Maritime Lien under the Law of P.R. China

In the previous issue of Sea Venture, there was an overview of the types of maritime and statutory liens which arise in England and Wales. This article discusses the position in China and particular issues to be aware of in this jurisdiction when enforcing maritime claims.

Definition and classification of maritime liens

There is no general action in rem under Chinese law. In order to arrest a ship regardless of its ownership, the claim against the ship needs to give rise to a maritime lien. Otherwise, if the claim is an ordinary maritime claim, the ship may only be arrested if it is the property of the person liable in personam. Maritime liens are provided for together with ship mortgage and possession liens under the Chinese Maritime Code (CMC). The definition of a maritime lien under the CMC is that it is "the right of the claimant to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim." When it comes to the priority rule, a maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over a ship mortgage.

According to Article 22 of CMC, the following five categories of claims give rise to maritime liens:

(a) claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement;
(b) claims in respect of loss of life or personal injury occurred in the operation of the ship;
(c) claims for ship's tonnage dues, pilage dues, harbour dues and other port charges;
(d) claims for salvage payment;
(e) claims for loss of or damage to property resulting from tortuous acts in the course of the operation of the ship. (It should be noted that if a ship carrying more than 2,000 tons of oil in bulk as cargo has valid oil liability insurance coverage or other financial security, those claims for oil pollution damage caused by the carrying ship are not attached with maritime liens even if it falls under category (e).

Priority rules of maritime liens

Maritime liens have a unique set of priority rules that are used when comparing one lien to another. In this regard, where there is more than one maritime lien attaching to a ship, the CMC provides that the maritime liens in different categories shall be enforced in the order from (a) to (e) as listed above. However, if salvage takes place after the incident giving rise to maritime liens in category (a) to (c), payment of the salvage claim will take priority over category (a). This is because if the ship is not salvaged, enforcing maritime liens in category (a) to (c) would be impossible.

Accordingly, where there is more than one salvage claim, the salvage which takes place later in time will take priority in the payment order. However, maritime liens within the same category of (a), (b), (c), and (e) will take the same sequence. Where there is more than one maritime lien falling into the same category (except for category (d) as mentioned above) and the value of those claims exceed the proceeds of sale, the claims falling into the same category of maritime liens will be compensated pro rata.

Discharge and distinction of maritime liens

A maritime lien attaches to a ship from the time of the incident and continues to be binding until it is discharged. A maritime lien can be discharged in the following circumstances:
- When payment of the claim has been made;
- In the case of transferring the ownership of a ship, failing to enforce the maritime lien within the 60-day period of a public notice issued by a court at the request of the purchaser;
- Chapter 11 of the Maritime Special Procedures Law of the PRC (MSPL) deals with procedures on public notice for enforcement of maritime liens. According to Article 129 of the MSPL, a purchaser has the option to choose whether or not to apply to court for publication of the ship transfer. If the purchaser applies for publicity, upon expiration of the 60-day period, the maritime court shall, upon application by the purchaser, make a judgment to declare that no maritime liens are attached to the transferred ship. Otherwise, maritime liens shall survive the transferee's sale of a ship.
- A maritime lien has not been enforced within one year since the existence of such maritime lien arising.
- The one-year period is applied only to maritime liens and does not apply to the usual time bars applicable to maritime claims. Furthermore, the one-year period is not subject to interruption. For example, the time bar for claims arising from ship collisions is two years under CMC. If the claimant fails to enforce the maritime lien by way of arresting the ship within the one-year period, the maritime lien shall be discharged, however, the underlying maritime claim is still protected by the two-year limitation period.
- The ship in question has been the subject of a forced sale by the court.
- In this regard, the court will put a notice on the forced sale and maritime liens are required to be registered to court within 60 days of the court's notice on forced sale is published by the court.
- The ship has been lost / destroyed.

Enforcement of maritime liens

Maritime liens are enforced by making an application for a ship arrest to the Chinese maritime court located at the place where the subject ship is berthed (Article 26 of the CMC). Upon expiration of the 30-day period of arrest, if the respondent fails to provide security, the claimant may initiate a lawsuit or arbitration (Article 29 of the Chinese Maritime Special Procedures Law) and then apply to the maritime court for auction of the ship.

The Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Arrest and Auction of Ships (Provisions) came into force on 1 March 2015. The Provisions include rules which pave the way for enforcement of maritime liens, these are summarised below.
Maritime lien and limitation fund for maritime claims

For those claims which give rise to a maritime lien\(^1\) and also are subject to maritime liability limitation, once a limitation fund has been established, the claimant would no longer be able to enforce its maritime lien. This means that once a limitation fund is established, maritime liens lose the privilege of priority and will be paid out according to the sequence as provided for under the limitation fund. In the judgment rendered by Ningbo Maritime Court (NMC, case No: (2011) Yong Hai Fa Wen Quan Zi No1), MV "269" collided with MV "168" causing MV "269" to sink. The inter-ship liability ruled by NMC was 50-50. Following the accident, MV "168" established a maritime liability limitation fund. Owners of cargo on board MV "269" initiated claims against MV "168" for cargo losses and requested NMC to confirm that their claims were attached with maritime liens. The NMC ruled that the cargo claim should be paid through the maritime limitation fund as the maritime liens which attached to such claims were discharged.

For completeness, claims in category (a), (c) and (d) are not subject to maritime liability limitation. Therefore, for these claims, establishment of a limitation fund would not prejudice the Claimant’s right to enforce maritime liens against the concerned ship.

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\(^1\) See Article 30 of the CMC: "The provisions of this Section shall not affect the implementation of the limitation of liability for maritime claims provided for in Chapter XI of this Code." Where enforcing a maritime lien conflicts with a maritime liability limitation fund, we are of the view that enforcement of maritime lien should give way to maritime limitation fund.