

Answers to Questionnaires by Japanese Maritime Law Association

The followings are Answers about the position of Japanese law to the Questionnaires. Relevant provisions of the legislations quoted herein below shall be specified in the Schedule entitled “Relevant Provisions of Japanese Legislations” annexed hereto.

1. Japan has not ratified any of the listed Conventions. There is no legislation or court system specially designed for admiralty jurisdiction in Japan. Procedures for the arrest of ship are prescribed by Japanese domestic legislations; such as Civil Preservation Act and Civil Execution Act, both of which are of general feature applicable to any kind of the attachments.
2. Since Japan has ratified none of those Conventions and procedures for the arrest of ship fall within the scope of application of Japanese domestic legislations (such as Civil Preservation Act and Civil Execution Act) as stated in Question 1 above, Model Rules to be drawn by CMI are not necessarily required.

Be that as it may, CMI Model Rules, if any, would serve as the reference to implement and interpret particular provisions of Japanese legislations.
3. When roughly categorized, ship is to be arrested in the following three instances: (i) Provisional Attachment, (ii) Public Auction to execute Security Rights (such as Maritime Lien and Ship’s Mortgage) and (iii) Compulsory Execution. The above (i) is the attachment as preservative measure with the object to keep the status quo of the property owned by debtor in order to preserve enforcement of the claim in future, whereas the above (ii) and (iii) are the attachments to enforce the claim by way of selling the attached property through public auction with the aim of having the claim satisfied by the sales proceeds.
4. (a) The claims which create Maritime Liens under Japanese law are provided in: Article 842 of the Commercial Code, Article 95 of the Act on Limitation of Shipowner Liability, Article 40 of the Act on Liability for Oil Pollution Damage and Article 19 of Carriage of Goods by Sea Act.

(b) Further, it is also possible to arrest ship by virtue of Lien on movables, which are provided for in Civil Code (Article 321 of the Civil Code).
5. There has been great amount of controversy over conflict law issue of Maritime Liens (in more particular, the issue of which law shall be applied to recognize their existence and effectiveness), with

various of schools of theories which are revealed in court's judgments and scholar's opinions; e.g. law of the ship's flag, *lex fori*, law of place for occurrence of cause and cumulative application of both laws governing the right in rem and the claim to be secured.

From a legal practitioner's view point, it is welcomed that the theory of *lex fori* has been dominant since 1990's as observed in several judgements rendered by courts of the first instance. Having said that however, there find some other recent judgements adopting the cumulative application of *lex fori* and the law to govern secured claim, the cumulative application of the law of the ship's flag and the law to govern secured claim, the cumulative application of law of place for occurrence of cause and the law to govern secured claim. In conclusion, this conflict of law issue has not been settled in Japan. It is, however, noted that many practitioners in Japan have exercised Maritime Liens in reliance upon *lex fori*, that is, based on only Japanese law. On this basis, all emerging issues, including release of a ship from arrest, have been negotiated under the common perception and settled much easier and quicker among the parties concerned in Japan.

6. With regard to Provisional Attachment, *ex parte* procedures are usually adopted to issue a writ of arrest, which may involve certain risk of an erroneous court decision; therefore, as a condition to issue an order of Provisional Attachment, counter-security is usually required to be deposited by claimant seeking an arrest. Meanwhile, as for arrest by way of enforcing the Security Right or Compulsory Execution, such counter-security is not required (For more details on counter-security, see the Answer to Question 16.)
7. As for the release from arrest of ship, there is a system in which arrest by way of Provisional Attachment is lifted; that is to say arrest can be lifted by depositing the money in the sum designated by the court, normally being equivalent to the claim amount plus interest and costs to be preserved (Article 22 and 51(1) of the Civil Provisional Remedies Act). Please be noted that the deposit shall be allowed in cash only.

In the meantime, as for the execution of Security Rights (Maritime Lien, Ship's Mortgage) and Compulsory Execution, there is a system for the release from arrest of ship in such manner as revoking the compulsory auction by way of providing a guarantee" (Article 117 and 189 of the Civil Execution Act)
8. Japanese law does not have such system similar to Caveats against arrest. There is no system in Japan, which serves to avoid arrest of ship beforehand.
9. The court itself does not take out any special insurance for risks involving ship under arrest. However, in practice there were cases, in which court bailiff and/or custodian (who was appointed by a

court bailiff to keep custody of ship under arrest) took out P&I insurance by its own name and expense.

In the meantime, as hull/machinery insurance is to be maintained in the name of the owner of arrested ship, and therefore neither court bailiff nor custodian nor even court in charge has any insurable interest in hull/machinery of the arrested ship. Therefore, neither of them would be in a position of taking out hull/machinery insurance in their respective name. Accordingly, during the period while ship is under arrest, hull/machinery insurance would be maintained in the name of the owner but at the cost of the claimant who sought an arrest in the first instance on the basis that such disbursement for insurance premiums will be later recouped by the sales proceeds of the ship in question.

10. Since enforcement of the State Redress Act, there were cases, *albeit* quite limited number, in which conduct of court bailiff was held to be wrongful and constitute tort, on which ground the State Government was found liable for the damages. In order to hold the State liable, it is necessary to establish that the state officer's conduct amounts to tort, which is in fact very difficult to be established.

Normally, arrested ship remains in the custody of her owner, but in case that there finds some risk that the owner will let the arrested ship go away somewhere in defiance of its obligation to stay her or do something wrong to reduce value of the arrested ship, the court may deprive the owner of its possession of the ship and place her under its control, for which purpose the court may appoint a custodian who shall keep custody and maintain the condition of the ship. Therefore, in a case where loss of or damage to the ship is caused by tortious conduct of a custodian while the ship is under his custody, the custodian or his employer may well likely be sued for its responsibility in tort claims. If the said custodian is the court bailiff, a civil servant belonging to the Government, then, the State Government might be sued under the State Redress Act.

11. There is no statutory provision specifically dealing with liability for wrongful arrest under Japanese law. Liability for wrongful arrest shall be based on tort as provided for in Civil Code.

12. It is the settled view that in order to hold an arresting party liable on account of wrongful arrest, the arresting party's conduct shall constitute tort. However, there is a dispute as to whether negligence is required to put blame upon the arresting party or liability of the arresting party shall be of absolute nature without negligence. In this respect there is the Supreme Court judgment dated December 24, 1968, holding to the effect "in the case where an order for Provisional Disposition (note: which is similar to Provisional Attachment) was revoked for the reason that it was wrongful owing to non-existence or invalidity of the alleged claim to be preserved, the arresting party, who willfully or

negligently applied for petition of Provisional Disposition, shall be liable for compensation of the damages of the other party resulting from execution of such Provisional Disposition by virtue of tort provision of Article 709 of Civil Code; in the generality, the claimant shall be presumed to have been negligent except for special circumstances in the event that an order for Provisional Disposition was revoked at objection procedure or in the event that the claimant's claim was dismissed by the final judgment in the suit on the merits; it should be however noted that the revocation of Provisional Disposition does not, *per se*, constitute such deemed negligence if that application for Provisional Disposition was made in good faith on reasonable ground". Having ruled as such, Supreme Court confirmed its consistent line of the thoughts that "negligence" is the constituent to hold a claimant resorting to such arrest action responsible for the damages of the other party on account of wrongful arrest.

Although there are a few judgements adopting theory of absolute liability (as in the judgments of the Tokyo District Court on May 30, 1970 and of the Osaka District Court on May 28, 1980) after the above Supreme Court judgment, in practice this matter has been dealt with on the theory of negligence liability.

In light of the judicial precedents above and the prevailing practice in Japan, rejection of the claim in the judgement on the merits does not, *per se*, hold the claimant liable for the arrest action.

Having said that however, as negligence may well be presumed in the event that the claim is dismissed in the judgment on the merits, the claimant would owe burden to prove that the action was made in good faith on reasonable ground in order to overrule such presumption of negligence.

The same logic of presumption of negligence as mentioned in the above in relation to Provisional Disposition/Attachment can be applied to the cases of enforcing Security Rights and Compulsory Execution.

13. It is understood that the question addressed here would be whether a claimant would be liable in case where it arrested a ship by mistakenly assuming that a debtor owned the arrested ship but it actually did not.

As stated earlier in Question 12 above, negligence would be presumed when the alleged claim for which an arrest was effected is dismissed by the judgment on the merits and the onus is shifted to an arresting party to prove that the arrest action was made in good faith on reasonable ground to establish immunity of the arrestor. Given that it would be an elementary error to mistake a shipowner, unless there is good reason to believe that the debtor was an owner of the ship in question, the claimant resorting to such arrest action would likely be held liable for the damages caused thereby. In this connection, if an issue of piercing corporate veil is involved in, then, who owned the arrested ship would not be a simple issue.

14. It is understood that the question addressed here would be whether a claimant shall bear liability for the damages in the event that Provisional Attachment or Security Rights are enforced for the grossly exaggerated amount of claim.

In relation to Provisional Attachment a claim of grossly exaggerated amount affects (i) the judgement of the court to evaluate degree of urgency in the sense as to whether it is necessary to take such preservative action on the part of the claimant and (ii) the degree of difficulty for the other party to release the arrested ship from arrest. Whilst, in relation to enforcement of Security Rights a claim of grossly exaggerated amount affects the degree of difficulty for the other party to release the arrested ship from arrest.

As for Provisional Attachment, even if grossly exaggerated amount is claimed, at least certain amount of the claim to be secured is in existence, and given further that counter-security to be deposited by the claimant would become larger in proportion to enlargement of the alleged claim amount to be secured, the fact that the claim amount is grossly exaggerated by itself would not be so decisive factor as leading to conclude that an arresting party shall be liable for the damages on account of alleging such grossly exaggerated amount of claim.

However, in the case where a claimant was imprudent to formulate such grossly exaggerated amount despite in the situation that accurate assessment of the claim could have been possible or in such case where a claimant had an intent of defraud in claiming for the grossly exaggerated amount, the claimant's action would likely be considered to be wrongful and it would be held liable for the damages caused thereby.

In the meantime, as for enforcement of Security Rights, it can be generally said that attachment by the grossly exaggerated amount of the claim would be considered more blameworthy compared to that in case of Provisional Attachment; the reason being that enforcement of Security Rights is the eventual course of action for fulfillment of the alleged claim, so that much higher degree of carefulness and prudence would be required to formulate the claim in accurate manner, failure of which would be more to be blamed. In some cases, such as a ship's collision, the claim amount is calculated as per the apportionment of liability based upon the quantum of the claims. In such case, if the exaggeration is made in assessing the quantum of the claim itself, the above is applied. However, as to apportionment of liability, there would be many arguable points in most of cases. Therefore, the arresting party should not be blamed for taking their own views on apportionment of liability unless that is evidently wrong and groundless.

Therefore, should the claimant be blamed on the foregoing accounts, the damages mentioned in the Questionnaire, such as caused by (i) the extra cost to procure the security, (ii) the delay due to the greater time required to procure the security and (iii) the owner being unable to provide the security

would likely be compensated as having reasonable causal link with the wrongful arrest.

15. With respect to Provisional Attachment, even if a debtor is largely solvent, such as in the case that it owns many other ships, such debtor's financial standing would not, *per se*, operate as bar the claimant from resorting to Provisional Attachment to its ship. For example, having regards that the shipping business is prone to be vulnerable to various external conditions, the possibility would not be completely ruled out that the debtor's financial standing would be suddenly put in jeopardy, particularly in the situation (which is normal situation) that the whole of the vessels owned by a debtor have been fully mortgaged.

On the other hand, in the case of enforcement of Security Rights and Compulsory Execution, a debtor's financial condition does not operate as bar from resorting to the attachment, because if a fully solvent debtor refuses to meet its obligation to pay, no choice will be left with the claimant but to enforce Security Rights or Compulsory Execution for sake of recovery.

16. With respect to Provisional Attachment, it is at the court's discretion whether to require provision of counter-security as condition precedent to issuing the arrest order, and in practice such counter-security would be required in almost all cases. It is discretionary power of the court to fix the counter-security in a proper amount. Theoretically the counter-security should be determined according to the merit of each case and the amount of the claim to be preserved, but that is not necessarily the case in practice. There exists a certain criterion in fixing the security throughout the courts in Japan, which in many occasions mechanically applies to an individual case. This criterion suggests that the amount of the security would be in the region of one-third of value of the claim to be preserved. Meanwhile, as for the case of enforcing Security Right and Compulsory Execution in enforcing Security Rights, no counter-security is required to be posted to obtain a court order for the arrest.

17. Under Japanese law, there are no particular provisions of penalty in either civil or administrative affairs, which are specifically applicable to wrongful arrest.

18. The proceeds to be realized in auction proceedings shall be distributed according to the priority order of the respective claims. Their priority orders are determined, in the first instance by an unanimous agreement among all of the claimants who have made distribution demand, and in case of failure in such unanimous agreement the priority order shall be determined by the relevant provisions of the Civil Code, Commercial Code and any other Acts (Article 85(2) of the Civil Execution Act).

In principle, between a claim secured by mortgage and a no-secured claim, the former shall prevail. Further, between claims respectively secured by mortgage, priority order is determined as per

chronological order of their registration (the older registration has the higher priority); among the non-secured claims they shall be treated equally in terms of priority.

Maritime Lien prevails over other Security Rights. That is, its priority over mortgage is stipulated in Article 849 of the Commercial Code, Article 19(3) of the Carriage of Goods by Sea Act, Article 95(3) of the Act on Limitation of Shipowner Liability and Article 40(3) of the Act on Liability for Oil Pollution Damage, and its priority over other liens is stipulated in Article 845 of the Commercial Code. Moreover, regarding priority among Maritime Liens each other, the Maritime Lien under Article 842 of the Commercial Code prevails over the Maritime Liens under the Carriage of Goods by Sea Act, Act on Limitation of Shipowner Liability and Act on Liability for Oil Pollution Damage (Article 19(2) of the Carriage of Goods by Sea Act, Article 95(2) of the Act on Limitation of Shipowner Liability and Article 40(2) of the Act on Liability for Oil Pollution Damage); and further, regarding priority among the ones under Article 842 of the Commercial Code, it is determined by the order set forth in Article 844(1) of the Commercial Code. It is noted that under Japanese Insurance Law, any claims to be covered by liability insurance shall give rise to a lien over the insurance proceeds payable to the assured once its liability is fixed. This may affect to review the wrongful arrest issue in some cases.

Schedule

Relevant Provisions of Japanese Legislations

Civil Code

(Statutory Liens for Sale of Movables)

Article 321 Statutory liens for the sale of movables shall exist with respect to movables, in connection with the price of those movables and interest on the same.

(Damages in Torts)

Article 709 A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

Commercial Code

Article 842 A person who holds any of the following claims shall have a statutory lien over the ship, its equipment and the freight charge yet to be received:

- (i) the costs for an auction of the ship and its equipment, as well as the costs for the storage of the same after the commencement of the auction procedure;
- (ii) the costs for the storage of the ship and its equipment incurred at the last port;
- (iii) the taxes imposed on the ship in connection with the voyage;
- (iv) the pilotage charge and towage charge;
- (v) the salvage charge and the general average to be borne by the ship;
- (vi) any claims which arise from the necessity of continuing the voyage;
- (vii) any claims of the captain and other mariners which arise from employment contracts; and
- (viii) in the case where the ship has not made any voyage after it was sold or manufactured, any claims which arise from the sale or manufacture and the outfitting of the ship, and any claims which arise from the outfitting of the ship, food and fuel that are required for its last voyage.

Article 844 (1) Where statutory liens held by a ship's creditors conflict with each other, the order of priority of those liens shall follow the order set forth in Article 842; provided, however, that between the claims listed in item (iv) to item (vi) of said Article, the one which arose later shall take precedence over

the one which arose earlier.

(2) Where two or more persons hold statutory liens of the same rank, they shall receive payment in proportion to the value of their claims; provided, however, that where the claims listed in Article 842, item (iv) to item (vi) arose at different times, the one which arose later shall take precedence over the one which arose earlier.

(3) Where statutory liens arose from two or more voyages, notwithstanding the provisions of the preceding two paragraphs, the one which arose from a later voyage shall take precedence over the one which arose from an earlier voyage.

Article 845 Where a statutory lien held by a ship's creditor and any other statutory lien conflict with each other, the statutory lien held by the ship's creditor shall take precedence over such other statutory lien.

Article 849 A statutory lien over a ship may be exercised prior to a mortgage.

Act on Limitation of Shipowner Liability

(Maritime Lien)

Article 95 (1) A person holding a claim subject to limitation holds a statutory lien over the Ship involved in the accident, its equipment, and freight charges yet to be received, as regards that claim.

(2) The statutory lien referred to in the preceding paragraph is next in order of precedence to the statutory lien referred to in Article 842, item (viii) of the Commercial Code (Act No. 48 of 1899).

(3) The provisions of Article 843 of the Commercial Code and the main clause of Article 844, paragraph (2); Article 844, paragraph (3); Article 845; Article 846; Article 847, paragraph (1); and Article 849 of that Code apply mutatis mutandis to the statutory lien referred to in paragraph (1).

(4) Notwithstanding the provisions of Article 847, paragraph (1) of the Commercial Code as applied mutatis mutandis pursuant to the preceding paragraph, if a ruling to commence limitation of liability proceedings is issued prior to the extinguishment of the statutory lien referred to in paragraph (1) and a ruling reversing the ruling to commence the limitation of liability proceedings or a ruling discontinuing the limitation of liability proceeding becomes final and binding, the statutory lien referred to in paragraph (1) extinguishes once one year has passed after the ruling to reverse or discontinue becomes final and binding,.

Act on Liability for Oil Pollution Damage

(Maritime Lien)

Article 40 The claimant of the limited claim pertaining to Tanker Oil Pollution Damage has maritime lien on the ship pertaining to the accident, its equipment and the freight that has not been received.

(2) The lien of the preceding paragraph is next in order of precedence to the lien in item 8 of Article 842 of the Commercial Law (Act No. 48 of 1899)

(3) The provisions of Article 843, the main clause of paragraph 2 and paragraph 3 of Article 844, Article 845, Article 846, paragraph 1 of Article 847 and Article 849 of the Commercial Law shall apply mutatis mutandis to the lien of paragraph 1.

(4) In the case there was a ruling of commencement of the procedure for limitation of liability before the extinction of the lien of paragraph 1, if a ruling to revoke the ruling or a ruling to abolish the procedure of the limitation of liability became final and binding, the lien of the paragraph 1 shall be extinct in one year after the finalization of the ruling notwithstanding the provision of paragraph 1 of Article 847 of the Commercial Law.

Carriage of Goods by Sea Act

Article 19 (Preferential right against ship)

(1) Where a part or whole of a ship has been the object of a contract of carriage for the goods, and the charterer in turn has made a contract of carriage with a third party, those who may claim the compensation for damage to the goods arising within the scope of the master's duties may exercise a preferential right for his claim against the ship and her accessories.

(2) Where there is conflict between the preferential rights under the preceding paragraph and under Article 842 of the Commercial Code, the former has the same precedence to one under Paragraph (9) of that Article.

(3) The provisions of Paragraph (2) and (3) of Article 844, Article 845, Article 846, Paragraph (1) of Article 847 and Article 849 of the Commercial Code shall apply mutatis mutandis to the preferential right under Paragraph (1).

Civil Provisional Remedies Act

(Money for Release from a Provisional Seizure)

Article 22 (1) An order for provisional seizure must specify the amount of money that the obligor must deposit in order to obtain a stay of execution of a provisional seizure or in order to have a provisional seizure that has already been executed revoked.

(2) A deposit of money set forth in the preceding paragraph must be made with an official depository within the jurisdictional district of the district court that has jurisdiction over the location of the court that has issued the order for provisional seizure or the court that executes the provisional remedy.

(Revocation of Execution of a Provisional Seizure by Reason of a Deposit of Money for Release from a Provisional Seizure)

Article 51 (1) If an obligor proves that it has made a statutory deposit of money equivalent to the amount of money specified under the provisions of Article 22, paragraph (1), the court executing the provisional remedy must revoke the execution of the provisional seizure.

(2) Notwithstanding the provisions of Article 12, paragraph (2) of the Civil Execution Act as applied mutatis mutandis pursuant to Article 46, a ruling made under the provisions of the preceding paragraph becomes effective immediately.

Civil Execution Act

(Preparation of a Distribution List)

Article 85 On the distribution date, an execution court shall determine the amounts of the principal of the claim, interest, and any other incidental claims, the amount of execution costs, and the order and amount of liquidating distribution with regard to each of the obligees set forth in the items of Article 87(1); provided, however, that this shall not apply to the order and amount of liquidating distribution in cases where an agreement has been reached among all of the obligees on the distribution date.

(2) In the case of determining the order and amount of liquidating distribution pursuant to the provisions of the main clause of the preceding paragraph, the execution court shall make the determination in accordance with the provisions of the Civil Code, Commercial Code and any other Acts.

(3) On the distribution date, the obligees prescribed in paragraph (1) and the obligor shall be summoned.

(4) On the distribution date, if the execution court finds it to be necessary for determining the matters prescribed in the main clause of paragraph (1), it may interrogate the obligees and the obligor who appeared and examine any documentary evidence that may be examined immediately.

(5) When the matters prescribed in the main clause of paragraph (1) (in the case prescribed in the proviso to said paragraph, they shall exclude the order and amount of liquidating distribution) have been

determined pursuant to the provisions of paragraph (1), a court clerk shall prepare a distribution list on the distribution date.

(6) A distribution list shall contain a statement of the amount of the proceeds of the sale and the contents of the determination of the execution court with regard to the matters prescribed in the main clause of paragraph (1) (in the case prescribed in the proviso to said paragraph, such contents with regard to the order and amount of liquidating distribution shall be the contents of the relevant agreement).

(7) The provisions of Article 16(3) and (4) shall apply mutatis mutandis to the service of a writ of summons upon the obligees prescribed in paragraph (1) (excluding those prescribed in the first sentence of paragraph (1) of said Article)

(Rescission of a Compulsory Auction Procedure Based on Provision of a Guarantee)

Article 117 In cases where the document set forth in Article 39(1)(vii) or (viii) has been submitted with regard to the claim of an obligee effecting a seizure, if the obligor provides, prior to any purchase offer, a guarantee equivalent to the total amount of the claims and execution costs of the obligee effecting a seizure and obligees who made a demand for liquidating distribution by the time of provision of the guarantee (or, if it is after the time limit for a demand for liquidating distribution, by such time limit), the execution court shall, upon petition, rescind the compulsory auction procedure, except for the procedure of liquidating distribution, etc.

(2) When a stay of execution based on submission of the document prescribed in the preceding paragraph has ceased to be effective, the execution court shall implement liquidating distribution, etc. of the guarantee, which has been provided pursuant to the provisions of said paragraph, for the obligees set forth in said paragraph. In this case, the execution court may reclaim any securities that have been deposited as provision of a guarantee.

(3) An appeal against a disposition of execution may be filed against a judicial decision to dismiss the petition set forth in paragraph (1).

(4) The provisions of Article 12 shall not apply to an order under the provisions of paragraph (1).

(5) The provisions of Article 15 shall apply mutatis mutandis to the provision of the guarantee set forth in paragraph (1) and the provisions of Article 78(3) shall apply mutatis mutandis to a realization in cases where the guarantee set forth in paragraph (1) has been provided by a method other than a statutory deposit of money.

(Auction of a Vessel)

Article 189 The provisions of Section 2, Subsection 2 of the preceding Chapter and Articles 181 to 184 shall apply mutatis mutandis to an auction for exercise of a security interest in a vessel. In this case, the phrase "an enforceable authenticated copy of a title of obligation" in Article 115(3) shall be deemed to be

replaced with "any of the documents prescribed in Article 181(1) to (3) as applied mutatis mutandis pursuant to Article 189," and the term "a general statutory lien" in Article 181(1)(iv) shall be deemed to be replaced with "a general statutory lien or the lien specified in Article 842 of the Commercial Code."