

# Protection Measures/Emergency Arbitrator Procedures in CMAC

## Arbitration Rules 2015

Cai Hongda    Huang Chenliang

First of all, it should be mentioned the background of China on protection measures for arbitration. At the very beginning of the Chinese maritime arbitration history, the Arbitration Commission had the right to make preservation of property. There was a regulation by the State Council on 21 November 1958, and it was “Decision of the State Council of the People’s Republic of China Concerning the Establishment of a Maritime Arbitration Commission within the China Council for the Promotion of International Trade”. The Decision regulated: “In cases within the cognizance of the Maritime Arbitration Commission, the Chairman of the Maritime Arbitration Commission may make decision in respect of measures of security and determine the amount and form of the security for the claim. Upon the request of one of the parties, the People’s Court shall enforce the decision referred to in the paragraph in accordance with law”. However, the situation changed since the Civil Procedure Law of China became effective on 9 April 1991. Then, on 1 July 2000, the Maritime Procedure Law of the People's Republic of China became effective, and this law also followed the Civil Procedure Law on the power of interim measures on the courts. Under the state legal frame, CMAC has the protection measures as the following features:

- (1) The protection measures must be decided and enforced by the people's courts, and this generally means the maritime courts have the power in maritime procedure rather than the arbitration tribunals;
- (2) The enforced objects may be property, evidence or the party's act or refrain from action;
- (3) The protected object must be connected with the maritime arbitration case; and
- (4) It is not an independent civil procedure, but it is an enforceable and temporary measure for the tribunal to guarantee the case being impartially and successfully tried. In addition, it is an important measure for the parties to safeguard their own legal rights.

According to the Arbitration Rules CMAC 2015, there are four protection measures: preservation of property; preservation of evidence; maritime injunction; and limitation for maritime claims.

- (1) The preservation of property

In the case of *M.V. "Yu Hua"* on disputes over hire, the claimant (ship owner) applied for a lawsuit to the Shanghai Maritime Court, demanding the first respondent as charterer and the second respondent as guarantor pay for the hire of *M.V. "Yu Hua"*, and in addition applied for the arrest of *M.V. "De Hai"* belonging to the second respondent. The Shanghai Maritime Court accepted the case and made a decision to arrest *M.V. "De Hai"*. The first respondent and the second respondent challenged the jurisdiction, arguing that there was an arbitration clause in the charter party and the court had no jurisdiction over the disputes. The Shanghai Maritime Court, after discussion, held that the arbitration clause was effective, and the second respondent was bound because of volunteering the arbitration clause. The Court overruled the claimant's lawsuit application and ordered the claimant "to submit the evidence with regards to the application for arbitration within seven days from the effective date of the decision, otherwise the court would release preservation of property according to the laws". The claimant submitted arbitration application to CMAC according to the decision and the arrest of *M.V. "De Hai"* was translated automatically into preservation of property in the arbitration proceeding. Article 28 of the Maritime Procedure Law regulates that "The time limit for ship arrest for preservation of a maritime claim is 30 days", instead of the seven days in the above case.<sup>1</sup>

(2) Evidence is necessary in order to testify the validity of a claim and forms the basis for the tribunal to make an award. The conditions of applying for preservation of maritime evidence are as follows:

- (i)The applicant is a party to the maritime claim;
- (ii)The evidence, preservation which is applied for, substantiates the maritime claim;
- (iii)The person against whom the application is made is a relevant party to the evidence preservation which is applied for; and
- (iv)As a matter of urgency, the evidence relevant to the maritime claim might be lost or hard to obtain, unless immediate preservation is resorted to.<sup>2</sup>

(3)The maritime injunction is a special security measure for protecting the party's legal rights. The

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<sup>1</sup> See *Maritime Arbitration Introduction* (Beijing: China University of Social Science and Law Press 2001) pp. 36-37.

<sup>2</sup> See Article 67 of the Maritime Procedure Law of PRC.

maritime court shall order the injunction to act or refrain from action to prevent the legitimate rights and interests of the claimant from infringed in request of the applicant.

(4) The Arbitration Rules of CMAC also has the provision for a limitation fund for maritime claims.

**In the Arbitration Rules 2015, CMAC extends upon “Article 27 Interim Measures” as follows:**

“1. In according with the application law or the agreement of the parties, a party may apply to the Arbitration Court for emergency relief pursuant to the CMAC Emergency Arbitrator Procedures (Appendix III). The emergency arbitrator may decide to order or award necessary or appropriate emergency measures. The decision of the emergency arbitrator shall be binding upon both parties.

2. At the request of a party, the arbitral tribunal may decide to order or award any interim measures it deems necessary or proper in accordance with the applicable law or the agreement of the parties and may require the requesting party to provide appropriate security in connection with the measures.”

This regulation may meet the new trend of international arbitration rules, and it may be used particularly for the parties who decide to apply for foreign laws. However, since the Chinese laws clearly state that only the people’s courts have jurisdiction for security measures for the parties, CMAC cannot make any decision in respect of measures of security and determine the amount and form of the security for the claim. Therefore, it is worthy of discussion on the reality and practice of adopting such a new interim measure without the people’s court permission under the Chinese laws. Dr. Tao Qu made the following comments on the new interim measure of the Arbitration Rules 2015: firstly it may lack legislative ground within mainland China, because it breaks through the current Chinese laws and judicial procedures, and CMAC arbitration tribunals may be hard to use such protection measure, except in Hong Kong, and it would promote CMAC to develop its business in Hong Kong; secondly it shows that CMAC tries to meet the international commercial arbitration developments; thirdly, it is of a surpassing spirit to push forward revision

of the Chinese arbitration law and other laws concerned in favour of the Chinese arbitration closer to the international business.<sup>3</sup> We think the comments are guidable. Since CMAC established CMAC Hong Kong Arbitration Centre in 2014, and there is “ Chapter V Special provisions for Hong Kong” in the Arbitration Rules 2015, including Article 74 “ Interim Measures and Emergency Relief” for CMAC arbitration in Hong Kong, we are confident that such a new and effective measure would be adopted in the arbitration proceedings in CMAC- Hong Kong. If CMAC obtains the successful arbitration experience in Hong Kong, it would benefit the further reform of the Chinese legislation and justice over commercial and maritime arbitration. Now the Supreme People’s Court adoptes more open attitude to support arbitration by some legal explanations, however the Chinese arbitration circles appeal to recover some part of the rights of provisioal measures such as reservation of property for the arbitration tribunals, instead of playing the role passing on only. This is the correct way to guide China maritime arbitration further closer to the world.

Cai Hongda [caihongda@cmac.org.cn](mailto:caihongda@cmac.org.cn)

Huangchenliang [huangchenliang@cmac.org.cn](mailto:huangchenliang@cmac.org.cn)

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<sup>3</sup> Adopted from Dr. Tao Qu’s speech on “*Provisional Measures in 2015 Arbitration Rules of CMAC*” at “International Maritime Arbitration Shanghai Seminar” hosted by China Maritime Arbitration Commission and Vancouver Maritime Arbitration Association on 23 September 2016.