

Landmark judgment on ship arrests under UAE Law

This article is a review of a landmark judgment by Khor Fakkaan's Court of Appeal (Appeal Number 44/2020 Commercial) regarding ship arrest procedures under UAE Law. This judgment's importance stems from the fact that the Khor Fakkan Court of Appeal accepted the validity of the arrest order claim over a vessel based on the UAE Maritime Law, notwithstanding that this claim was cancelled by Cabinet Resolution No. (57) of 2018 concerning the Executive Regulations of Federal Law No. (11) of 1992 of the Civil Procedures Law.

Nature of the claim

On 10 June 2019, a shipping company ('Claimant') agreed to sell one of its vessels to another company ('Defendant') based on a vessel purchase Agreement ('MoA'). The purchase price of the vessel was in the amount of US\$11,700,000 ('Purchase Price') and to be paid via an escrow account. Furthermore, it was agreed that the Defendant would pay 20 per cent of the Purchase Price to the Claimant in advance prior to the delivery of the vessel and the remaining balance, amounting to 80 per cent of the Purchase Price, to be paid within three days of delivering the vessel to the Defendant.

On 9 October 2019, the Claimant received 20 per cent of the Purchase Price amounting to US\$ 2,340,000. Therefore, the Claimant arranged for the ownership of the vessel to be transferred to the Defendant and according to the MoA, the vessel was delivered to the Defendant at Khor Fakkan Port on 23 October 2019. However, the Claimant still had not received 80 per cent of the Purchase Price of the vessel. Therefore, on 25 January 2020, the Claimant filed arbitration proceedings in London against the Defendant claiming back either ownership of the vessel, or alternatively, 80 per cent of the Purchase Price amounting to US\$9,983,921.91 owed to them. Moreover, on 28 January 2020, the Claimant obtained an arrest order over the vessel ('Vessel') which was at Khor Fakkan Port. The Claimant based the ship arrest application on the MoA.

The validity of arrest order claim

Cabinet Resolution No. (57) of 2018 concerning the Executive Regulations of Federal Law No. (11) of 1992 of the Civil Procedures Law, which came into effect in February 2018, ('New Civil Procedures Law'), requires creditors who obtained attachment orders over their opponents' real estate and movable assets to file the validity of debt claims (the substantive claims) no later than eight days as of the issue date of the attachment orders, with the competent court to prove the right to their claims. Otherwise, the attachment orders will be null and invalid, unless the validity of debt claims have been filed before the attachment is granted.

However, the Old Civil Procedures Law required the creditors to file the validity of debt claims and validity of attachment order claims within eight days from the date of executing the attachment orders before the competent court in order to prove their right and validate the attachment orders over real estate and movable assets of their opponents. Nonetheless, the New Civil Procedures Law cancelled the validity of attachment order claims.

Therefore, as the Claimant filed the validity of debt claim in London (arbitration proceedings in January 2020), and was not required to take any further action in the UAE under the New Civil Procedures Law and it was therefore deemed the arrest order over the Vessel should stay until a final award is issued in the arbitration proceedings.

Nevertheless, the Claimant filed a validity of arrest order claim with Khor Fakkan's Court of First Instance requesting the Court to stay the validity of arrest order claim in the UAE until a final award is issued in the validity of debt claim in London.

The Claimant established its claim on the following grounds:

1. although the New Civil Procedures Law does not require the validity of arrest order claims to be filed by the creditors, this law does not refer in its preamble to the Maritime Law. Therefore, the Maritime Law should apply in relation to the ship arrest procedures;
2. the Maritime Law is a private law, however, the Civil Procedures Law is a general law, thereby, the rules of private law should prevail over the general rules;
3. the Maritime Law deals with the ship arrests' procedures, however, the Civil Procedures Law deals, in general, with precautionary attachments over the debtor's real estate and movable assets (i.e. land, properties, bank accounts, vehicles, etc). Therefore, the ship arrest procedures which are set out in the Maritime Law should be applied in ship arrests.;
4. based on Articles 120/1 of the Maritime Law, the Court of Khor Fakkan should have jurisdiction to decide upon the validity of the arrest order claim as it issued the arrest order over the Vessel. This Article states: *"The judgment shall include confirmation of the arrest, an order for sale and the conditions thereof, the day appointed for the conduct thereof, and the starting price. The order may be appealed against in accordance with the provisions laid down by law within fifteen days from the date judgment is pronounced, otherwise the appeal shall lapse. The Court shall speedily determine the appeal."*
5. article 121 of the Maritime Law requires judgments which are issued in the validity of debt claim to confirm/validate the arrest orders over the arrested vessels. However, the validity of the arrest order claim depends on the outcome of the validity of debt claim that was filed in London. Therefore, the validity of arrest claim should be accepted based on Articles 120 and 121 of the Maritime Law and the Court should stay the validity of arrest order claim until a final award is issued in the validity of debt claim in London (arbitration proceedings). Article 120 of the Maritime Law provides: *"The notice of arrest shall contain a summons to attend before the relevant civil court in the area of which the arrest is effected for adjudication on the validity of the debt, of whatever amount"*.
6. once the validity of debt claim in London is proven, the Court should validate/confirm the arrest order over the Vessel and order the sale of the Vessel in accordance with the Court's procedures based on Article 121 of the Maritime Law.

The Court of First Instance

The Defendant filed, with the Court, a statement of defence in response to the validity of arrest order claim arguing the following:

1. the Court of Khor Fakkan does not have jurisdiction to hear the validity of the arrest order claim, as it was agreed to refer any dispute arising out of the MoA to the arbitration in London. Alternatively, the Court does not have jurisdiction to hear the validity of arrest order claim, as the Claimant and Defendant are not domiciled in the UAE;
2. the Claimant's debt is not classified as a maritime debt, so the arrest order was not issued in accordance with the Maritime Law;
3. the Defendant does not have the capacity to be sued in this claim as it transferred 80 per cent of the

Purchase Price to the escrow account and it submitted to the Court a remittance advice showing that it had transferred 80 per cent of the Purchase Price to the escrow account.

Therefore, the Defendant requested the Court to dismiss the validity of arrest order claim and release the Vessel.

The Claimant responded to the Defendant's statement of defence as follows:

1. the arbitration clause in the MoA does not give the arbitral tribunal the jurisdiction to issue arrest orders over the Vessel. The Court of Khor Fakkan should have the jurisdiction to decide upon the validity of the arrest order over the Vessel based on Articles 120/1 of the Maritime Law, as it is the said Court which had issued the arrest order over the Vessel. Moreover, based on Articles 21 and 22 of the UAE Civil Procedures Law, the Court has the jurisdiction to hear the validity of arrest order as the Vessel is within the UAE's territorial waters;
2. the Claimant's debt is considered a maritime debt, as it relates to a dispute over the ownership of the Vessel and/or in connection with the co-ownership of the Vessel. Moreover, the MoA relates to the use and/or exploitation of the Vessel which is also considered a maritime debt;
3. the Court does not have the jurisdiction to decide on the Defendant's arguments in which it alleged that it paid 80 per cent of the Purchase Price, as such defence should be determined by the arbitration proceedings in London in the validity of debt claim. In any event the Claimant submitted evidence that shows that it has not received 80 per cent of the Purchase Price.

Hence, the Claimant requested the Court to ignore all of the Defendant's arguments and stay the validity of arrest order claim until a final award is issued in the arbitration proceedings in London.

The judgment of the Court of First Instance

On 3 February 2020, Khor Fakkan's Court of First Instance issued its judgment and decided to stay the validity of arrest order claim until a final award is issued on the validity of debt claim in London (the arbitration proceedings). The Court based its judgment on the following grounds:

1. the Court has the jurisdiction to decide upon the validity of arrest order claim based on Article 22 of the Civil Procedures Law;
2. the Court has the jurisdiction to validate/confirm the arrest order over the Vessel and sell the Vessel in accordance with the Court's procedures based on Article 121 of the Maritime Law once the validity of debt claim in London is proven;
3. the Defendant has the capacity to be sued in this claim, as it is evidenced in the claim that the Defendant has not paid the full Purchase Price of the Vessel to the Claimant;
4. the Claimant's debt is classified as a maritime debt, as it relates to the dispute over the ownership of the Vessel and/or in connection with the co-ownership of the Vessel based on Article 115/M/N of the Maritime Law;
5. it is evidenced that the Claimant filed the arbitration proceedings based on the MoA and the Defendant did not challenge the arbitration proceedings.

Therefore, the Court decided to stay the validity of arrest order claim until a final judgment is issued in the validity of debt claim in London based on Article 102 of the Civil Procedures Law which provides: *"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."*

The Court of Appeal

The Defendant filed an appeal before the Khor Fakkan Court of Appeal, challenging the judgment of the Court of First Instance, while repeating all the arguments it had raised before the Court of First Instance. Hence, the Defendant requested the Court to dismiss the validity of arrest order claim and release the Vessel.

The Claimant also reiterated all its arguments which were raised before the Court of First Instance and confirmed that the appealed judgment was issued in accordance with the law. Therefore, the Claimant requested the Court to dismiss the appeal and uphold the judgment of the Court of First Instance.

Judgment of the Court of Appeal

On 22 June 2020, the Court of Appeal dismissed the Defendant's appeal and upheld the decision of the Court of First Instance. The Court of Appeal ruled that the judgment of the Court of First Instance was issued in accordance with the law and it responded to all of the Defendant's arguments. Therefore, the Court of Appeal adopted the Court of First Instance's findings and referred to it as a part of its judgment. Moreover, the Court of Appeal added the following reasons to its judgment:

1. the Court has the jurisdiction to decide upon the validity of arrest order claim based on Article 22 of the Civil Procedures Law;
2. the Claimant's debt is deemed as a maritime debt based on Article 115/D, as the vessel purchase agreements relate to the use or exploitation of the Vessel;
3. the validity of arrest order claim is specifically mentioned in Article 121 of the Maritime Law, and this law is a private law and its rules should supersede the general rules.

Since the validity of the arrest order over the Vessel depends on the outcome of the validity of the debt claim in London (the arbitration proceedings), the validity of arrest order claim should be stayed until a final award is issued on the validity of debt claim based on Article 102 of the Civil Procedures Law.

Conclusion

It could be argued that the ship arrest procedures which are set out in the Maritime Law should prevail over the attachment procedures which are laid out in the Civil Procedures Law in ship arrest claims. Moreover, Article 121 of the Maritime Law requires judgments which are issued in the validity of debt claim to confirm/validate the arrest orders and order the sale of the arrested vessels. Therefore, although the New Civil Procedures Law cancelled the validity of attachment order claims which were required by the Old Civil Procedures Law, it is advisable that creditors ask the court to validate/confirm the arrest order over arrested vessels (based on Article 121 of the Maritime Law) when they file the validity of debt claims to avoid having their claims dismissed on a technicality.

It should be noted that the Court of Appeal judgment is final. It is also worth mentioning that the Defendant challenged the arrest order over the Vessel by way of filing a grievance and an appeal, however, the grievance and appeal were both rejected.

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