



## **The Supreme Court of PRC published new regulations on the arrest and sale of ships**

On 28 February 2015, the Supreme Court of PRC published the Regulations on Certain Issues Concerning the Application of Law Relating to Arrest and Auction Sale of Ships (“Arrest and Sale of Ships Regulations”) which will come into force on 1 March 2015.

The Arrest and Sale of Ships Regulations were based on a consultation paper published by the Supreme Court on 29 November 2013. The majority of the provisions in the consultation paper have been adopted especially those in relation to the parts concerning the auction sale of arrested ships but some provisions have been left out, e.g. the restriction of bareboat chartering of a ship has been taken out of the preservatory measures permitted, and unhappily, the determination of counter security by reference to 30 days of hires has also been removed. The following is a brief introduction to the main provisions of the Arrest and Sale of Ships Regulations.

### **Documentary arrest**

Article 1 of the Arrest and Sale of Ships Regulations provides that an applicant may apply to prevent the transfer or mortgage of ships (whilst the operations of the ships will not be restricted). The preservation can be achieved by the court ordering the ship registration authorities to impose the required restriction. This restrictive measure was usually referred as a documentary arrest as compared to the physical arrest of ships. Formerly, the law only allows the court to convert a physical

arrest to a documentary arrest in appropriate circumstances, but now documentary arrest can be applied as an independent preservatory measure. It is to be noted, however, that documentary arrest will practically be only available to ships registered in China.

### **The sale of ships under bareboat charter**

According to the Maritime Procedure Law 2000 (MPL), a ship under a bareboat charter may be arrested if the bareboat charter was responsible for the maritime claim for which the arrest is applied for (assuming in the first instance that the claim falls into the scope of Article 21 of the MPL). However, there was a controversy as to whether a ship so arrested can be sold to satisfy the claim in circumstances where security is not duly provided to lift the arrest. The reason for denying the right of sale was said to be that, as a general principle, a party cannot apply to dispose of a property that is not owned by the debtor. But to allow a party to arrest a ship without giving it the right to have her sold for satisfaction of its claims greatly diminishes the practical use of the arrest. The Arrest and Sale of Ships Regulations has now clearly provided that a ship arrested under a bareboat charter may be sold.

### **The counter security**

The requirement of counter security and the inconsistent and unpredictable standards adopted by the various maritime courts for determining the amount and form of counter security are the most unsatisfactory aspects of the ship arrest practice in China. Whilst it is impractical to expect that the counter security requirement is completely eliminated but it should be feasible to streamline (and



simplify) the requirements among the maritime courts. In the consultation paper, the Supreme Court had proposed that "when a maritime court orders a maritime claimant to provide security in accordance with Article 16 of the Special Maritime Procedure Law, the loss for seizure, and the costs and expenditure of maintenance may be calculated temporarily according to a seizure period of 30 days. Under an emergency, the maritime court may allow the maritime claimant to provide security in installments". These provisions were constructive, but unfortunately they were not adopted in the Arrest and Sale of Ships Regulations.

The Arrest and Sale of Ships Regulations had only provided that the amount of counter security should be about the same amount as "the various costs and expenditure of maintenance that may be incurred during the arrest of the ship, the loss of earning caused by the arrest, and the costs incurred by the respondent to provide security for lifting the arrest". It is suspected that inconsistency and confusion of the amount of counter security required for a ship arrest will probably remain.

As to return of counter security, the Arrest and Sale of Ships Regulations provide that in two circumstances the court may order the return of the counter security immediately, namely, (1) the respondent has consented to the return; and (2) the applicant has obtained a judgment (or similar legal document) by which the applicant is awarded compensation in about the same amount as what was claimed in the arrest proceeding. In addition, the applicant may apply for return of the counter security after the substantive trial is completed, but the counter security will only be returned where the respondent has failed to bring an action for

wrongful arrest within 30 days of being informed of the applicant's application.

## **The procure for auction sale**

For the auction sale of a ship under arrest, the court would arrange a valuation of the ship on the basis of which a reserve price for the auction would be determined. The Arrest and Sale of Ships Regulations prescribe in detail how the reserve price should be set and adjusted for auctions: for the first auction, "the reserve price shall not be lower than 80% of the valuation", and if a new auction is necessary because the previous auction is aborted, the court "may appropriately lower the reserve price, provided that the amount lowered for each new auction shall not exceed 20% of the reserve price of the previous auction."

The court may decide to sell the ship other than by means of auction after two auctions have been aborted, but "the selling price shall not be less than 50% of the vessel's valuation", unless with consent of the creditors holding at least two-thirds of the creditors' rights that have been accepted for registration.

According to the Arrest and Sale of Ships Regulations, the auction sale of ships for the purpose of realizing mortgage rights or enforcing judgments or awards shall follow the same procedure of auction provided in the MPL as well as in the Arrest and Sale of Ships Regulations.

## **Registration of claims**

When a ship is to be sold by the court, all claims for related to the ship should be registered with the court



for distribution of the sale proceeds. According to Article 116 of the MPL, if a creditor has not yet obtained an enforceable judgment or award at the time of registering the claims, it shall promptly bring an action in the maritime court that has accepted registration of the claim, or commence arbitral proceedings, as the case may be, in order to have the claim confirmed. It is expressly provided in the MPL that a judgment made by a maritime court confirming the claim will be final and subject to no appeal by any party.

According to the Arrest and Sale of Ships Regulations, there is one exception, i.e. in ship collision cases where the extent of fault of the vessel in collision is yet to be determined the parties' right of appeal should be reserved. Furthermore, the Arrest and Sale of Ships Regulations have clarified that for the claims which court proceedings have already been commenced before the registration of the claims with the court, the parties shall still have right to appeal the first instance judgments.



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