

The Chinese Special Regulations with Regard to the Settlement of Maritime Claims

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I. Introduction

Under the Chinese law system, the Maritime Law is an special branch of the Civil Law,¹⁾ in correspondence with this system, the law with regard to the maritime litigation is attributed to the field of Civil Procedural Law. In view of the fact that the maritime claims has its own features which are influenced by the complex nature of navigation, the maritime claims can not be solved solely by virtue of the Civil Procedural Law, so, there must be some special regulations, such regulations have been made by Supreme Court of China which are called as "Regulations Relating to the Arrest of Ships before Litigation" and "Regulations with Regard to Auction of Ships Which Have Been Arrested by Maritime Court for Clearing off the Debts". The two regulations mentioned above are important supplement to the Civil Procedural Law. The maritime court will settle the case in accordance with the Civil Procedural Law combining with these special regulations. This Paper will introduce these regulations to the persons who are unfamiliar with Chinese law system.

II. The meaning of maritime claims

In accordance with the legal theories of China, the maritime claims can be explained respectively in narrow sense and in broad sense. The maritime claims in narrow sense is the claim for loss of life or personal injuries or the loss of or damage to the properties suffered in the accidents occurred at sea; while the maritime claims in broad sense includes not only the claims mentioned above but also the claims for loss of or damage to the properties arising from a breach of contract.²⁾

Under the "Regulations Relating to Arrest of Ships before Litigation", only in the circumstance of maritime claims can the ships be arrested before litigation, while the

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1. 司玉琢編, 海商法詳論, 中國大連海專大學(校)出版社, 1995, p.32.

2. 司玉琢編, 新編海商法學, 人民交通出版社(中國), 1993, p.350

maritime claims in the sense of "Regulations" can be listed as below:³⁾

- (1) Ship's collision or other traffic accidents occurred at sea;
- (2) Loss of life or personal injuries occurred in the handling or operation of the ship including the loss of life or personal injuries caused to the crew members and passengers;
- (3) Oil pollution caused by the ships;
- (4) Claims in respect of measures taken to avert the pollution which might be occurred or the measures taken to minimize the damage of pollution;
- (5) Claims for to the reward of salvage at sea or the claims in respect of dredging out or removal of wreck of the vessel or sunken objects or floating materials of the ship;
- (6) The charter parties;
- (7) The contracts of carriage of goods by sea or the contracts of carriage of passengers by sea;
- (8) General average;
- (9) Towage or pilotage;
- (10) Providing the labourer or supply the ship with food, materials, articles, fuel oil and equipment (including containers) which are necessary for operation or maintenance of the ship;
- (11) Harbour dues, channel dues, quay dues, canal dues and port disbursements;
- (12) Construction, repairing, refitting or providing the equipment of the ship;
- (13) Ship's mortgage and other security secured by the ship which is similar to the nature of ship's mortgage;
- (14) Marine insurance contract;
- (15) Claims for the wages of the master and crew, and social insurance or other charges concerned;
- (16) the charges or expenses paid by master, shipowner, bareboat charterer, or other charges or agents;
- (17) Commission, service charge or agency fee paid by shipowners, bareboat charterers or other charterers who have paid the expenses for the ship;
- (18) Claims in respect of ownership or the possession of ship;
- (19) Claims with regard to the distribution of profit in management of ship;
- (20) Ship sale and purchase contract.

By comparing the "Regulation" with the "International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952",⁴⁾ it can be found that the scope of "maritime claims" in the sense of the Regulation is much wider than that of latter one.

3. 中國最高人民法院, 關於海事法院訴訟前扣押船舶的規定, 1994.

4. 國際海事條約匯編, 中國大連海事大學(校)出版社, 1994, p.200.

III. Arrest of ships before litigation

Under the circumstances of maritime claims, the ship which is involved in the dispute can be arrested before litigation at the request of applicant, but we should pay attention to the following points:

3.1. The scope of the ships which can be arrested

The ships which can be arrested are restricted as follows:

(1) The ships which belong to the same shipowners, same operators or same charterers who are deemed to be liable for the maritime claims when the claims occurred

The law system of China belongs to the continental law system which pursues the principle of "action in personam". In accordance with this principle, the target of the civil action is the person rather than the ship. Since the purpose for arrest of ship is only for obtaining the security in cash, so, only the ship which belongs to the person who is deemed to be liable for the claims can be arrested. In this sense, the application for arrest of ship should be brought to the court under the condition that the ship to be arrested belongs to same shipowner, same operator or same charterer when the maritime claims occurred. Briefly speaking, the ships to be arrested should belong to the person who is liable for the maritime claims when it was occurred. Such principle shall not apply to the case in respect of maritime lien.

(2) Other ships which belong to the persons who are deemed to be liable for the maritime claims.

In case that there are no opportunities to arrest the ship which is liable for the maritime claims, then other ships which belong to the same shipowner, same operator or same charterer can also be arrested.

(3) The ships which are owned, operated or chartered by operators or charterers who are liable for the maritime claims.

(4) If the maritime claim is not in connected with the ownership, possession, mortgage of the ship or the distribution of the profit, then, other ships which have not been involved in the maritime claims can also be arrested.

3.2. The procedure for arrest of ship

3.2.1. Application for arrest of ship

The applicant should bring an application in written form to the maritime court, the following points should be stated clearly in the application:

- (1) The name of the person who is deemed to be liable for the maritime claims;
- (2) The reason for arrest of the ship;
- (3) The amount of security to be provided by the applied person.

In addition to the application, the relevant evidences which are in connection with the case should be attached.

3.2.2. Review of the application

Upon receiving the application for arrest of the ship, the maritime court should review the application to see that whether the application is in conformity with the conditions with regard to arrest of ships or not. if the application is reasonable, the maritime court should make the decision for arrest of ship within 48 hours and, the order for arrest of ship with the signature of director of the court shall be issued at same time.⁵⁾ In case that the ship to be arrested belongs to a state which has concluded the consular treaty or navigational agreements with China, such treaties or agreements should be followed.

3.2.3. Providing the counter security

In the decision for arrest of ship, the maritime court should order the applicant who wants to arrest the ship to provide a counter security. the counter security should be sufficient and satisfactory in order to indemnify the defendant for his loss arising from the wrongful arrest, in the event that his application is illegal.

The counter security shall be provided to the bank which is appointed by the court. if there are any agreements in regard to jurisdiction or arbitration, the counter security can also be provided to the applicant or arbitration tribunal or other courts appointed in the contract by both parties. In case that the applicant refuses to provide the counter security, the maritime court will not accept the application for arrest of ship.

3.2.4. Enforcement of the arrest of ship

5. 中國海商法協會主辦，中國海商法年刊，1994，p.191.

In the process of execution of the arrest, all of the documents with regard to the arrest of the ship should be brought by the executive judge to the master of the ship, the master should sign on the short note acknowledging receipt, if the master refuse to sign it, the receipt should be signed jointly by the executive judge and witness, the joint signature shall be deemed as that the document have been duly received by the master.

The order for arrest of ship should be read by the executive judge to the master of the ship, and thereafter, the order should be stuck on a conspicuous place of the main mast of the vessel.

As stated above, the arrest of ship shall not be prejudiced by any agreements in respect of jurisdiction, arbitration or applicable law.

The fee for arrest of ship shall be paid by the applicant, while other charges for enforcement of arrest of the ship shall be paid by the claimed party. If the arrest of ship is proved to be wrongful act, the applicant shall be responsible for all of these expenses.

The applicant has no right to arrest the ship which has been released or other ships which are owned by the claimed party for the same reason except for the following reasons:

- 1) The security provided by the claimed party is not sufficient, but it should be noted here that the amount of security shall not exceed the ship's value;
- 2) The person who has provided the security is unable to perform his obligation.

3.2.5. Providing security

Once the ship has been arrested by the court, the claimed party has no alternative but to provide security as soon as possible so that the ship can be released. The security provided by the claimed party is by no means to recognize the fact that he is responsible for the claim or he has waived his right for limitation of liability. The forms of security shall be decided by the court. If sufficient security has been provided by a bank or a reputable company which has properties in China, the security in cash is not required.

3.2.6. Settlement of the case

In accordance with the civil procedural law, there are four patterns for settlement of the case which are as follows:

(1) Litigation

In case that the claimed party refuses to provide security, the litigation will start. The maritime court by which the ship has been arrested has jurisdiction over the case automatically, but under such circumstance, the maritime court which has the original jurisdiction over the case by virtue of the civil procedural law shall not be excluded from such jurisdiction. In other words, the applicant has the right to select a court among those courts which have the jurisdiction over the case.

Under the circumstances of pre-litigation security, the limitation of time for bringing the suit is 30 days which is from the time the property has been arrested until the suit is brought to the court, so, once the ship has been arrested as a measure of pre-litigation security, the claimant should take his time to prepare for litigation, all of the legal documents should be got ready so that they can bring a suit to the court in due course within that period, otherwise, the ship which has been arrested shall be released by the court at the expiration of the period.

(2) Arbitration

In case that there are any effective arbitration agreements or arbitration clauses in the contract of carriage of goods by sea, the disputes can also be brought to arbitration, under such circumstance, since the security has been provided already by the claimed party, the award of arbitration can easily be executed in future.

The maritime court will not accept the suit brought by any parties under the condition that there is a valid arbitration agreement or arbitration clause in the contract. In accordance with Arbitration Law of China, being a valid arbitration agreement, the following circumstances should not be related:

- a) The disputes to be arbitrated has gone beyond the scope of arbitration recognized by law;
- b) the arbitration agreement is concluded by the person who has no capacity for civil conduct or the person with limited capacity for civil conduct;
- c) The arbitration agreement was signed by a person who has been forced by the other side;
- d) The contents of arbitration agreement is not clear that it can not be performed, for example, it is only provided in the agreement that any disputes arising from the contract shall be brought to arbitration, but there are no any provisions in regard to the place of arbitration or arbitration commission, then it is obvious that such agreement can not be performed in practice.

Under the above conditions, the maritime court will negate the legal effect of the arbitration agreement.

In China, the maritime claims to be arbitrated shall be brought to China Maritime Arbitration Commission which is in Beijing. There are many specialists in the field of shipping (including professors, judges, masters and some other persons who have the navigational experience) have been engaged as arbitrators by the commission, the maritime cases can be settled fairly and reasonably through arbitration. the awards made by the Maritime Arbitration Commission shall be performed voluntarily and consciously by both parties involved in the arbitration. In the event that anyone of the parties reject to execute the award of arbitration, the other side has the right to bring the award to the court which has jurisdiction over the case for execution, or bring it to the court of foreign country by virtue of the Convention on the Recognition and Enforcement of foreign Arbitral Awards, 1958.

(3) Reconciliation

In case that the security has been provided by applied party, the maritime claims can also be settled by means of reconciliation which is held outside of court.⁶⁾ The agreement of reconciliation signed by both parties on the basis of negotiation shall be executed voluntarily, once the agreement has been torn up by anyone, the disputes have to be brought to litigation.

(4) Mediation

The mediation is a special system provided in Civil Procedural Law of China. What is called mediation is a method for settlement of the case under which the parties involved in the dispute will conclude an agreement for settlement of the claim on the basis of negotiation which is held by court. The purpose of mediation is to promote mutual understanding between both parties so that the case can be settled more quickly than litigation, the mediation which is emotionalized should be carried out under the principle of voluntariness. The mediation can be held by the court at any stage of civil action. Once the statement of mediation made by the court on the basis of voluntariness has been put into effect, its function is similar to that of decision made by court and it will be forced to execute.

IV. Auction in sale of the ship

4.1. Conditions for auction of the ship

After arrestment of the ship, if the claimant bring a suit to the court, the security

6. 趙新華主編, 民事訴訟法學, 吉林人民出版社(中國),1989, p.171.

will be changed automatically as security in the litigation. The arrest of ship under condition of the security in the litigation is not influenced by the regulation in respect of limitation of 30 days as stated above. Under following circumstances, the ship can be auctioned at the request of applicant:⁷⁾

- 1) The shipowner did not provide the sufficient or reliable security within the period of time provided in the law;
- 2) In light of specific conditions, the ship is not suitable to be arrested for a long period of time;
- 3) The shipowner, who is also the defendant, is liable for the maritime claims.

4.2. The procedure in auction

The auction in sale of ship should be carried out in accordance with the following steps:

4.2.1. Bringing a suite to the court

The claimant should bring a suit to the court and tender application for auction in sale of the ship.

4.2.2. Review of the application

Upon receiving the application for auction of the ship, the maritime court should review it and decide that whether the application can be ratified or not.

4.2.3. Ratification of application

Once the application has been ratified, the maritime court should take following steps:

(1) To issue an information of auction in sale of the ship in which the time, place and the reason for auction of ship should be clearly stated. The information should be sent in written form or any other necessary means to the registration authority of the ship and to the persons who have been registered as shipowner, mortgagee, or the persons who have the priority in compensation with respect to the ship.

(2) Making the announcement for auction of the ship on local news paper or the news paper of the state which is distributed to foreign countries, the news paper should be issued for three running days, the contents of the announcement is as below:

- a) The reason for auction of the ship;

7. 中國最高人民法院 關於海事法院拍賣被扣押船舶清償債務的規定, 1994.

- b) the list of member in the Auction Committee;
- c) the time and place of the auction and the method for communication;
- d) the information for registration of creditor (If the applicant did not make registration within 60 days from the time the announcement is issued, it will be deemed as that the creditor has waived his right).

The expenses which is necessary in auction of the ship shall be paid by the applicant in advance, otherwise, his application in respect of the auction shall not be ratified.

4.2.4. The enforcement of auction

The auction will be held by the auction committee which consists of a judge, an accountant and a ship's inspector. The function of the Committee is to appraise and evaluate the ship; presiding over the meeting of auction; signing the fixture note of transaction with buyer; and going through the formalities for transferring of the ownership.

The person who wants to buy the ship should register himself with the Auction Committee and provide an identity certificate of legal representative, authorization issued by the buyers and the certificate with respect to the ability of payment.

The base price for auction of the ship shall be determined by maritime court on the basis of evaluation of the ship made by the auction committee.

Once the transaction has been concluded, the buyer should pay 25% of the deposit in advance and pay in full of money within 7 days starting from next day of transaction, if the buyer go back on his own promise, the deposit shall not be returned to him, if the buyer did not pay in full of the money at the expiration of the period, it can be deemed as that he has gone back on his own promise.

As long as the ship's price has been paid in full, the auction committee should go through formalities for delivery of ship and the order for release of ship shall be issued by the court.

After an auction in sale of the ship has been performed, the maritime court should publish the announcement on the news paper to declare that the ship has been sold to the buyer, the ownership has been transferred from that time, the buyer shall never be liable for the debt occurred before delivery of the ship.

4.2.5. Checking and confirmation of creditor's right

(1) The maritime court should take time to hear the case in due course in order to confirm the creditor's right of plaintiff;

(2) The maritime court should check up the creditor's right which have been registered and confirm the identity of creditors who will be indemnified;

(3) The sequence of indemnification should be established.

4.2.6. Clear off the debts

As long as the period for registration of creditors expires, the maritime court should hold a meeting which is to be attended by creditors, the agreement in respect of clearing off the debts shall be concluded by all of creditors on the basis of distribution plan which is made in accordance with the sequence of indemnification decided by all of creditors. Such agreement ratified by the court is the basis of distribution.

The debts will be cleared off in accordance with the sequence which is established as below:

- (1) Maritime lien;
- (2) Possessory lien on ship;
- (3) Ship mortgage;
- (4) Other creditor's right which have been registered.

It should be mentioned that the legal costs, the expenses for preserving and auction of the ship, the expenses for distribution of the proceeds of ship and other expenses paid for the common interests of the claimants shall be deducted and paid firstly from the proceeds of the ship.

V. Conclusion

The maritime litigation, being a component part of civil litigation is very complicated due to its nature, thus, many provisions with regard to maritime litigation can not be covered in the civil procedural law. Under such situation the "Regulations Relating to Arrest of Ships before Litigation" and the "Regulations with Regard to Auction of Ships Which Have Been Arrested by Maritime Court for Clearing off the Debts" played an important rule in maritime litigation, it goes without saying that the "Regulation" is an important supplement to the Civil Procedural Law.

Since the Regulations mentioned above are not issued by legislative organs, it an not be called as law. For this reason, since 1992, the "Special Procedural Law of Maritime Litigation" is being made. The contents of the law is similar to that of regulations

stated above. It is expected that the historical mission of the regulations will be completed in a short future.

參考文獻

1. 司玉琢編，海商法詳論，中國大連海事大學(校)出版社，1995. p.32
2. 司玉琢編，新編海商法學，人民交通出版社(中國)，1993, p.350.
3. 中國最高人民法院，關於海事法院訴訟前扣押船舶的規定，1994.
4. 國際海事條約匯編，中國大連海事大學(校)出版社，1994.
5. 中國海商法協會主辦，中國海商法年刊，1994, p.191
6. 趙新華主編，民事訴訟法學，吉林人民出版社(中國)，1989, p.171.
7. 中國最高人民法院，關於海事法院拍賣被扣押船舶清償債務的規定，1994.