

The Judicial Interpretation for Ship Arrest and Judicial Sale



Counter-security quantification

There has emerged, in recent years, inconsistent practice by maritime courts in calculating the level of counter-security required to arrest a ship. The Interpretation (§5) sets out the factors to be included in such determination to be calculated over 30 days. These include the maintenance costs incurred by the ship whilst under detention; any hire lost as a result of the arrest and the costs incurred in putting up security to release the ship. Hire will be calculated against an available market rate, but this can be adjusted to the actual hire rate evidenced by the ship.

Return of counter-security

The SMPL does not describe when a claimant is entitled to a return of their counter-security. The Interpretation (§6) now defines three circumstances when the court can order the release of a counter-security, namely: (i) should the defendant does not raise a counter-claim, (i.e. for wrongful arrest) within 30 days of receiving the maritime court's notification of the conclusion of the case; (ii) the parties agree the security can be released; (iii) the defendant is required by an "effective legal instruments" to compensate the claimant. This is understood to include an arbitrator's award, a mediator's direction or a court order.

Ship sale

The Interpretation (§§13 & 14) sets out the procedure for an exception sale should a judicial auction twice fail. In such cases the ship may be sold for no less than 50% of the assessed ship's value, failing which – and with the consent of the creditors representing over 2/3 of the registered claim – any amount. If the ship still cannot then be sold the maritime courts may release the ship.

The Chinese Supreme People's Court recently issued an important direction on the practice and procedure to be adopted by regional courts in ship arrests and judicial sale.

The Judicial Interpretation for Ship Arrest and Judicial Sale of 28th February, 2015 (the "Interpretation") became immediately effective on 1st March. The Interpretation seeks to resolve procedural uncertainties resulting from the implementation of the Special Maritime Procedure Law in 2000 ("SMPL") and entirely replaces the 1994 Provisions on Ship Arresting And Judicial Sale. The Interpretation address a wide range of issues, including clarifying the procedure for a bareboat sale; the quantum of counter-security to be provide by an arresting party and when such security should be returned; the procedure for a judicial sale; and the time limits for proving a claim. These are considered further below:

Bareboat charters

The SMPL (§23) did not address the question of whether a bareboat chartered ship could be auctioned pursuant to a claim against the bareboat

charterer – and not the registered owner. The Interpretation (§3) makes clear that the ship now can be sold in judicial auction. However, the ship can be arrested only if she remains under the same bareboat charter or ownership has transferred to the bareboat charterer.

Counter-security exemptions

Ordinarily, a claimant seeking an arrest order must first establish counter-security to satisfy a wrongful-arrest counter-claim. The Interpretation (§4) now exempts from this obligation crew members and stevedores advancing a personal injury claim. Such applicants are now need only pay a court fee of CNY5,000, which is significantly lower than the level of counter-security previously required. The Interpretation also extends this exemption to any claim by a crew member arising from their contract of employment with the shipowner or bareboat charterer.

Jurisdiction resolution

The Interpretation (§23) augments and refines the application of the new Civil Procedural Law of PRC (which became effective from 1st January 2013) by establishing that the maritime court which enjoys sole jurisdiction over a ship for her arrest and sale is the place where the ship is found or registered. A ship is eligible for auction 60 days after the last public announcement of the judicial sale, during which time all claims should be lodged.

Entitlement to arrest a ship

A significant clarification included in the Interpretation (§43) is the express provision that a ship can be arrested to enforce any claim against the owner or bareboat charterer, such as a foreign arbitration award or judgement, provided that such claim or judgement is recognised by an order of a Chinese court.

Continued trading

An interesting feature of the Interpretation is that after an arrest, the court may permit an owner to continue to trade the ship within Chinese

jurisdiction. However, the owner is not entitled to sell or mortgage the ship during this period. The ship remains liable for arrest by any other party, and the court seized with the application for the second arrest is not bound to follow the earlier decision for the conditional release and trading of the ship.

The Interpretation provides a number of important clarifications on the procedures for the arrest and sale of a ship. Of most interest to our Members will be the relative ease with which crew and personal injury arrest orders can be obtained, by virtue of the exemption from the need to provide counter-security. The extension of the scope of claims for which a ship can be arrested and sold increases the risk of detention when trading to the PRC. The Interpretation does not deal with issues, which might be expected, such as the consequences of shipowner entering insolvency; the level of counter-security required in cases where there are a large number of independent claimants and whether it is competent to arrest a ship under construction. It remains to be seen how the measures will be implemented, but the clarity they now bring is to be welcomed. ■

A full text of the Judicial Interpretation in original Chinese text with an English translation is attached.

Special thanks are made to Hai Tong Law Office, Beijing for their guidance and Wang Jing & Co., Guangzhou for their comments and their English translation of the Interpretation.

For more information, please contact Felix Lau (felix.lau@thomasmiller.com) or Chao Wu (chao.wu@thomasmiller.com)