

Arrest/ Attachment/ Injunction for Maritime Claims in Japan
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A. Shipowner vs. Charterer

In case the charterer falls into a financial difficulty and fails to pay the charter hire or to perform their obligation under the charter, the shipowner may be entitled to terminate the charter and to withdraw the ship from the charterer's trade.

When the withdrawal needs certain action by the charterer, the shipowner may apply for the injunction in Japan. However, the procedure for such injunction to compel the charterer to do something or not to do something is very complex and would not be reached to the order without hearings with attendance of the parties. Also, if the charterer does not have an address in Japan, it is very difficult to enforce such an injunction. The shipowner has lien on the bunker owned by the charterer. Thus, the hire payment has failed and the charter terminated, the shipowner may reject the re-delivery of or the adjustment with respect to the bunker, and get collection of the unpaid hire by the price of the remained bunker. The shipowner usually does not have lien on the cargo for the unpaid charter hire. Under the creditor's right to subrogate the debtor's right to a third party, the owner may enforce the time charterer's right to claim for the unpaid freight against the cargo owner. However, the case is rare where the freight is not yet collected when the ship has arrived at the destination.

B. Charterer vs. Owner

The Charterer's claim against the owner includes the paid charter hire, disbursement, the additional cost for the carriage, the indemnity claim for the charterer's payment or liability to the cargo interests or sub-charterers. Only the cargo claims which fall into the claims subject to the limitation under the Limitation Convention may be attached with maritime lien on the ship. Otherwise, no lien, and thus, the charterer should chase the other assets of the owner, using the procedure of temporary

attachment. As I mention below, there are various hurdles to accomplish such attachment.

Also, the owner is very often located in FOC country, and strictly speaking, the charterer could not effectively pursue the action in Japan. To avoid this, we are very often using the principle of piercing a corporate veil. I refer to it below.

1 Two types of arrest of ships: Enforced auction sales and provisional attachment

There are two types of ship's arrest in Japan, i.e. arresting ship for enforced auction sales and arresting ship in way of provisional attachment to preserve the debtor's asset for a judgment in the future. This distinction, and whether the claimant could arrest ship in way of enforced auction sales, is important in practice, since 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 bond companies, who could issue a guarantee acceptable to the court.

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: -

(a) claims based on, (i) a final and conclusive judgment, (ii) a judgment with effect of

temporal execution¹, (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)²

(b) claims based on (i) mortgage, (ii) lien or other hypothèque, which is certified as existing by a final and conclusive judgment, a certificate of notary public or a certificate of registry, and in case of lien and maritime lien (Article 842 of *Commercial Code – Law No. 48 of 1899*), documents to prove the existence of such lien (Articles 189 and 181 of *Civil Execution Law*). The maritime lien will be enforceable only for a period of one year after the cause of the claim was arisen (Article 847 of *Commercial Code*).

If your claim is not of the above kind, 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 (including ships) 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 ships in the future could be satisfied easily in most of maritime claims, since ships will move at various risk at sea and be easy to sell. If provisional attachment of a ship would not satisfy your claim amount, you can attach another ship, or ships.

2 Maritime claims

Instead of explaining articles of the relevant codes referred to above, I believe, it would be easier for you to grasp the situation in Japan if the explanation will be made on each sort of claims, and I will do so in the order of maritime claims

¹ 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.

² 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.

categorized in the Arrest Conventions.

(a) Damage caused by a ship

This sort of claim typically arises out of a collision with another ship or other third party's property. Though *Commercial Code* provides for maritime lien on various maritime claims on the ship as I will mention below, it does not provide maritime lien for this sort of claim, which is provided in *Japanese Limitation Law* (Article 95 of *Law Concerning Limitation of Shipowner's Liability: Law No. 94 of 1975*)³. By Article 95 of the Law, a claimant, whose claim is subject to limitation, has maritime lien on the ship involved in the accident. Thus, the berth owner could arrest a ship which gave damage to his berth, and the owner of a ship involved in a collision could arrest the other ship, both on maritime lien for enforced auction sales.

(b) Personal injury / death

Maritime lien is attached with claims for loss of life or personal injury caused in connection with the operation of ship, since those claims are also subject to limitation. The crew's claim against the shipowner under their employment contract is not subject to limitation (Article 3(1)-5 of *Limitation Law*), but such claims are attached with maritime lien by virtue of Article 842(7) of *Commercial Code*.

(c) Salvage

Salvor's claims against the shipowner is attached with maritime lien under Article 842(5) of *Commercial Code*. Claims of the shipowner or the other persons who own the salvaged properties against the salvor in tort or in breach of contract shall be subject to limitation, and thus the salvaged property interests can arrest a salvor's ship involved in negligent salvage operation based on maritime lien granted by Article 95 of *Limitation Law*.

(d) Pollution damage

³ Japan has ratified 1996 Protocol to 1976 LLMC, which came into force on August 2006.

If *Ship Oil Pollution Damage Compensation Law* (Law No. 95 of 1975)⁴ is applied to the pollution damage and damage/loss/cost arisen out of oil spill prevention or cleanup cost, those claims are attached with maritime lien under Article 40 of the said Law. The Law, as same under 1992 CLC/FC and its 2003 Protocol, will apply to oil pollution from tankers carrying persistent oil, and thus the claims arising out of any other pollution shall be attached with maritime lien by Article 95 of *Limitation Law*.

(e) Wreck removal

Wreck removal cost, if incurred on the third party, their claims are with maritime lien under Article 95 of *Limitation Law*.

(f) Use or hire of ship

There are various kinds of claims from charterer to the owner, but claims arisen out of breach of contract are not subject to limitation and thus are not granted maritime lien (Article 3(1)-3 of *Limitation Law*). If the claim is for damage/loss of cargoes or charterer's property arisen out of some incident in connection with the operation of the ship, the claim is subject to limitation (Article 3(1)-1/2 of *Limitation Law*), and the charterer, including indemnity claim upon having the cargo claims, could arrest the ship in the way of enforced auction sales.

(g) Carriage of goods

Maritime lien is given to claim for cargo loss or damage against the carrier in accordance with Article 3(1)-2 of *Limitation Law* and Article 19 of *Japan COGSA* (*Law of International Carriage of Goods by Sea: Law No. 172 of 1957; corresponding to Hague Visby Rules*)⁵.

(h) General Average

Article 842(5) of *Commercial Code* has given maritime lien to claims for general

⁴ Japan ratified 2003 Protocol to 1992 CLC/FC.

⁵ see <http://www.japanlaw.co.jp/cogsa/cogsa.html> for translation. This is in our firm's web site, though it has not been taken care of for a long time, but is one of the oldest web-sites by the law firms.

average contribution.

(i) Towage and pilotage

Article 842(4) of *Commercial Code* gives maritime lien to claims not only for pilotage, but also towage.

(j) Supplies, repairs and construction

Article 842(6) of *Commercial Code* gives maritime lien to claims for goods or materials supplied to a ship for her operation and maintenance, but its scope is restricted. Article 842(6) provides, "claims for the matter necessary to continue her voyage." A part of supplied goods or materials may not be considered as the one necessary to continue the voyage, which only includes the cost necessary for ships to enter/leave ports and to pursue her voyage. The voyage here is only the voyage she is at that time continuing. Thus, the material supplied for the next voyage would not be within the provision of Article 842(6)⁶. The case held that the "voyage" is a voyage from the ship's departure of the port of her base for business (if she has no business base, the port of registry) to her arrival of the same. Though it was a fishing boat case, the court said that the "voyage" is the one from her departure of the port to go to fishing operations at sea and to her return to any port after the completion of fishing operations⁷. It is submitted that the voyage for a commercial ship shall mean the one which shipping companies usually count as one voyage as numbered.

If the claim is for repair cost, to raise maritime lien it is necessary that the repair was necessary for the continuing voyage. Thus, if the repair or maintenance was made for the forthcoming voyage, the maritime lien is not attached to claims for that repair cost. Article 842(2) however grants maritime lien to claims for the cost to preserve a ship at the last port. The repair cost at a dockyard (not during a voyage) therefore may raise maritime lien under Article 842 (2), but that maritime lien should be enforced at that port. Otherwise, the maritime lien for the repair cost will be

⁶ The Order of Takamatsu High Court dated Dec. 9, 1977; The Order of Tokyo High Court dated May 27, 1981

⁷ Order of Tokyo High Court dated Dec. 19, 1978; The Judgments of the Supreme Court dated Mar. 24, 1983 and Mar. 27, 1984

diminished.

From the above, if a collision or grounding suffered a ship and she first made temporary repair to complete her voyage and then went to a dockyard for permanent repair, the first dockyard can enforce maritime lien for a period of one year from the completion of temporary repair, but the second dockyard for permanent repair should exercise possessory lien on the ship at the time of her re-delivery to the shipowner, and if the dockyard re-delivered the ship to the shipowner, the dockyard should enforce maritime lien before the commencement of the next voyage. The same situation will occur in case of a ship construction and delivery.

Recently, the Supreme Court held on Feb. 5, 2002 that apart from maritime lien provided in Article 842 of *Commercial Code*, the dockyard could enforce lien in general which is provided in Articles 320 of *Civil Code* (*Law No. 89 of 1896*). This lien in general is admitted for a person who preserved a movable (personal property) on that movable property; for instance, for the watch repairer on repaired watch even after he re-delivered the watch. The ship is not a real estate, but is given by laws a special legal position, by which a ship can be registered and mortgaged. Japanese scholars and practitioners have long discussed if those lien on movables could be enforced on ships. There are many issues even if the Supreme Court's judgment should be applied to ship's arrest case. For instance, it is not confirmed whether the dockyard can arrest a ship by the same way of arrest as for maritime lien. Also the issue is which of mortgage or lien in general has preponderance in distribution of auction sales proceeds, while lien in general is in any event behind maritime lien (Article 392(2) of *Civil Code*). By the said Supreme Court's judgment, the case was returned to the court of the first instance, and would go to the Supreme Court again, when the Supreme Court would confirm or overturn its former judgment. I could not easily make its prospect. By that judgment however, the dockyard has obtained a very strong tool for their recovery of repair fees from the shipowners, since lien in general on movable will last long except in case that movable is delivered further to a third party.

(k) Port and other due

Article 842(3) of *Commercial Code* gives maritime lien for claims for tax and other dues in connection with the voyage. Except one year time limit (Article 847(1)), this

maritime lien will be enforceable even after the completion of the voyage.

(l) Wages

As mentioned earlier, Article 842(7) of *Commercial Code* grants the crew's claim against the shipowner arisen out of their employment contract. Please note that the provision gives it only to the crew's claims under employment contract. In typical case of unpaid wages, the employment contract providing for the wages is made between the crew and a manning company and the manning agreement between the manning company and the shipowner sometimes via management company. If salary is unpaid, the crew could arrest the ship, but the manning company who paid salary to the crew could not arrest the ship with maritime lien for its claim against the shipowner or the management company, since maritime lien is not given to it in Article 842(7) of *Commercial Code*. The crew's claim with maritime lien of course include the cost for repatriation and social insurance contribution, as well as the claims for personal injury and death in accordance with the employment contract, and in case of claims not under the contract, the maritime lien under Article 95 of *Limitation Law* would arise.

(m) Disbursements

Often, the charterer, the shipper or the agent make disbursements for the ship's master in connection with her operation and voyage. Whether those claims are attached with maritime lien is whether those costs are disbursed for continuation of the voyage or for preservation of the ship and her equipments at the last port. Many sorts of the agency fees and disbursement are not within that category, and Japanese practitioners always have to work on categorising each items of the agency's claims to those with and without maritime lien.

(n) Insurance premium

It is submitted that the insurance premium is the cost necessary to continue the voyage she is engaged, and thus given maritime lien by virtue of Article 842(6) of *Commercial Code*. Here is the same issue referred to in the above (j) for supplies. Due date for the premium in relation to the voyage would be an essential factor.

(o) Commission, brokerage and agency fees

Those cost would not be considered as within Article 842(6) of *Commercial Code*. However, it might be considered, depending on the case whether the agency fee is the cost necessary and incidental to arrange repairs, supplies, etc., in such case, the agency fee or its part is granted with maritime lien. Otherwise, the agent shall arrest the ship in way of provisional attachment. Maritime lien would not be granted to the commission or brokerage.

(p) Disputes as to ownership or co-ownership

I could not imagine any case in which maritime lien is granted to these claims in accordance with *Commercial Code*, *Civil Code*, *Limitation Law* or *COGSA*. Maybe, only the cases in which arrest of ship in way of procedure for enforced auction sale is the case where there is an agreement certified by the notary public, which includes one party's covenants to accept the enforced auction sale of his asset including ships immediately upon having the other party's demand (Article 22 of *Civil Execution Law*), besides a case where the claimant has obtained the judgment.

(q) Mortgage or hypothèque

As mentioned on the top part of this paper, the mortgagee can arrest the mortgaged ship to pursue enforced auction sale based on mortgage with a certificate of notary public or a certificate of registry.

(r) Sales of ship

Article 842(8) grants maritime lien on ship to the claims arisen out of her sales, construction or equipment but only before she has not commenced the voyage after her sale or construction. Thus, the time limit for this maritime lien is short after the delivery. The Supreme Court's decision mentioned above may give the seller or the construction yard more room to arrest a ship in way of enforced auction sale. Articles 321 and 311 of *Civil Code* gives the seller lien in general on a movable. Apart from unstability of the Supreme Court's decision, this lien will vanish when the movable is delivered further to a third party, which often is made in ship building or sales cases.

3 Procedure

(a) Court

The court having its venue where a ship is located has the jurisdiction over the case for arresting ship. If one follows this jurisdictional rule strictly, the claimant might have difficulties to find enough time upon ship's arrival at a port to apply for the arrest order, obtain the arrest order and go to the ship with the sheriff to execute the arrest, if taking account of modern ship's short stay at the port. *Civil Execution Law*, thus, sets up additional jurisdictions for the arrest order, by which the district court in which venue the high court is located has jurisdiction over the arrest case, for instance Tokyo Nagoya, Osaka, Hiroshima, Sendai, Sapporo, Fukuoka district courts has such jurisdiction. In addition, the claimants could apply for the arrest order to those courts before the ship is coming to certain ports in Japan. If the arrest order is issued by such district court, the claimant could arrest the ship when she will come to any Japanese port but within 2 weeks after the arrest order is issued.

Further, in practice, the court would in most cases informally accept the application for arrest order before the ship is coming to the port, and start review and inquiry to the claimant, by which the claimant could find whether the court would issue the order or would reject the application, or if there is any short of documents which the court think it necessary to be produced.

(b) Governing law for the maritime lien

The procedure of arrest or provisional attachment is made in accordance with *Civil Execution Law* or *Civil Preservation Law*. The court will check whether maritime lien exists on the claimant's claim, or in provisional attachment case, whether the claimant has valid claims against the asserted debtor and that debtor owns the ship to be attached. The prevailing scholar's opinions and the judgments publicized on the case report⁸ say that the maritime lien should exist under the law of flag and the law to be applied to the claim, on which the claimant asserts the maritime lien is granted.

⁸ The Order of Hiroshima High Court dated Mar. 9, 1987; The Order of Takamtsu High Court dated Apr. 30, 1985, etc.

However, it has been criticized, as the court should not take into account the law of flag, which is very often only a flag of convenience. It is submitted that the law of a place where the arrest is being made shall be applied. The practice of the court however seems that the court reviews Japanese law as *lexi fori* at least⁹. In any event, the practitioner should prepare to show that the law of flag admits the maritime lien the claimant will assert. Normally, we are submitting the relevant provisions of the law and the lawyer's opinion. However, in these days, ship's flag tends to be an unfamiliar country where no quick actioned lawyer is available, which be an arrestor's headache.

(c) Arrest of ship ready to sail

The Japanese law prohibits to arrest a ship which is ready to sail. What is the situation of "ready to sail." The completion of loading/discharging cargo and bunkering would not be enough. The port authority's departure permit should be made, the engine should be stand-by, the pilot already come aboard, and the last line should be let go. There is a court decision that a ship hove up anchor should be considered as "ready to sail"¹⁰. In practice, this would not happen in most cases. In most cases, the arrestors contacted the port authority and the coast guard and inform them of their intention to arrest ship and the issuance or within-one-hour issuance of the arrest order. We contacted the agent to advise the same, and the agent could not help but move to let her receive the arrest order smoothly.

(d) Arrest of sister or associated ship

A sister or associated ship arrest can be made in Japan in the way to apply for provisional attachment. The claimant has to prove that the wrongdoer or its employer owns the sister ship to be arrested.

Arresting a pure sister ship is easy. If a ship AA collides with a ship BB, and if a corporation A owns AA and another ship AB, a corporation B owning BB could arrest AA in way of enforced auction sales and AB in way of provisional attachment. Copies of Lloyd's Register of Ships to show A's ownership of AA and AB would be

⁹ The Order of Tokyo District Court dated Dec. 15, 1992

¹⁰ The Order of Osaka High Court dated Mar. 6, 1998

enough for the court to issue the provisional attachment order.

If in the same case A owns C, a corporation registered in flag of convenience country, and C owns a ship CC, the claimant should produce evidence to show A's ownership and control of C and C's ownership of CC. The latter can be made by Lloyd's Register of Ships or a certificate of ship CC's registration. However, the former part involves the assertion of piercing a corporate veil of C, and the claimant should produce evidence to show that A owns the whole shares of C and the directors of A are same as C's. In some of flag of convenience countries, it is extremely difficult to get the evidence showing the shareholders, and sometimes even the directors. Japanese court sometimes declines to issue the provisional attachment order, if the claimant's proof on the equity ownership of C is indirect, circumstantial or informal, since in any event, the property to be attached shall be proved to be the property owned by the wrongdoer or his employer, A in this case.

What will happen if A is owned by D corporation and D owns C, which owns CC? Though the claimant has to establish D's ownership of C as mentioned above, the level of the proof or evidence to show D's ownership of A could be at lower level, since this is not the issue of the ownership of the property to be attached but the one as to who is an actual employer of the wrongdoer, who shall be responsible for a collision. It would satisfy the judge if the claimant presents with indirect or circumstantial evidence to show that D controls A and D in its name is doing the business, utilizing AA. However, the low leveled proof may raise the amount of the security, which the judge determines at his discretion and which the claimant shall submit to receive the provisional attachment order. The difficulties mentioned in the previous paragraph might be overcome if the claimant could assert that A's director is at fault in supervising the crew of AA or maintaining AA and that B is owned by A's director. It all depends on the case.

(e) Arrest procedure in practice

-- Pre-application stage

Find if and when and where a target ship will come to some port or ports in Japan and how long she will stay there. Review if the opponent could or would quickly offer the security to satisfactorily secure your claims or would choose to submit the

security to release the ship, or if they might, or could not help but, choose to leave the ship to the subsequent procedure for enforced auction sales. The length of arrest before release would affect the total cost of arrest action, since immediately after the arrest, the court will request the arrestor to deposit the estimate cost to keep the ship in the port, such as the berth charge, waters, provisions, seamen's or custodian's crew salary if the arrest goes long, and the custodian's fee. Though it depends on the port, berth and ship conditions, the claimant should submit the deposit of around US\$20,000 to 30,000 as the first deposit to the court within a week or two after the arrest, though of course this cost shall have the first priority over all other claims.

In case the arrest is expected to last long, estimate the cost to keep the ship in the port and the cost of the other expenses, for instance, to disembark the present crew and embark the custodian's crew, if necessary. Check if and with how much premium the arrestor could insure the arrested vessel.

Drafting the application itself would not be difficult job, but preparation of evidence sometimes need time, since all evidence should have a translation to Japanese language. The power of attorney is necessary, but does not need to be notarized, which some other country's court will demand. The certificate of corporate registry is also to be prepared. Japanese court demands such certificate to show identification of the name of the corporation, address and the representative director. Sometimes, proof of the authorization to one of the officers to sign on the power of attorney is necessary, since the name of the authorized person's position in a corporation in some countries does not seem to have such a position from Japanese eyes.

The claimant should prepare the appraisal of the ship's value, which will help the judge to determine the amount of security.

-- Application, order and arrest procedure

As mentioned earlier, the court will accept an informal application for arresting ship before the ship comes to the port. The attorney for the arrestor should contact the sheriff as earlier as possible, since they are not so many number and terribly busy always. The attorney should check if some of the sheriff belonged to the court will have time to pursue the arrest. The stamp duties for the application for enforced

auction sales are inexpensive, like US\$25. Inquiries and discussions are mostly made through the court clerk. Not so often, but sometimes the court judge will have a meeting at his room with the attorney to have oral explanations.

Once the judge finds the application in order, he will issue the order to commence enforced auction sales or to take the certificate of the ship's nationality and other documents. The sheriff will go to the ship, and take the certificate of the ship's nationality and other several documents such as the radio certificate and tonnage certificate. Without them, the ship could not leave the port. Of course, the arrest order says that the ship should not leave the port.

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 ship'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.

(f) Release from arrest

In case the interests of the arrested ship offer a certain security and the claimant accepts it, typically in case of arrest of opposing ship after the collision and when the club of the arrested ship issues its letter of undertaking, the claimant could withdraw the arrest application with the approval of the debtor/shipowner.

Not through the above, the arrested ship's interests could take an action to object against the claim and the enforced auction sales procedure, and with such an action,

could apply for the stoppage of the auction sales procedure. The court, almost all times upon having the application, will order to stop the auction sales procedure with its request to the applicant to submit the counter security to the court. The amount of security is equivalent to the amount of the claim on which the arrest was made. 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. Upon receiving the order to stop the enforced sales procedure, attorneys for the arrested ship will run to the sheriff to get return of the certificate of ship's nationality and other documents, and immediately pass them onto the ship to enable her to leave the port, by which the ship would suffer the minimum detention.

The other types by which the ship could be released is the order or judgment to order to stop the arrest, provisional attachment and enforce auction sales procedure. This may come from the limitation proceeding or the bankruptcy proceeding. Article 23 of *Limitation Law* provides for the limitation court's discretion to order the stoppage of the arrest, provisional attachment, injunction, auction sales procedures against the assets of the applicant and beneficiaries of limitation proceedings. *Ship Oil Pollution Damage Compensation Law* and *Bankruptcy Law* have similar provisions. However, it takes time for the court to order such stoppage, since the court having the application for limitation proceeding shall review if the applicant satisfied the requirements for limitation proceeding, the amount of the fund and the other factors. Rather than doing so, the interests of the arrested ship could be quick in releasing the ship by the way mentioned in the previous paragraphs.

(g) Jurisdiction on merit

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 arrest ship, and at the same time to bring a suit against the defendant before the same court. This method would also give the claimant a merit to shorten a period to serve the letter of complaint overseas by serving it to the master of the ship if he was involved in the cause of the claimant's action. Article 713 of *Commercial Code* provides, "The master of a ship when she is out of the port of registry shall have the authority to take any and all legal and non-legal actions

necessary for the voyage." The scope of the application of this Article has not yet been fully examined by the court¹¹, but it is sure that the master at the first port of call after the collision has an authority to receive not only the arrest order but the letter of complaint with respect to the collision claim.

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. In addition, the same Article provides for the court at the port of ship's registry over the claims against the shipowner or the other persons who use her regarding the ship or her voyage (para 6); for the court where the ship is located over the claims based on mortgage, lien or other hypothèque on the ship (para 7); for the court where tortious act was made over the claims arisen out of that tortious conduct (para 9); for the court at the first port of call of the claimant's ship over his claim arisen out of a collision or the other accident at sea (para 10); and for the court where the salvage operation was made or where the salvaged ship first reached over the claim regarding salvage (para 11).

Of course, these options 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 arrest of ship in way of enforced auction sales, that auction procedure will automatically be forwarded, unless the defendant takes action to object against the arrest and auction procedure or the limitation or bankruptcy court orders the stoppage of the same procedure. If the defendant takes such actions, the court of the same place will keep hearing the case, though often the parties would agree to the transfer of the case to the court of more convenience, since a port of arrest action may often be very inconvenient for attorneys for both parties. In case the limitation or bankruptcy court orders the stoppage of the arrest and auction procedure, the claimant still has an option to choose the court of a different place for his suit.

¹¹ see 2 (j) above re meaning of "voyage".

However, the limitation or bankruptcy court might issue an order to stop such litigation. This is the matter to be more properly treated in the topic of the limitation procedure.

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 factors 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 keep the ship until his action will reach to a judgment. By the judgment (please see the top of this Article), the provisional attachment procedure will be replaced to the enforced auction sales procedure upon the claimant's application therefor.

(h) Auction procedure

To keep the arrested ship safe and to avoid deterioration of her condition and value, the claimant can apply to the court to appoint the custodian. The custodian's work varies, depending on the ship's nature and condition, the port condition and various other circumstances. Until the completion of the auction, the cost of keeping the ship and the custodian fees should be disbursed by the claimant, who should deposit sufficient money to the court and the court will make payment to the custodian for his own fees and his payment to the other people, such as the port authority, the supplier, the repairer, the seamen. The court will sometimes appoint the company doing the agency business at the port, but the claimant might be encouraged to ask the court to appoint the other person as recommended who has experiences in

keeping the ship under arrest and whom the claimant could easily liaise with, since in any event all the cost would come to the claimant and the local company doing the agency business does not have much incentive to save the cost, while they often do not have experiences in this sort of work.

The court then set the minimum bid price and the auction date. Japanese courts are always busy, and there are many auctions every day for real estates and personal properties. Japanese courts are not flexible in changing the order of auctions, depending on deterioration of the properties or their maintenance cost. Besides very exceptional cases, even the earliest, there would be three months minimum until the first auction date. If there is no bidder who meets the minimum bid price at the auction, the second auction date will be set in an interval of the similar 2 – 4 month period.

The minimum bid price is decided based on the appraisal. The court appoints the appraiser, but again the claimant could recommend the court to appoint a certain expert, who maybe best experienced, quick and reasonably priced. The claimant, its attorneys and the experienced appraiser are in the better position to forecast what kind of bidders with how much price would be interested in buying the ship. They could discuss the minimum bid price with the court, which would affect the total cost for the auction, if take into account the interval between the first, second and third auction dates.

Besides the auction, the claimant could find a buyer outside of the auction, and upon having the approval of the mortgagees and the other claimants who submitted their claims before the court for a period set forth by the court, as well as the debtor and the shipowner, the claimants could withdraw the procedure. The shipowner will sell the ship to a buyer, and the sales proceed will be distributed in accordance with the agreement. The private sale is usually quicker with less cost, but will have a risk that the shipowner could be claimed by the other claimants who have not submitted their claims before the court, and the buyer might receive the other arrest action.

The auction is simple, which is held at the court room. The bidders put their bid into a box. It is a five minute job, and within the day, the court could disclose the result. The successful bidder should submit the cash deposit of 10-30 percent of his bid price within a short period like a week, and if he fails to do so, the deposit is

confiscated and will be added to the amount to be distributed.

(i) Distribution of sales proceed

The sales proceed derived by the auction sales will be distributed to the claimant who arrested the ship (or in case there is the prior arrest or provisional attachment, those who applied for the arrest of the ship and accepted it by the court), the mortgagees, the claimants who submitted their claims before the end of the period which the court determined and made public notice. No creditors in general could participate into the procedure as the claimants. The claimants who could submit their claim for distribution are those who obtained the judgment of the kind by which the claimant could arrest the ship (please see the top of this article), those who have maritime lien (and based on the recent Supreme Court judgment, who have lien in general), as well as those who made provisional attachment prior to the claimant's arrest and auction sales procedure. The distribution shall be made in the following order (Article 844(1) and Article 842).

- (i) *cost incurred in connection with the auction sales of the ship after the commencement of the enforced auction procedure (Article 842 (1))*¹²
- (ii) *cost to maintain the ship at the last port (Article 842 (2))*¹³ --- see 2 (j) above
- (iii) *tax and the other dues for her voyage (Article 842 (3))* --- see 2 (k) above
- (iv) *pilotage and towage (Article 842 (4))* --- see 2 (i) above
- (v) *salvage and general average (Article 842 (5))* --- see 2 (c) (d) (h) above
- (vi) *claim arisen out of necessity to continue her voyage (Article 842 (6))* --- see 2 (j) (m) (n) above
- (vii) *crew's claim under the employment contract (Article 842 (7))* --- see 2 (b) (l) above
- (viii) *claim arisen out of ship's sales, construction, equipment but before her departure and claim for her equipments, provisions or bunker for her last voyage (Article 842 (8))*
- (ix) *claim based on Japanese COGSA or Limitation Law or Ship Oil Pollution Damage Compensation Law* --- see 2 (a) and (c) to (g) above

¹² Article 842 (1) This cost means the cost incurred by the court during the procedure. Paying this cost first is provided in Civil Execution Law (Articles 189, 121, 63 (1), 116 (2)), and thus Article 842 (1) for this cost is meaningless.

¹³ This cost means one at the port where the ship is arrested and became under the auction procedure, by which the maintenance cost before the auction procedure will be paid next to the court cost.

- (x) mortgage --- see 2 (q) above
- (xi) claim with lien in general --- see 2 (j)(r) above mortgage --- see 2 (q) above

note: If several claims are categorized as those of the paragraphs (i) to (viii), which raised in more than one voyage, those arisen in later voyage have preponderance over those arisen in the former voyage (Article 844(3)). If several claims categorized in the same paragraph (iv), (v), (vi) or (vii) are arisen in the same voyage but in different time, the claim arisen later has preponderance over the one arisen former (Article 842(2)). Otherwise, several claims categorized in the same paragraph shall receive distribution in proportion of the amount of their claims (Article 842(2)).

The court will develop the distribution table and if there is no objection from relevant parties, the sales proceed will be distributed. Please do not imagine your daily work speed, for instance: prepare excel sheet distribution table before the auction sales, and complete the table on the day next to the completion of the delivery of the ship, and distribute cash within a week. Again, Japanese judge and court clerk are very busy, and it would take a considerable period of time before you get cash from the court.