

Arrest of Properties in Japan  
for the Ship Owner's Claims against the Charterers  
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A Ship owner's claims against charterers

Major claims the ship owner may have against the charterer are unpaid hire. Under Japanese law, like the other continental law countries, the rights in properties, including maritime lien and possessory lien, shall be the one stipulated in the law. Thus, lien as provided in the contract such as the charter party or bill of lading could not be exercised in Japan as provided in the contract terms. Under Japanese law is no maritime lien for the ship owner's claim for unpaid hire on bunker or any other property of the charterer on board the ship. Neither does the ship owner has any lien for the same on the other property, such as sister ships, of the charterer not on board the ship.

If the property of the charterer, not limited to bunker or cargoes on board the ship is in custody of the ship owner, the ship owner has a possessory lien on such property. (Article 521<sup>1</sup> of *Commercial Code: Shoho; Law No. 48 of 1899*) Therefore, in case the sub-charterer owns the bunker, the ship owner could not enforce lien on bunker. However, the creditor has the right to enforce the debtor's right to a third party, if the debtor does not have sufficient fund to repay the debt and if the creditor's claim has close relevance to the debtor's claim (Article 423<sup>2</sup> of *Civil Code: Minpo; Law No. 89 of 1896*). The creditor thus could enforce lien on bunker if neither of the charterer and sub-charterer pays unpaid hire.

Enforcing lien here is similar to possessory lien under English law, and therefore,

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<sup>1</sup> Article 521 of *Commercial Code* The creditor has any claim due arisen out of the commercial acts between and for the two commercial men, the creditor has the right to enforce lien on the property or the valuable paper which is owned by the debtor but in custody of the creditor due to its commercial act with the debtor until the creditor receives the payment of the claim, except in case where the parties agree otherwise.

<sup>2</sup> Article 423 of *Civil Code* The creditor, in order to preserve its claim, is entitled to enforce the rights belonged to the debtor....

not effective during the charter term, but only at the end of the charter where the charter is withdrawn or the charter term comes to the end. In real situations however, the charterer in most cases has claims against the ship owner for the bunker price at the end of the charter. If the ship owner also has the claims against the charterer, the ship owner could set off its claims against the charterer's claims for the price of the bunker, by which the ship owner could recover its claims partly or wholly.

Usually, the ship owner, due to ineffectiveness of arresting bunker, should look to the arrest of sister ship or the other property in the foreign countries, if the law of such a country grants the ship owner more effective rights to enforce their claims. Otherwise, in Japan, they have to look to the provisional attachment on the other properties of the charterers, unless the ship owner has obtained a final and conclusive judgment or award in a country, which ratified New York or Hague Conventions.

*Civil Execution Law (Minji Shikko Ho: Law No. 4 of 1979)* sets forth sort of claims by which the claimant or the creditor could arrest a ship in way of enforced auction sales, which are claims based on, (i) a final and conclusive judgment, (ii) a judgment with effect of temporal execution<sup>3</sup>, (iii) a Japanese court's final and conclusive judgment for enforcing a foreign judgment, (iv) a Japanese court's final and conclusive judgment for enforcing an arbitral award, (v) an agreement certified by the notary public for the claim to seek payment of money or its equivalent, which includes the debtor's covenants to accept the enforced auction sale of his asset immediately upon having the claimant's demand (Article 22)<sup>4</sup>

## B Provisional attachment in general

To pursue provisional attachment, the claimant should prepare substantial amount (around 1/4 to 1/3 of the claim amount) of security for provisional attachment, and only limited types of security, such as cash or cash equivalent or Japanese bank or insurance company's guarantee in a special form, will be accepted by the court. There are no available bond company who could issue a guarantee acceptable to the court with a minor percentage of the commission, while, for instance, Korea has such

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<sup>3</sup> Japanese judgment in most cases have a sentence upon the plaintiff's request to allow the winner plaintiff to enforce the judgment temporarily. To stop the enforcement based on such judgment, the defendant should appeal the case and make deposit of the amount equivalent to the amount awarded by the judgment.

<sup>4</sup> Article 22 sets forth the other claims which have also reached to the level equivalent to a final and conclusive judgment, but for my purpose here, I omitted them, since they rarely occur.

bond companies, who could issue a guarantee acceptable to the court.

You have to apply for provisional attachment, which procedures are provided in *Civil Preservation Law (Minji Hozen Ho: Law No. 91 of 1989)*. Provisional attachment will be ordered by the court if without preserving the debtor's asset your monetary claim would become impossible or very difficult to enforce against the debtor's assets in the future. This requirement of impossibility or difficulty to enforce your claim on assets in the future could be satisfied easily in most of the charterer's claims. If provisional attachment of one asset would not satisfy your claim amount, you can attach another asset.

Targets of the provisional attachment maybe any of the charterer's properties, such as the real estates, movables, ships, automobiles, valuable properties, the claim against third parties (including the claim against the bank for its bank account).

In the attachment of movables, including bunker, the sheriff shall retain the attached property. The ship owner could not retain the bunker, nor use it. The ship owner shall prepare for the storage of the attached property, especially the one which the sheriff would have difficulties to hold, such as bunker, in some place where the sheriff could control easily. This attached property should be preserved until the judgment of the case, unless the charterer submit to the court the money to release the bunker, which the charterer would not do. If the attached property would deteriorate in its nature or significantly decrease its value during the sheriff's custody, the property could be sold by auction and its proceed will be held by the court.

The court will attach the real estate by registration of such provisional attachment on the register of the real estate. If there is any condition of the real estate, which need the preservation of the real estate, the court by its own or upon having the creditor's application will appoint the custodian to preserve the value of the real estate. The procedure is similar to those for the ship.

In case of the application for provisional attachment, if the judge finds the application in order, he will determine the amount of security, which the claimant should submit. The amount of the security is in a range between 1/4 to 1/3 of the claim amount, but if the asset's value is far more or less, compared with the claim



amount, the amount of the security would be adjusted. The court will have the discretion to decide the amount of security, depending on the merits of the case and the presented evidence. The security should be cash, cash equivalents such as the government bond, and the guarantee letter issued by Japanese banks, insurance companies, and the other admitted financial institutions. As the form of the guarantee provides for the strict liability of the guarantor, Japanese banks would not offer to be the guarantor with a commission base arrangement, but demand the cash deposit account without the right to withdraw until cancellation of the guarantee. Thus, sometimes, the cash deposit is easier and quicker to arrange. In exchange of submission of the security, the court will issue the provisional attachment order. The arrest procedure is the same as in case of enforced auction sales.

In order to release the asset from provisional attachment, the types of counter security acceptable to the court are same as in the security to be submitted in case of provisional attachment application; i.e. cash, cash equivalent and Japanese bank or insurance company's guarantee letter in a special form.

### C Jurisdiction

*Civil Procedure Law* in its Article 5 has the venue provisions, by which the court having the venue where the security for the claim or the defendant's asset (ship) is located has the jurisdiction over the claim (Article 5(4)). Thus, for the claimant, it would be convenient to attach the asset, and at the same time to bring a suit against the defendant before the same court.

Besides a place of ship or security, the claimant could choose the court at a place where the defendant shall perform its duties (Article 5(1) of *Civil Procedure Law*); in both tort and contract claims mostly the defendant shall make payment at the claimant's business place, and thus the claimant could bring a suit at the court where his office is located. Article 5(5) of *Civil Procedure Law* provides for jurisdiction of the court at a place of defendant's business place or office. These option given to the claimant will be narrowed or excluded by the jurisdiction clause in the relevant contract, such as bill of lading, charter parties, salvage contract or by the parties' agreement after the incident, such as a typical jurisdiction agreement exchanged shortly after the collision.

In case of provisional attachment, if the claimant agrees to accept a separate security to be issued by the club, the underwriter or the bank, mostly with a jurisdiction agreement, the case of provisional attachment is finished. If not, the defendant has to submit cash as a counter security, and the ship will be released but the security will not be released until the completion of the case for the claim. The claimant, which succeeded in provisional attachment, shall bring a suit against the defendant without delay, and the defendant can prompt the claimant to do so. If he fails to do so, the court shall order the claimant to bring a suit against the defendant, and if he does not follow the order, the court will release the ship if not yet released or the cash as the counter security. The claimant can choose the court for his claim in accordance with the venue provisions in *Civil Procedure Law*. Even if there is no other factor to give the jurisdiction to some court in Japan over the claim in question, at least, the court where the provisional attachment was made has the jurisdiction because of the ship or the security there (Article 5(4) of *Civil Procedure Law*). The provisional attachment procedure does not include the auction procedure, and thus, the claimant at its disbursement shall pay the cost to preserve the asset until his action will reach to a judgment. By the judgment, the provisional attachment procedure will be replaced to the enforced auction sales procedure upon the claimant's application.

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