore, the Dubai Court should have the jurisdiction to hear the case.

Dubai Court of First Instance's Judgment

i. In Relation to the Substantive Claim:

The Court found that the Claimant's claim was governed by the contractual terms of the shipbuilding agreements and not by the terms of the First Preferred Ship Mortgage. Moreover, the Court held that the First Preferred Ship Mortgage arose from the contractual terms within the shipbuilding agreements and these terms determined the parties' obligations. In addition, the Court ruled that since the shipbuilding agreement of the Arrested Ship contained an arbitration clause, the Dubai Court of First Instance did not have jurisdiction to hear the substantive claim. Therefore, the Court decided to dismiss the same.

ii. Validity of the Arrest Order Claim:

In relation to the Arrest Order, although the Dubai Court of First Instance acknowledged from the submitted documents that the Claimant had failed to commence arbitration proceedings, the Court decided to stay/suspend the arrest order over the Arrested Ship until the dispute was finally determined by arbitration.

The Court of Appeal's Judgment:

The Claimant filed an appeal before the Dubai Court of Appeal challenging the Court of First Instance's

judgment. The Claimant argued in its appeal that the nature of its claim was based on the terms of the First Preferred Ship Mortgage Agreement and not on the terms of the shipbuilding agreements and therefore, the Dubai Court should have jurisdiction to hear the case.

The Defendant filed its own appeal challenging the Court of First Instance's decision in relation to staying the Arrest Order over the Arrested Ship until the dispute was determined by arbitration. The Defendant argued the following:

1. The Claimant should have commenced arbitration proceedings before arresting the Ship or within Eight days from the day of executing the Arrest Order over the Ship according to Article 255 of the Civil Procedures Law;
2. Then the Claimant should have filed with the Court an application requesting to stay the arrest order over the Arrested Ship until a final Arrest Order was issued in Arbitration;
3. Along with the stay application, the Claimant should have also attached evidence which demonstrated that arbitration proceedings had been commenced before arresting the Arrested Ship, or that the arbitration proceedings would be commenced within 8 days from the day of executing the Arrest Order over the Mortgaged Ship in accordance with the requirements of to Article 255 of the UAE Civil Procedures Law

In conclusion, the Defendant argued that the Claimant failed to follow the procedures, set out above in sections a, b and c, and since the Claimant instead filed a claim to validate the Arrest Order over the Arrested Ship and claimed the sum of USD 95,489,569, the Arrest Order must be dismissed.

The Court of Appeal dismissed both appeals and upheld the Court of First Instance's judgment.

The Court of Cassation's Judgment:

Both the Claimant and the Defendant filed appeals with the Cassation Court reiterating the arguments they each had raised before the Court of Appeal. The Court of Cassation dismissed both appeals and upheld the Court of Appeal's Judgment.

Additionally, in relation to the Defendant's appeal, the Court of Cassation based its judgment on Article 102 of the Civil Procedures Law, which states:

"The court shall order a stay of the proceedings if in its opinion it should defer judgment on the subject matter pending determination of another question on which the judgment is dependent; as soon as the cause of the stay has ceased, either of the parties may recommence the action."

Furthermore, the Court of Cassation ruled that as long as the Courts did not have the jurisdiction to hear the substantive claim, (as the claim should be determined by arbitration), the Claimant could commence the arbitration proceedings separately from the Validity of Arrest Order claim. In other words, it is not required to commence the arbitration proceedings before arresting the ship, nor after arresting the ship or within Eight days of the date of executing the Arrest Order over the Ship, nor even after the arbitration clause is raised before the Court.

Comment

The Dubai Court of Cassation contradicts other judgments, which require that arbitration proceedings should be commenced either before arresting the ship or after arresting the ship.

It is worth mentioning that in the dispute in question, the matter was eventually settled amicably and the Arrested Ship was released from the UAE's Jurisdiction. Nevertheless, ship owners, ship builders and any parties incorporating any arbitration clauses into relevant agreements should be aware of the Court of Cassation Judgment and act accordingly.

Al Tamimi & Company's [Transport & Insurance team](#) regularly advises on Ship Arrests. For further information please contact [Tariq Idais t.idais@tamimi.com](mailto:Tariq.Idais@tamimi.com)