



## **China's Supreme Court issues new judicial interpretation on ship arrest and judicial sale of ships**

China is not traditionally a popular jurisdiction for ship arrest. However, Members and clients with ships calling at ports in China should be aware of this development. This guidance is aimed at clarifying ship arrest and sale procedure in the Chinese maritime courts which could lead to more frequent vessel arrests in China.

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This Insight is a brief commentary on a new judicial interpretation<sup>1</sup> issued by China's Supreme Court. It covers a number of issues relating to ship arrest and the judicial sale of ships (the Interpretation) that came into force on 1 March 2015.

**Provision of counter-security for arrest** It is normal practice for a claimant to provide counter-security when arresting in China. Article 76 of the Special Maritime Procedure Law 1999 (SMPL 1999)<sup>2</sup> provides that the amount of counter-security should be equivalent to the probable loss the arrest would cause to the party whose vessel is arrested. Over the years, the practice of the Chinese maritime courts has varied depending on the facts of the case and different approaches by individual judges. In some cases, the counter-security amount was equivalent to 30 days' hire of the vessel, whilst in others an amount equal to the claim in respect of which the vessel was arrested.

The Interpretation sets out in Article 5 a mechanism to calculate the security amount based on the aggregate of:

- the maintenance expenses of the vessel during the period of arrest
- the loss of use resulting from the arrest
- the cost to the party whose vessel had been arrested (the respondent) to provide security to release the vessel.

This is the same formula used for assessing the losses resulting from wrongful arrest, as set out in Article 24 of the Supreme Court's judicial interpretation of 2003 relating to application of the SMPL 1999.<sup>3</sup>

A number of factors remain unclear, however, such as:

- the level of maintenance to be carried out during the arrest period
- the applicable rate of hire while under arrest
- the scope of security costs – in practice, the maritime courts have generally only included the commission payable by the respondent to provide a bank guarantee.

Furthermore, at the time the arrest application is made – and counter-security is assessed – the respondent will not have an opportunity to substantiate or challenge the evidence submitted relating to maintenance, hire and security costs. That said, once counter security has been provided following the vessel's arrest, the owners may apply for the amount of security to be increased in the event it can be shown that the original amount is insufficient to cover the owners' likely losses if the arrest proves wrongful.

Although Article 5 still leaves some open questions, at least it sets out a formula to be followed.

A further clarification relating to counter-security is set out in Article 4. This provides that the maritime courts have a discretion *not* to request counter-security if the arrest relates to a claim for personal injury at sea or a claim arising under a crew service contract.

**Multiple arrests of the same vessel** Article 2 of the Interpretation allows multiple claimants to arrest the same vessel as security for their respective claims. Further, if a claimant has made an arrest application but not applied for a judicial sale, then any subsequent claimant making an arrest application may apply for judicial sale of the vessel according to Article 28 of SMPL 1999.

The Interpretation does not, however, tackle the issue of whether each claimant having arrested the vessel must provide counter-security to the full extent of their respective claims.

**Judicial sale and procedure** There are several provisions relating to the judicial sale of vessels:

- Article 11 provides that the judicial sale of a vessel is to be organized by a ship auction committee (comprising judges, auctioneers and surveyors, normally three or five persons, as per Article 34 SMPL 1999)
- Article 13 states that in the event of two failed judicial auctions, the sale price of a ship can be reduced – but not to less than 50 per cent of its assessed value
- Article 14 provides that if a ship has still not been sold after a price reduction, the court may lower the price below 50 per cent of its assessed value provided consent is given by creditors representing two thirds or more of the registered creditors' claims. In the event a sale is still unsuccessful, the court may release the vessel from arrest
- Article 16 requires creditors to register their claims within 60 days after the court's announcement for the first judicial auction.

**Release of counter-security** The practice of the Chinese maritime courts relating to release or return of counter-security has been a concern for claimants in the past. Counter-security could be held up to two years after the claim had been settled on the basis that it represented security for a possible, subsequent wrongful arrest claim brought by the respondent.

Article 6 of the Interpretation will no doubt be welcomed by claimants. It provides that counter-security should be returned to the claimant *forthwith* :

- if the respondent agrees, or
- if the claimant requests its return, supported by a valid judicial instrument affirming that the respondent is liable for the claim and the awarded amount is approximately equivalent to the amount of security.

In addition, when a claim has been finally concluded, the claimant can apply to the maritime court for return of the security. The court will notify the respondent and allow them to bring any wrongful arrest claim within 30 days, failing which the security will be returned to the claimant.

**Arrest and judicial sale of bareboat chartered vessels** Article 23 of SMPL 1999 allows a claimant to apply to arrest a vessel where its bareboat charterer may be liable for a maritime claim and the ship is under bareboat charter at the time of arrest. However, it has not been clear whether the claimant could apply for judicial sale of the vessel following the arrest.

This is now resolved by Article 3 of the Interpretation, which provides that the claimant is entitled to apply (under Article 29 SMPL 1999) for a judicial sale of the vessel to recover a maritime claim for which the bareboat charterer is liable.

This provision is likely to expose head owners to the possibility of their vessel being subjected to a judicial sale through no fault of their own. This might be of significant interest to a shipowner who finances a bareboat charterer to purchase a vessel.

**Miscellaneous** Article 7 provides that the shipowner or bareboat charterer is to remain in charge of management of the vessel while under arrest. Should they fail to do so, the maritime court may appoint the claimant or a third party to manage the ship. In which case, the management costs are to be borne by the shipowner or bareboat charterer, or to be paid out of the proceeds of a judicial sale of the vessel.

Under Article 9, the maritime court must terminate the arrest order in the event that it is impossible to enforce the arrest for “objective reasons”. It has not been defined what amounts to “objective reasons”. One possibility could be that the vessel is no longer within the jurisdiction of the Chinese maritime courts, another that the vessel has become a total loss.

The Interpretation should result in a more common approach to arrest and judicial sale by the Chinese maritime courts. However, some issues arising under the SMPL 1999 remain to be resolved, such as whether insolvency of an owner of an arrested ship should take priority over a maritime lien. Nevertheless it is expected that this Interpretation will be generally welcomed by the maritime courts and parties involved in maritime claims.

Acknowledgement: Thanks to Wang Jing & Co for use of their [in-house English translation of the Interpretation](#) , in which further details of the changes can be found.

Questions or comments concerning this Gard Insight article can be e-mailed to the [Gard Editorial Team](#) .

1 Wang Jing & Co, [inhouse translation of Interpretation No.6 \(2015\) Provisions of the Supreme People's Court on Issues concerning the Application of Law in handling Ship Arrest and Judicial Sale . Link in Chinese to the Interpretation](#) 2 [Link in Chinese to SMPL 1999](#) 3 [Link in Chinese to the 2003 Interpretation on Several Issues regarding SMPL 1999](#)

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