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PROCEDURAL CORNER
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the People's Republic of China

- FELIX W H CHAN -

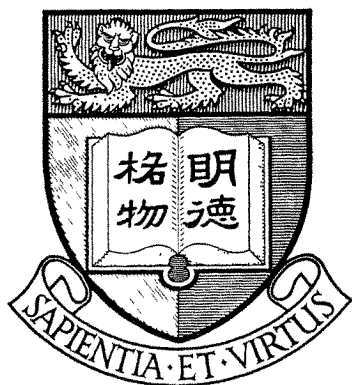
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PROCEDURAL CORNER

Arresting and Auctioning Vessels in the People's Republic of China

By

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Procedural corner

ARRESTING AND AUCTIONING VESSELS IN THE PEOPLE'S REPUBLIC OF CHINA

There are now 10 maritime courts established in the People's Republic of China (PRC); Dalian, Tianjin, Qingdao, Shanghai, Guangzhou, Beihai, Wuhan, Xiamen, Haikou and Ningbo¹ and each maritime court has jurisdiction over a specific geographical area. The Chinese legal system does not recognise the *in rem* concept, so it is, therefore, necessary to establish that a claimant has a maritime claim *in personam* against the defendant such as the shipowners, charterers or the managers of the vessel.

For what claims can one arrest a vessel?

The arrest of vessels in PRC is governed by the Rules of the Supreme People's Court on the Arrest of Vessels Prior to Litigation by Maritime Court, promulgated on 6 July 1994 (the Arrest Rules). According to the Arrest Rules, a claimant has a right to apply for arrest of the vessel if he has a maritime claim in relation to the vessel, and if the shipowner, the charterer or the manager is liable *in personam* for the maritime claim. There are 20 types of maritime claim defined in the Arrest Rules. These are claims in connection with:

1. ship collision or other accidents;
2. death or personal injury caused by ships;
3. pollution of waters by ships;
4. measures taken to prevent or mitigate pollution;
5. salvage and wreck removal;
6. charterparties;
7. contracts of carriage of goods or passengers by sea;
8. general average;
9. towage or pilotage;
10. supply of bunker, materials or labour to ships;
11. port dues and charges;
12. ship repairs and constructions;
13. ship mortgages or other ship-related securities similar to ship mortgages;
14. marine insurance;
15. wages or social insurance premiums of crews and masters;

1. Although Hong Kong became a Special Administrative Region of PRC on 1 July 1997, the maritime law previously in force in Hong Kong (which was largely U.K. law and practice) has been maintained since the transfer of sovereignty. The legislation discussed in this article does not apply in Hong Kong.

16. disbursements paid for the ships by masters, shipowners or charterers;
17. commissions or agency fees by shipowners or charterers;
18. ownership or right to possession of ships;
19. ship management or distribution of profits among co-owners;
20. contracts of sale and purchase of ships.

In addition, all other ships owned by the shipowner responsible for the maritime claim and all other ships owned, managed or chartered by the manager or charterer responsible for the maritime claim can also be arrested as “sister ships”. However, only the subject vessel can be arrested if the maritime claim is in connection with the mortgage of the vessel. The arresting court will also have jurisdiction over the relevant maritime claim, although the jurisdiction is not exclusive. Under the Arrest Rules, the court will grant a stay of proceedings if there is a valid arbitration agreement. If the arbitration agreement is considered void, unenforceable, expired or uncertain, the court still has jurisdiction over the matter. There are time limitations of actions. Any dispute involving foreign parties should be commenced within 30 days from the date of arrest. If only local parties are involved, the proceedings should be commenced within 15 days from the date of arrest of the vessel.

Procedural aspects of ship arrest in the PRC

A maritime claimant making an application to arrest the vessel must provide written evidence to the court. A vessel mortgagee has to provide the court with copies of the relevant security documents, demands, notices and other material or information relating to the claim including a breakdown showing the amount of principal, interest and expenses. After examining the evidence, the court shall make a decision within 48 hours from the filing of the application. Before granting the arrest order, the court may order the claimant to provide security covering any losses that the defendant may suffer under a potential wrongful arrest. The amount of security shall be, in principle, the same as the amount of the maritime claim. Cash security is not necessary if the security is provided by an adequate and reliable bank or otherwise.

Release of a ship

The arrested vessel shall be released upon provision of security by the defendant. The type, form and amount of security shall be considered and determined by the court. The release order shall be granted without delay after the provision of the security as described in the court order. Providing security does not constitute any admission of liability or waiver of limitation of liability. The defendant has to pay the fees and expenses in respect of the arrest to the relevant port authority, although these expenses shall be borne by the claimant if the arrest turns out to be wrongful.

Auctioning a vessel in the PRC

This is governed by Rules of the Supreme People’s Court on the Auction of Vessels under Arrest promulgated on 6 July 1994 (the Auction Rules). The ship to be auctioned must be owned by the defendant liable for the maritime claim. Hence, a sister vessel arrested by the

court cannot be auctioned if the owner of that vessel is not the party liable for the maritime claim *in personam*.

An applicant applying for the auction of the vessel shall submit a written application to the arresting court. Having considered the grounds of the application (such as the failure of the defendant to provide satisfactory security as prescribed by the court), the court will then decide whether to allow the auction of the vessel. Appeal against the decision of the maritime court is possible but the appeal is final. The execution of the court order will not be stayed pending appeal.

The applicant has to bear all the pre-auction expenses. In fact, the Auction Rules require the applicant to deposit an advance payment with the court for the pre-auction expenses. The actual expenses of the auction itself are to be borne by the defendant. Unfortunately, the Auction Rules are silent on whether the actual expenses of the auction itself are to be deducted from the proceeds of the sale of the vessel.

If the applicant has successfully obtained an order for auction, he is required to notify all other interested parties and mortgagees whose interests have been registered with the ship registry of the country where the ship was registered. The notice of auction shall reach the interested parties and mortgagees 30 days before the auction through any electronic or other means of communications. The notice of auction shall include the time and venue of the auction as well as the grounds supporting the auction of the ship. In addition, public notices shall be advertised in the national and local newspapers in the PRC.

All creditors shall register their alleged claims over the ship with the maritime court within 60 days from the date of notice. Late registration of claims will be regarded as waiver of their rights over the proceeds of the auction of the vessel. The creditors have to provide written evidence supporting their claims when they register their interests.

Having made an order of auction, the court shall immediately direct the formation of a Ship Auction Committee. The committee consists of court bailiffs, accountants and ship surveyors. Their duties include ship surveying, valuation and preparing and executing the legal documents necessary for the sale and purchase of the ship. The committee will also conduct the actual auctioning of the ship.

Ranking of claims

Under the Maritime Code of the People's Republic of China (the Maritime Code), a maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over ship mortgage.

1. Maritime liens: the following maritime claims shall be entitled to maritime liens:
 - (a) claims for crew wages and other remuneration; crew repatriation and social insurance costs made by the master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;
 - (b) claims in respect of loss of life or personal injury occurring in the operation of the ship;
 - (c) claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;
 - (d) claims for salvage payments;

- (e) compensation claims for loss of or damage to property resulting from tortious acts in the course of the operation of the ship.
- 2. The possessory lien refers to the right of the ship builder or repairer to secure the building or repairing costs of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof. The possessory lien shall be extinguished when the ship builder or repairer no longer possesses the ship he has built or repaired.
- 3. Ship mortgage: if two or more mortgages are established on the same ship, the ranking of the mortgages shall be determined according to the dates of their respective registrations.

Special notes

- A. Cash security is not necessary if the security is provided by an “adequate and reliable bank or otherwise”. In practice, the court will not easily accept foreign security whether it is provided by a foreign bank or a P&I Club, but will insist on a cash deposit. Foreign parties are usually required to procure a guarantee from Bank of China, PICC (People’s Insurance Company of China), COSCO (China Ocean Shipping Company) or China P&I (China Shipowners Mutual Assurance Association).
- B. According to the PRC Civil Procedure Law, when hearing a case involving a foreign national, the court shall use the spoken and written language in common use in PRC. If a party so requests, an interpreter may be provided to him at his own expense. Hence, it is necessary to spend a large amount of time and expense on translation of all the relevant documents, including the mortgage deeds, bills of lading or charterparties into Chinese if this has not already been done. In urgent arrest applications, some maritime judges competent in the English language may be willing to make an order of arrest based on the documents in the English language, but this cannot be guaranteed.
- C. In the PRC, there is a lack of clear judicial guidelines on what is deemed wrongful arrest. There are also no guidelines on the assessment of damages caused by wrongful arrest.
- D. Compensation claims for loss of or damage to property resulting from tortious acts in the course of the operation of the ship are entitled to maritime liens. There are uncertainties as to the meaning of “tortious act in the course of the operation of the ship”. Does it include cargo claims founded in tort (as in the U.S. system) or merely collision claims? In relation to oil pollution, there is a proviso that compensation claims for oil pollution damage caused by a ship carrying more than 2,000 tonnes of oil in bulk as cargo, which has a valid certificate attesting it has oil pollution liability insurance coverage or other appropriate financial security, are not within the scope of the maritime liens. This, however, would seem not to apply to a general cargo vessel, or a tanker in ballast.
- E. Should there be difficulties tracing the whereabouts of the vessel, information concerning voyage records or movements of a vessel in the PRC is not easily available. Even professional agents often fail to provide up to date information.

- F. Foreign parties must be represented in the maritime courts by PRC lawyers. Power of attorney for a PRC lawyer must be authorised by a Chinese notary in a Chinese Consulate in the foreign business's home country.
- G. Under the Arrest Rules, if a ship is arrested by the maritime court and the defendant refuses to provide security within the time limit, the applicant has to commence proceedings in the arresting court within 15 days (or 30 days if foreign parties are involved) from the date of arrest in order to maintain the arrest. The applicant can neither pursue the claim in a foreign court nor commence arbitration proceedings in accordance with the foreign jurisdiction clause. Note, however, that the position is different if the claimant is a party to a local arbitration agreement. He can apply for an order of arrest through CMAC (China Maritime Arbitration Commission) in accordance with the PRC Arbitration Law. If the court decides that the foreign jurisdiction clause or foreign arbitration clause is valid, a stay of proceedings will be granted so that the arrest can no longer be maintained. Unfortunately the Arrest Rules fail clearly to deal with the relationship between security and jurisdiction. It is uncertain whether a maritime claimant can obtain security in the PRC to secure a foreign judgment or foreign arbitration award.

FELIX W.H. CHAN*

MARITIME CONVENTIONS RATIFIED BY ROMANIA

1. Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910

The Convention was ratified by Romania on 17 January 1913 and has not yet been denounced.

2. Protocol of 1967 to Amend the Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910

The Protocol is in force in Romania.

3. International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels 1910

The Convention was ratified by Romania on 16 January 1913 and was published in the *Official Gazette of Romania* no. 231 on 17 January 1913.

4. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 25 August 1924

Romania ratified this Convention on 12 March 1925 and the date of entry into force was 4 February 1938.

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