

# New Provisions and Relevant Cases of the Supreme People's Court on the Arrest and Auction of Ships

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**【Brief Introduction】** The arrest and auction of ships is a special preservation system of maritime cases with its particularity in aspects of scope of application and conditions, implementation procedures and results, etc. As a large shipping country, China has rich experience in arrest of vessels mainly based on *Maritime Procedure Law of the People's Republic of China* and its interpretation; but many details are still not covered yet in practice which arouse some uncertainties in operations. To unify the judgment criteria, the Supreme People's Court issued *Provisions of Supreme People's Court on Applicable Laws of Arrest and Auction of Ships* and ten typical cases, one of which concerns dispute under shipbuilding contract.

**【Key Words】** arrest of ships, auction of ships, demise charter, waiting for arrest of ships in turn, interpleader cause, registration of the claims

On February 28<sup>th</sup>, 2015, *Provisions of Supreme People's Court on Applicable Laws of Arrest and Auction of Ships* (hereinafter referred to as "Provisions on Arrest of Ships") and ten typical cases was issued by the press box of the Supreme People's Court and entered into force as of March 1<sup>st</sup>. Provisions on Arrest of Ships is the provisions specially aimed at the arrest and auction of ships after *Maritime Procedure Law of the People's Republic of China* and its interpretation, clarifying the ambiguous operational issues courts suffered in practice

with 10 typical cases issued for reference. Here are some abstracts and comments of important content:

## 1. Key terms and contents of Provisions on Arrest of Ships

1.1 Overcoming the procedural limits of “waiting for arrest of ships in turn”, and allowing concurrent arrest of ships

### Relevant terms:

*Article 2 Maritime court, at the request of different maritime applicants, may arrest the ships already arrested by the court or other maritime courts.*

*In case the maritime applicant firstly applying for the arrest of ships fails to apply for the auction of ships, the maritime applicant later applying for the arrest of ships may apply to the maritime court permitting its application for arrest of ships for the application of auction of ships in accordance with the provisions of Article 29 of Maritime Procedure Law of the People’s Republic of China.*

In most cases, several applicants need to realize their creditors’ rights through arrest of the same ship. However, *Maritime Procedure Law of the People’s Republic of China* and its interpretation makes no provision on this circumstance. In the past practice, the maritime court could only conduct “waiting for arrest of ships in turn” in line with the provisions<sup>1</sup> of “waiting for seizure and arrest of ships in turn” of *Provisions of seizure, arrest and freeze of assets in the civil enforcement by People’s Court* issued by the Supreme People’s Court. Therefore, the so-called waiting for arrest of ships in turn refers to the circumstance that the ship is arrested again by another maritime applicant through application after the ship’s first time arrest has been released.

Waiting for arrest of ships in turn plays an important role in the maritime litigation of the past 10 years and benefits the protection of interests of creditors. However, it is obvious that

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<sup>1</sup> *Provisions of seizure, arrest and freeze of assets in the civil enforcement by People’s Court* issued by the Supreme People’s Court taking effect as of January 1<sup>st</sup>, 2005 is the latest legal provision of civil enforcement, property preservation and advance execution. Article 28 of such provision stipulates, “other people’s court may wait to enforce seizure, arrest and freeze in turn of the property being already seized, arrested and frozen by people’s court. Where the seizure, arrest and freeze has been discharged, the preoccupied registration on waiting to seize, arrest and freeze in turn shall automatically come into force.” Such provision provides legal basis for the waiting for arrest of ships in turn, and therefore concludes the argument on the feasibility of waiting for arrest of ships in turn (arrest of ships for many times) over the years.

waiting for arrest of ships in turn is complex in procedure. Latter applicants have to realize their claims according to the arrest procedure of former applicants. For instance, in case the person against whom the claim is made offers no counter security to release the ship after the ship is arrested, the latter applicant would have no chance to arrest the ship and have to register the claim after the former maritime applicant's applying for the auction of ship. The procedure would be even more complex if more than one maritime applicants wait for arrest of ships in turn.

*Provisions on Arrest of Ships* overcomes the procedural limits of waiting for arrest of ships in turn. The parties may apply for concurrent arrest of ships and the latter maritime applicant is entitled to apply for auction if the ship has not been auctioned. Such provisions simplify the procedure and meanwhile, interests of applicant in the first order will not be damaged for the reason that the order of compensation of the auction amount depends on the nature of maritime claims and has no direct relations with the order of waiting for arrest of ships in turn.

1.2 Clarifying that the ships by demise charter “could be arrested as well as be sold”.

**Relevant terms:**

*Article 3 The maritime court shall give the permission in case the ship is arrested due to the liability of the demise charterer of the ship to the maritime claim, the maritime applicant applies for auction of the ship to discharge of relevant debts arising from the operation of the ship by the demise charterer according to the provisions of article 29 of Maritime Procedure Law of the People's Republic of China.*

Arrest and auction of the ship by demise charter actually comes from the principle of “action in rem” of British maritime law, from which *Maritime Procedure Law of the People's Republic of China* learns something for reference and regulates that the ship in dispute may be arrested if the demise charterer is liable to the maritime claim. However, obviously this imported concept is a little unacclimatized when embedded in Chinese legal system. Above

all, the demise charterer, as the creditor, has no ownership of the ship. Whether the court could auction the assets not belong to the creditor has to be further considered.

In the considerable period of time even after the enforcement of *Maritime Procedure Law of the People's Republic of China*, there has been argument that whether the demised chartered ship under arrest could be auctioned or not. The maritime court regards that the paragraph 2<sup>2</sup> of article 23 of *Maritime Procedure Law of the People's Republic of China* has clarified that the demise chartered ship “could be arrested as well as be sold”, but many people consider that such provision is not clarified since it only refers to the issues of arrest.

Provisions on Arrest of Ships gives clear explanation on this issue that the demise chartered ship “could be arrested as well as be sold”.

### 1.3 Determining calculation method for the security of the arrested ship

#### **Relevant terms:**

*Article 5 The amount of security provided by a maritime applicant stipulated in the paragraph 2 of article 76 of Maritime Procedure Law of the People's Republic of China shall be in line with the maintenance fees and expenses incurred during the arrest of ships, losses of schedule caused by arrest and the expenses of security paid by the person against whom a claim is made for the discharge of ship.*

*Upon the arrest of ships, in case the security provided by the maritime applicant is not enough to compensate for the losses suffered by the person against whom a claim is made, the maritime court shall enjoin the additional security provided by the applicant.*

The arrest of ships concerns two securities, one is security of maritime applicant, the other one is the counter security of the person against whom a claim is made. The first one is concerned here---the security of maritime applicant.

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<sup>2</sup> Paragraph 2 of article 23 of *Maritime Procedure Law of the People's Republic of China* stipulates, “the maritime court may arrest other ship or ships which, when the arrest is effected, is or are owned by the ship-owner, demise charterer, time charterer or voyage charterer who is liable for the maritime claim, except for claims with respect to ownership or possession of a ship.”

The main purpose of the security of arrest of ships is to secure the compensation made by the maritime applicant to the person against whom a claim is made in case arrest the ship wrongly. Article 16 of *Maritime Procedure Law of the People's Republic of China* stipulates that the amount of security provided by the maritime applicant shall be in line with the losses caused by its application to the person against whom a claim is made. The specific amount shall be determined by the maritime court. In other words, the judge handling the case has the discretion over the specific amount of the security of arrest of ships.

In practice, maritime courts' provisions on the security of arrest of ships are in chaos, and even the same maritime court has different requests in different stages. Some require security to be provided equal to the claims, some even require the security equal to the amount of losses of 30-day schedule. If the claim is considerable, the maritime applicant may not be able to afford the security and decide to give up arresting the ship.

*Provisions on Arrest of Ships* of the present version clarifies the calculation of the amount of security, i.e. maintenance fees and expenses incurred during the arrest of ship+loss of sailing schedule incurred by arrest+expenses paid by the person against whom a claim is made for the discharge of ship by providing security.<sup>3</sup>

#### 1.4 Narrowing down the scope of “interpleader cause of first instance as the final”

##### **Relevant terms:**

*Article 20 Provisions of paragraph two of article 116 of Maritime Procedure Law of the People's Republic of China shall not apply to the applicant filing lawsuit over relevant claims before the registry of claims. The party may institute an appeal according to law against the judgment and ruling made by the maritime court.*

*Article 21 After the creditor brings claim-confirming proceeding in accordance with the provision of paragraph one of article 116 of Maritime Procedure Law of the People's Republic of China, if the proportion of fault resulting in collision needs to be judged, the*

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<sup>3</sup> This calculation has the same items and scope of the compensation made by the applicant when arresting ships by mistake according to article 24 of judicial interpretation of *Maritime Procedure Law of the People's Republic of China*.

*party may institute an appeal according to law against the judgment and ruling made by the maritime court.*

Article 116 of *Maritime Procedure Law of the People's Republic of China* stipulates that the creditor providing other evidence of maritime claims shall bring claim-confirming proceeding to the maritime court where the registry of claim is accepted after the claim is registered. Parties having arbitration agreement shall apply for arbitration immediately. The judgment and ruling made by the maritime court on the claim-confirming proceeding has legal forces and the parties shall not institute an appeal. In other words, these claim-confirming proceedings overcome second instance as the final, i.e. "first instance as the final". Such provision is for the purpose that the amount of the auction of ships could be distributed in time.

The legitimacy of such claim-confirming proceeding of first instance as the final has always been controversial due to the complexity and large objective of maritime cases. *Provisions on Arrest of Ships* narrows down the scope of claim-confirming proceeding of first instance as the final, excluding the following two circumstances:

First, the claim-confirming proceeding which has been filed before the registry of claim;

Second, the cases needing to judge the proportion of fault resulting in collision.

#### 1.5 Determining a number of issues in respect of auction of ships and registry of claims

Article 10 to article 22 of *Provisions on Arrest of Ships* give specific provisions on issues of auction of ships and registry of claim, including confirmation of announcement period of auction for a second time, confirmation of reserve price of auction, auction with minimum price and auction without minimum price, the period for registry of claim and time for issuing the judgment, conclusion of registry of claim, etc. These provisions simplify the procedure and clarify the scope of duty and function. Here we will not discuss this issue in details.

## **2. Relevant cases in respect of arresting the ships under dispute of building ships**

One of the 10 cases attached to the *Provisions on Arrest of Ships* issued by the maritime court is related to the dispute under the ship building. The selling of ship by the shipyard (the buyer is considered as breach of contract) is prevented by the buyer through the application to the maritime court of Xiamen for the arrest of ships as follows:

*Case concerning application made by Eclipse Property Holding Co.,Ltd. of Marshall Island to arrest ship "L-710" (One) Basic facts On December 1<sup>st</sup>, 2006, Eclipse Property Holding Co.,Ltd. of the Republic of Marshall Island ("the applicant") entered into the Contract of Ship Building with Fujian Shenglong Ship Building Co.,Ltd. and Wenzhou Runyang Import and Export Trading Co.,Ltd. ("the respondents"), agreeing that the respondents build a single-hull bulk cargo ship (the ship's number is "SL-710") for the applicant for the price of USD 38 million to be paid in advance by 5 installments each with USD 7.6 million. The parties agree to submit the dispute to London, England for arbitration. Upon payment of first installment for the amount of USD 7.6 million, the applicant canceled the contract because of the respondents' breach of contract. In July, 2009, the respondents applied to the arbitration court of London for arbitration, claiming the court to make the judgment that the applicant has no right to cancel the contract and has the advance payment refunded. The applicant filed a counterclaim, requesting the court to judge that it has canceled the contract according to agreement and is entitled to be refunded the advance payment and interest for the amount of USD 7.6 million, or to judge the respondents to compensate for the assessed losses for the repudiatory breach they have constituted. In September, 2010, the applicant was informed that the respondents were ready to sell the "SL-710" ship under construction, therefore applied to the maritime court of Xiamen for the arrest of such ship and ordered the respondent to provide reliable security for the amount of USD 9.08million. (Two)Result of judgment Upon examination, the maritime court of Xiamen regards that the application made by the applicant is in line with the legal condition of arrest of ships in China. The court ruled to arrest the ship "SL-710" parked in Fuan of Fujian province in accordance with provisions of article 12, article 14, paragraph (thirteen) of article 21, paragraph (one) of paragraph 1 of article 23 of Maritime Procedure Law of the People's Republic of China and item 2 of article 21 of Explanation of Supreme People's Court to the application of Maritime Procedure Law of the People's Republic of China. During the arrest of ship, arbitration court of London ruled the applicant is entitled to cancel the contract and request the compensation for losses according to common law. Later the respondents and the applicant reached a settlement and fulfilled the obligation of compensation, upon which the maritime court of Xiamen discharged the arrest of ship "SL-710" by law. (Three) Typical significance The present case is the preservation case of maritime claim made by a foreign party applying to the court of China for the arrest of ship in the disputes arbitrated by a foreign arbitration agency. It often takes years from the application of arbitration to the acceptance of enforcement. The judgment of winning the case is easily unable to be enforced due to the*

*transfer of assets by the parties. As the contracting party of UN's Convention on the Recognition and Enforcement of Foreign Arbitral Award, China is obliged to recognize and enforce the foreign arbitral awards. At the application of foreign arbitration party, adopting the preservation measure of arresting the ship parked in China is beneficial to successfully enforcing the foreign arbitration award. Article 14 of Maritime Procedure Law of the People's Republic of China stipulates, "preservation of maritime claims shall not be prejudiced by the jurisdiction agreement or arbitration agreement between the parties in respect of maritime claim." Item 2 of article 21 of Explanation of Supreme People's Court to the application of Maritime Procedure Law of the People's Republic of China gives further clarification, "the maritime court shall accept the case if a foreign court has accepted relevant maritime case or the relevant disputes have been submitted for arbitration, but the property involved is in the territory of PRC and the party has applied to the maritime court where the property is located for the preservation of maritime claim." In the present case, the maritime court of Xiamen judges to allow the application of Eclipse Property Holding Co.,Ltd. to arrest the ship and prevent without delay the respondents from handling the ship and facilitate the enforcement of rights and obligations provided by the relevant foreign arbitration awards. It shows the strictness of our maritime court to apply law and the idea and heart to protect fairly the legitimate rights of parties from home and abroad. It wins international recognition and praise. The Greek ship owner came all the way to maritime court of Xiamen to express its gratitude and respect.*

In the case, on selling the ships by Chinese shipyard, the buyer applies to the court for arresting the ship under construction for the reason that its dispute is arbitrated in abroad, the court implements the arrest in line with its function and rights. In fact, the author regards that the dispute still exists over whether the *Maritime Procedure Law of the People's Republic of China* could be applied or not due to the fact the ship under construction is not the ship of maritime law in the true sense. However, since the Supreme People's Court lists such case into ten cases concerning the arrest of ship, proper attention shall be attached to it for the maritime court probably will take it as an example in the future practice.

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