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Dissertation for Ph. D. in Law

A Comparative Study on Arrest of Ships

--With focus on the Chinese law & through
mainly comparing with the Korean law
under the international conventions

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Chapter 1: Introduction

1.1 Purpose of the Study

It is said that the 21st century is the century of ocean¹.

Basing on the achievements obtained over the past centuries and with the economic internationalization and fast increasing international trade and rapidly developing science & technology, ocean transportation and other ocean-related activities are increasing day by day.

Ocean transportation and ocean-related activities can't operate without ships². Disputes arising out of above activities and relating directly or indirectly with ships are also increasing day by day in large scale. In order to exert pressure on the ship-owner and/or other ship-operators for the settlement of dispute, to make his claim secured, or to ensure jurisdiction over the particular case by a particular court, a claimant usually uses arrest of ship as first choice.

Now arrest of ships has become a typical legal regime in maritime law. This typical legal regime is originated from and determined by the characteristics of ship and maritime litigation. As a result, inside a state, maritime legal rules in respect of arrest of ships are quite different from common civil rules in respect of preservative measures. For different states, maritime rules in respect of arrest of ships are also different in some degree. Basing on their own legal traditions and legal philosophies, absorbing their own judicial practice, considering the special situation they face and protecting the special interests they are concerned with³,

¹ In the Republic of Korea, according to the opinions held by Prof. Lee Kyung-ho and Prof. Cheong Sheng-gun, ocean is the basis of mankind's benefits and the reservoir of resources for the 21st century. In addition, ocean is also the last undeveloped area on the Earth and the human beings' living and national strategy are all concerned with it. The ocean is meaningful to mankind in the sense of ocean transportation, food resources, mineral resources, living space, global environment, national development, and warfare. For detailed information, please refer to: the Ocean and the National Policy written by the two professors, published by Hak Hyun Publishing House, 2001, p.411.

In China, most maritime scholars including the former president of Dalian Maritime University Prof. Si Yu-zuo are of the opinion that the 21st century is a century of ocean. Please refer to:
Prof. Si Yu-zuo: A Research on Chinese Maritime Legislation Trends and Policies, Beijing: Law Publishing House, 2001, p.1.

² The main principal of maritime activities is maritime enterprise. Maritime enterprises are economic units that pursue profits using ships as tool and using ocean as stage. Please refer to:
Prof. Cheong Yeong-seok : A Basic Course of Maritime Commercial Law, Busan: Hae-in Publishing House, 2003, pp.3-6.

³ In this sense it is very easy to understand that for a country with a large cargo interests to be protected it is natural for this country to permit the arrest of ship under no strict conditions; and it is not difficult to understand that for a major maritime country with a large fleet of ships to be protected its judicial practice tends to lay down strict and complicated conditions for arrest of ships.

most of maritime states have established their own special regime of arrest of ships. We know that common law states such as the United Kingdom, the United States have developed a unique theory and practice of arrest of ships which is called “action in rem”⁴; by contrast, in civil law states or continental law states, arrest of ships was and is still deemed as a special preservative measure and thus another unique legal theory and practice in respect of arrest of ships has been established.

Arrest of ships usually concerns foreign elements, because ships especially seagoing ships use the ocean as stage of activity and go into and from ports of different states, ship-related disputes usually involve parties in different states, and events giving rise to the maritime disputes often happen in foreign state or international waters. So jurisdiction over arrest of ships and over the merits of the disputes, the choice of proper law, enforcement of the arrest of ships, etc. are themselves important issues in theory and practice. In order to unify rules in respect of arrest of ships and to overcome or reduce the law conflicts among different states, there appear some international conventions. The famous ones are as follows: Arrest Convention of 1952⁵, Civil Jurisdiction Convention of 1952, EEC Jurisdiction Convention of 1968, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988, Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993, Arrest Convention of 1999⁶. These international conventions play a very important role in establishing uniform rules in respect of arrest of ships, and exert great influence upon the legislation and judicial practice of both contracting states and non-contracting states⁷. But problems still exist. As these conventions are usually the result of compromise among contracting states, some of the provisions are not perfect and some are confusing and misleading. Some states are members of old conventions and some are members of new ones, so at the same time the old and new

⁴ For the detailed information about “action in rem”, please refer to the chapter 2.2.3 of this paper.

⁵ The official name of the convention is “International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships of 1952”, hereinafter it is referred to as “ Arrest Convention of 1952”.

⁶ The official name of the convention is “International Convention on Arrest of Ships of 1999”, hereinafter it is referred to as “ Arrest Convention of 1999”.

⁷ For example, China is not a contracting party to the Arrest Convention of 1952 and the Arrest Convention of 1999, but the Chinese Arrest Provisions of 1994 and the Chinese Special Maritime Procedure Law of 1999 are both heavily influenced by the Arrest Convention of 1952 and the Arrest Convention of 1999 respectively.

conventions coexist together. There still exist conflicts of rules in one way or another.

In China, a legal regime of arrest of ships with Chinese characteristics has been established too. China is an important ocean state. She has about 18,000 km coastal line and exercises jurisdiction of different degrees over a large ocean area. China-related international investment and trade are developing at an astonishing speed, and ocean transportation is becoming more and more important in China. China maintains a large fleet of ships, ranking the fifth on the list of major maritime transportation states⁸; She is also a state with a large quantity of cargoes, so she is concerned with the protection of interests of cargo-owners too⁹. In order to balance the interests of ship-owners and cargo-owners and keep pace with related international conventions, China is perfecting step by step her rules in the field of arrest of ships. In 1986 China first made Regulations on Arrest of Ships; in 1991 China added pre-litigation preservative measure to her Civil Procedural Law, symbolizing the beginning of pre-litigation arrest of ships; in 1994 the Supreme Court of China made the Provisions on Maritime Pre-litigation Arrest of Ships (hereinafter called the Arrest Provisions of 1994); in 1999 China enacted Maritime Special Procedure Law, one important content of which is about arrest of ships. In the course of legislation perfection, Chinese maritime judicial practice is getting richer and richer. In China, ten maritime courts have been established in major port cities along the coast and along the Changjiang River¹⁰. Many special maritime judges are dealing with maritime cases the number of which is increasing at an annual speed of about 30%. According to statistics, Chinese maritime courts have dealt with more than 40,000 maritime cases, one-third of which are foreign-related and near 2000 ships among which 60% are ships flying foreign flags have been arrested. The object of Chinese maritime court system is

⁸ According to World Ocean Transportation Report for Year 2004 issued by the United Nations' Trade & Development Conference, the Chinese total ship tonnage is 4,741,888 tons which occupies 6.1% of the world total tonnage and ranks the 5th in the world list. For detailed information, refer to www.chinaship.com.

According to the statistics of 2004, the Chinese ship construction industry has completed more than 8,500,000 tonnage of ship construction that occupies 15% of world total ship construction and China has ranked the 3rd in the world ship construction list. Refer to www.finance.sina.com.cn.

⁹ In China, about 90% of import and export cargoes are transported by sea. Please refer to:

Li Hai: A Study on Property Rights over Ships, Beijing: Law Publishing House, 2002, p.336.

¹⁰ These ten Chinese maritime courts are: Dalian Maritime Court, Tianjin Maritime Court, Qingdao Maritime Court, Shanghai Maritime Court, Wuhan Maritime Court, Ningbo Maritime Court, Xiamen Maritime Court, Guangzhou Maritime Court, Haikou Maritime Court, Beihai Maritime Court.

to form a maritime judicial center in Asia-Pacific region.¹¹ Now the Chinese law and practice have developed a lot, but this doesn't mean that there are no problems or no room for perfection. On the contrary, seen from the perspective of comparative law and judged according to practice, both Chinese law and judicial practice should be revalued and perfected.

The Republic of Korea (hereinafter referred to as "Korea") is a friendly neighbor of China. Since the establishment of formal diplomatic relationship between the two countries, the bilateral trade and investment has increased at an astonishing speed, and therefore there are more and more cases of arrest of ships concerning the two countries. In addition, Korea has formed a special legal regime in respect of arrest of ships. It is very necessary to conduct a comparative study on the ship-arrest legal regimes of these two countries.

In view of above background, I think it is meaningful to study the legal issues of arrest of ships. The reason is that arrest of ships is a worldwide issue, an issue concerning balance of interests of different states and different civil principles. As a law teacher and at the same time a lawyer, I have been very interested in this study and I get much courage from my supervising professor Cheong Yeong-seok. In this paper, I want to focus on the Chinese law and practice in respect of arrest of ships and, through mainly comparing with the Korean law under the relevant international conventions, try to conduct a thorough and deep comparative study on arrest of ships and to propose possible programs for perfecting legislation and judicial practice of both China and Korea, and finally try to provide some constructive advice to ship-related parties.

1.2 Scope of the Study

In order to accomplish the above-mentioned purpose, after thinking deeply, I decide to include the following contents in this paper:

(1) Introduce to and comment on the general aspects of arrest of ships. In this part, I compare and analyze the definition of ship and the concept of arrest of ships, introduce to the classification of arrest of ships, analyze the nature of arrest of ships, point out the functions of arrest of ships, comment on the development of legal regimes of arrest of ships, and outline the main issues and problems in arrest of ships. The purpose of this chapter is to provide some basic knowledge about the

¹¹ Chief editor Mr. Jin Zheng-jia: *Appraisal and Analysis of Typical Chinese Maritime Cases*, Beijing: Law Publishing House, 1998, preface.

topic, identify the issues and problem to be discussed, and lead to the following chapters.

(2) Analyze the two main elements in arrest of ships. Firstly, I compare and analyze the claims in respect of which a ship can be arrested. In order to maintain the healthy development of maritime transportation and other maritime activities, claims in respect of which a ship can be arrested are restricted to a limited scope under some legal regimes. In this part, I discuss the concept of maritime claim, analyze and compare the lists of maritime claims under international ship-arrest conventions, and analyze and comment on the maritime claims under Chinese legal system and under Korean legal system. The scope of claims in respect of which a ship can be arrested is a hot issue in theory and practice, it can reflect the policy of a country and it highly concerns the interests of both ship-owners and cargo-owners. Secondly, I discuss and analyze the issue of what ships can be arrested. This issue is most important in arrest of ships. In this part, I analyze the arrest of ships in respect of which a claim is asserted and the arrest of sister ships, then discuss the theory and practice of arrest of associated ship with focus on the piercing of corporate veil, discuss the prohibition or restriction on the arrest of some ships under special situations which mainly concerns ships ready to sail or in the course of navigation and ships immune from arrest, and analyze the conditions under which a ship can be rearrested and the condition of multiple arrest of ships.

(3) Compare and analyze the procedural issues in arrest of ships. Firstly, I deal with the issue of jurisdiction relating to arrest of ships. This is an issue of conflict of laws. In this part, I focus on two kinds of jurisdiction, one being the jurisdiction over arrest of ships and another being jurisdiction over merits of the case. At the same time, I discuss the relation between maritime litigation jurisdiction and maritime arbitration jurisdiction. Secondly, I discuss the application for arrest of ships by applicant and the review over and decision on arrest of ships by court, discuss the forms of enforcement of arrest of ships, and analyze the release of arrested ships. Finally, I deal with the issue of judicial sale of arrested ships. For the issue of judicial sale of arrested ship, I analyze the conditions of judicial sale of arrested ships and discuss the main procedures for judicial sale of arrested ships.

(4) Analyze two special issues in arrest of ships. One is the issue of wrong or unjustified arrest of ship. For this issue, I analyze the jurisdiction over the claim

arising out of wrong or unjustified arrest of ships, discuss and compare the standards in judging the wrong or unjustified arrest of ships, and finally discuss the scope of liability for the wrong or unjustified arrest of ships. Another is the issue of securities relating to arrest of ships. For this issue, I mainly discuss and analyze the security provided by applicant for the purpose of arresting a ship and the security provided by defendant for the purpose of releasing the arrested ships or avoiding arrest of ships.

(5) At the end of this paper, I summarize the contents having been discussed and analyzed, give some suggestions for perfecting law and practice of China and Korea, and give some advice to ship-arrest related parties.

1.3 Methods of Study

In this study, I try to use effective methods to deal with the issues to be discussed and analyzed. According to the characteristics of the issues, I mainly use the following methods:

(1) Method of comparative law.

As mentioned above, arrest of ships usually involves foreign elements. In this area there are many theories and practices, national laws and international conventions. They compete and influence with one another, absorb the reasonable contents of one another, and in some degree they are the results of competition and reaction with one another. As far as the study is concerned, without the method of comparative law, the study can't go smoothly and can't be successful. Just as a famous maritime law expert said, it is very important and even essential to use the method of comparison in the study of laws, as you can't truly know your laws unless you know the laws of other countries¹². Thus, method of comparative law is the main method adopted in this study. The comparison is mainly made between the Chinese law and international arrest conventions and Korean law.

(2) Method of connecting legal theory with judicial practice.

Legislation is based on legal theory and judicial practice is decided by legislation and directed by legal theory. In order to precisely explain the law and practice, the legal theory supporting the law and practice should not be ignored; in order to enrich and develop the legal theory and improve the law, the judicial

¹²William Tetley: *Maritime Liens and Claims*, 1st edition, London: Business Law Communications Ltd., 1985, preface, p.1.

practice should be studied. Unlike United Kingdom and United States, China is not a state of case law, but in China judicial rulings, particularly those made by the Supreme Court of China, can exert great influence on the Chinese judicial practice¹³. Therefore, method of connecting legal theory with judicial practice is also one important method used in this study. The method of case analysis is given a special attention to in this study.

(3) Method of connecting substantive law with procedural law.

In social life, substantive laws that regulate substantive relations of rights and obligations are always closely connected with procedural laws that guarantee the enforcement of the substantive rights and obligations¹⁴. Most rules of arrest of ships fall within the scope of procedural law, but they are closely connected with substantive maritime laws such as law of maritime contracts, law of maritime torts and law of maritime titles, maritime liens, maritime mortgages and maritime possessory lien. So in the course of analysis, the study of arrest of ships is frequently combined with the study of related substantive laws.

(4) Method of historical analysis.

Chairman Mao Ze-dong, the former leader of China, once said “if you want to know a thing from the head to the tail, you must study its history.”¹⁵ I believe this is also true in respect of the study of arrest of ships. Using the rules in the Arrest Convention of 1952 as an example, every rule thereof has its own history of life, from its conception, its discussion, its amendment, its acceptance as binding rule to its enforcement in practice. Thus, method of historical analysis is also used in this study.

Here, I can say that the above methods are used jointly or individually with different weight in different chapters. More frequently, they are used jointly in the course of study.

¹³ In Chinese current judicial practice, the Supreme Court of China often issues direction on the adjudication on special legal issues. In addition, the Supreme Court of China also directly deals with most important and most influential cases. It is responsible for the explanation of law in the judicial practice. Its ruling on a case and directions on a legal issue are binding upon all the Chinese courts of all levels.

¹⁴ Chief editor Mr. Cai Fa-bang: *A Course for Civil Procedural Law*, Beijing: Law Publishing House, 1997, p.5.

¹⁵ Chairman Mao Ze-dong: *Against the Rigid Belief in Books*, this article was collected in the *Selected Articles Written by Mao Ze-dong*, Beijing: the People's Publishing House, 1965, p.20.

Chapter 2: General Aspects of Arrest of Ships

In order to provide basic knowledge for the further discussion and specify the issues to be analyzed, here in this chapter, definition of ship, concept of arrest of ships, the history of legal regimes of arrest of ships, and the main issues and problems in respect of arrest of ships are dealt with.

2.1 Definition of Ship

Ship is the tool in ocean transportation and other ocean-related activities. Ship usually floats and moves on the stage of vast ocean and goes into and from ports of different states. Ship is also the core property of shipping enterprises.¹⁶ Maritime disputes usually connect directly or indirectly with ships. As far as this study is concerned, ship is the object of arrest. So analyzing the definition of ship and determining its scope is important and helpful for the purpose of this study.

What is a ship? This is a seemingly easy but actually difficult question, as up to today there is no worldwide-accepted uniform definition of ship. According to the common knowledge, ship is the general name for carrying tools operating on or in waters.¹⁷ But under national laws and international conventions, for the particular purpose of the laws and conventions, special concepts of ship are given. “Ship” has a special meaning and application scope in a particular law or convention.

In Chinese Maritime Commercial Law, the definition of ship is given as “sea-going ships and other marine mobile units, but not including ships or crafts to be used for military or public service purpose, nor small ships of less than 20 gross registered tons.”¹⁸ For the purpose of establishing maritime possessory lien, ships under construction are also recognized as “ship” in this law.¹⁹ In Korean Ships Law as amended on 15th of April 1999, the definition of ship is given as

¹⁶ The value of a modern ship is becoming larger and larger. In order to reduce the operational legal risks, nowadays company with a single ship is organized in large number. For this kind of company, the ship is the only property it owns.

¹⁷ Chief editor Cheng Bin: Introduction to Ships and Marine Engineering, Shanghai: Shanghai Communication University Publishing House, 1996, p. 6.

¹⁸ Refer to Article 3 of Chinese Maritime Commercial Code of 1992. In the sections of “ships’ collision” and “maritime salvage” of this Law, the ships covered are not confined to this definition. Please refer to comment made in:

Chief editor Si Yu-zuo: Research on Special Issues of Maritime Commercial Law, Dalian: Dalian Maritime University Publishing House, 2002, p.390.

¹⁹ Refer to Article 14 of Chinese Maritime Commercial Law of 1992.

“any kind of ship that can be used to navigate on or in waters”²⁰; and according to this definition, ships are classified into motor ships, sailing ships and floating ships (floating ships refer to ships that can not navigate by their own power but by power of another ship). This definition is given to better adapt to the new development of modern maritime industries. But in the field of arrest of ship, only a registered ship or a ship that can be registered can be arrested as a ship preservative measure. Motor ships and sailing ships of over 20 registered tons and floating ships of over 100 registered tons are subject to arrest as a ship. Other ships can’t be object of arrest of ship but object of arrest of personal property.²¹

In Merchant Shipping Act of 1894 of the United Kingdom, ship is defined as any ship that is used in maritime navigation.²² In Commercial Law of Japan, ship is referred to as any ship that can be used in maritime navigation for the commercial purpose.²³

In international maritime conventions, the concept of ship is also qualified by using specific standards for the sake of achieving the aims of the conventions. Clarifying the concept of ship defined in a particular maritime convention is essential to correctly understand and apply the convention.

In some maritime conventions, for the purpose of identifying the ships to which the convention applies, a special definition of ship is also given and ships are strictly distinguished according to their respective characteristics. The standards used to distinguish ships in international conventions usually make reference to the waters in which a ship is sailing or is intended to sail, to the size of the ship or other characteristics of the ship.²⁴ In some conventions, a distinction is made between seagoing ships and ships of inland navigation²⁵. A typical example of this

²⁰ See: Item 2 of Article 1 of Korean Ships Law amended on 15th, April 1999, and for more information on definition of ship in Korean law, please refer to essay “A Summary Survey on the Definition of Ships” written by Lin Dong-jie, published in Korean Sea Law Journal, the 18th issue, Oct. 1996, pp.15-37.

²¹ Please refer to article 172 and article 186 of the Korean Civil Enforcement Law, and article 2 of the Korean Ships Registration Law. Please also refer to:

Prof. Cheong Yeong-seok and others: A Comparative Study on the Laws of China and Korea in Respect of Arrest of ships and Arrest of Cargoes on Board of a Ship, Maritime Law Research of Korean Maritime Institute, No. 2 of the 15th issue of Dec. 2003, p.42.

²² Nigel Meeson: Ship and Aircraft Mortgage, London: LLP, 1989, p.8.

²³ Refer to item 1 of article 684 of Commercial Law of Japan.

²⁴ Francesco Berlingieri: Arrest of Ships, the 3rd edition, London: LLP, 2000, p.14.

²⁵ Actually the basis of the distinction between sea-going ships and inland navigation ships is not clearly indicated in all conventions. In view of the classification of ships, seagoing ship is so called mainly because the ship is designed and constructed with sea-environment adapting ship-design and ship-construction rules and is used to navigate at sea to carry cargoes and/or passengers. I think the following points should be clarified in understanding the definition of seagoing ships:

kind of convention is Collision Convention of 1910. In its article one, a reference is only made to collisions between seagoing ships and collisions between a seagoing ship and an inland navigation ship, with collisions between inland navigation ships being excluded from the application scope of the convention. In some conventions, only seagoing ships are covered and regulated by the conventions. Examples can be referred to Convention on Immunity of State-Owned Ships of 1926 in which reference is made to seagoing ships and the United Nations Convention on Conditions for Registration of Ships of 1986 in which “ship” is defined as “any self-propelled seagoing vessel used in the international seaborne trade for the transport of goods, passengers, or both, with the exception of vessels of less than 500 gross registered tons”²⁶.

When the size or other characteristics of ships are used to distinguish ships, the tonnage, the intended use, propulsion, existence of a crew or not, registration and physical conditions of the ship are usually employed individually or jointly to facilitate the distinction. In Convention on Limitation of Liability for Maritime Claims of 1976, contracting states are permitted to formulate a specific national legal regime for regulating the liability limitation of ships less than 300 gross registered tons. Convention on Conditions for Registration of Ships of 1986 is a typical example of use of combined standards. This Convention does not cover ships less than 500 gross registered tons and also provides that the ships must be used in international seaborne trade for the transport of goods, passengers or both.

From above comparison and analysis, it can be concluded that the concepts of ship referred to in national maritime laws and international maritime conventions are different in some degree with one another. It is necessary to individually analyze and clarify the concept of ship used in a particular law or convention.

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- a. The use of the ship can't determine whether a ship is seagoing ship or not. So maritime transport ship, ship for use in ocean investigation and exploration, ocean fishing ship, ship for use in ocean scientific research etc. are all covered by the concept of seagoing ship;
 - b. A ship can't be classified as a seagoing ship only because it can occasionally navigate at sea or operate at sea. This is to say that an inland ship is still an inland ship even though it can or is navigating at sea; following the same logic, a seagoing ship is still a seagoing ship even though it sometimes navigates into inland waters;
 - c. The propulsion method of a ship can't determine whether a ship is a seagoing ship or not. This means that sailing ships or ships of other kinds of propulsion should also be named as seagoing ship if they are designed and registered to mainly navigate or operate at sea;
 - d. Whether the ship is self-propelled or not can not determine whether a ship is seagoing ship or not.
- ²⁶ Refer to article 2 of the United Nations Convention on Conditions for Registration of Ships of 1986.

Then, what characteristics does a ship possess? This is also an issue that can affect or even shape the rules relating to ships.

Because of its mobility and its huge value, in order to effectively control and administer the ship, for the sake of keeping maritime order and maintaining maritime safety, according to international law, ship is required to be registered by competent government authority.²⁷ Many events and items such as construction of the ship, purchase of the ship, ship's disappearing and deconstruction, owner of the ship, maritime mortgage on the ship, demise charter of the ship etc. are required to be compulsorily registered. The registration information is made public and is available to common people. In order to keep the creditability of the registration, most national laws provide that the information having not been registered can't be used against a faithful third party who reasonably trusts the information having been registered. This characteristic of ship is of great significance in respect of arrest of ships. Through the registration of ship, the physical and legal conditions of a ship to be arrested can be known. By marking correspondingly in the registration of ship, the ship can also be arrested "alive"²⁸ which means not physically retaining the ship but only restricting the transaction of the ship.

Another characteristic of ship is that a ship should fly the flag of the state in which she has got registered and should be deemed to have the nationality of such state. This characteristic of ship is meaningful in law. Seen from the angle of public law, the registering state is vested jurisdiction over the ship flying its flag, at public sea it exercises exclusive jurisdiction over such ship with only a few exceptions, and in wartime the flag and nationality of a ship is used to distinguish ships and decide whether the ship is an enemy ship, a friendly ship or a neutral ship²⁹. Seen from the angle of international private law, the flag and nationality of

²⁷ According to the international law, sea-going ships should be registered accordingly. But international law does not provide concrete terms and conditions for the ship registration. International law (see article 5 of Convention on High Sea of 1958 and article 91 of UN Convention on the Law of Sea of 1982) lays down the basic principle that every state itself should decide whether or not to give registration to a particular ship and determine the terms and conditions for such registration, but the registered ship should have genuine contact with the registering state. As a result, every state regulates its own terms and conditions for ship registration in its territory. There form three main styles of ship registration system: strict registration system, moderate registration system, and open registration system. Seen from Chinese Ships Registration Regulations of 1988, China belongs to the strict registration system; States such as Panama, Liberia etc. obviously belong to the open registration system; the majority of other states belong to the moderate system.

²⁸ For the functions of "alive" arrest and the conditions for such an arrest, please refer to the Chapter 4.4 of this paper.

²⁹ Chief editor Wang Xie-ya: *The International Law*, Beijing: Law Publishing House, 1995, p.286. Please

a ship is an important contact point to be considered in determining the civil jurisdiction and in determining the proper law³⁰.

Thirdly, seen from the legal nature of ship, ship combines the nature of real property and the nature of personal property³¹. In practice, a particular state always emphasizes one aspect of above nature or the other. Because ship is treated as a special real property and because it is uniquely registered and because it has its own name, nationality, age, birth and death, identification number, so in some states, it is personalized and in practice it is also called “her”. For example, in common law states such as the United Kingdom and United States still exists the civil procedure of “action in rem” which attributes personality to a ship³²; in some continental law states such as France and Italy, though ship is defined by law as personal property³³, but in reality it is treated the same way as a real property. In practice, most states more or less combine the two aspects in dealing with the issues relating to the nature of ship. The above two aspects of nature of ship exert great influence on the ship-related rules including ship arrest rules.

2.2 Concept of Arrest of Ships

Arrest of ships is a common phenomenon in maritime field. But, what is arrest of ship? In general sense, arrest of ship means that a competent public authority, following legal procedure, for administrative or judicial purpose, arrests or detains or attaches a ship and doesn't let it go. This general concept of arrest of ships excludes the illegal arrest or detention of a ship by private power, but does cover the arrest or detention of a ship by judicial authority or administrative authority. Judicial arrest of a ship can be defined as follows: a judicial authority, i.e. a court or a tribunal, arrests or detains a ship following legal procedures for the purpose of preserving a claim or enforcing a court judgment or arbitral award or

also refer to:

Chief editor Wei Min: Law on Sea, Beijing: Law Publishing House, 1987, pp.208-212.

³⁰ Chief editor Zhao Xiang-lin: International Private Law, Beijing: China Politics and Law Science University Publishing House, 1997, pp.309-310.

³¹ In some countries a ship is deemed as a personal property (movable property) and in some countries is deemed as a real property (or an immovable property). But I think it possesses the characteristics of both.

³² D.C. Jackson: Enforcement of Maritime Claims, 2nd edition, London: L.L.P., 1996, pp.193-221.

³³ Wu Huan-ning: Maritime Commercial Law, Beijing: Law Publishing House, 1989, p.25. Please also refer to:

Meng Qing-kai: Brief Introduction to French Ship Arrest Procedures, Guangzhou: Maritime Trials, the 2nd issue, 1996, p.38.

administrative order or other enforceable legal documents³⁴. Thus judicial arrest of ship can be further classified into judicial arrest of ship as a preservative measure and judicial arrest of ship as an enforcement measure³⁵. The judicial arrest of ship as a preservative measure can also be classified into two categories that are pre-litigation arrest and in-the-course-of-litigation arrest. As for administrative arrest or detention of ship, it means that an administrative authority arrests or detains a ship according to administrative procedure for the purpose of enforcing administrative law, a typical example of which can be an arrest by a maritime administrative bureau of a ship that has caused marine pollution and is trying to escape. The classification of arrest of ship is of great significance because, for different kinds of arrest, there are different rules concerned and different conditions required.

For the purpose of this study, I select the judicial arrest of ship as a preservative measure as the subject of this study. But sometimes the judicial arrest of ship as an enforcement measure is also discussed whenever necessary. In the following parts of the study, arrest of ship refers to only judicial arrest of ship as a preservative measure, unless otherwise specified.

In regard to the concept of arrest of ship, under different national legal regimes and in different maritime conventions, there are different notions. To clarify the notions is of importance for correctly understanding the spirit of the laws and conventions.

2.2.1 Concept of Arrest of Ships in International Conventions

In Arrest Convention of 1952, arrest of ships means “the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.”³⁶ Seen from this definition, here

³⁴ Under the Chinese legal regime, courts are not only responsible for enforcement of judgments made by themselves but also responsible for the enforcement of some administrative decisions or enforceable instruments certified by a public notary.

³⁵ In Korea, arrest of ship as a preservative measure is called “provisional arrest” (in Korean language “假押留”). Please refer to:

Cheong Hai-deok: A Study on Enforcement against Ships, Ph. D. paper of Graduate School of Keong-Hi University, 2000, p. 15.

³⁶ See: Item 2 of Article 1 of Arrest Convention of 1952. In this item, the word of “judgment” actually covers any judgment given by a court or a tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision, writ of execution, as well as the determination of costs or expenses by an officer of the court. Under national legal regimes, there are other documents that may also entitle a claimant to seize and sell a ship in a forced sale but can not come under the notion of ‘judgment’ however wide, examples of these documents can be listed as promissory note and acknowledgement of debt made in the

the definition of arrest of ships excludes not only the administrative arrest of ships but also the judicial arrest of ships as a means of execution and satisfaction of a judgment irrespective of civil nature or criminal nature³⁷. Up to 1997, the convention had been ratified or acceded by more than 80 states and regions. So the above definition is of great meaning. But what should be pointed out is that this definition is not wholly satisfactory because under the legal regimes³⁸ where a distinction is drawn between arrest of a property as a preservative measure and arrest of a property whose title or possession is in dispute, the definition only applies to the first type of arrest. In the convention, the list of maritime claims in respect of which a ship can be arrested includes the disputes as to title and possession of ship, but the arrest of ship under this situation is not to “secure the claim” and obviously the arrested ship under this situation can’t be released simply against a security.

In the Arrest Convention of 1999, the definition of arrest of ship is given as “any detention or restriction on removal of a ship by order of a Court to secure a maritime, but doesn’t include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument”.³⁹ This definition is not, in essence, different from that of Arrest Convention of 1952. Taking into consideration of the scope of ships covered by the two conventions⁴⁰ and the maritime claims provided by the two conventions⁴¹, in fact, there are delicate differences between these two definitions.

form of a notary deed. These documents are also excluded from the scope of definition of arrest of ships because the arrest of ships under these situations is not to “secure a claim” but to enforce a right.

³⁷ According to national laws of many states, a ship can also be arrested by court for the purpose of confiscation and punishment. For example, in Italy, a ship with which a crime has been committed such as a ship used in smuggling can be arrested in a criminal procedure; a ship can also be arrested in a criminal procedure for the purpose of securing or enforcing the fines levied on the criminal or damages granted to victims. Please refer to: Francesco Berlingieri,; *Arrest of Ships*, 3rd edition, London: LLP, 2000, p.63.

³⁸ Examples of this kind legal regime can be given to that of Italy and that of France. In Italy, preservative arrest and arrest of property whose title or possession is in dispute are distinguished and are put under different procedures. In France, there is a similar regime.

³⁹ Refer to: Item 2 of Article 1 of Arrest Convention of 1999.

⁴⁰ The arrest of ships under Arrest Convention of 1952 only covers sea-going ships; by contrast, the arrest of ships under Arrest Convention of 1999 not only covers sea-going ships but also non-seagoing ships.

⁴¹ Arrest Convention of 1999 deletes the item of claim—bottomry which is covered by Arrest Convention of 1952 --from its list of maritime claim in respect of which a ship can be arrested, but adds in its list the items of damage caused by ship to environment, costs or expenses relating to removal or deposition of sunk ship or wrecked ship or stranded ship or abandoned ship, port or canal or dock or harbor or other waterway dues and charges, any commission or brokerages or agency fees payable in respect of ship by or on behalf of the ship owner or demise charterer., and any disputes arising out of the sale of the ship.

2.2.2 Concept of Arrest of Ships under Chinese Law

Under the Chinese legal regime, pre-litigation arrest of ships was once defined as follows: pre-litigation arrest of ship is a measure taken by a maritime court, upon the maritime claimant's application, before commencing litigation, to arrest according to legal procedures the concerned ship as a pre-litigation preservative measure.⁴² According to this definition, the pre-litigation arrest of ship includes not only the pre-litigation arrest of ship that is owned or operated by the defendant but also the arrest of ship that is owned or operated by the claimant. In the Chinese Special Maritime Procedure Law of 1999, the arrest of ship is treated as one of maritime claim preservative measures⁴³. In the 12th article of this law, maritime claim preservative measure is defined as a compulsory measure taken by maritime court upon the maritime claimant's application against the property of the defendant in order to secure the maritime claim. Here if "property of the defendant" is understood as "the property owned by the defendant", the ships that can be arrested shall be restricted to ships owned by the defendant. This naturally means that the maritime claimant can't apply to arrest the ship that is owned by him but is illegally occupied by others. This also sets obstacle for the claimant to apply for arrest of a ship that is demise-chartered by the defendant, because in this situation the defendant doesn't own the ship. But in the same law, the maritime claims in respect of which a ship can be arrested include the disputes arising from ownership or possession of the ship and disputes relating to the use of and income from the ship and also the disputes concerning ship mortgage and right of similar nature⁴⁴. Therefore, there exists an obvious contradiction between the definition of arrest of ships and the definition of maritime claims in respect of which a ship can be arrested. For the benefit of unification of legal rules, the above definition of arrest of ships should be amended so that it can cover all the arrest of ships arising out of the list of maritime claims. Here, in order to remove the contradiction, I suggest that "property (ships) belonging to the defendant or the particular dispute concerns" should be used to replace "property (ships) of the defendant".

2.2.3 Concept of Arrest of Ships under Common Law System

⁴² Refer to Article 1 of the Arrest Provisions of 1994 made by the Supreme Court of China.

⁴³ According to this law, there are other preservative measures such as arrest of cargo, injunction etc.

⁴⁴ Refer to items 19, 20, and 21 of article 21 of the Chinese Maritime Special Procedure Law of 1999.

Under the common law system, for example, under the legal system of the United Kingdom, arrest of ships is based on the action in rem and the injunction or attachment of ship is based on the action in personam. There is no clear definition of arrest of ships.

(1) About the arrest of ships in action in rem

In maritime judicial practice, courts of the United Kingdom personify the ship. When a ship causes damage in collision or other maritime accidents, the ship herself (not the crew or ship owner) is deemed to be the wrongdoer.⁴⁵ Therefore the ship herself should be responsible for the damage and the claimant can take action directly against the ship. The arrest of the ship is only a result of the action in rem. Because this practice can effectively protect the interests of the maritime claimant and can provide the court with jurisdiction over the merits of the case, and this practice is especially useful in situations where the claimant can't identify the true owner of the ship that has caused damages or in situations where the English court's jurisdiction over personam is restricted⁴⁶, it was once broadly used and still is using in maritime litigation. As result of evolution, nowadays the action in rem can be taken not only against the ship in respect of which the claim is asserted but also against a sister ship.⁴⁷ This practice is also inherited and followed by other common law countries, such as the United States. What should be pointed out under the legal system of the United States is that the action in rem (a ship) can be taken only in situations where a maritime lien is exercised.⁴⁸ Because the United States has not acceded to any international conventions on

⁴⁵ In fact some of legal scholars can't deny that the ship in these cases is only a tool that is used to cause the damage. Natural person or legal person should be held responsible for the damage. Please refer to:

D.R.Thomas: Maritime Liens, London, Steven & Sons, 1980, p.63.

D.C.Jackson: Enforcement of Maritime Claims, 2nd edition, LLP, 1996, p.126.

⁴⁶ According to the Supreme Act of the United Kingdom of 1981, the High Court shall not entertain an action personam to enforce a claim to which this section applies unless:

- (1) the defendant has habitual residence or place of business within England or Wales or
- (2) the case of the claim arose within inland waters of England or Wales or within the limits of a port of England or Wales or
- (3) as a case arising out of the same incident or series of incidents is processed in the Court or has been heard and determined in the Court.

Judged in accordance with above contents, the jurisdiction by English Courts over action in personam is limited. So, in some cases, the action in rem is necessary for ensuring the jurisdiction by the English Courts. Please refer to:

Yang Liang-yi: Maritime Law, Dalian, Dalian Maritime University Publishing House, 1999, p.2.

⁴⁷ D.R.Thomas, Maritime Liens, London, Steven & Sons, 1980, p.63.

D.C.Jackson: Enforcement of Maritime Claims, 2nd edition, LLP, 1996, p.473.

⁴⁸ Refer to Bendict on Admiralty, Volume 2, Matthew Bender & Co. Inc. 1996, pp.2-3.

maritime liens, and the national law of the United States recognizes many maritime claims secured by maritime liens (some of them are not recognized in other countries), and not only statutory law but also case law can create maritime liens⁴⁹ in the United States, maritime claims which can lead to action in rem are no less than those under the legal system of the United Kingdom. Under the legal system of United States, the term of “arrest of ship” only refers to the arrest of ship occurring in action in rem, and the arrest of ship occurring in action in personam is called “attachment of ship”⁵⁰.

(2) About the arrest of ship in action in personam

According to the Supreme Court Act of the United Kingdom of 1981, action in personam can be taken in regard to any maritime claim⁵¹. This means maritime claimant can take action in personam if conditions for action in rem can't be satisfied. In the course of action in personam, arrest of ship can also happen. This kind of arrest of ship is in the form of “mareva injunction”.⁵² The mareva injunction is an interim order issued by the court before the final judgment is given. The mareva injunction prohibits the defendant's disposition of his property in order to ensure the enforcement of final judgment. The conditions for the issuing of mareva injunction are as follows: a. the plaintiff has a good arguable case against the defendant; b. unless the defendant being prohibited to dispose his property, there shall exist real risks of difficulty or failure in enforcing the final judgment due to the defendant's disposition of his property; c. in regard to the particular case, injunction can be issued only when the situation shows the issuance is just and convenient. Mareva injunction can be applied to cases of any nature including maritime cases. Seen from above contents, the mareva injunction is quite similar to the preservative measure taken in litigation under continental/civil law system.

Under the legal system of the United States, in addition to the action in rem, there also exists action in personam. In the course of action in personam, the

⁴⁹ Grant Gilmore and Charles L. Black: the Law of Admiralty, 2nd edition, the Foundation Press Inc., 1975, p.633.

⁵⁰ Christopher Hill, Kay Soehring, Tameyuki and Christie Helmer: Arrest of Ships, London: Lloyd's of London Press Ltd., 1985, pp.83-99.

⁵¹ D.C. Jackson: Enforcement of Maritime Claims, 2nd edition, London: LLP, 1996, p.11.

⁵² Mareva injunction is originated from the famous case of Mareva Compania Naviera S.A. versus International Bulkcarriers S.A. For detailed information, please refer to 1975 (2) Lloyd's Report, p.509.

For a detailed comment, please refer to:

Yang Liang-yi: Injunctions, Beijing: China Politics and Law Science University Publishing House, 2000, p.9.

preservative measure can also be taken. Unlike the injunction under legal system of the United Kingdom, this kind of measure is called “attachment” under the legal system of the United States. The purpose of attachment is to: (1) obtain jurisdiction over person for the court; (2) obtain security for the claim; (3) satisfy the final judgment from the proceeds of the sale of the attached property⁵³. Attachment as a preservative measure in litigation can be taken not only in maritime cases but also common civil or commercial cases, not only against ships but also against other property at sea or on land. According to Supplementary Rules (which is also called Admiralty Rules and which is supplementary to Federal Rules of Civil Procedure of the United States), attachment in maritime cases must be taken in conformity with the Rule B of the Supplementary Rules; by contrast, arrest of ship in action in rem can only be taken in conformity with Rule C of the Supplementary Rules⁵⁴.

(3) Comparison between the arrest of ship in action in rem and arrest of ship in action in personam

The differences between the two kinds of arrest of ship can be summarized as follows:

- a. The arrest of ship in action in rem is an inherent part of action in rem; the arrest of ship in action in personam is only an ancillary procedure in action in personam.
- b. In action in rem, only the ship that is listed as the defendant can be arrested; but injunction or attachment can be taken against several ships if the total value of the ships doesn't exceed the amount that is claimed
- c. Once action in rem is taken, arrest of the ship can follow immediately; but in action in personam, injunction or attachment can only be permitted after you have proved that you can win the case and that there is risk of failure or difficulty in enforcing the final judgment and that the issuing of injunction or attachment is fair and appropriate in the particular case.
- d. The claimant is not required to provide security for the arrest of ship in action in rem; but the claimant is required to provide security for issuing of injunction or attachment;
- e. The arrest of ship in action in rem can make the plaintiff a secured creditor; but injunction or attachment can't make the plaintiff a secured creditor.

⁵³ Christopher Hill and others: *Arrest of Ships*, London: Lloyd's London Press Ltd, 1985, p.85.

⁵⁴ *Federal Civil Judicial Procedure and Rules*, West Publishing Co., 1994, pp.225-260.

Please also refer to:

Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.141.

2.2.4 Concept of Arrest of Ships under the Continental/civil Law System

Under continental/civil law system, unlike the common law system, there is no such mechanism as action in rem, and only action in personam can be taken. Under continental law system, arrest of ship is defined as a procedure to secure the claim. The claimant can apply for arrest of ship prior to litigation or in the course of litigation. The purpose of the arrest of ship is only for obtaining security for the claim and for guaranteeing the enforcement of final judgment. It can't be used to obtain the jurisdiction over the merits of the case for the court, and it can't be used to secure the enforcement of foreign judgment or foreign arbitral award.

The characteristics of arrest of ships under continental law system are as follows:

- (1) It is a judicial measure. Only the court having jurisdiction over the merits of the case, according to legal procedure, can take the measure.
- (2) It is a provisional measure. It can be taken prior to litigation or in the course of litigation.
- (3) It is a preservative measure. Unlike the arrest of ship as an enforcing measure, its purpose is to get security for the claim.
- (4) It can be started only upon the claimant's application. Court doesn't start the procedure actively.
- (5) It can be taken only against the property owned by the debtor.

2.2.5 Concept of Arrest of Ships under the Korean Legal System

Under the Korean legal system, the concept of arrest of ship is very similar to the concept of arrest of ships under the continental law system. In Korea, the Korean Civil Enforcement Law regulates the arrest of ships. According to the Korean Civil Enforcement Law, arrest of ships can be divided into two categories: arrest of ship as an enforcement measure and arrest of ships as a preservative measure.⁵⁵ Arrest of ship as a preservative measure is taken to secure the claim. Under the Korean legal system, there is no such concept of action in rem and therefore arrest of ships can only be taken in action in personam. If the defendant has not been identified, the action cannot be taken against a ship, and in addition

⁵⁵ In the Korean Civil Enforcement Law, arrest of ship as a preservative measure is regulated in the Chapter 4 of this law. Arrest of ships as an enforcement measure is regulated in the Chapter 2 of this law. In reality, there is close connection between these two arrests, as the enforcement procedure of arrest of ships as a preservative measure needs to follow that of arrest of ships as an enforcement procedure.

the arrest of ship cannot lead to the jurisdiction by the arresting court over the merits of the case. Under the Korean legal system, the common method of enforcement of arrest of ship is to collect the ship nationality certificate and related necessary ship documents from the ship and keep them in the court. According to article 178 of the Korean Civil Enforcement law, before the service of notice of ship auction order, the measure of supervision and preservation of ship has the effect of arrest of ship.

In conclusion, concept of arrest of ships under the Korean legal system is similar to that of continental or civil law system and is different from that of the common law system. By contrast, the concept of arrest of ships under the Chinese legal system has absorbed the reasonable elements of both continental law system and common law system because on the one hand the Chinese legal system recognizes that arrest of ship is mainly a preservative measure in action in personam and on the other hand it recognizes some rules of action in rem such as the rule of permitting to take action against the ship in situation that the ship owner has not or is difficult to identify and the rule of vesting on the arresting court the jurisdiction over the merits of the case.

2.2.6 Conclusion:

From above analysis of the concept of the arrest of ship, it can be concluded that concept of arrest of ship under different legal systems is not same. Particularly there exist two main categories of concept of arrest of ship, i.e. the concept of arrest of ship under the common law system and the concept of arrest of ship under continental law system. Concept of arrest of ship under other national legal systems follows the example of continental law system or the example of common law system or absorbs the reasonable elements of both of them⁵⁶. Concept of arrest of ships under the Korean legal system follows the example of the continental law system; by contrast, concept of arrest of ships under the Chinese legal system combines the reasonable elements of both continental law system and common law system. As for the concept of arrest of ship in maritime international conventions, it is inevitably influenced by both the common law system and continental law system, but say precisely, the Arrest

⁵⁶ An example is the legal system of China. The main body of Chinese legal system is that of continental law system, but the Chinese legal system also incorporates some rules of particular characteristics of common law system, one rule of which is to permit arrest of a ship even though the ship owner is unknown.

Convention of 1952 is mainly influenced by the common law system and the Arrest Convention of 1999 tries to keep a balance between the two law systems.

Seen from the concept of arrest of ships under different national legal regimes and international conventions, functions of arrest of ship can be summarized as follows:

- (1) To obtain security for the maritime claim. Once the ship is arrested, the claimant doesn't need to worry about the enforcement of the final judgment or arbitral award in favor of him;
- (2) To enforce and fulfill the maritime liens on the ship. According to laws of many nations, arrest of ship is the only way to enforce the maritime liens on the ship⁵⁷;
- (3) To facilitate the litigation process. In the situations where the identification of defendant is difficult or the defendant is unknown, the claimant can still commence the litigation procedure through arrest of the ship, so that time can be saved and problem of time bar can be solved; Additionally, if the ship is arrested, the service of litigation documents to defendant is very easy because the service can be made to the captain of the ship according to law of many countries⁵⁸;
- (4) To vest on the arresting court the jurisdiction over the merits of the case. Common law states emphasize this function. Law of many common countries provides that the arresting court can obtain jurisdiction over the merits of the case if there is no effective agreement of jurisdiction or arbitration between the parties of dispute. This gives the claimant a right to choose the forum of court.⁵⁹

In order to perfect legislation, I suggest that the Korean law should conduct a feasibility research on the possibility of incorporating some rules of action in rem under the common law system into its own law, because action in rem has a long history and some rules of action in rem can meet the needs and reality of modern ocean transportation. The common law system has also exerted a profound influence on the Arrest Convention of 1952 and the Arrest Convention of 1999. If the Korean law can effectively combine the continental law system and the

⁵⁷ For example, according to Chinese Maritime Commercial Law of 1992, maritime liens should be exercised and enforced by court's arrest of the ship in respect of which the maritime liens arise out of. See: article 28 of Chinese Maritime Commercial Law of 1992.

⁵⁸ In this case the captain is deemed as the legal agent of the ship owner.

⁵⁹ The choice of forum by the claimant is humorously called as "forum shopping" which means the claimant chooses the most favored and convenient forum of court to commence the litigation procedure. This practice is the result of conflicts of law, and we are safe to say that it shall last as long as there are different rules concerning jurisdiction over the case.

common law system together just as the Chinese law has done, it can better keep line with international trends and better protect the interests of Korean parties and can also enlarge the jurisdiction of Korean courts.

2.3 Historical Development of Regimes of Arrest of Ships

In order to get a full and comprehensive knowledge of the arrest of ship and to grasp how the problems relating to arrest of ships arise and how they can be solved, knowing the evolution of regimes of arrest of ship is very important. This can't be achieved without a historical survey.

2.3.1 The Common Law Regime of Arrest of Ships

The United Kingdom is a typical country of common law regime. In respect of arrest of ship, most of other common law states follow its example. So the historical survey of common law regime of arrest of ship focuses on the regime of the United Kingdom.

The United Kingdom is an ancient and famous maritime state. Centuries ago, judicial practice of arrest of ship began and developed. But from the viewpoint of legislation, the statutory right of arrest of ship has come into existence since the 19th century, exactly speaking, since enacting of the Admiralty Court Act (1840-1861)⁶⁰. In the Act, the maritime courts' "in rem" jurisdiction was recognized. The Supreme Court of Judicature Act (1873-1875) incorporated the Maritime Court into the High Court and further enlarged the scope of "in rem" jurisdiction. The Supreme Court of Judicature (consolidation) Act of 1925 refined and unified the rules concerning the "in rem" and "in personam" jurisdiction of maritime courts. After the advent of Arrest Convention of 1952, Administration of Justice Act of 1956 was enacted and updated the rules relating to maritime jurisdiction. In 1959 the United Kingdom officially ratified the Arrest Convention of 1952⁶¹, and, due to the inconformity of national rules with the convention, the United Kingdom enacted the Supreme Act of 1981 which, according to the requirements of the Arrest Convention of 1952, unified its rules and kept them in line with the new development of international rules. Now the Supreme Act of

⁶⁰ Christopher Hill and others: Arrest of Ships, London: LLP, 1985, p.1.

⁶¹ CMI Yearbook, 1996, p.443.

1981 is the current legal basis for the action in rem (mainly action against ship and arrest of ship)⁶².

In addition to the action in rem, the United Kingdom also develops a regime of action in personam in maritime cases. According to the Supreme Court Act of 1981, in respect of all maritime claims action in personam can be taken⁶³. In cases where action in rem is difficult or is impossible, the maritime claimant can take action in personam if the defendant has place of business or place of residence in the United Kingdom or there are other connecting points with the United Kingdom. In action in rem, if the defendant behind the “rem” appears before the court, action in rem can also turn to action in personam. In action in personam, a special preservative measure is created which is called “injunction”. Actually, as early as in 1875, maritime court of the United Kingdom had been permitted to issue the injunction to secure the maritime claim. In judicial practice, in 70s of 20th century, through the milestone case of *Mareva Compania Naviera S. A. versus International Bulkcarriers S.A.*, maritime court of the United Kingdom began to use the injunction (for this reason, the injunction is also called “mareva injunction”)⁶⁴.

Therefore the legal regime of the United Kingdom in regard to arrest of ship develops in two lines, one is arrest of ship in action in rem (ship), and the other is injunction in action in personam⁶⁵.

2.3.2 The Continental Law Regime of Arrest of Ships

France and Germany are two typical states in continental law system. Laws of the two states have heavily influenced the laws of other continental law states such as the Republic of Korea, Japan etc⁶⁶. So the survey focuses on these two states.

⁶² Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.1.

⁶³ D.C. Jackson: *Enforcement of Maritime Claims*, 2nd edition, London: LLP, 1996, p.11.

⁶⁴ Steven Gee: *Mareva Injunction and Anton Piller Relief*, 2nd edition, Longman Law, Tax and Finance, 1990, p.9.

⁶⁵ In fact, seen historically, the classification of “action in personam”, “action in rem” and “action mixa” rooted in Roman law. Please refer to:

Prof. Si Yu-zuo: *A Research on Chinese Maritime Legislation Trends and Policies*, Beijing: Law Publishing House, 2001, p.612.

⁶⁶ In Korea, arrest of ship as a preservative measure is deemed as one step of civil procedure. Together with the hearing procedure and enforcement procedure, arrest of ship as a preservative measure consists the whole civil proceedings. Unlike in China, there are no special maritime courts and no special maritime procedures in the Korea. Please refer to:

Cheong Yeong-seok and others: *A Comparative Study on Laws of China and Korea in Respect of Arrest of*

In both of France and Germany, there is no special maritime litigation law. The procedural rules relating to maritime litigation (including arrest of ship) are contained in common civil procedural law⁶⁷.

Unlike the court system of the United Kingdom, there are no special maritime courts in court systems of France and Germany.

In both of France and Germany, ship is regarded as a personal property and arrest of ship is regarded as a provisional preservative measure.

In France, before 1967, arrest of ship was taken according to rules applying to arrest of personal property. After 1967, French law absorbed some contents of Arrest Convention of 1952 and began to be influenced by the legal philosophy of common law system⁶⁸. In France, the special rules pertaining arrest of ship are contained in the No.967 law passed on 27th Oct. 1967. According to this law, the Chief Judge of Commercial Court can issue order to arrest a ship upon the claimant's application. The Chief Judge can also refuse the claimant's application if he thinks there is no reason to arrest the ship. If refused, the claimant can appeal to a higher court.

2.3.3 The International Unification of Rules of Arrest of Ships

The existence of different legal regimes of arrest of ships results in conflicts of laws and causes a lot of problem for the shipping industry, maritime insurance industry, maritime practitioners and judges of different countries. There is an urgent need to unify the rules of arrest of ship.

As early as in 1930, the International Maritime Committee (CMI) began to bend on the work of making a uniform arrest convention⁶⁹. Under the coordination of CMI, overcoming many difficulties and compromising the different opinions of continental law states and common law states, in 1952 on the Brussels Diplomatic Conference, the Arrest Convention of 1952 was approved with 13 votes in favor, none against and six abstentions⁷⁰. This convention mainly covers the following issues: maritime claims in respect of which a ship can be

Ships and Arrest of Cargoes on Board of a Ship, Maritime Law Research of Korean Maritime Institute, the No.2 of the 15th issue, Dec. 2003, pp.36-37.

⁶⁷ Meng Qing-kai: Brief Introduction to French Ship Arrest Procedures, Maritime Trials, the 2nd issue of 1996, p.38-39.

⁶⁸ Meng Qing-kai: Brief Introduction to French Ship Arrest Procedures, Maritime Trials, the 2nd issue of 1996, P.38.

⁶⁹ Francesco Berlingieri: Arrest of Ships, the 3rd edition, London: LLP, 2000, p.3.

⁷⁰ Francesco Berlingieri: Arrest of Ships, 3rd edition, London: LLP, 2000, p.9.

arrested; ships that can be arrested; jurisdiction over the arrest of ship and over the merits of the case; securities for release of the arrested ship; rearrest and multiple arrest of ships etc. It reflects the two main functions of the arrest of ship: to establish jurisdiction of arresting court over the merits of the case and to obtain security for the claim. The convention is a compromise of the common law system and continental law system, and it absorbs the reasonable elements of both systems.⁷¹ For example, as for the issue of claims in respect of which a ship can be arrested, under continental law system both maritime and non-maritime claims can be a cause of arrest of ship, but under common law system only maritime claims can trigger action in rem and cause arrest of ship. As a result, the convention adopts the formula of common law system, and regulates that only listed maritime claims can be cause of arrest of ship. As for the issue of liability for wrong or unjustified arrest of ship, under the continental law system the claimant should burden the liability for all damages or losses incurred by the defendant due to the arrest of ship, but under common law system only in some exceptional situations the claimant should be responsible for the wrong or unjustified arrest of ship and even in these exceptional situations the liability should be strictly restricted⁷². Due to the sharp differences, the convention fails to make substantial rules for the liability of wrong or unjustified arrest of ship, and instead it only makes a rule of international private law and leaves this issue to be decided by the proper national law.⁷³

The long period of application of Arrest Convention of 1952 shows that the convention itself has defects and should be amended.

Firstly, the convention can't catch up with the development of shipping industry. With the rapid development of science and technology, containerization has enjoyed great development, marine pollution is becoming serious, and many new principles are involved into the ship-related laws. As a result, the practice of bottomry has been outdated and should be deleted from the list of maritime claim

⁷¹ Nicholas Gaskell and Richard Shaw: The Arrest Convention of 1999, *Lloyd's Maritime and Commercial Law Quarterly*, November 1999, p.470.

Here we can not deny that the Arrest Convention of 1952 has tried to achieve at least two aims: first to combine the two legal systems together and form a uniform regime for arrest of ship; second, to make arrest of ship both a measure of securing maritime claims and a measure ensuring the jurisdiction by the arresting court over the merits of the case. Please also refer to the following article:

Wang Li and Zou Zong-cui: On the Arrest of Ships and the Jurisdiction of the Arresting Court over the Merits of the Case Connecting with the Arrest of Ships, *China Maritime Trials Yearbook*, 1999, p.315.

⁷² CMI Bulletin No. 105, p.3.

⁷³ Refer to article 6 of the Arrest Convention of 1952.

in respect of which a ship can be arrested⁷⁴. Additionally, the damage to environment caused by ships' operation has drawn world attention and has been regulated by international conventions such as International Convention on Civil Liability for Oil Pollution Damage of 1969 and International Convention on Salvage of 1989. Therefore, maritime pollution claims should be added to Arrest Convention of 1952 in the list of maritime claims in respect of which a ship can be arrested⁷⁵.

Secondly, the Arrest Convention of 1952 has not successfully dealt with issue of rearrest and multiple arrest of ship. Seen from the application of the Arrest Convention of 1952 and judged from the judicial practice, the exceptions to the principle of prohibiting rearrest or multiple arrest of ship should be enlarged to effectively and fairly protect the interests of the maritime claimants.

Thirdly, the Arrest Convention of 1952 has not solved the issue of liability for wrong or unjustified arrest of ship. In practice, lack of uniform rules in this area leads to conflicts and results in the imprudent arrest of ship by the maritime claimant and directly damages the shipping industry⁷⁶.

Fourthly, the Arrest Convention of 1952 should be amended in regard of rules of arresting sister ships, particularly under the background of increase of one-ship company and the trend of ships flying convenient flag. In order to balance the interests of ship and cargo, the scope of ship that can be arrested should be enlarged.

Fifthly, the Arrest Convention of 1952 has not effectively solved the issue of jurisdiction relating to arrest of ship and has not well coordinate the jurisdiction by arresting court over arrest of ship and the enforcement of judgment or arbitral award made by a foreign court or arbitral tribunal.

⁷⁴ "Bottomry" has been unknown to the law of sea for many years and therefore there is no point to keep it in the list of maritime claims in respect of which a ship can be arrested. Bottomry happened in the eras when the communication was not advanced.

⁷⁵ Zhu Zeng-jie: Comments on the 1999 International Convention on Arrest of Ships, China Maritime Trials Yearbook, 1999, p.144.

Mr. Zhu Zeng-jie is a famous Chinese maritime law expert. He was one of the main members of the Chinese delegation to the Arrest Convention Conference. He once acted as the President of UN/IMO Diplomatic Conference on Arrest of Ships.

⁷⁶ Zhu Zeng-jie: Comments on the 1999 International Convention on Arrest of Ships, China Maritime Trials Yearbook, 1999, p.144.

Sixthly, due to above defects, some of the main shipping and trade countries such as the United States, China, Japan, Canada and the Federal Russia have not ratified the convention and this quite limits the operation of the convention⁷⁷.

In conclusion, the Arrest Convention of 1952 cannot well adapt to the needs of international trade and transportation. It should be amended or redesigned⁷⁸.

Following hard work of CMI, IMO and UNCTAD⁷⁹, Arrest Convention of 1999 was adopted by the diplomatic conference convened at Geneva from 1 to 12 March 1999⁸⁰.

The Arrest Convention of 1999 is also the result of compromise. Facing the challenge of maritime industry of 21st century, it combines the common law system and continental law system, well balances the interests of parties in the arrest of ships, and better unifies the rules in regard to arrest of ships. Compared with Arrest Convention of 1952, it is advanced and more reasonable and can better meet the needs of international shipping industry. As improvements, it further enlarges the scope of maritime claims in respect of which a ship can be arrested, and clarifies the relation between jurisdiction over arrest of ship and jurisdiction over merits of the case. It also specifies the scope of ships that can be arrested, redefines the related conditions, and makes many other changes to Arrest Convention of 1952⁸¹. It shall exert a profound influence on the legislation and judicial practice of many countries.

2.3.4 The Evolution of Chinese Legal Regime of Arrest of Ships

The history of Chinese legal regime of arrest of ship is short. From the establishment of the People's Republic of China in 1949 to the beginning of 80s

⁷⁷ Zhu Zeng-jie: Comments on the 1999 International Convention on Arrest of Ships, China Maritime Trials Yearbook, 1999, p.144.

⁷⁸ According to the comprehensive review by the International Maritime Commission over the Arrest Convention of 1952, it was concluded that it was impossible to only make some minor amendment to the Convention and it was necessary to thoroughly amend the Convention both in contents and form.. Please refer to International Maritime Commission Lisbon Conference Records. Lisbon II, p.126.

⁷⁹ CMI (International Maritime Committee) is a private institute organized by maritime scholars and practitioners; IMO (International Maritime Organization) is an inter-governmental organization whose main function is to make rules relating to maritime affairs and coordinate the activities of member states in regard to maritime affairs; UNCTAD (United Nation's Conference on Trade and Development) is established by the United Nations whose function is to deal with issues of trade and development; in respect of arrest convention, the Trade and Development Board of UNCTAD is involved.

⁸⁰ Li Hai: A Study on Property Rights over Ships, Beijing: Law Publishing House, 2002, p.322.

⁸¹ Zhu Zeng-jie: Comments on the 1999 International Convention on Arrest of Ships, China Maritime Trials Yearbook, 1999, pp.155-159.

of 20th century, the Chinese legal regime of arrest of ship was mainly an administrative procedure⁸². Due to the underdeveloped trade, ocean transportation and the communist economy regime, Chinese administrative authority once played a decisive role in arrest of ship and it not only decided but also enforced arrest of ship⁸³.

Since the adoption of open-door policy and the economic reform, Chinese judicial authority has been becoming more and more important. With the making and perfection of civil litigation procedure, maritime disputes began to be handled by courts. In 1981 the Supreme Court of China ratified the Report on Legal Procedure for Arrest of Ship made by High Court of Shanghai, and regulated that arrest of ship in civil procedure should be decided by court and that relevant administrative authority should assist the court in enforcing arrest of ship⁸⁴. Thus judicial authority over arrest of ship has been set up.

In 1982 the Chinese Civil Procedure Law was enacted. Thereafter, a ship can be arrested by court as a preservative measure. In 1984, Chinese maritime courts were established and began to handle maritime cases exclusively⁸⁵.

Considering the special characteristics of arrest of ship, in order to regulate the relations thereof, in 1986 the Supreme Court of China made the Concrete Provisions on Pre-litigation Arrest of Ships. In 1987 the Supreme Court of China made the Concrete Provisions on the Forced Sale of Arrested Ships to Pay off Debts, and thus established the legal regime of arrest of ships with Chinese characteristics.

In Chinese Civil Procedure Law of 1991, the Chinese People's Congress confirmed the basic rules of arrest of ships made by the Supreme Court of China.

In 1992, the Chinese Maritime Commercial Law was enacted, but unfortunately there were no provisions concerning the arrest of ships. So in order to update the

⁸² During the Chinese Cultural Revolution from 1966 to 1976, the Chinese court system was almost destroyed, and all of the power was held by the then Revolutionary Committee of different levels. After Mr. Deng Xiao-ping came to power in 1978, the Chinese court system was restored and strengthened.

⁸³ The main maritime administrative authority of that time was the Chinese Port Supervising Bureau, the former body of the nowadays Chinese Maritime Bureau.

⁸⁴ For detailed information, please refer to the following legal document: Answer to the Questions about Arrest of Ship Procedures before the Issuing of Provisions on Arrest of Ships (this document was made by the Supreme Court of China).

⁸⁵ At the beginning, only 6 maritime courts were organized in 1984. Several years later, due to the increase of maritime cases, other 4 maritime courts were set up. The first 6 maritime courts are: Dalian Maritime Court, Tianjin Maritime Court, Qingdao Maritime Court, Shanghai Maritime Court, Guangzhou Maritime Court, Wuhan Maritime Court. The 4 maritime courts added are: Ningbo Maritime Court, Xiamen Maritime Court, Haikou Maritime Court, Beihai Maritime Court.

related rules, in 1994 the Supreme Court of China amended the Concrete Provisions on Pre-litigation Arrest of Ships of 1986 and the Concrete Provisions on the Forced Sale of Arrested Ships to Pay off Debts of 1987.

With the further development of Chinese open-door policy and reform, China has become a main country of both international trade and maritime transportation, and the old regime of arrest of ship couldn't keep up with the new characteristics of maritime industry and couldn't keep line with the international uniform rules and customs. Additionally, the majority of rules of arrest of ships in China were made by the Supreme Court of China, and not by the supreme legislature. According to the Chinese Constitution, the basic laws should be enacted by the supreme legislature. Judged according to the Chinese Constitution, the rules made by the Supreme Court of China lack the same authority with rules enacted by the supreme legislature of China⁸⁶.

Therefore in 1999, the supreme legislature of China enacted the Chinese Special Maritime Procedure Law. This law, on the basis of Chinese judicial practice, keeping the reasonable elements of old rules, learning from the Arrest Convention of 1952 and the Arrest Convention of 1999, establishes Chinese new legal regime of arrest of ships.

2.3.5 Development of Korean Legal Regime of Arrest of Ships

According to the Korean civil procedural theory, there are three main steps in civil procedure: step of judgment making; step of claim preservation; step of enforcement of confirmed rights. In the past, the Korean Civil Procedural Law covered all above three steps. According to the 1960 Korean Civil Procedural Law, arrest of ships as a preservative measure was covered by section 4 of chapter 7 of this law and arrest of ship as an enforcement measure was covered by section 2 of chapter 7 of this law. Following the revision of the above law in 1990, a new section "provisions on the auction for enforcement of secured claims" was included as section 5 of chapter 7 in this law. In 2002, the Korean civil procedural regime underwent an important reform. As a result of this reform, the steps for claim preservation and enforcement of confirmed rights are separated from the

⁸⁶ Under the Chinese legal regime, priority order of legal rules is as follows: 1 Constitution; 2 Basic law; 3 Administrative regulations enacted by the State Council, the central government of China; 4 The explanation or procedural rules made by the Supreme Court of China. Because the judicial rules relating to arrest of ship were mainly made by the Supreme Court of China before 1999, and because these rules ranks very low in the priority order, it is necessary to make a basic law in respect of arrest of ships.

Korean Civil Procedural Law and a new law “the Korean Civil Enforcement Law” is made to regulate the separated two steps.

Recognizing the differences between the procedure of judgment making and procedure of claim preservation and enforcement, above reform leads to the enacting of the Korean Civil Enforcement Law; but not recognizing the special characteristics of maritime procedure, the reform doesn't lead to the enactment of a special maritime procedural law. As a result, arrest of ship as a preservative measure is mainly regulated in chapter 4 of the Korean Civil Enforcement Law and arrest of ship as an enforcement measure is mainly regulated in chapter 2 of the Korean Civil Enforcement Law.

2.3.6 Conclusion:

From the historical review of the development of legal regimes of arrest of ships, it can be seen that every legal regime has its own history, and there are quite differences in the development of these legal regimes.

From above review, it can be concluded that reform is important and necessary for every legal regime. Only through reform, a legal regime can be improved. During the reform, comparing and learning from other legal regimes is very important. This is true for the reform of Chinese legal regime, and is also true for the perfection of international conventions.

Just as the Chinese legal regime has absorbed the reasonable elements of both continental law system and common law system, and has incorporated many rules of international convention into its legal regime, I believe, in the future, the reform of the Korean legal regime should also pay attention to the learning from other legal regimes.

Comparing with the Chinese legal regime, it can be seen that the current Korean legal regime doesn't recognize the special characteristics of maritime litigation and Korea has not enacted a special maritime procedural law to deal with maritime cases and related arrest of ships. Considering the international legislative trends of major maritime countries, I think that Korea as an important maritime country should enact a special maritime procedural law.

Chapter 3: The Two Main Elements in Arrest of Ships

In arrest of ships, there are two main elements that must be firstly analyzed and be paid special attention to. One of the elements is that in respect of what claim/claims a ship can be arrested, and another is that which ship/ships can be arrested. These two elements are the core issues in national ship arrest laws and related international ship arrest conventions, and are also two main conditions for arrest of ship.

3.1 Claims in Respect of Which a Ship can be Arrested

3.1.1 Concept of Maritime Claim and Related Debate

Maritime claim is a very important concept in maritime law. Even though in some countries claims in respect of which a ship can be arrested are not restricted to maritime claims⁸⁷, in fact laws of many countries⁸⁸ and the international arrest conventions⁸⁹ expressly provide that a ship can be arrested only for securing maritime claims. Therefore, it is essential to clarify the concept of maritime claim.

Generally speaking, a maritime claim means any claim arising out of maritime transportation and maritime operation. This is a broad definition of maritime claim. In a maritime claim relationship, there are three basic elements: the maritime claimant, the maritime defendant, and their rights and obligations. Compared with common civil claims, maritime claims have some unique characteristics. The most important characteristic is that maritime claim is always closely connected with and based on maritime activity.

As a tool of maritime transportation and maritime operation, ship is a special property. If permitting ships to be arrested on the basis of any claims irrespective of the nature, normal maritime order can be disturbed. Arrest of ship as a special preservative measure must be specially treated and be granted to special

⁸⁷ For example, in Korea, according to its civil procedure law, the claims in respect of which a ship can be arrested are not confined to specified claims though arrest of ships often occurs in respect of maritime claims. Please refer to:

Cheong Yeong-seok and others: A Comparative Study on Laws of China and Korea in Respect of Arrest of Ships and Arrest of Cargoes on Board of a Ship, Maritime Law Research of Korean Maritime Law Institute, the No.2 of the 15th issue, Dec. 2003, p.41.

⁸⁸ For example, under the current Chinese legal system, a ship can only be arrested in respect of a maritime claim.

⁸⁹ Both of the Arrest Convention of 1952 and the Arrest Convention of 1999 require that the claim in respect of which a ship can be arrested can only be a maritime claim.

claimants.⁹⁰ Due to this idea, claims in respect of which a ship can be arrested are strictly restricted to a specified scope by some national laws and international conventions. Therefore, there exists a restrictive definition of maritime claim.

But, for a long time, there has been a debate on the scope and kinds of maritime claim in respect of which a ship can be arrested.

As early as when the Arrest Convention of 1952 was drafted, there were different viewpoints among CMI members in regard to scope and kinds of maritime claim in respect of which a ship can be arrested.⁹¹ The viewpoint of the civil law countries was that arrest of ship should be permissible in respect of any claim; the viewpoint of the common law countries particularly of the United Kingdom was that arrest of ship should be permitted only in respect of claims of a maritime nature. The former viewpoint first prevailed but then the second was accepted with some qualification. Finally a compromise was reached by adopting the English approach whereby arrest of ship is permitted only in respect of claims of a maritime nature and by permitting the arrest of not only the ship in respect of which the claim arose but also any other ship in the same ownership.⁹² Then the concept of “maritime claim” was discussed and clarified. Finally, a closed list of maritime claims (17 items of maritime claims)⁹³ that is similar to the list of claims in respect of which the English High Court was granted maritime jurisdiction by the Supreme Court of Judicature (consolidation) Act of 1925 was discussed and adopted.⁹⁴

In the course of drafting the Arrest Convention of 1999, the same issue was once again raised and fiercely debated. There were mainly two kinds of opinion. One was to adopt a closed list of maritime claim, and the second was to give an open list of maritime claim.⁹⁵ Those who supported the first opinion⁹⁶ argued

⁹⁰ CMI Yearbook, 1997, p.279.

⁹¹ Francesco Berlingieri: Arrest of Ships, the 3rd edition, London: LLP, 2000, p.73.

⁹² A summary of the compromise is made by Neill, L.J. in the “Deichland” <1989> 2 Lloyd’s Rep 113, p.117. The first part of the compromise reflects the view of common law countries while the latter part satisfies the requirement of continental law countries to enlarge the scope of ships that can be arrested.

⁹³ Refer to Item 1 of Article 1 of the Arrest Convention of 1952.

⁹⁴ CMI Bulletin No. 105, p.5. This list is a closed list of maritime claims in respect of which an arrest of ship can be permitted while any other claim not included in the list cannot justify an arrest of ship under the convention.

⁹⁵ CMI Yearbook, 1997, pp.282-283.

In fact, during the debate, some even claimed that a mixed approach should be adopted that is a general clause followed by a non-exhaustive list. Please refer to Francesco Berlingieri, Arrest of Ships, the 3rd edition, London: LLP, 2000, p.389.

⁹⁶ These countries include some major shipping countries such as Federal Russia, France, Germany, Sweden,

that: (1) the closed list can unify the different national provisions of contracting states, can stabilize the contents of the convention and can strengthen the foreseeable nature of the rules; (2) the closed list can effectively prevent the disorder in judicial practice of arrest of ships caused by the open definition of maritime claim, and therefore can be helpful in keeping the maritime order and promoting the international trade and ocean transportation; (3) once new maritime claims in respect of which a ship can be arrested occur, the closed list can be timely amended. Those for the open list⁹⁷ argued that: (1) with the fast development of science and technology, and with the change of maritime industry, new maritime claims in respect of which a ship can be arrested shall inevitably occur. In order to meet the new challenges, the provisions of the convention should be flexible and an open list should be adopted; (2) the convention should not be amended frequently, and should keep stable, an open list can leave room for newly emerging maritime claims.⁹⁸

As a result of compromise, in the Arrest Convention (draft) 1985, a mixed definition of maritime claim was adopted. On the one hand it gave a general open definition of maritime claim and on the other hand it also gave a list of typical maritime claims (22 items of maritime claim were mentioned).

Until the opening of international diplomatic conference of 1999, the opinion of an open list prevailed. The Chinese delegation supported this opinion due to the fact that the Chinese rules imitated the above Arrest Convention (draft) 1985 and also provided an open definition⁹⁹. But, in the course of the international diplomatic conference of 1999, when reviewing the definition of maritime claim, the majority of the attending delegations including Chinese delegation, surprisingly turned to support the closed list of maritime claim. In order to adapt to the development of international trade and maritime operation, 22 items of maritime claim were included in the new list. For satisfying the strong requirement from environment protection power, in the item “d” of the list a kind of open definition is adopted as an exception which reads that “damages or threat

Greece, Denmark, Belgium, etc.

⁹⁷ These countries include some main shipping countries such as the United States, Canada, Norway, Spain, Japan, Brazil, etc.

⁹⁸ Zhu Zeng-jie: Comments on the 1999 International Convention on Arrest of Ships, China Maritime Trials Yearbook, 1999, p.148.

⁹⁹ Please refer to: A Letter about the Situation of Attending the UN/IMO Arrest of Ships Diplomatic Conference (Ministry of Transportation of China, letter No. 76 of 1999), p.2.

of damages caused by the ship to the environment, and damage, costs, or loss of a similar nature to those identified in this subparagraph ‘d’ ”.

From above introduction and analysis, in conclusion, the two methods of definition of maritime claims in respect of which a ship can be arrested have advantages and disadvantages respectively, and the different opinions factually reflect the different interests of different countries. This can be seen from the long fierce debates. The definition finally adopted by the 1999 conference is a good compromise of the two opinions. The closed list with newly added items of maritime claim can well promote the unification of related national rules of contracting states, can effectively keep the normal order of maritime activity and can balance the needs of justice and efficiency¹⁰⁰.

3.1.2 Analysis and Comparison between Maritime Claims in Arrest Convention of 1952 and Arrest Convention of 1999

This kind of analysis and comparison can provide us with a new perspective and is helpful to correctly understand the meaning of the provisions of the conventions.

In the Arrest Convention of 1952 there are 17 items of maritime claims in respect of which a ship can be arrested, but in the Arrest Convention of 1999 the number is 22. In the following part, a detailed comparison and analysis of the corresponding items shall be made.

Item 1 in the Arrest Convention of 1999 is “ loss or damage caused by the operation of the ship”¹⁰¹. The corresponding item in the Arrest Convention of 1952 is “damage caused by any ship either in collision or otherwise”¹⁰². Comparing the two descriptions, it can be seen that the former one enlarges the corresponding maritime claims in respect of which a ship can be arrested. The latter limits the maritime claims to damage caused by ship in collision or act of similar nature (maritime tort); by contrast, the former extends the maritime claims to any loss (of life or property) or damage (to health or property) caused by the operation of ship. As far as I reasonably understand the meaning of “operation of ship”, it covers all aspects and steps of operation of ship, including but not limited to acts of handling of cargo, managing of ship, and leasing of ship. As there is no

¹⁰⁰Zhu Zeng-jie: Comments on the 1999 International Convention on Arrest of Ships, China Maritime Trials Yearbook, 1999, p.155.

¹⁰¹ Refer to item (a) in section (1) of article 1 of the Arrest Convention of 1999.

¹⁰² Refer to item (a) in section 1 of article 1 of the Arrest Convention of 1952.

exact explanation in regard to “operation of ship”, this leaves the contracting states some free space of interpretation. One definite thing is that the former description is “certainly wide, much wider than the latter one”¹⁰³.

Item 2 in Arrest Convention of 1999 is “loss of life or personal injury occurring, whether on land or in water, in direct connection with the operation of ship”¹⁰⁴. The corresponding item in the Arrest Convention of 1952 is “loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship”¹⁰⁵. The former item uses the word “direct” to emphasize the close connection between event of loss or injury and the operation of ship. This is so described as to keep line with the International Convention on Maritime Liens and Mortgages of 1993¹⁰⁶; the wording of “whether on land or in water” clarifies the place of event of loss or injury and enlarges the scope of maritime claim.

Item 3 in Arrest Convention of 1999 is “salvage operation or any salvage agreement including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment”¹⁰⁷. The corresponding item in Arrest Convention of 1952 is only “salvage”¹⁰⁸. The former wording is more concrete and concise. It covers the salvages irrespective of the existence of salvage agreement or not, which is to say that it applies also to salvage agreement which gives rise to a claim not basing on the salvage operations actually performed¹⁰⁹. In order to encourage the salvage operation, and effectively prevent environment pollution caused by ship or cargo in danger, the Salvage Convention of 1989 provides a special compensation for the salvage operator if the salvage operator provides salvage service to ship or cargo which threats damage to environment. The Arrest Convention of 1999, in order to co-ordinate with the Salvage Convention of 1989, inserts the above kind of special compensation into this item.

Item 4 in Arrest Convention of 1999 is “damage or threat of damage caused by ship to the environment, coast line or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of

¹⁰³ Francesco Berlingieri: Arrest of Ships, the 3rd edition, London: LLP, 2000, p.304.

¹⁰⁴ Refer to item (b) of section 1 of article 1 of the Arrest Convention of 1999.

¹⁰⁵ Refer to item (b) of section (1) of article 1 of the Arrest Convention of 1952.

¹⁰⁶ Refer to (b) in the section 1 of article 4 of the International Convention on Maritime Liens and Mortgages of 1993.

¹⁰⁷ Refer to item (c) of section 1 of article 1 of the Arrest Convention of 1999.

¹⁰⁸ Refer to item (c) of section (1) of article 1 of the Arrest Convention of 1952.

¹⁰⁹ Francesco Berlingieri, Arrest of Ships, the 3rd edition, London, LLP, 2000, p.304.

reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or losses of a similar nature to those identified in this subparagraph”¹¹⁰. There is no corresponding item in Arrest Convention of 1952. It is a newly inserted item. This item is added in the list of maritime for the sake of keeping line with related provisions of CLC of 1969, its Protocols of 1984 and 1992 and UNCLOS of 1982¹¹¹. Its purpose is to protect environment and provide remedy for the suffered. It can be seen from the broad wording of the item that the situations of damage to environment by ship are sufficiently considered and the protection of the suffered is powerful. It covers not only damages that already occurred but also threat to damage. Of special meaning, it covers claims in respect of preventive measures undertaken to avoid pollution damage and in respect of environment reinstatement measures actually undertaken or to be undertaken. Additionally it covers the damages done to or expenses incurred by a third party.¹¹² This item also uses the terminology “---damage, costs, loss of a similar nature to those identified in this subparagraph” which reminds me the method of open definition.

The item 5 in Arrest Convention of 1999 is “costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew”. This item is also newly added to the list in view of the fact that in the Maritime Liens and Mortgages Convention of 1967 a maritime lien was provided in respect of wreck removal¹¹³. It was felt advisable to refer to the cargo laden on a sunken ship. Even though in the Maritime Liens and Mortgages Convention of 1993 wreck removal is no longer included in the list of maritime liens, but if the removal is effected by a public authority or carried out according to instruction given by a public authority in the interest of safe navigation or the protection of marine environment, the costs

¹¹⁰ Refer to item (d) in section 1 of the article 1 of the Arrest Convention of 1999.

¹¹¹ Under the pressure of environmentalists, the measures of environment protection are strengthened bit by bit in international legal regime.

¹¹² The reference to a third party was once questioned by CMI. But the delegation of the United States insisted that it be inserted with the intention to refer to other interests that are damaged such as fishery, shellfish shoreline.

¹¹³ Refer to item (v) of the section 1 of article 4 of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1967.

thereof shall be paid first from the proceeds of the sale before all other claims secured by a maritime lien on the vessel¹¹⁴. Within the above limits, therefore the costs or expenses should be deemed as a maritime claim. In addition, all other costs or expenses of removal of wreck or cargo laden on the ship irrespective of their priority in distribution of the proceeds of the sale should also be included in the list of maritime claim. So, in conclusion, the insertion of this item to the list of maritime claims is to encourage the removal of wreck and cargo for the sake of safe navigation and for the sake of marine environment protection.

Item 6 in the Arrest Convention of 1999 is “any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise”¹¹⁵. The corresponding item in Arrest Convention of 1952 is “agreement relating to the use or hire of any ship, whether by charter party or otherwise”¹¹⁶. Comparing the two items, I can’t find substantial differences between them. What should be pointed out is that “charter party” here in the Arrest Convention of 1999 may be referred only to bareboat charter party, because any agreement relating to the carriage of goods is covered by the subsequent subparagraph (g).

Item 7 in Arrest Convention of 1999 is “any agreement relating to the carriage of goods or passengers on board the ship whether contained in a charter party or otherwise”¹¹⁷. The corresponding item in Arrest Convention of 1952 is “agreement relating to the carriage of goods in any ship whether by charter party or otherwise”¹¹⁸. It can be seen that any agreement relating to the carriage of passengers on board the ship is also included in the 1999 convention, which is purported to keep pace with the provisions of Carriage of Passengers and Their Luggage by Sea Convention of 1974, Athens.

Item 8 in Arrest Convention of 1999 is “loss of or damage to or in connection with goods (including luggage) carried on board the ship”¹¹⁹. The corresponding item in Arrest Convention of 1952 is “loss of or damage to goods including baggage carried in any ship”¹²⁰. The slight differences between the two items are that “loss or damage in connection with goods” is added into the item of 1999 convention and that “baggage” of 1952 convention is replaced by “luggage” of

¹¹⁴ Refer to item 3 of article 12 of the international Convention on Maritime Liens and Mortgages of 1993.

¹¹⁵ Refer to item (f) of section 1 of article 1 of the Arrest Convention of 1999.

¹¹⁶ Refer to item (d) of section 1 of article 1 of the Arrest Convention of 1952.

¹¹⁷ Refer to item (g) of section 1 of article 1 of the Arrest Convention of 1999.

¹¹⁸ Refer to item (e) of section 1 of article 1 of the Arrest Convention of 1952.

¹¹⁹ Refer to item (h) of section 1 of article 1 of the Arrest Convention of 1999.

¹²⁰ Refer to item (f) of section 1 of article 1 of the Arrest Convention of 1952.

1999 convention. The loss in connection with goods may consist, for example, of economic loss and damage due to delay. The replacement of “baggage” by “luggage” gets rid of the confusion in regard to the meaning of “baggage”.

The item of “general average” keeps the same¹²¹. But in Arrest Convention of 1952, following this item is the item “bottomry” which has been deleted in Arrest Convention of 1999 because it is no longer often used in practice due to development of science and technology¹²².

Item “towage”¹²³ keeps the same. It is understood that claims arising out of towage contract or out of torts in the course of towage are covered in this item.

Item “pilotage”¹²⁴ keeps unaltered. It is commonly understood that the pilotage as a public service provided to ships should be guaranteed for the sake of safe navigation. So pilotage is a maritime claim in respect of which a ship can be arrested.

Item 12 in Arrest Convention of 1999 is “goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance”¹²⁵. The corresponding item in Arrest Convention of 1952 is “goods or materials wherever supplied to a ship for her operation or maintenance”¹²⁶. Comparing the two provisions, it can be found that the item in 1999 convention expands the scope of protection so as to include not only all kinds of supplies of material but also services rendered. Furthermore the supplies and services have been widened by reference to the preservation and management of the ship in addition to the operation and maintenance. As a result, any provider of supplies or services to the ship can apply to arrest the ship for securing his claim.

Item 13 in Arrest Convention of 1999 is “construction, reconstruction, repair, converting or equipping of the ship”¹²⁷. The corresponding item in Arrest

¹²¹ Refer to item (g) of section 1 of article 1 of the Arrest Convention of 1952 and to item (i) of section 1 of article 1 of the Arrest Convention of 1999.

¹²² Refer to item (h) of section 1 of article 1 of the Arrest Convention of 1952. For reasons of deletion of this item, please also refer to:

Berlingieri: Arrest of Ships, 3rd edition, London: LLP, 2000, p.87.

¹²³ Refer to item (j) of section 1 of article 1 of the Arrest Convention of 1999 and to item (i) of section 1 of article 1 of the Arrest Convention of 1952.

¹²⁴ Refer to item (k) of section 1 of article 1 of the Arrest Convention of 1999 and to item (j) of section 1 of article 1 of the Arrest Convention of 1952.

¹²⁵ Refer to item (l) of section 1 of article 1 of the Arrest Convention of 1999.

¹²⁶ Refer to item (k) of section 1 of article 1 of the Arrest Convention of 1952.

¹²⁷ Refer to item (m) of section 1 of article 1 of the Arrest Convention of 1999.

Convention of 1952 is item (l) that reads “construction, repair or equipment of any ship or dock charges and dues”. “Reconstruction of the ship” and “converting of the ship” is added into the item of 1999 convention. The purpose of this addition is to make the right of arrest of ships available to the ship repairer, constructor, converter and equipper.

Item 14 in the Arrest Convention of 1999 is “port, canal, dock, harbor and other waterway dues and charges”¹²⁸. This corresponds with the latter part of item (l) in Arrest Convention of 1952. The item (l) of 1952 convention regulates claims of different nature, so 1999 convention separates the claims into two independent items. Here in 1999 convention the dues and charges are extended to those of port, harbor, canal and other waterway.

Item 15 in Arrest Convention of 1999 is “wages and other sums due to the master, officers and other members of the ship’s complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf”¹²⁹. This item corresponds with the item (m) of Arrest Convention of 1952 that reads “wages of masters, officers, or crew”. Compared with the provision of 1952 convention, this provision of 1999 convention is more complete and more reasonable, and it extends coverage on non-seaman workers of the ship and coverage over the repatriation and social insurance. It is brought into line with related maritime liens and mortgages conventions¹³⁰.

Item 16 in Arrest Convention of 1999 is “disbursements incurred on behalf of the ship or its owners”¹³¹. It has no substantial difference with the corresponding item (n) of Arrest Convention of 1952 which reads “master’s disbursements, including disbursements made by shippers, charterers or agents on behalf of a ship or her owner”. But it corrects the loose language used in the latter and covers all kinds of disbursements incurred on behalf of the ship or her owner, while the description of the latter is too wide in respect of disbursements made by shippers but not relating to the operation of the ship (which should not be deemed as a maritime claim).

¹²⁸ Refer to item (n) of section 1 of article 1 of the Arrest Convention of 1999.

¹²⁹ Refer to item (o) of section 1 of article 1 of the Arrest Convention of 1999.

¹³⁰ In all of the three international maritime liens and mortgages conventions of 1926,1967 and 1993, the wages or other sums due to masters and crew are listed as a claim secured by maritime lien and enjoy a high priority in payment.

¹³¹ Refer to item (p) of section 1 of article 1 of the Arrest Convention of 1999.

Item 17 in Arrest Convention of 1999 is “insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the ship owner or demise charterer”¹³². This is a new item and it fills the gap in the 1952 convention, because obviously the claims for insurance premiums and mutual insurance calls are maritime claims by nature. What must be paid special attention to is that the notion of premium is very wide as it not only includes insurance of loss of or damage to the ship but also any insurance connected with the operation of the ship such as liability for injury of passengers, liability for ship pollution etc. Another point is that the premiums must be “payable by or on behalf of the ship owner or the demise charterer” but no other persons.

Item 18 in Arrest Convention of 1999 is “any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the ship owner or demise charterer”¹³³. This item is also newly inserted in the list of maritime claim, as the claims for commissions, brokerages and agency fees are clearly maritime claims. Special attention should be directed to the point that, when commissions, brokerages or agency fees are payable by the demise charterer, arrest is permissible only when the special requirements set out in the convention are met.

Item 19 in Arrest Convention of 1999 is “any dispute as to ownership or possession of the ship”¹³⁴. The corresponding wording in Arrest Convention of 1952 is “disputes as to the title to or ownership of any ship”¹³⁵. It is obvious that the wording of the 1952 convention repeats the same concept by reference to “title” and “ownership” and it doesn’t mention the disputes as to possession of the ship that should be regulated in the same item with disputes of ownership

Item 20 in Arrest Convention of 1999 is “any dispute between co-owners of the ship as to the employment or earnings of the ship”¹³⁶; here the reference to the dispute about possession of the ship which is included in the corresponding provision (p) of the 1952 convention was correctly deleted, with other things in (p) of the 1952 unchanged. But the restriction of disputes between co-owners only to the employment or earnings of the ship is incomplete, because there are other disputes such as those relating to the sale of or the mortgage on the ship that are

¹³² Refer to item (q) of section 1 of article 1 of the Arrest Convention of 1999.

¹³³ Refer to item (r) of section 1 of article 1 of the Arrest Convention of 1999.

¹³⁴ Refer to item (s) of section 1 of article 1 of the Arrest Convention of 1999.

¹³⁵ Refer to item (o) of section 1 of article 1 of the Arrest Convention of 1952.

¹³⁶ Refer to item (t) of section 1 of article 1 of the Arrest Convention of 1999.

probably more likely to justify the arrest than disputes as to employment or earnings.

Item 21 in Arrest Convention of 1999 is “a mortgage or a ‘hypothèque’ or a charge of the same nature on the ship”¹³⁷. The corresponding wording in Arrest Convention of 1952 is “the mortgage or hypothecation of any ship”¹³⁸. It can be seen that the item of the Arrest Convention of 1999 enlarges the scope of maritime claim and also includes “a charge of the same nature on the ship”. The wording of this item keeps line with that of the International Convention on Maritime Liens and Mortgages of 1993¹³⁹. Due to the fact that the Arrest Convention of 1999 doesn’t require the mortgages or “hypothèque” or charge be registered, if the national law of a Contracting State recognizes non-registered mortgage, this item can also cover claims arising thereof.

Item 22 in Arrest Convention of 1999 is “any dispute arising out of a contract for the sale of the ship”¹⁴⁰. This is a newly inserted item, having no its counterpart in Arrest Convention of 1952. It is recognized that a claim arising out of the sale of a ship is a maritime claim. The claimant may be the seller who claims purchase price for the ship or may be the buyer who requires the full performance by the seller of the ship sale contract. What must be kept in mind is that the claim must arise out of a contract of sale of ship and, a claim in respect of pre-contractual damages is not a maritime claim and, therefore, is not covered by this item.

From above analysis and comparison of the items of maritime claims in the Arrest Convention of 1952 and in the Arrest Convention of 1999, I can conclude that: (1) in both conventions, a closed list of maritime claim is adopted and maritime claims in respect of which a ship can be arrested are restricted to the items listed; (2) Compared with the 1952 convention, the 1999 convention covers more items (five new items not including the implied expansion in the amended items¹⁴¹) of maritime claims in order to adapt to the changing world, and the provision of the 1999 convention is more concise and reasonable; (3) the provision of the 1999 convention is more flexible, and in some items a kind of

¹³⁷ Refer to item (u) of section 1 of article 1 of the Arrest Convention of 1999.

¹³⁸ Refer to item (q) of section 1 of article 1 of the Arrest Convention of 1952.

¹³⁹ According to this Convention, mortgages should be duly registered in order to enjoy a priority in payment. Please refer to article 1 of this convention.

¹⁴⁰ Refer to item (v) of section 1 of article 1 of the Arrest Convention of 1999.

¹⁴¹ These 5 newly added items of maritime claims are: environmental damages; removal of wreck; port dues and passage charges; agent fees; dispute of ship sale contract.

open definition of the maritime claim is adopted to cover as many maritime claims as possible; (4) the 1999 convention incorporates the items of maritime liens and mortgages into its list of maritime claims in respect of which a ship can be arrested; but in regard of mortgage, “hypothèque”, or charge of the same nature, it doesn’t require them being registered; (5) both of the two conventions are the result of conflicts and compromise among competing powers and interests. The common law countries, following the practice of action in rem, want to restrict claims in respect of which a ship can be arrested to maritime claims and even to only some maritime claims; the continental law countries, deeming the arrest of ship as a preservative measure, want to make the arrest of ship available to all civil claims irrespective of their nature; the ship owners want to limit the scope of items of claims entitling the arrest of ship, but the cargo interests are eager to enlarge the scope of the claims. So it is safe to say that the two conventions try to balance the competing powers and interests. But, saying frankly and fairly, the 1999 convention can better balance the competing powers and interests than the 1952 convention, because the former is better worded and considers more the requirements of continental law countries¹⁴².

Additionally, it should be pointed out that both of the conventions provide some exceptions to the application of the list of maritime claim because it is very difficult or unnecessary to unify the rules under these exceptional situations. For example, it is provided, in section (2) of article 8 of the Arrest Convention of 1952, that “a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of the Contracting State permits arrest”; in section (4) of the same article, it is further provided that “nothing in this convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State”; in section (1) of article 10, a Contracting State is entitled to reserve the right not to apply the convention to arrest of ship for any claims enumerated in paragraphs (o) and (p)¹⁴³, but to apply their domestic

¹⁴² The Arrest Convention of 1952 more reflects the opinions of common law countries and the requirements of the ship owners; by contrast, the Arrest Convention of 1999 can keep a better balance between the competing countries and competing interests by taking into consideration of more opinions of the continental law countries and the opinions of cargo owners.

¹⁴³ Paragraph (o) refers to disputes as to the title to or ownership of any ship and paragraph (p) refers to

laws to such claims. In section 6 of article 8 and section 1 of article 9 of Arrest Convention of 1999 there are similar provisions.

3.1.3 Analysis of and Comment on the Maritime Claims under Chinese Legal System

The definition and scope of maritime claim under Chinese legal system undergo some changes with development of the maritime litigation regime.

On 30 January 1986, basing on the rich judicial experience, absorbing the reasonable contents of the Arrest Convention of 1952 and the Arrest Convention (draft) of 1985, the Supreme Court of China made the Arrest Provisions of 1986. This document defined the maritime claims as “any claims relating to or arising out of the construction, sale, lease, management, operation, salvage, ownership, mortgage, lien of maritime ships”, and listed 20 items of maritime claim¹⁴⁴.

On 6 July 1994, in order to adapt to new development and practice, the Supreme Court of China amended the Arrest Provisions of 1986 and made the Arrest Provisions of 1994. The Arrest Provisions of 1994 provided a new definition and list of maritime claim. This definition of maritime claim is given as¹⁴⁵:

“any claims relating to or arising out of the ownership, construction, possession, operation, sale, salvage, mortgage, and liens of maritime ships, such as:

- (1) Ship collisions and other accidents relating to ship;
- (2) Death and personal injury caused by ship due to handling and operation of ship;
- (3) Marine pollution caused by ship;
- (4) Measures taken to prevent possible pollution or measures taken to minimize or get rid of pollution damages;
- (5) Maritime salvage, raising or removal of wrecked ship or sunken goods or floating goods;
- (6) Contract of ship lease;
- (7) Carriage of goods or passengers contract;
- (8) General average;

disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship.

¹⁴⁴ Jin Zheng-jia and Weng Zi-ming: A Special Study on Maritime Claim Preservative Measures, Dalian: Dalian Maritime University Publishing House, 1996, pp.53-54.

¹⁴⁵ Refer to article 2 of this legal document.

- (9) Towing and piloting of ship;
- (10) Foods, provisions, materials, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation or daily maintenance;
- (11) Port, passage, canal, harbor dues and charges;
- (12) Construction, repair, converting, or equipping of ship;
- (13) Ship mortgage or other ship securities of the same nature;
- (14) Maritime insurance contract;
- (15) Claims for wages, social insurance contribution and other sums due to the master and other crewmembers;
- (16) Disbursements incurred for the ship by the master, ship owner, bare-boat charterer, other charterer or their agents;
- (17) Commission, procedural fee, agency fee to be paid for the ship by the shipowner, bareboat charterer, or other persons on behalf of them;
- (18) Ownership and possession of ship;
- (19) Disputes arising out of the operation of or earnings from the ship between the co-owners of the ship;
- (20) Contract of ship sale.”

Seen from above contents, the definition of maritime claim in Arrest Provisions of 1994 combines the method of general definition and the method of listing maritime claims in order to make the definition open to newly arising maritime claims and at the same time limit them to a reasonable scope. This is also the method of definition adopted by the Arrest Convention (draft) of 1986¹⁴⁶. We can see that there have no substantial differences between the items of maritime claim in Arrest Provisions of 1994 and the items listed in Arrest Convention of 1999¹⁴⁷, but the order and wording of maritime claims in Arrest Provisions of 1994 is different in some degree from that in Arrest Convention of 1999, and the difference can lead to different understanding and explanation.

On 25 December 1999, the Chinese supreme legislature¹⁴⁸ enacted the Chinese Special Maritime Procedure Law. This law doesn't follow the previous formula of definition that is composed of a general definition and then a detailed list. In order

¹⁴⁶ This method of definition was adopted in the draft in order to compromise opinions of the two main law systems and provide a possibility to flexibly enlarge the list.

¹⁴⁷ Seen from this angle, the Chinese list of maritime claims in Arrest Conventions of 1994 is closer to the list in the Arrest Convention of 1999 than the list in the Arrest Convention of 1952.

¹⁴⁸ The Chinese supreme legislature is the National People's Congress.

to keep line with the newly made Arrest Convention of 1999¹⁴⁹, it adopts the method of a closed list of maritime claim. In its 21st article, it directly incorporates the closed list of 22 items of maritime claim contained in Arrest Convention of 1999, and in the 22nd article it further provides that “no application for arrest of a ship may be filed except for the maritime claims as stipulated in Article 21 of this Law; there are exceptions, however, for executing judgments, arbitral awards or other legal documents.” According to above provisions, only basing on the listed maritime claims a ship can be arrested in China, and no other civil or maritime claims can be a justified cause for arresting a ship. This explanation is accepted by Chinese maritime law experts and professionals, and is confirmed by the Chinese Supreme Court who once noticed that “ starting from 1st July 2000, all maritime courts and local courts of all levels can’t accept application for arrest of ship for securing claims unless according to the provision of article 21 of the Chinese Special Maritime Procedure Law, with enforcing judgment, arbitral award, and enforceable credit documents certified by public notary being excepted”. As Chinese maritime courts exercise exclusive jurisdiction over maritime cases, arrest of ship as a preservative measure can only be based on the listed maritime claims and be authorized by maritime courts in China. Chinese common courts can’t arrest a ship basing on a common claim¹⁵⁰.

In view of the fact that the items of maritime claims in Chinese Special Maritime Procedure Law of 1999 and those in Arrest Convention of 1999 are same and that there already has a full analysis of the individual items respectively, so it is not necessary to analyze them again.

But, sometimes I wonder whether it is sensible and practical to wholly incorporate into Chinese Special Maritime Procedure Law of 1999 what the Arrest Convention of 1999 has already provided in regard to maritime claims. Here I want to deal with this issue deeply and try to give an answer.

I think that it is insensible and unpractical to completely incorporate the items of maritime claim in Arrest Convention of 1999 into the Chinese national law. I also think that, considering Chinese particular situation, the claims in respect of

¹⁴⁹ In the course of making the Chinese Special Maritime Procedure Law of 1999, the Arrest Convention of 1999 was also being hotly discussed and negotiated. The final result is that soon after the passing of the Arrest Convention of 1999, the Chinese Special Maritime Procedure Law of 1999 was passed by the National People’s Congress of China.

¹⁵⁰ Before the enactment of the Chinese Special Maritime Procedure Law of 1999, some common courts also extended their power to arrest of ship and this practice caused a serious problem and disorder in arrest of ship.

which a ship can be arrested by Chinese courts should be enlarged so that they not only cover maritime claims but also common claims. The reasons are as follows:

(1) As aforesaid, the Arrest Convention of 1952 and the Arrest Convention of 1999 restrict the claims in respect of which a ship can be arrested to the listed maritime claims only because it is easier and necessary to unify the contracting states' national rules of arrest of ships in handling maritime cases with foreign elements. According to application articles of the two conventions, they don't intervene a contracting state's national law concerning arrest in its own jurisdiction of a ship flying its flag by a person whose habitual residence or principal place of business is in its territory, so in this situation a contracting state is given freedom and is permitted to arrest such ship basing on non-maritime claims¹⁵¹;

(2) National laws of many continental law countries permit arrest of ship for securing non-maritime claims. For example, in Germany¹⁵², France¹⁵³, Japan, arrest of ship is deemed as a provisional preservative measure for securing claims including both maritime claims and non-maritime claims;

(3) In common law countries such as the United Kingdom and the United States, while arrest of ship in action in rem still confines to maritime claims, the arrest of ship in the form of "attachment" and "injunction" has been created in action in personam to secure the non-maritime claims and this kind of arrest of ship can be decided and enforced by common courts¹⁵⁴;

(4) According to Chinese legal tradition, Chinese law system has heavily influenced by continental law theory and practice, and arrest of ship is also treated as a preservative measure for securing claims¹⁵⁵. Restricting arrest of ship only to maritime claims is a tradition of common law system and is a result of action in rem.

(5) Restricting arrest of ship only to maritime claims can cause unfair effect on non-maritime claimants, because the ship owners' activities are not confined

¹⁵¹ Refer to article 8 (6) of the Arrest Convention of 1999 and the article 8(4) of the Arrest Convention of 1952.

¹⁵² Jin Zheng-jia: A Research on German Maritime Procedures, Maritime Trials, the 4th issue of 1994, p.28.

¹⁵³ Meng Qing-kai: Brief Introduction to French Ship Arrest Procedures, Maritime Trials, the 2nd issue of 1996, p.38.

¹⁵⁴ Steven Gee: Mareva Injunctions and Anton Piller Relief, 2nd edition, Longman Law, Tax and Finance, 1990, pp.16-17

¹⁵⁵ Jin Zheng-jia: A Study on Maritime Procedural Law, Dalian: Dalian Maritime University Publishing House, 2001, pp.95-97.

within sea area and can also extend to land. If non-maritime claimants are denied the right of arrest of ship, their rights can be endangered. According to the current Chinese Special Maritime Procedure Law, once a ship is arrested, the maritime claimant and the ship owner can negotiate a ship mortgage to let the ship released from arrest. If this is the case, the maritime claim is actually vested a right of priority compared with common claim. This is obviously unfair.

In conclusion, the two conventions don't prohibit the arrest of ship for securing common claims under specified situations where there are no foreign elements concerned. Both continental law countries and common law countries permit in some degree and in some form the arrest of ship for securing common claims. The strict restriction of arrest of ship to only maritime claims can create unfair effect on non-maritime claimants. In view of above reasons, I suggest that, in China, under specified conditions, arrest of ship should also extend to cover common claims. Even after it accedes the Arrest Convention of 1999 in future, China can still establish and maintain a parallel system as follows: (1) In regard of foreign related arrest of ship, the arrest can only be based on the listed maritime claims; (2) In regard of non-foreign-related arrest of ship, the arrest can be based on any maritime claims and some specified common claims. This parallel system is in conformity with the convention, as the convention doesn't intervene the national law in regard of non-foreign-related arrest of ship¹⁵⁶; it can also balance the interests of ship owners and common claimants in a non-foreign-related arrest of ship. Of course, ship is a special maritime property, once it is arrested, a large loss can occur; if arrest of ships frequently happens, maritime order can also be disturbed. In order to minimize such loss and disorder, some conditions should be laid down in regard to the arrest of ship due to non-maritime claims.

3.1.4 Analysis of and comment on the Claims in the Korean Law

Under the Korean legal system, the claims in respect of which a ship can be arrested are not confined to maritime claims. In theory and in practice, arrest of ships can also be applied for non-maritime claims. As aforesaid, under the Chinese legal system, only in respect of one of the 22 maritime claims a ship can

¹⁵⁶ Both of article 8(4) of the Arrest Convention of 1952 and the article 8(6) of the Arrest Convention of 1999 provide that the conventions do not modify or affect the rules of law in force in any Contracting State relating to the arrest of any ship physically within the jurisdiction of the that State of its flag procured by a person having habitual residence or principal place of business in that State.

be arrested. Maybe this is the biggest difference between the Korean legal system and the Chinese legal system in this regard.

But, in practice, under the Korean legal system, the most common claims leading to arrest of ships are claims secured by maritime liens.

According to the Korean Commercial Law¹⁵⁷, the following claims are secured by maritime liens and thus can naturally lead to arrest of ships:

- “(1) Litigation fees which are incurred for the common interests of the creditors, fees related to the auction of the ship and its associated facilities, taxes relating to the navigation activity, pilotage and towage, fees for preservation and inspection of the ship after its entering the last port;
- (2) Ship crew and other ship servants’ claims arising out of employment contract;
- (3) Ship salvage fees and contribution to general average;
- (4) Compensations for damages due to ship collision; compensations for damages to navigational facilities, port facilities or navigational route caused by other navigational accidents; compensations for loss of life or injury to seafarers or passengers caused by navigational accidents.”

It must be noticed that the list of claims secured by maritime liens under the Korean legal system has been heavily influenced by the relevant international maritime liens conventions. Before the revision of the Korean Commercial Law in 1991, the list of maritime liens under the Korean legal system was heavily influenced by the 1926 Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages. After the revision, the list is in some way influenced by the 1967 Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages and the 1985 revised draft¹⁵⁸.

In conclusion, from above analysis, it can be found that there is great difference between the claims in respect of which a ship can be arrested under the Korean legal system and the claims under the Chinese legal system. As the Chinese legal system keeps line with the Arrest Convention of 1999, it can be said that the Korean legal system in this regard is quite different from the Arrest Convention of 1999. I have criticized the Chinese approach of complete incorporation of the provisions of the Arrest Convention of 1999 in this regard,

¹⁵⁷ Refer to article 861 of the Korean Commercial Law as revised in 31 Dec. 1991

¹⁵⁸ Prof. Cheong Yeong-seok: Law of International Carriage of Goods By Sea, Beom-han Book Corporation, 2004, p.399.

but I cannot agree with the approach adopted by the Korean legal system too. The correct approach is to restrict the claims to maritime claims and, at the same time, to set some exceptions.

3.2 Ships that May be Arrested

The scope of ships that may be arrested is a core issue in the law and practice of arrest of ship. In judicial practice, one condition for application of arrest of ship is that the ship can be arrested according to relevant laws. A court must review the application to determine whether the ship in question can be arrested according to laws. The different provisions on this issue can heavily affect the competing interests of ship-owners who desire to limit the arrest of ships to a scope as narrow as possible and cargo-owners who hope to broaden the scope as wide as possible.

The Arrest Convention of 1952, Arrest Convention of 1999, and the Chinese law have some differences in the treatment of this issue. So comparing and analyzing the relevant provisions under different legal systems is of essential importance, particularly for judges and legal practitioners, because wrong or unjustified arrest can result in great damage to the ship-owner and can also cause liability on the part of the applicant¹⁵⁹.

In view of a survey on the related provisions of the Arrest Convention of 1952, the Arrest Convention of 1999 and Chinese national law, this issue mainly concerns the following sub-issues:

- a. Arrest of a ship in respect of which a maritime claim is asserted;
- b. Arrest of sister ships;
- c. Arrest of associated ships;
- d. Arrest of ships ready to sail or in the course of navigation;
- e. Ships immune from arrest;
- f. Rearrest and multiple arrest.

In this part of the paper, I want to deal with above sub-issues by comparing and analyzing the relevant provisions of the Arrest Convention of 1952 and Arrest Convention of 1999 and the Chinese law.

¹⁵⁹ If an arrest of ship is finally proved wrong or unjustified, the ship owner shall suffer losses and, according to laws of most countries, the ship owner is entitled to take action against the ship arrestor for claim of such losses.

3.2.1 Arrest of the Ship in Respect of Which a Maritime Claim is Asserted

3.2.1.1 Relevant provisions in Arrest Convention of 1952

The Arrest Convention of 1952 addresses this sub-issue in its article 3. Section 1 of this article provides that “subject to the provisions of section 4 of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in item (o), (p), or (q) of section 1 of article 1”.

According to above provision, “the particular ship in respect of which a maritime claim arose” can be arrested, and in regard to item (o) (disputes as to the title to or ownership of any ship), item (p) (disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship), and item (q) (the mortgage or hypothecation of any ship), only the particular ship can be arrested.

But question is: whether the particular ship in respect of which the maritime claim arose can be arrested unconditionally. Seeing at first glance, the answer is “yes” because it is so stated; but, if I analyze the above article thoroughly, I can answer “no” to the question. A requirement that the owner of the particular ship must be the person liable for the claim (save when the claim is secured by a maritime lien and save when the claim is against the particular ship which is demise-chartered) is clearly implied by the provision which states that a ship other than the one in respect of which the maritime claim has arisen may be arrested when it was owned, at the time when the maritime claim has arisen, by the owner of the particular ship. The arrest of another ship in the same ownership would in fact be utmost unreasonable if the owner of the particular ship were not liable in respect of the maritime claim. It is also implied by the wording “subject to the provisions of paragraph 4” in article 3 (1). Provisions of paragraph 4 of article 3 constitute an exception to the general rule laid down in paragraph 1 of article 3. This exception applies in the right of arrest of a ship when the demise charterer and not the owner is liable in respect of the maritime claim. Therefore, the general rule must necessarily be that the arrest is only permissible when the owner of the ship is liable. The link between the person liable and the ship in respect of

which the maritime claim has arisen must continue to exist until the time when the arrest is made¹⁶⁰. The general rule is, in fact, that a claim is enforceable on the property owned by the defendant (the debtor) and the only exception is made in regard to claims secured by a maritime lien, but unfortunately the Arrest Convention of 1952 has not clearly expressed this point. More unfortunately, the Arrest Convention of 1952 in its last sentence of paragraph (4) of article 3 provides that “the provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.” This wording seems to indicate that in addition to the case of bareboat charter party there are other cases such as time charter party or voyage charter party where the particular ship can be arrested even though the owner is not liable. This wording is against the general rule that a claim can only be enforceable on the property owned by the person who is liable (the exception to this general rule is only made in respect of claims secured by a maritime lien), and this wording exerts adverse influence on national legislations and has caused big confusion in judicial practice.

As mentioned above, according to Arrest Convention of 1952, in the case of a demise charter of a ship, if the bareboat charterer and not the registered owner is liable in respect of a maritime claim arising out of that ship, the claimant can arrest the particular ship which is demise-chartered by the defendant. This provision also causes problems, as in some countries such demise-chartered ship can't be arrested, in some countries it can be arrested but can't be compulsorily sold, and in some countries it can be arrested and can also be compulsorily sold¹⁶¹. Unfortunately, the Arrest Convention of 1952 doesn't distinguish the different situations and provide a flexible solution¹⁶².

According to the Arrest Convention of 1952, in the case of dispute as to the ownership of any ship, only this particular ship and no other ships can be arrested¹⁶³. This provision is correct because in this situation the particular ship as a special property is in dispute and it can't be replaced by any other property or

¹⁶⁰ The arrest of ship after it has been sold to a third person other than the defendant has been held not to be permissible in France by the Montpellier Court of Appeal with judgment 31 July 1996 over the case of *Sallyview Estates Ltd. v. S.A. Enjoy-The “Zaher V”*, <1997> DMF 31.

¹⁶¹ In common law countries such a ship can be taken action against and can be judicially sold; In some civil law countries such a ship can not be arrested and can not be sold; in some civil law countries such a ship can be arrested but can not be judicially sold (the old Chinese judicial practice is this case).

¹⁶² Fortunately when Arrest Convention of 1999 is made, this issue has been correctly addressed.

¹⁶³ Refer to article 3(1) of the Arrest Convention of 1952.

security. Due to the same reason, according to the convention, in disputes between co-owners of any ship as to the ownership, possession, employment or earnings of this ship, only this particular ship and no other ship/ships can be arrested.

According to the convention, in the case of mortgage on any ship, only the particular ship and no other ship/ships can be arrested. Here exercising mortgage right against the particular ship should be distinguished from exercising the common credit right that is not secured by mortgage. Only in the former situation the particular ship and no other ship can be arrested because the mortgage always follows the particular ship irrespective of who is her owner¹⁶⁴. In the former situation, the claimant can only arrest the particular ship and is entitled to be paid from the proceeds of the sale of the particular ship according to the priority order. In the latter case, the creditor can arrest a ship/ships other than the particular ship, but in this case he can only be treated as a common creditor without any privileged right. The convention regrettably ignores the above differences of the two situations.

Seen from the above analysis, it can be concluded that the provisions of Arrest Convention of 1952 in regard to the arrest of ship in respect of which a maritime claim is asserted are not perfect, and should be amended so as to clearly distinguish the arrest of such ship under different situations, particularly distinguish the arrest of ship due to maritime liens or mortgages from the arrest of ship due to other common maritime claim.

3.2.1.2 Relevant provisions in Arrest Convention of 1999

Identifying the defects of Arrest Convention of 1952 in regard to the arrest of ship in respect of which a maritime claim is asserted and aiming at readdress the defects, the Arrest Convention of 1999 distinguishes arrest of ships under different situations and provides reasonable conditions for every kind of arrest.

Section 1 of Article 3 of Arrest Convention of 1999 provides that arrest of a ship in respect of which a maritime claim is asserted can be permitted under the following 5 situations according to the respective conditions stipulated.

(1) Claim against the Owner of the Ship

¹⁶⁴ According to general legal principle, once a mortgage is effectively established on a property, the mortgage begins to be attached to the property. If the owner of the property has sold the property to a third party, the mortgage still follows the property to the third person.

According to item (a) of section 1 of article 3 of the Arrest Convention of 1999, “arrest is permissible of any ship in respect of which a maritime claim is asserted if the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected”. This provision correctly remedies a defect of the Arrest Convention of 1952. The Arrest Convention of 1952 provides only that a claimant may arrest the particular ship in respect of which the maritime claim arose but fails to expressly stipulate that the owner of the ship must be personally liable for that claim and must still be the owner of the ship when the arrest is effected. The provision also clarifies the issue of when the ship should be still owned by the liable person. It definitely stipulates that when the arrest of such ship is effected such ship must be still owned by the person liable, so as to unify the different judicial practice.¹⁶⁵ But a minor problem still exists in that the above provision doesn’t clarify the manner of how to determine the priority of the sale of the ship and the arrest of the ship. Majority judicial practice is that registration of the sale of the ship can confirm the sale of a ship, that is to say, when the arrest is effected, if the registration of the sale of such ship has been effected earlier, then the ship can’t be deemed as still being owned by the person liable and therefore can’t be arrested¹⁶⁶.

(2) Claim against the Demise Charterer

According to item (b) of section 1 of article 3 of the 1999 convention, “arrest is permissible of any ship in respect of which a maritime claim is asserted if the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected”. Here, to arrest the particular ship that is demise-chartered, two requirements must be met: one is that the demise charterer is liable to the claim arising out of the ship; the other is that when the arrest is effected the demise charterer is still the demise charterer or becomes the owner of the ship. But the particular ship that is time-chartered or voyage-chartered can’t be arrested when the time charterer or voyage charterer is liable¹⁶⁷. In this regard the reason to distinguish between

¹⁶⁵ In judicial practice of some countries, “when the arrest of such ship is effected the ship must still be in the ownership of the person liable” is replaced either by “when the action is commenced the ship must still be owned by the person liable” or “when the arrest decision is made the ship is still owned by the person liable.

¹⁶⁶ It is indicated by this rule that, though the ship has been sold to a third party, as long as the sale has not been registered, the ship can still be deemed owned by the previous owner and can still be arrested as a property of the previous owner.

¹⁶⁷ During the Diplomatic Conference for the Review of Arrest Convention of 1999, a proposal was made to delete the word “demise”, thereby extending the right of arrest to claims against any charterer, including time

demise charterer and time/voyage charterer is that the demise charterer directly possesses and operates the demise-chartered ship, the captain and crew of the ship are employed and controlled by the demise charterer, and any damage is caused by the demise charterer using the demise-chartered ship as a tool. So in the case of demise charter, the particular ship can be arrested if the conditions set down by the convention for arrest of the demise-chartered ship are met, otherwise unfair and unreasonable result can occur. On the contrary, under the time charter/voyage charter, it is the ship owner who controls and possesses the ship, if the time/voyage charterer and not the shipowner should be personally liable for the claim, then the chartered ship or her registered ship owner has no direct link with the claim and thus the ship should not be arrested.

But problem still cannot be ignored in the case of arrest of the particular ship which is demise chartered. According to principle of the continental law system, only the property owned by the debtor/defendant can be arrested to secure the claim and to satisfy an enforceable judgment, and, in term of ownership, the demise-chartered ship is not the property of the demise charterer, thus, strictly speaking, it can't be sold to satisfy the enforceable judgment against the demise charterer. Even in the United Kingdom, one of the common law countries, the Justice Administration Act of 1956 once provided that the demise-chartered ship cannot be arrested for the claim which the demise charterer is liable, because the demise charterer is not a beneficial owner of the ship. In 1981, the Supreme Court Act began to permit the arrest of a ship that is demise-chartered for exercising a statutory lien. Under Chinese legal system, in the past there was a serious problem in regard to arrest of demise-chartered ship, because according to the legal rules of that time, a demise-chartered ship can be arrested if the claim is asserted in respect of the ship and the demise charterer should be liable, but the ship cannot be sold to satisfy a judgment against the demise charterer due to the fact that the ship is not a property of the demise charterer. In order to cure the defect and unify the national provisions of Contracting States, the Arrest Convention of 1999 provides that "notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a

charterer and voyage charterer. But CMI observer pointed out that arrest of a ship in respect of claim against a demise charterer is only an exception to the general rule according to which, unless the claim is secured by a maritime lien, a ship can only be arrested in respect of claims against its owner and also that it is very dangerous to widen the exception. And, finally, this opinion was accepted by the conference.

judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.”¹⁶⁸ This provision, in fact, lays down restriction to the arrest of demise-chartered ship, and it means that only the law of the nation where such arrest is applied for permits the forced or judicial sale of such ship, the arrest of such ship can be allowed¹⁶⁹.

(3) Claim Based on a Mortgage, “Hypothèque” or Charge

According to item (c) of section 1 of article 3 of Arrest Convention of 1999, arrest is permissible of any ship in respect of which a maritime claim is asserted if “the claim is based upon a mortgage or a ‘hypothèque’ or a charge of the same nature on the ship”. This is another exception to the general rule that only a ship owned by the person liable for the claim both at the time when the claim arose and at the time when the arrest is effected can be arrested. This is because that the mortgage or a charge of the same nature on a ship can be established by the previous ship owner who is the defendant, and because that once the mortgage is established it shall follow the ship irrespective of who owns the ship. This provision doesn’t expressly require that the mortgage or a charge of the same nature must be registered, so the provision doesn’t forbid the Contracting State to recognize and enforce unregistered mortgage. According to MLM (maritime liens and mortgages) Convention of 1993, registration of mortgage is a condition for its recognition and enforcement in member states. But as to a non-member-state of MLM Convention of 1993, but who is a member state of Arrest Convention of 1999, its national law may recognize the unregistered mortgage. In order to unify the rules, the section 3 of article 3 of the Arrest Convention of 1999 provides that “notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.” Therefore, it follows that, in a member state of Arrest Convention of 1999 where the arrest is applied for and whose national law recognizes an unregistered mortgage, then a foreign ship on which the unregistered mortgage was established can be arrested in the case the mortgage secures a claim against a person who is not the current owner of the ship. It may happen that, even though a

¹⁶⁸ Refer to section 3 of article 3 of the Arrest Convention of 1999.

¹⁶⁹ In this sense, the rule that a demise-chartered ship can be arrested (section 1 of article 3) and the condition which is laid down for the restriction on the arrest of demise-chartered ship (section 3 of article 3) must be combined together, otherwise misunderstanding can happen.

foreign country where the ship is registered may recognize an unregistered mortgage, but if the member state where the arrest is applied for doesn't recognize an unregistered mortgage, according to the above provision of the Arrest Convention of 1999, the ship can't be arrested in case the mortgage secures a claim against a person who is not the current owner of the ship

(4) Claim Relating to the Ownership or Possession of the Ship.

According to the item (d) of section 1 of article 3 of the Arrest Convention of 1999, arrest is permissible of any ship in respect of which a maritime claim is asserted if the claim relates to the ownership or possession of the ship. Here the general rule that the person liable for the claim must be the owner of the ship can't apply, because, strictly speaking, there is no person liable, and the subject matter of the claim is the ship itself and is not a sum of money, and the ship cannot be replaced by anything else. In this sense, even the definition of arrest given by the convention in its article 1(2) cannot apply in regard to arrest of ship in cases of ownership or possession of the ship, because in this situation the arrest is not for securing a maritime claim but rather for preventing the continued use of the ship by a person who is alleged not being the owner of the ship or a person entitled to the possession of the ship. Noticing the special character of this kind of claim and of the related arrest of the ship, the last sentence of section 2 of article 3 of the Arrest Convention of 1999 clearly provides that the rules of arrest of sister ship don't apply to claims in respect of ownership or possession of a ship, that is to say, only the particular ship and no other ship/ships can be arrested; and additionally, considering the sensibility of this issue and its close connection with a particular contracting state, in the item (c) of section 1 of article 10, the 1999 convention grants a contracting state the right to exclude the application of the convention to claims relating to ownership or possession of the ship. So if such right of exclusion has been exercised by a contracting state, the national law of this state shall prevail and apply to the arrest of ship in regard to disputes of its ownership or possession.

(5) Claim Secured by a Maritime Lien

According to item (e) of section 1 of article 3 of Arrest Convention of 1999, arrest is permissible of any ship in respect of which a maritime claim is asserted if "the claim is against the owner, demise charter, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for". This provision allows arrest of the particular

ship for exercising maritime lien. It is generally understood that a maritime lien is a privilege granted by law to some special maritime claimants to arrest the particular ship through judicial power within a specified period¹⁷⁰ and to get paid in priority from the proceeds of the forced sale of the particular ship. The maritime lien follows the particular ship through the transfer of the ship¹⁷¹. Unlike the maritime mortgage, the maritime lien needs no registration in order to be effective.

In Arrest Convention of 1952 there are no particular provisions on the arrest of ships for claim secured by a maritime lien. But with the advent of MLM Convention¹⁷², it had been agreed that the right to arrest a ship, irrespective of the claim against the ship-owner or the demise charterer, should be limited to the claims secured by one of the maritime liens listed in the MLM Convention. In the course of drafting the Arrest Convention of 1999, such maritime liens listed in MLM Convention were also listed in the Draft of Arrest Convention of 1999. This restriction of maritime liens to those enumerated in MLM Convention gave rise to a hot debate during the 1993 Diplomatic Conference. Some states strongly objected to this restriction, because they recognize maritime liens more than or other than those listed in the MLM Convention. Finally a compromise was reached on the basis that contracting states were permitted to grant maritime liens other than those listed in MLM Convention. Because of this, the terms “international maritime liens” (referred to maritime liens listed in MLM Convention) and “national maritime liens” (referred to maritime liens granted or recognized by national law) thereafter came into use. In order to unify the rules, in the final draft, a very simple provision was adopted to refer only to the maritime liens recognized or granted by the national law of the state where the arrest is applied for. The effects of this provision are that, for a member state of MLM Convention, the maritime liens are those listed in the MLM Convention, but for a non-member-state of the MLM Convention, the maritime claims are those granted or recognized by the national law of this state. Additionally, the special reference to only claims against the ship-owner, demise charterer, ship-manager and

¹⁷⁰ According to international conventions on maritime liens and mortgages, the time bar for exercising maritime lien is usually one year with some exceptions. In addition, a maritime lien can also be destroyed in some specified situations such as judicial sale, destruction of the ship etc.

¹⁷¹ According to article 8 of the Maritime Liens and Mortgages Convention of 1926, “claims secured by a lien follow the vessel into whatever hands it may pass”.

¹⁷² MLM Convention is a shortened name for “maritime liens and mortgages convention”. Up to date, there are three relevant conventions: MLM of 1926, MLM of 1967, and MLM of 1993.

ship-operator also solves the problem caused by section 4 of article 3 of Arrest Convention of 1952, closing door to the possibility of arresting a particular ship basing on maritime claim against the time-charterer or voyage-charterer¹⁷³. This is, obviously, an advance compared with the relevant provision of Arrest Convention of 1952.

3.2.1.3 The Relevant Provisions under Chinese Law

In regard to arrest of a ship in respect of which a maritime claim is asserted, the Chinese relevant provisions have undergone changes.

According to the Arrest Provisions of 1994, a ship in respect of which a maritime claim is asserted can be arrested under the condition that this particular ship belongs to the same ship-owner or ship-operator or ship-charterer both at the time when the maritime claim arose and at the time when the ship is arrested, with the arrest of a ship basing on exercising the maritime liens excepted¹⁷⁴. This provision doesn't distinguish different kinds of charterer, which implies that if a time-charterer or a voyage charterer is responsible for a maritime claim, the claimant can also arrest the particular ship in respect of which the claim is asserted against the time charterer or voyage charterer. This unjustly enlarges the scope of arrest of the particular ship. As we all know, in the case of demise charter, because the demise charterer controls and operates the ship, so if the demise charterer is liable for the claim, the particular ship that is demise-chartered can be arrested in some countries under some conditions¹⁷⁵ (under Arrest Convention of 1999, this kind of arrest can be admitted provided that the arrested ship can be forcibly sold to satisfy the judgment or arbitral award), but the arrest of the particular ship in the case where the time-charterer or voyage charterer and not the ship-owner is liable for the claim is unreasonable because the time-charterer or voyage-charterer has a very loose contact with the particular ship and the

¹⁷³ As previously mentioned the ship which is demise-chartered can be arrested in some cases because the ship is under the direct control and possession of the demise charterer and the ship owner should burden some risks when he gets profits from the demise charter. This rule puts pressure on the ship owner upon choice of demise charterer. The ship owner is obliged to study on the demise charterer and keep a close watch on the operation of the demise-chartered ship. But in time charter or voyage charter, the connection between the time charterer or voyage charterer and the ship is not so close that it is not justified to arrest the ship time-chartered or voyage-chartered.

¹⁷⁴ Refer to article section 1 of article 3 of this legal document.

¹⁷⁵ But in some countries time-chartered ship and voyage-chartered ship can also be arrested. For example, in Germany, this is the case. Please refer to:

Jin Zheng-jia: A Research on German Maritime Procedures, Maritime Trials, the 4th issue of 1994, p.27.

ship-owner is not liable for the claim. Permitting the latter arrest of ship can severely damage the interests of the innocent ship owner and can cause disorder in arrest of ship. Additionally, according to Concrete Provisions on the Forced Sale of Arrested Ships to Pay off Debts which was made in 1987 and amended in 1994 by the Supreme Court of China, only the ship which is owned by the person who is liable for the claim can be forcibly sold to satisfy the final judgment, and this expressly excludes the possibility of judicial sale of the arrested ship if the time/voyage charterer rather than the ship owner is liable for the claim. Therefore, the Arrest Provisions of 1994 and the Concrete Provisions on the Forced Sale of Arrested Ships to Pay off Debts of 1994 are in direct contradiction¹⁷⁶, and the result of this contradiction is that the particular ship in the case where the time charterer or voyage charterer and not the ship owner is liable for the claim can be arrested according to the former document but can not be judicially sold according to the latter document. In this case, the purpose of the arrest cannot be fulfilled because the security cannot be obtained and enforced; at the same time the innocent ship owner can incur a large loss. The unreasonable enlargement of the scope of arrest of a particular ship by the Arrest Provisions of 1994 is due to the incorrect understanding of the relevant provisions in Arrest Convention of 1952¹⁷⁷.

The above shortcoming is overcome by the Chinese Special Maritime Procedure Law of 1999. In regard to arrest of a ship in respect of which a maritime claim is asserted, this law completely follows the principles adopted by the Arrest Convention of 1999. According to this law, the particular ship in respect of which a maritime claim is asserted can be arrested if (1) the ship owner is liable for the claim and is still the ship owner upon the arrest of such ship (2) the demise charterer is liable for the claim and is still the demise charterer or ship owner upon the arrest of such ship¹⁷⁸. This law doesn't permit the arrest of a particular ship if the time charterer or voyage charterer and neither the ship owner nor the demise

¹⁷⁶ The Arrest Provisions of 1994 permitted the arrest of not only demise-chartered ship but also time-chartered ship and voyage-chartered ship; in contrast, the Judicial Sale Provisions 1994 did not allow the judicial sale of any ship which is not owned by the defendant, this closed door to the judicial sale of the arrested ship which is demise-chartered, time-chartered or voyage-chartered if the charterer and not the ship owner is the defendant in the case.

¹⁷⁷ Please refer to the part of this paper devoted to the analysis of the scope of ships that can be arrested under the Arrest Convention of 1952.

¹⁷⁸ This is also in conformity with the general principle of Chinese civil procedural law that properties directly connected with the case can be arrested. Please refers to: Chief editor Cai Fa-bang: New Version of Civil Procedural Law, Beijing: Law Publishing House, 1994, p. 61.

charterer is liable for the claim. As to the arrest of the particular ship in the case where the demise charterer and not the ship owner is liable, problem may still exist. According to the Arrest Convention of 1999, the arrest of demise-chartered ship can only be permitted if the law of the country where the arrest is applied for allows the judicial sale of such ship. Under current Chinese legal system, such ship can be arrested, but there is no provision as to whether such ship can be judicially sold. If the Chinese Special Maritime Procedural Law of 1999 (a special law) fails to provide rule for this issue, according to the general principle of Chinese law, the common law (in regard to this case, the Civil Procedural Law of China) should be used to fill the gap. According to the Civil Procedural Law of China, only the property owned by the debtor/defendant can be judicially sold to satisfy the judgment against him. Therefore, the Chinese Special Maritime Procedural Law of 1999 does not completely solve the contradiction between arrest of the particular ship and the judicial sale of such ship in the case the demise charterer not the ship owner is liable for the claim. In judicial practice, maritime courts of China now has tendency to permit the judicial sale of such ship even though there is no clear legal basis to do so. In the future, if China accedes or ratify the Arrest Convention of 1999, China must make additional provision in regard to the judicial sale of such ship in order to perfect the provision of arrest of such ship and keep in conformity with the Convention.

The Chinese Special Maritime Procedure Law of 1999 also provides that a particular ship in respect of which a claim secured by ship mortgage or a right of the same nature is asserted can be arrested. Here special attentions must be paid to the provision of Chinese Maritime Commercial Law of 1992 that only registered ship mortgage is legally recognized and if the mortgage is not registered the mortgage is not effective to a third party¹⁷⁹. Additionally, in the case of exercising the registered mortgage, only the particular ship upon which the mortgage is established can be arrested and once such ship is arrested and judicially sold the claimant is entitled to enjoy priority in payment from the proceeds of the sale of the ship¹⁸⁰.

According to the Chinese Special Maritime Procedure Law of 1999, a maritime court of China can arrest the particular ship in respect of which maritime claim as

¹⁷⁹ Refer to article 13 of the Chinese Maritime Commercial Law of 1992.

¹⁸⁰ Under Chinese legal system, registered mortgage is listed after maritime liens and possessory liens but before common claims. Please refer to article 25 of the Chinese Maritime Commercial Law of 1992.

to the ownership or possession of the ship arises. This provision also incorporates the relevant provision of the Arrest Convention of 1999. Due to the specialty of arrest of ship in this situation, the Arrest Convention of 1999 further provides that such arrested ship can be put in the hand of the original operator or be subjected to a special arrangement if a sufficient security is provided.¹⁸¹ Regrettably, the Chinese Special Maritime Procedure Law of 1999 fails to further provide whether such arrested ship can be released or be subject to a special arrangement on its operation if sufficient security is provided.

Like the Arrest Convention of 1999, the Chinese Special Maritime Procedure Law of 1999 also provides that a particular ship in respect of which a claim secured by maritime liens can be arrested. According to the Arrest Convention of 1999, the maritime liens are subject to the provisions of the national law of the state where the arrest is applied. So it must be noticed that under the Chinese Maritime Commercial Law of 1992, only following maritime liens are recognized in the following order: (1) claim for wages and other sum due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf; (2) loss of life or personal injury occurring in the course of the operation of the ship; (3) claim for ship tonnage dues, pilotage fees, port dues or other charges; (4) claim for salvage fees; (5) claim for loss or damage caused by the operation of the ship¹⁸².

The Chinese Special Maritime Procedure Law of 1999 doesn't provide the arrest of a particular ship due to a claim secured by possessory lien. As the Chinese Special Maritime Procedure Law of 1999 clearly provides that a ship can be arrested for securing the claims arising out of construction, reconstruction, repair, converting or equipping of a ship¹⁸³, it can be logically inferred that the particular ship under construction, reconstruction, repair, converting or equipping can be arrested for exercising possessory lien on such ship. The prerequisite for exercising possessory lien is that such ship is still possessed by the constructor, repairer, converter or equipper upon the arrest of such ship¹⁸⁴. In this case, only

¹⁸¹ In other cases the arrested ship must be released if sufficient security has been provided.

¹⁸² Refer to article 22 of the Chinese Maritime Law of 1992.

¹⁸³ Refer to item 13 of the article 21 of the Chinese Maritime Litigation Special Procedure Law 1999.

¹⁸⁴ If the ship built or repaired has left and is not under the possession of the repairer or builder, the repairer or builder can still arrest that ship. But in this case, the arrest is not made for the purpose of exercising possessory lien. The arrestor in this case cannot enjoy priority in payment from the proceeds of the sale of the arrested ship.

the particular ship on which the possessory lien is established can be arrested and such claimant is entitled to enjoy priority in payment from the proceeds of the sale of the ship. Additionally the arrest of the particular ship for exercising possessory lien cannot be adversely affected by the fact that such ship is transferred to a third party¹⁸⁵. But, if an arrest of ship is not for exercising possessory lien but for exercising common right to construction fees, repair fees etc, other ships owned by the person who is liable can also be arrested.

3.2.2 Arrest of Sister Ships

The permission of arrest of sister ships is a result of conflict and compromise between common law system and continental law system. According to theory and practice of action in rem under common law system, the ship is personified and arrest is only permitted in regard to the particular ship in cases of maritime claim and no other ship can be arrested, so in the early history of common law countries, there was no concept of “arrest of sister ship”; on the contrary, under continental law system, arrest of ship is considered as a preservative measure to secure a claim, so not only the particular ship in respect of which a claim is asserted but also other ships (sister ships) owned by the person liable can be arrested¹⁸⁶. A compromise was reached in Arrest Convention of 1952: on one hand, the convention limited the right of arrest of ships only to specified maritime claims and, on the other hand, it extended the right of arrest from the particular ship to sister ships¹⁸⁷.

3.2.2.1 Relevant Provisions in Arrest Convention of 1952

According to the section (1) of article 3 of Arrest Convention of 1952, “subject to the provisions of paragraph 4 of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship”. This provision clearly empowers the maritime claimant to arrest the sister ships owned by the person who was liable for the maritime claim and was the owner of the particular ship at the time when the maritime claim arose. As to the concept of “sister ships”, the

¹⁸⁵ This means that the mortgage can also follow the ship into a buyer who subsequently bought the ship.

¹⁸⁶ Francesco Berlingieri: *Arrest of Ships*, London: LLP, 2000, p.105.

¹⁸⁷ Please refer to article 3 of the Arrest Convention of 1952.

section (2) of the same article provides that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons¹⁸⁸.

The Arrest Convention of 1952 also extends the principle of arrest of sister ships to ship-operator, ship manager, demise charterer, time charterer and voyage charterer. The section (4) of the article 3 provides that “when in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such (particular) ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claims. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.” The former part of this provision clearly restricts the arrest of sister ships to ships owned by the demise charterer, and the latter part expressly extends the application of rule of arrest of sister ships to ship operator, ship manager, time charterer or voyage charterer etc¹⁸⁹.

What should be paid attention to is that, according to section (1) of article 3 of the Arrest Convention of 1952, the arrest of sister ship doesn't apply to disputes as to the ownership of any ship, disputes between co-owners of any ship as to the possession, employment, earnings of that ship, and mortgage of any ship. These exceptions to the rule of arrest of sister ships did not exist in the draft approved by the CMI at Naples¹⁹⁰ but were first suggested by British delegation at the Diplomatic Conference¹⁹¹. This proposal was supported by Spanish and French delegations and finally accepted by the Conference¹⁹². It is quite understandable

¹⁸⁸ Here “share” means a part of property in a ship. Please refer to:
Francesco Berlingieri: Arrest of Ships, London: LLP, 2000, p.112.

¹⁸⁹ For example, if a time charterer is liable for a maritime claim, any ships owned by him can be arrested for securing such claim.

¹⁹⁰ Refer to 1971 1 Lloyd's Report 49 (C.A.)

¹⁹¹ The full context of the British Delegate's suggestion is that:

He indicates that His Majesty's Government would like two points to be modified. The right of arrest of a sister ship should be limited so as to exclude the following cases: 1. The mortgage; 2. The cases of co-ownership with respect to claims listed in Art. 1 (a) and (f). In the case of mortgage, it doesn't seem possible to arrest a ship other than that which is mortgaged. With respect to paragraphs (a) and (f), he who alleges to have a right of co-ownership in a ship can't enforce such claim on another ship.

¹⁹² The Spanish delegate stated as follows: The Spanish Delegation shares the views of the British Delegation on the sister ship. It would not be equitable to permit the arrest of a sister ship in the case of mortgage. Arrest in such case rather the commencement of enforcement proceedings on the subject matter of the real right,

that in the case of disputes as to ownership or possession of the ship only the particular ship should be arrested because the claims are closely connected to the particular ship and the purpose of such arrest is for securing the ownership or possession of the particular ship and not for obtaining financial security and the arrest of sister ship can not achieve above purpose. But in regard to ship mortgage, the argument in favor of not applying rule of arrest of sister ship rule to ship mortgage is that the maritime nature of the claim is decided by the mortgage and not by the nature of the debt secured by the mortgage. So only the nature of ship mortgage gives rise to a maritime claim, and arrest of ship in the case of exercising ship mortgage should be confined to that particular ship. In my opinion, it is quite doubtful whether the above exclusion has sufficient rationale because some of the disputes such as disputes as to the earnings of the ship only pertain to money interests and don't only connect with the particular ship. In these situations, the arrest of sister ship owned by the defendant can also secure the claim of the plaintiff. In the case of ship mortgage, in practice it is very difficult to arrest the particular ship on which the mortgage is established, so it is necessary to empower the claimant to arrest a sister ship owned by the debtor. Of course, in this case, the claimant can't enjoy priority in payment from the judicial sale of the sister ship¹⁹³.

3.2.2.2 The Relevant Provisions in Arrest Convention of 1999

Section 2 of article 3 of the Arrest Convention of 1999 regulates the arrest of sister ships. Section 2 reads that:

“Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose, (a) owner of the ship in respect of which the maritime claim arose; or (b) demise charterer, time charterer or voyage

whilst as regards personal claims, arrest is merely a security measure on a part whatsoever of the assets of the debtor. It would, therefore, be necessary to modify the text of Article 1 in order to clearly establish a distinction between real and personal rights as the basis of a conservative measure. Please refer to footnote 68 of :

Francesco Berlingieri: Arrest of Ships, London: LLP, 2000. p.114.

¹⁹³ So, in my opinion, the mortgage right holder can choose to arrest the particular ship on which the mortgage is set up. If this is the case, the mortgage holder shall enjoy priority in payment from the proceeds of the sale of the arrested ship. He can also arrest a sister ship owned by the defendant/debtor, if this is the case, he can not enjoy priority in payment from the proceeds of the sale of the arrested ship as this ship is not the particular ship on which the mortgage is established.

charterer of that ship. This provision doesn't apply to claims in respect of ownership or possession of a ship".

This provision covers two situations of arrest of sister ships: first, the arrest of a sister ship in a strict sense---the arrest of any other ships owned by the person who is liable for the maritime claim and was owner of the ship in respect of which the maritime claim arose---which in the Arrest Convention of 1952 is regulated by section 1 of article 3; secondly, the arrest of a ship owned by the person liable for the maritime claim, who, when the claim arose, was the demise charterer, time charterer or voyage charterer of the ship in respect of which the claim arose. The purpose of this provision is to extend the sister ship rule to cases where the person liable for the claim is not the owner of the ship in respect of which the claim arose but is the owner of another ship¹⁹⁴.

But the wording "this provision doesn't apply to claims in respect of ownership or possession of a ship" can cause confusion. As mentioned above, the arrest of sister ship rule in Arrest Convention of 1952 doesn't apply to disputes as to ownership, possession, employment, earnings of the ship, mortgage or hypothecation of any ship; in contrast, the Arrest Convention of 1999 deletes some disputes and only keeps disputes of ownership or possession of the ship being excluded from the application of rule of arrest of sister ship. Compared with the Arrest Convention of 1952, the formula of the Arrest Convention of 1999 is more reasonable. As far as I understand, the arrest of sister ship rule should apply to the claim as to employment and earnings of the ship. As to the mortgage, a distinction should be made. For exercising right of mortgage, only the particular ship can be arrested and no other ships can be arrested; for exercising the common right under the mortgage, sister ships owned by the debtor can also be arrested, and in this situation the creditor can not enjoy any priority in payment from the proceeds of the judicial sale of the arrested ship. Out of the same reason, in the case of exercising maritime lien, only the particular ship can be arrested; in the case of exercising the common right under the maritime lien, sister ships owned by the debtor can also be arrested, in this situation the creditor can not enjoy priority in payment from the proceeds of the judicial sale of the ship. If understood like above, the wording of the Arrest Convention of 1999 in respect of the application of rule of arrest of sister ship can not cause problem, otherwise confusion in interpretation can occur and the confusion can exert adverse

¹⁹⁴ Francesco Berlingieri: Arrest of Ships, London: LLP, 2000, p.322.

influences on judicial practice of arrest of the particular ship and arrest of sister ships.

3.2.2.3 Relevant Provisions in Chinese Law

The Arrest Provisions of 1994 also regulates the arrest of sister ship. According to the section 3 of article 3 of the Arrest Provisions of 1994, a sister ship/ships owned by the person who is liable for the claim and was the owner of the ship in respect of which the maritime claim arose can be arrested. This is arrest of sister ship in strict sense and this provision is in conformity with the Arrest Convention of 1952 and the Arrest Convention of 1999. Unfortunately, the above section continues to provide that, other ships operated by or chartered by ship operator or ship charterer who is liable for a claim in respect of the particular ship he has operated or chartered can also be arrested. This provision unjustly enlarges the scope of arrest of sister ships, because it unreasonably extends rule of arrest of sister ships to any other ships operated or chartered by the ship operator or ship charterer¹⁹⁵. This extension can result to the excessive protection of the interests of the claimant and can severely damage the interests of the ship owner and disturb the normal order of shipping world. Like the Arrest Convention of 1952, the Arrest Provisions of 1994 also provides that arrest of sister ship doesn't apply to the maritime claim as to the ownership, mortgage, possession, operation or earnings of the ship. As commented above, this exclusion of application of the arrest of sister ship rules is not wholly correct and practical.

The Chinese Special Maritime Procedure Law of 1999 has replaced the Arrest Provisions of 1994 and has incorporated the provision of Arrest Convention of 1999 in regard to arrest of sister ships. It has put an end to the provision of the Arrest Provisions of 1994 that any other ships operated or chartered by the ship operator or ship charterer can also be arrested. But the wording "this provision doesn't apply to claims in respect of ownership or possession of a ship" can cause the same interpretation problem as analyzed in the part 3.2.2.2.

3.2.3 Arrest of Associated Ships

¹⁹⁵ More serious problem exists. The provision does not give the "charterer" a strict explanation. According to this provision, not only demise charterer is included but also time charterer and voyage charterer are included. The absurd result of the application of the provision can be as follows: A company time-chartered a ship B owned by company C; at the same time A company time-chartered another ship D owned by company E. If A company is responsible for a maritime claim in respect of ship B, then ship D can also be arrested.

In some jurisdictions¹⁹⁶ not only the sister-ships owned by the person who is liable for the maritime claim can be arrested but associated ships or ships controlled by the person who is liable can also be arrested under some conditions. This means that the strict requirement that the arrested ship must be completely owned by the person liable is softened, as in some countries the corporate form may be disregarded or as it is said the corporate veil can be “pierced” in the case of fraud or in the case two companies are under the full control of the same person or persons.

In the Arrest Convention of 1952 there is no direct mention of “associated ship”, and even there lacks a clear definition of ship owner¹⁹⁷. This situation leaves enough space for the individual state to address the issue.

During the preparation for the Arrest Convention of 1999, in view of the development in several countries in regard to piercing the corporate veil, CMI thought it was convenient to recommend in its Position Paper that it should be made clear that the Convention doesn’t prevent the courts of Contracting States to pierce the corporate veil when this is permitted by the *lex fori* (the local law)¹⁹⁸. The delegation of the United Kingdom went farther and made a more far-reaching proposal at the Diplomatic Conference. The delegation suggested that an express provision be included in the Convention in this respect and that arrest be permissible of a ship not owned by the person against whom the claim has arisen when the ship is “controlled” by such person and also suggested a number of factors in considering the existence of such control.¹⁹⁹ This proposal gave rise to

¹⁹⁶ The South Africa is a typical country of this kind.

¹⁹⁷ In this sense, the “associated ship” is a concept created by some States for the purpose of enlarging scope of arrest of ships.

¹⁹⁸ The following statement was made in this respect by the CMI in its report:

The international Sub-committee made an attempt to draft a rule in relation to the sister ship rule permitting the lifting of veil between several companies owning ships when those companies are owned or controlled by the same persons. The Arrest Convention of 1952 contained a not very clear provision of this nature in article 3 of paragraph (2). The Conference found that this problem is of a more general nature and that a solution should not be attempted with specific application in arrest situations but that the problem would have to be left to national law.

¹⁹⁹ The delegation of the United Kingdom had suggested that paragraph (2) of Art. 3 be replaced with the following text:

- 3 (2) (a) Arrest is also permissible of any other ship which, when the arrest is effected, is:
- (1) owned by the same person who, when the maritime claim arose, was liable for the claim as owner of the ship in respect of which the claim arose;
 - (2) owned by the same person who, when the maritime claim arose, was liable for that claim as the demise charterer, time charterer or voyage charterer of the ship in respect of which the maritime claim arose, or
 - (3) effectively controlled by a person as if that person owned the arrested ship, provided that at the

a lengthy and fierce debate at the Diplomatic Conference. A small number of delegations such as those of Denmark, Finland, Norway, Sweden, Republic of Korea, Malta supported in principle the UK proposal while the majority of the delegations opposed to it on different grounds. These grounds can be summarized as follows: (a) the question whether and in what conditions the corporate veil can be pierced is a question involving general principles of corporate law and is not suitable to be regulated in a particular maritime convention dealing with a very specialized issue;²⁰⁰ (b) attempts to give a legislative solution to this problem at a national level are proved not successful²⁰¹; (c) piercing the corporate veil would adversely affect the maritime trade and only protect the interests of certain groups;²⁰² (d) the growth of single ship companies is well justified and is not at all due to the intention to circumvent the arrest of sister ships;²⁰³ (e) the notion of “control”, on which the UK proposal is based, is not clear and its application would give an unacceptable discretion to the courts exercising jurisdiction on the arrest of ship;²⁰⁴ (f) the adoption of the suggested rules would adversely affect crews and ship management companies.²⁰⁵ Confronted with these objections, the UK proposal was put aside and not further discussed. But in my opinion, some of the above opposing stances are groundless, for example, the stance that justifies the proliferation of single ship companies is not holding and persuasive, because, as already shown by the analysis of reality,

time the maritime claim arose such person controlled the person who is liable for that claim.

(b) In determining whether a ship is effectively controlled by a person, a Court may take into account all

relevant factors including but not restricted to, whether that person is able to:

- (1) make decisions in respect of that ship,
- (2) influence the implementation of those decisions, and
- (3) direct the distribution of profits from the operations of that ship.

(c) If the ship is not owned by the person who is liable for the maritime claim, the question whether there is a connection between the person owning the ship and the person liable for the maritime claim such as to justify the arrest shall be decided in accordance with the law of the State where the arrest is applied for.

(d) This paragraph (2) shall not apply to claims in respect of ownership or possession of a ship

As for similar suggestions made by delegations of other Contracting States, please also refer to introduction and comment given by Prof. Francesco Berlingieri in *Arrest of Ships*, third edition, published by LLP in London in 2000, p.323.

²⁰⁰ Opinions expressed by delegations from Canada, the Netherlands, Japan, France, Sri Lanka, Belgium, Australia, Thailand, Ghana, Philippines.

²⁰¹ Opinion expressed by delegations from Denmark, Croatia, Finland, Norway, Sweden.

²⁰² Opinion expressed by delegations from Greece, Hong Kong, Thailand, Panama.

²⁰³ Opinion expressed by Malta and ICS.

²⁰⁴ Opinion expressed by delegations from Hong Kong, Mexico, Malta, ICS.

²⁰⁵ Opinion expressed by delegations from China, Malta, ICS.

single ship companies are often organized to provide an additional and illegitimate shield to the owner's responsibility. I also think that even though it is proved impossible to find an internationally accepted solution to this problem at present, this problem should not be ignored and further attempts should be made to solve it as soon as possible in the near future

As a result of the rejection of the UK proposal, currently there are no uniform rules on the question whether and in what conditions the corporate veil can be pierced and on whether ships owned by companies having a corporate identity different from that of the company liable for the claim may be arrested. So it can be logically said that in current situation *lex fori* (national law of the country where the arrest is applied) shall apply in this regard.²⁰⁶ In addition, the Arrest Convention of 1999 has no similar provision to the one in Art. 3(2) of the Arrest Convention of 1952 in regard to which ships should be deemed to be in the same ownership, and this fact also indicates that the decision on the question is intended to be subject to *lex fori*.

In view of above analysis, an investigation into and study on *lex fori* (the relevant national law and practice in respect of this issue) is necessary and important. Following is a survey of law and practice of some typical countries.

In Belgium corporate veil can be and has been pierced several times in connection with the arrest of ships owned by companies other than those owning the ship in respect of which the claim had arisen when it appeared that the creation of separate legal entities was a fiction and the corporate form of a company had been used for fraudulent purposes;

In the United Kingdom "piercing the corporate of the ships" was not accepted in initial stage, but nowadays it seems that there may be circumstances in which it is permitted to pierce the corporate veil if it is proved that sufficient evidence shows that the corporate veil is a mere façade concealing the true facts. In other words, under the legal system of the United Kingdom, it is possible to arrest in some strictly restricted situations the "associated ship" on which the owner of the particular ship retains "beneficial ownership".

In the United States, when the need to protect those who deal with the corporation outweighs the need to recognize the corporate independence and

²⁰⁶ Many delegations suggested at the Diplomatic Conference that this matter be left to the *lex fori*. These delegations include delegations from Italy, Greece, Turkey, and Korea. Delegations from Norway, Sweden, Finland, Malta, Croatia also hinted at the same solution.

shareholders' limited liability, the corporate veil may be pierced and the arrest of "associated ships" in this situation is justified. According to the judicial practice of US Courts, corporate veil can be pierced when the corporate form has been used to achieve fraud or when the corporation has been so dominated by an individual or another corporation and its separate identity has been so disregarded that it primarily transacted the dominator's business rather than its own and can be called the alter ego of the dominator²⁰⁷. In order to judge whether a corporation is nothing but an alter ego of another one, the following elements are usually considered: (1) the absence of a part/parts of the corporate existence, i.e. issuance of stock, election of directors, keeping of corporate records etc.; (2) inadequate capitalization; (3) whether funds are operated for personal rather than corporate purposes; (4) overlap in ownership, officers, directors, personnel between the two corporations; (5) common office space, address and telephone numbers of the two corporations; (6) the amount of business discretion exercised by the allegedly dominated corporation; (7) whether the allegedly dominating corporation deals with the dominated corporation within arms length; (8) whether the corporations are treated as independent profit centers; (9) whether the debts of the allegedly dominated corporation are paid or guaranteed by the dominating corporation; (10) whether the property of the corporation in question is deemed or used by the alleged dominating corporation as its owns²⁰⁸.

In France arrest of a ship owned by a company other than the one liable for the maritime claim has frequently been granted by a French court. In most cases such arrest has been granted on the ground of close association (not a relation of ownership in strict sense) between the ship in respect of which the claim has arisen and another ship the arrest of which is requested. In several judgments French Courts have given a new interpretation to the provisions of sections (1) and (2) of the Arrest Convention of 1952 saying that the arrest of a ship owned by a different company was not in conflict with the Convention when the two companies were linked by a common interest or their fictitious nature was proved. In the famous case of *Brave Mother Shipping Ltd. versus Maritime Transports Overseas GmbH*, the French Court held in its judgment that "whereas, if Art. 3 of

²⁰⁷ Refer to cases of *Itel Containers International Corp. versus Atlantrafik Export Serv. Ltd* (909 F. 2d 698-2, p.703, year of 1990) and *Gartner versus Snyder* (607 F.2d 582, p.586. Second Circuit, year of 1989).

²⁰⁸ Refer to case of *Wm. Passalacqua Builders Inc. versus Resnick Developers South Inc. and Others* (933 F.2d 131, p.139).

the Convention²⁰⁹ states that, when all parts of the vessel belong to the same person or persons, the ships are deemed to be in the same ownership, this provision does not exclude that evidence is given that a ship belongs to the same person or persons even though the parts do not wholly belong to him or them and that it has been found that the two ships in respect of which the dispute has arisen, even if registered as belonging to distinct legal entities, were owned by companies whose assets were united through the members of the same family and by a *communaute d'interets* (common interests----added by the author of this paper)".

In South Africa, according to its Admiralty Jurisdiction Regulation Act 105 of 1983, the claimant can arrest an "associated ship". The "associated ship" is so defined in section 3 (7) a of the Act as: an associated ship means a ship, other than the ship in respect of which the maritime claim arose: (1) owned, at the time when the action is commenced, by the person who was the owner of the ship concerned at the time when the maritime claim arose; or (2) owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose; or (3) owned, at the time when the action is commenced, by a company which is controlled by a person who owned the ship concerned or controlled by the company which owned the ship concerned, when the maritime claim arose. Therefore, according to this definition, an "associated ship" is, either a ship that is owned by the same person or by a person or company who controls the company or person who owned the ship in respect of which the maritime claim arose.²¹⁰

In China, there are no legal provisions concerning the piercing of corporate veil or arrest of associated ships. Among the Chinese scholars, some support the piercing of corporate veil and arrest of associated ships. In judicial practice, Chinese Courts seldom pierce the corporate veil and arrest the associated ships. In the course of preparation for the Arrest Convention of 1999, the Chinese delegation strongly objected the British proposal of arrest of associated ships, and argued that the British proposal conflicts with the universally accepted legal regime of limited liability corporation and that the enacting into international law

²⁰⁹ Here "Convention" refers to the Arrest Convention 1952.

²¹⁰ There is a detailed notion of "associated ship" in Hare's Shipping Law and Admiralty Jurisdiction in South Africa, Kenwyn 1999, p.77.

The purpose of the Admiralty Jurisdiction Regulation Act 105 of 1983 is to extend the jurisdiction by South Africa's Courts over maritime cases. Refer to:

Yang Liang-yi: Maritime Law, Dalian: Dalian Maritime University Publishing House, 1999, p.51.

of the British proposal can do great damage to the legal basis of modern enterprises and cause great disorder²¹¹. Taking into consideration of the reality that in China most large shipping companies are state-owned and shipping companies usually have complicated controlling-and-controlled relations with each other, the British proposal once adopted can do damage to national interests of China. In my opinion, maybe this is one of the main reasons that China opposed the British proposal.

In some other countries such as Denmark, Haiti, Croatia, Slovenia etc., piercing the corporate veil and arrest of associated ships is not permitted, of course, basing on different reasons²¹².

In conclusion, from above analysis, it can be seen that there are quite different approaches in regard to the arrest of associated ships. Corporate veil can be pierced and associated ships can be arrested in some countries but not in other countries. In the countries where corporate veil can be pierced, the criteria on basis of which the corporate veil can be pierced differ in some degree, and thus the scope of associated ships that can be arrested also quite differs in different jurisdictions. Due to the differences in this regard, now it is impossible to unify the rules through an international convention.

3.2.4 Arrest of Ships Ready to Sail or in the Course of Navigation

There is no doubt that a ship being in a port for commercial operations can be arrested; but in regard to arrest of a ship ready to sail or in the course of navigation, there is no consensus and uniform rule.

Because arrest of a ship ready to sail or in the course of navigation can greatly disturb the normal operation of the ship and can do damage to the interests of cargo owners whose cargoes are on the ship and especially it is very difficult and dangerous to arrest a ship in the course of navigation, in some countries such a ship is not subject to arrest. For example, in France, according to article 215 of its commercial code, a ship ready to sail cannot be arrested. But most countries do not give a special treatment to ships ready to sail or in course of navigation when considering arrest of ships and they do not prohibit the arrest of such ships.

²¹¹ Please refer to a Letter to Ministry of Foreign Affairs on the Situation of Attending the UN/IMO Diplomatic Conference on Arrest of Ships (the letter was written by the Ministry of Transportation of China).

²¹² Francesco Berlingieri: Arrest of Ships, London: LLP, 2000, p.116. p.125.

In the preparation of the Arrest Convention of 1952, the majority of the delegations thought it proper to clarify the rule in this regard and uniformly provide that ships ready to sail can be arrested. Therefore, in the final version of the Arrest Convention of 1952, there is a provision that says that a ship can be arrested even though the ship arrested be ready to sail.²¹³ It should be noted that this Convention does not clearly lay down rules in regard to arrest of ships in the course of navigation. The specific reference to arrest of ships ready to sail in this Convention doesn't seem to indicate the prohibition by this Convention of the arrest of ships in the course of navigation. Actually, the UN Convention on Law of Sea of 1982 even permits, under specified conditions²¹⁴, the arrest by a coast state of foreign ships within the territorial sea of the coast state for the purpose of civil proceedings, the arrest of foreign ships within the internal waters for purpose of civil proceedings being completely subject to the national law of the coastal state.

Due to the fact that the Arrest Convention of 1952 only refers to the arrest of ships ready to sail but not to the arrest of ships in navigation, in order to be clearer, in the Lisbon Draft of the Arrest Convention of 1999, the new wording "a ship may be arrested even though it is ready to sail or is sailing" replaces the old wording " a ship may be arrested even if ready to sail". This new wording was objected by some delegations in the course of discussion. Some argued that the arrest of a ship already sailing would be difficult to implement and could also pose safety problems for the ship, the persons on board and persons involved in the arrest of the ship²¹⁵; some held the view that such an arrest could heavily and

²¹³ Refer to section (1) of article 3 of the Arrest Convention 1952.

²¹⁴ In regard to civil jurisdiction in relation to foreign ships, article 28 of UN Convention on Law of Sea of 1982 provides that: (1) the coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship;

(2) the coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State;

(3) paragraph (2) is without prejudice to the right of the coastal State, in accordance of its law, to levy execution against or to arrest , for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

This article tells us that the coastal State can arrest a foreign ship for the purpose of civil proceedings even though the ship is passing through the territorial sea if the arrest concerns the obligations or liabilities assumed or incurred by the ship in the course of or for the purpose of passing through the territorial waters or if the ship is passing through the territorial sea after its leaving internal waters. But, for other reasons or purpose, a foreign ship passing through the territorial sea of a coastal State can not be arrested or forced to divert its normal course just for exercising civil jurisdiction on the ship. This article establishes a balance between the need of arrest of a foreign ship passing through the territorial sea and the need of normal operation of the ship.

²¹⁵ Delegations from Hong Kong, China, from Italy, from Netherlands etc. are of this opinion.

adversely affect the interests of third parties. The delegation of Republic of Korea not only objected the arrest of ship that is sailing but also ship that is ready to sail, arguing that arrest of a ship that is ready to sail or is sailing is not desirable because it may destabilize normal practice of commerce by affecting customers not involved in the claim and suggesting, therefore, that such an arrest should not be permitted²¹⁶. But the majority of the delegations support arrest of such a ship, arguing that the denial of the right of arrest of such a ship within the limits of the territorial waters of any one State would be in violation of the rules laid down in Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 and UN Convention on the Law of Sea of 1982 and that such denial was also not in conformity with the current judicial practice of most Contracting States. Finally, as a compromise, the International Maritime Committee suggested that, before a consensus on this issue was reached, it was desirable that the whole provision regarding the arrest of a ship that is ready to sail or is sailing should be deleted so that the question be left to national law. This suggestion was accepted by both of opposing groups and, therefore, in the final version of Arrest Convention of 1999 the wording in regard to arrest of a ship that is ready to sail or is sailing was deleted.

3.2.5 Ships Immune from Arrest

The legal status of a ship is closely connected with the issue of whether the ship can be arrested. For the purpose of application of legal rules pertaining arrest of ships, maritime laws of most countries divide ships into private ships and ships owned or operated by state, and further divide ships owned or operated by state into military ships owned or operated by state, non-commercial ships owned or operated by state, and commercial ships owned or operated by state, and then

²¹⁶ Delegation from Sudan is also of this opinion. The national law of the Republic of Korea prohibits the arrest and sale of a ship that has finished preparation for sailing. The article 744 of the Commercial Law of the Republic of Korea provides that “ a ship and its attached facilities can not be arrested or provisionally arrested if the ship has finished the preparation for sailing, save in cases where the claim arose out of the obligation connected with the preparation for sailing”. In addition, the section 2 of article 38 of the Republic of Korea’s Law on Voluntary Sale by Auction also provides that “a ship that has finished preparation for sailing can not be sold by auction before the ship has finished the voyage of navigation, save in cases where the claim arose out of the obligation connected with the preparation for sailing”. Seen from above provisions, in the Republic of Korea, the arrest of a ship that is sailing or is ready is not permitted. Please refer to: Cheong Hai-deok: A Study on Enforcement against Ships, Ph. D. paper of graduate school of Korean Keong-hi University, 2000, p.52.

exclude the military ships and non-commercial ships owned or operated by state from the scope of ships that can be arrested.

Above exclusion is based on principle of state immunity. Inside a state, this immunity of military ships and non-commercial ships owned or operated by this state from arrest is for the national security and public interests²¹⁷; in international society, this immunity is for keeping international public order and for avoiding conflicts between states. This principle of state immunity has long been established and arrest immunity of military ships and non-commercial ships owned or operated by state has long been recognized²¹⁸. It is universally understood that the principle of state immunity is based on and rooted in equality of state sovereignty.²¹⁹

But it must be noticed that standard of state immunity has undergone some changes. In the early stage, absolute state immunity was accepted. According to this absolute state immunity, any ships owned or operated by state irrespective of the purpose or use of the ships are all entitled to immunity from arrest, thus even commercial ships owned or operated by state are entitled to this immunity. The United States and the United Kingdom, in the past, all recognized the immunity of commercial ship owned or operated by socialist countries, and this practice in fact effectively protected the national interests of socialist states. With more and more ships owned or operated by state being put into commercial activity, absolute state immunity faced more and more challenges. The famous international scholar, Oppenheim²²⁰, once said that the increasing intrusion of state into commercial activity posed a need to amend the absolute state immunity²²¹. Entering into 20th century, more and more states began to adopt the principle of restricted state immunity. American Courts began to apply the theory of restricted state immunity in 1952, and American Congress enacted Foreign Sovereignty Immunity Act in 1976. The Parliament of the United Kingdom enacted State Immunity Act of 1978²²². Then Singapore, South Africa, Pakistan, Canada, Australia followed. As

²¹⁷ In many countries, there is a principle that the public interests are prior to the private interests.

²¹⁸ Liang Su-ying: *International Law*, Beijing: China Politics and Law Science University Publishing House, 1993, pp.53-54.

²¹⁹ There is a famous proverb in the international law that "between the equal persons or entities there exists no jurisdiction over each other".

²²⁰ Maybe Mr. Oppenheim is the most famous international scholar of his time.

²²¹ For a full understanding of his comments on the state immunity, please refer to:

Sir Robert Jennings and Sir Arthur, Eds. *Oppenheim's International Law*, the 9th edition, volume 1, 1992.

²²² State Immunity Act of 1978 (section 10 (2)) provided that "a State is not immune as respects (a) an action in rem against a ship belonging to that State or (b) an action in personam for enforcing a claim in connection

early as in 1926, the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships endorsed the theory of restricted state immunity and excluded the commercial ships owned or operated by state from the scope of state immunity.

In the course of preparation for the Arrest Convention of 1952, there was a debate on the issue of arrest immunity of ships owned or operated by state. The Draft Convention approved at Naples provided that “nothing in this Convention shall modify or affect the laws and principles in force in this respective of Contracting States relating to the immunity from arrest of warships and state-owned vessels”²²³. The Italian delegation proposed to replace above provision with wording “this Convention shall not apply to warships and to state-owned ships employed in a public non-commercial service”. This proposal was strongly objected by the British delegation on the ground that this wording was based on Article 3 of the 1926 Immunity Convention and that it could prevent the ratification of the Arrest Convention by states who had not ratified and did not intend to ratify the 1926 Immunity Convention²²⁴. This objection was supported by some other delegations and finally the British delegation’s proposal to delete the provision in regard to ships immune from arrest was accepted and therefore in the final version of Arrest Convention of 1952 there lacked provision pertaining ships immune from arrest. As a result, the issue of ships immune from arrest was left to the law of forum of arrest.

It is very interesting that the Italian proposal was adopted in the Convention on Maritime Liens and Mortgages of 1967 and the Convention on Maritime Liens and Mortgages of 1993 and the Civil Liability Convention of 1969²²⁵. Just as

with such a ship, if at the time when the cause of action arose, the ship was intended for use for commercial purpose”.

As early as in 1974, British Court used the theory of restricted state immunity to rule against Philippine Government. Refer to the case of the Philippine Admiral (1974) 2 Lloyd’s Report 568.

And earlier than above case, in 1958 the famous English Judge Denning expressed the following opinion in the case of *Rahimtoola versus Nizan of Hyderabad*: sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. Please refer to: Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.41.

²²³ Refer to article 11 of the Draft Convention approved at Naples.

²²⁴ Mr. Miller, a member of British delegation, during the conference, said “Mr. Miller doesn’t want to cause a loss of time to the Conference, but reminds it that his colleagues have already expressed in a manner sufficiently convincing the reasons why it was absolutely impossible for the British delegation to accept the Italian amendment. The Convention deals with arrest of ships and not with the immunity of State-owned ships. The question has been regulated by another Convention that Great Britain hasn’t ratified. He proposes to replace the present article with the corresponding article with jurisdiction.”

²²⁵ Refer to Article 12(2) of this 1967 Convention, Article 13(2) of this 1993 Convention and Article 11(1) of

mentioned above, since 1952, more and more national laws and judicial practices have indorsed the restricted state immunity. Therefore, it is quite logical and natural for the Arrest Convention of 1999 to provide that the Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for time being, only on government non-commercial service²²⁶.

According to the Chinese law and judicial practice, military ships and non-commercial ships owned or operated by state are immune from arrest too. But there are slight differences in the provisions of different eras. The Arrest Provisions of 1986 clearly provided that “military ships and governmental ships that are put into pure public service can’t be arrested”. The Arrest Provisions of 1994 amended the above provision and instead provided that “these Provisions don’t apply to military ships and public service ships”²²⁷. Compared with the Arrest Provisions of 1986, the Arrest Provisions of 1994 is less definite. Therefore, the Chinese Special Maritime Procedure Law of 1999 provided that “no ship engaging in military or government duties may be arrested”²²⁸. This new provision is in line with the relevant provision of Arrest Convention of 1999. It should be noted that Chinese maritime judicial practice no longer emphasizes the ownership of the ship, instead emphasizes the use and nature of the ship. This means that, if a ship is owned or operated by military or government agency, but it is put into commercial use in the voyage in question, then in the dispute thereof this ship can not be immune from arrest. There is a famous case handled by a Chinese maritime court, in which a military ship was put into commercial use to tug another commercial ship for money and in the course of tug the military ship collided with a third party ship and the third party successfully applied to Chinese maritime court for arrest this military ship. In the judicial decision on arrest of the military ship, the Chinese maritime court held that, even though the ship was truly owned and operated by military agency, it can not be denied that the collision occurred in the commercial voyage of this military ship and therefore this military ship can not immune from arrest, otherwise it shall be very unfair to the victim commercial ship²²⁹.

this 1969 Convention respectively.

²²⁶ Refer to Article 8(2) of Arrest Convention of 1999.

²²⁷ Refer to item 2 of article 7 of this legal document.

²²⁸ Refer to article 23 of the Chinese Special Maritime Procedure Law of 1999.

²²⁹ Jin Zheng-jia, Weng Zi-ming: A Special Study on Maritime Claims Preservative Measures, 1st edition, Dalian: Dalian Maritime University Publishing House, 1996, p.80.

3.2.6 Right of Rearrest and Multiple Arrest

As a principle, a ship can't be arrested by more than once in respect of the same maritime claim by the same claimant.

This principle was reflected in the Arrest Convention of 1952. In section 3 of Article 3 of Arrest Convention of 1952, it was provided that:

“A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant and if a ship has been arrested in any one of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is good cause for maintaining that arrest.”

Seen from above provision, the reason why rearrest of the same ship or multiple arrest of any other ship in the same ownership is not allowed is that bail or other security for the release of the arrested ship has been provided²³⁰. This also clearly indicates that once the bail or security has been released the ship can be rearrested or any other ship in the same ownership can be arrested. So it is reasonably understood that, once the bail or other security is provided, the bail or the security can replace the ship arrested, thus once the bail or the security is provided the ship arrested should be released and once the bail or the security is released the ship can be rearrested or any other ship in the same ownership can be instead arrested.

Following the same rule, when the ship arrested has been released or has escaped without any bail or security having been provided, the same ship can be rearrested or any other ship in the same ownership can be arrested subsequently.

It should also be noted that, according to the above provision, if the claimant can satisfy the court that there is a “good cause” for maintaining or granting a

²³⁰ The purpose of arrest of a ship is for obtaining sufficient security for the claim. In this sense, the bail or security provided can replace the ship arrested. Therefore, once bail or security is provided, the ship should be released from arrest; and once security has not been given but the ship has been released from arrest, then the ship or other ships in the same ownership can be rearrested.

second arrest, rearrest of the ship previously arrested or arrest of any other ship in same ownership (multiple arrest) can be granted or maintained. As to the “good cause”, under different legal systems, there are different interpretations. Generally speaking, a typical example of such a “good cause” is the situation in which the actual amount of the claim proves to be higher than originally estimated and claimed.²³¹

The principle that a ship can't be arrested by more than once in respect of the same maritime claim by the same claimant and the exceptions to this principle were also considered in the course of making Arrest Convention of 1999²³². Some delegations including the delegation of the Republic of Korea preferred the approach adopted by the Arrest Convention of 1952 whereby an rearrest or multiple arrest of ship was not permitted and exceptions to this principle should be strictly restricted to circumstances such as fraud or misrepresentation in order to protect the legitimate interests of ship owners and cargo owners²³³. But most delegations favored a more flexible approach to cases other than fraud and misrepresentation that would justify the rearrest or multiple arrest in respect of the same maritime claim. The CMI International Sub-Committee and CMI both supported the latter approach and considered the exceptions to the principle were inadequate and therefore should be enlarged. Finally, the Article 5 of Arrest Convention of 1999 that corresponds to the Article 3 of Arrest Convention of 1952 was adopted by 25 votes to 1 with 7 abstentions²³⁴.

Article 5 of Arrest Convention of 1999 provides as follows:

“1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

²³¹ For example, in a collision case the claimant whose vessel was damaged by another vessel might have claimed a lower amount because it at first appeared that the damage was not too serious. Therefore, a low amount of security for the claim was provided and the ship arrested was released. But in the end, it was found that the actual damage was much serious than at first estimated, so it was held reasonable to rearrest that ship or to arrest any ship in the same ownership.

²³² In regard to this issue there are two drafts----Draft of CMI International Sub-Committee and CMI Draft. There are slight differences between these two drafts.

²³³ Delegations of the United States, Liberia are also of this opinion.

²³⁴ Refer to CMI Report, reproduced in page 517 of the Arrest of Ships written by Mr. Francesco Berlingieri, LLP, 2000.

- (a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or
 - (b) the person who has already provided the security is not, or unlikely to be able to fulfill some or all of that person's obligations; or
 - (c) the ship arrested or the security previously provided was released either: (1) upon the application or with the consent of the claimant acting on reasonable grounds, or (2) because the claimant could not by taking reasonable steps prevent the release.
2. Any other ship that would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:
- (a) the nature or amount of the security already provided in respect of the same maritime claim is inadequate; or
 - (b) the provisions of paragraph 1 (b) or (c) of this article are applicable.
3. "Release" for the purpose of this article shall not include any unlawful release or escape from arrest."

According to above wording, this Article deals with two situations, the first being rearrest of a ship after its release from arrest and rearrest of a ship in respect of which security has been provided to avoid the arrest, and the second being arrest of other ships in the same ownership (multiple arrest).

For the first situation, section 1 of above Article 5 sets out the following three exceptions to the general principle prohibiting the rearrest: (a) inadequacy of the nature or amount of the security already obtained. If the amount of security already provided is lower than the amount of claim, irrespective of the actual increase of damage or loss incurred by the claimant or not, the claimant is entitled to rearrest the ship to the extent that the security given is for an amount lower than the value of the ship. As previously mentioned in this paper, the security is given to replace the ship, so it is a general principle of Arrest Convention of 1999 that the security cannot exceed the value of the ship. The nature of the security is deemed inadequate, for example, when the period of the security is not long enough to permit the enforcement of a judgment or arbitral award or the security shall be subject to a judgment of a court who cannot exercise jurisdiction on the merits of the case; (b) Inability of the person who has provided the security to fulfill his obligations due to lack of financial means or due to foreign currency restrictions and other reasons; (c) Release of the arrested ship or of the security

previously provided. The release can be due to the application or consent of the claimant. In this case, a further condition that the claimant must have acted on reasonable grounds is required. The reasonable grounds may be, as the case may show, that the owner is unable to provide security immediately and the delay in the sailing can cause great damages to the owner and the owner applies for release of the ship and the claimant gives consent to the release or, that the owner or a third party has promised to provide security as required and the claimant has reasonably believed the promise and thus has applied for release of the ship arrested. The release can also be due to the claimant being unable to prevent the release by taking reasonable measures, for example, the ship is ordered to be released as it has constituted threat to the safety of the port. But it must be noted that the release in this case must not be due to the fault of the claimant or non-performance of the obligation by the claimant.

For the second situation, the section 2 of above Article provides that, if the claimant has been unable to obtain a security for the full amount of his claim because the value of the ship he has arrested is lower, he may arrest a sister ship or ships in order to obtain an additional security to cover the balance of his claim.

From above analysis, it can be said that, compared with Article 3 (3) of Arrest Convention of 1952, Article 5 of Arrest Convention of 1999 is clearer, more detailed, and more reasonable. It tries to seek a balance between the interests of the owners who wish to avoid a situation in which the same ship or sister ships in the same ownership are arrested repeatedly for the same claim and the reasonable interests of the creditors who hope to obtain adequate security for the whole of claim²³⁵.

In China, its provisions in regard to right of rearrest and multiple arrest are heavily influenced by relevant international conventions. The Arrest Provisions of 1994 was influenced by the 1985 CMI Draft of Arrest Convention and it regulated that:

“ A claimant can not, in respect of the same claim, arrest the ship which has been arrested and released or any other ships owned by the debtor/defendant, unless: (1) nature or amount of the security obtained in respect of the same claim is inadequate, on condition that the aggregate amount of security may

²³⁵ Frankly speaking, the Arrest Convention of 1999 has cured the imbalance created by the Arrest Convention of 1952. Compared with the Arrest Convention of 1952, the Arrest Convention of 1999 is more for the interests of the claimants rather than the interests of the ship owners.

not exceed the value of the ship; (2) the person who has already provided the security can not, or is unlikely to be able to fulfill some or all of that person's obligations"²³⁶.

This provision has two defects. One is, according to the (1), the claimant is not entitled to arrest other ships in the same ownership once the security obtained from the first arrest of ship exceeds the value of ship arrested, and this is obviously unreasonable and unfair; the other defect is, the provision did not mention, as an exception to the rule prohibiting rearrest or multiple arrest, the release of arrested ship or release of security previously provided due to claimant's application or consent on reasonable grounds or due to reasons beyond the control of the claimant. This exception to the general rule has been incorporated in 1985 CMI Draft of Arrest Convention and has been confirmed by Arrest Convention of 1999 ²³⁷. Judicial practice has proved this exception is very reasonable and useful.

The Chinese Special Maritime Procedure Law of 1999 provides in its article 24 that:

“A maritime claimant is not permitted to apply to arrest a ship previously arrested in respect of the same claim, unless: (1) adequate security has not been provided; (2) the person who has already provided the security can not, or is unlikely to be able to fulfill some or all of that person's obligations; (3) the ship arrested or the security previously provided was released either upon the application or with the consent of the claimant acting on reasonable grounds or because the claimant could not by taking reasonable steps prevent the release.”

This provision tries to keep line with the relevant provision of Arrest Convention of 1999 and cure the above two defects in Arrest Provisions of 1994. But, regrettably, this provision only deals with the rearrest of the ship previously arrested, and seems not to deal with the arrest of any other ship which has not been previously arrested. In this respect, the above provision is not perfect and is not in conformity with the Arrest Convention of 1999 which correctly prohibits not only the rearrest of the ship previously arrested but also prohibits arrest of any other ship which has not been previously arrested unless otherwise specially

²³⁶ Refer to Article 4 (10) of this legal document.

²³⁷ This exception is both provided in the 1985 CMI Draft of Arrest Convention (refer to item (c) of article 5) and in the Arrest Convention of 1999 (refer to item (c) of article 5).

provided. Therefore, in my opinion, the above provision of the Chinese Special Maritime Procedure Law of 1999 should be amended to cover the arrest of multiple arrest (arrest of sister ship).

3.2.7 Comparison between the Chinese Law and Korean Law in respect of Ships that can be Arrested

It is meaningful to conduct this kind of comparison, because through the comparison we can find the differences between the two legal regimes.

As introduced above, under the Chinese legal system, ships that can be arrested are divided into two categories: ship in respect of which a maritime claim is asserted and sister-ship in the same ownership. In addition, according to the Chinese law, a demise-chartered ship can be arrested if a claim is arising out of it, and a ship ready to sail or in the course of navigation can also be arrested even though in judicial practice Chinese maritime courts are reluctant to arrest such ship. According to the Chinese law, arrest of ship must satisfy the conditions provided by the law.

But under the Korean legal system, there is no above distinction among ships that can be arrested. Under the Korean legal system, as long as it is owned by the debtor, any ship can be arrested for securing the claims against the debtor, no matter it is a ship in respect of which the claim arises or is a sister ship. Vice versa, if the ship is not owned by the debtor, for example, if the ship is chartered by the debtor, the ship can not be arrested.

Under the Korean legal system, ships that can be arrested are classified into following categories:

(1) Ships that can be registered or have been registered. Ships that can be registered include motor ships of over 20 gross tonnage, sailing ships of over 20 gross tonnage and floating ships of over 100 gross tonnage (ships have no own power and can only be towed by other ships). For ships that can be registered but have not got registered, if following conditions are satisfied, they can also be arrested: a. There is an application by the creditor; b. The application is provided to a competent court; c. There is a certificate of the survey of the gross tonnage of the ship; d. There is a certificate of the Korean nationality of the debtor and his address; e. If the debtor is a legal entity, there is a certificate of the address of its headquarter and the name and address of its legal representative; f. There is a certificate showing that the ship is owned by the debtor.

(2) Ships that can't be registered. The arrest of ships that can't be registered can only be conducted following the procedures for arrest of personal property.

(3) Ships under construction. Under the Korean legal system, even though the ship under construction can't be called a ship, but for purpose of establishment of mortgage, the ship can be deemed as a "ship" and therefore can also be arrested and auctioned for fulfillment of the claim secured by the ship mortgage²³⁸.

Under the Korean legal system, even though a ship is a foreign ship, the ship can be arrested as long as the ship has entered the Korean territory.

As for arrest of ships ready for sailing, under the Korean legal system, according to article 744 of its Commercial Law, a ship ready to sail can't be subject to arrest, unless in respect of debts relating to the voyage to be commenced or to be continued²³⁹. The reason for this legislation is said to be that if the ship is permitted to be arrested the cargo owners and/or passengers shall incur losses. In this respect, the Korean legal system is quite different from the Chinese legal system. As I have pointed out that the Arrest Convention of 1952 expressly provides that a ship can be arrested "even though the ship arrested be ready to sail".²⁴⁰ In the Lisbon Draft of the Arrest Convention of 1999, the new wording "a ship may be arrested even though it is ready to sail or is sailing" replaces the old wording "a ship may be arrested even if ready to sail". This new wording was objected by some delegations but supported by most delegations. Finally, as a compromise, in the final version of Arrest Convention of 1999 the wording in regard to arrest of a ship that is ready to sail or is sailing was deleted and the issue was left to the national laws. In my opinion, the above Korean provision has no sound basis and is not practical. The reasons are as follows: (1) this provision shall greatly restrict the jurisdiction of Korean courts; (2) this provision can do damages to the interests of Korean parties because Korean ships may be arrested in other countries in such situation but Korean claimants can not arrest foreign ships in the same situation in Korea; (3) Once such a ship is arrested, nowadays it is relatively easy to find a replacing ship, and due to the development of modern finance and modern communication the ship owner can arrange a

²³⁸ Refer to article 874 of the Korean Commercial Law and article 36 of the Korean Ship Registration Regulations.

²³⁹ Cheong Yeong-seok and others: A Comparative Study on Laws of China and Korea in Respect of Arrest of Ships and Arrest of Cargoes on Board of a Ship, Maritime Law Research of Korean Maritime Law Institute, No. 2 of 15th issue, Dec. 2003, p.43.

²⁴⁰ Refer to section (1) of article 3 of the Arrest Convention of 1952.

security for the release of the ship in a short period of time; (4) It is a big burden and sometimes difficult for the claimant to certify that the ship is not ready for sailing; (5) In some cases, even if the ship is ready for sailing, the arrest of such ship can not heavily affect the interests of third parties. Due to these reasons, I suggest that the above Korean provision should be amended. Whether such a ship can be arrested should be left to the discretion of the arresting court after taking all the elements into consideration.

Chapter 4: The Main Procedural Issues in Arrest of Ships

This chapter deals with the main procedural issues in arrest of ships. The main procedural issues dealt with in this chapter are: jurisdiction issue in arrest of ships, application for arrest of ships, review over and decision on the application by court, enforcement of arrest of ships, release of arrested ship, and judicial sale of arrested ship.

4.1 Jurisdiction Issue

Jurisdiction is an important issue in civil cases. The jurisdiction not only can affect the procedural rights of the litigation parties but also their substantial rights²⁴¹. The jurisdiction can also affect or even determine the proper law to be used in an international maritime case, because a court of one country can at the same time obtain the right to use its rules of conflict laws and its procedural rules once it obtains the jurisdiction over the case²⁴². In addition, a prerequisite for the recognition and enforcement of a foreign judgment is that the foreign court has jurisdiction over the case, otherwise the recognition and enforcement shall be refused²⁴³. Jurisdiction also concerns the interests of different countries, so it is not strange that each country tries to extend its civil jurisdiction over as many civil cases as possible, and therefore conflict of laws in respect of civil jurisdiction is very serious.

Civil jurisdiction in relation to arrest of ship is very special and complicated, as the ship to be arrested is often moving here and there and usually concerns the territories of different countries and parties of different countries. The long established jurisdiction principle that a court that has arrested a ship can exercise jurisdiction over the merits of the case in which the arrested ship is involved

²⁴¹ Chief editor Zhao Xiang-lin: *International Private Law*, Beijing: China Politics and Law Science University Publishing House, 1999, p.392.

²⁴² If a court has established jurisdiction over the case, it shall then apply the rules of conflicts of law of its country and determine the proper law that should be applied to decide on the merits of the case. Under different jurisdiction the rules of conflicts of laws may be different and then the proper law can also be different.

²⁴³ A basic condition for the recognition or/and enforcement of a foreign judgment or arbitral award is that the foreign court or arbitral tribunal has effective jurisdiction over the case. This principle is not only accepted by the New York Convention on Recognition and Enforcement of Foreign Arbitral Award of 1958 but also by some international jurisdiction treaties such as the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.

makes the jurisdiction more complicated. The jurisdiction in relation to arrest of ships can be divided into two categories, i.e. the jurisdiction over arrest of ship and jurisdiction over the merits of the case²⁴⁴.

4.1.1 Jurisdiction over Arrest of Ships

First, let's discuss the issue of jurisdiction over arrest of ships. Here three sub-issues are concerned, and they are: the authority having jurisdiction over arrest of ships, the principle of territorial jurisdiction, and the principle of jurisdiction irrespective of agreement on jurisdiction or arbitration.

4.1.1.1 Authority having Jurisdiction over Arrest of Ships

What kind of authority can exercise jurisdiction over arrest of ships is an important issue. Because arrest of ships discussed here refers only to arrest of ships for the purpose of obtaining security for maritime claims, so the authority that can exercise jurisdiction over arrest of ships should be of judicial nature.

Article 4 of the Arrest Convention of 1952 clearly provides that a ship may only be arrested under the authority of a court or of the appropriate judicial authority of the Contracting State in which the arrest is made. According to this article, arrest of ship should be and must be authorized by a judicial authority. Because there are many Contracting States, in order to cover arrest (arrest for obtaining security for a maritime claim) ordered by an authority of judicial nature other than a court, the Convention correctly refers to not only "authority of a court" but also "appropriate judicial authority"²⁴⁵. This deliberate wording is consistent with the definition of arrest of ships in article 1(2) whereby the arrest of ship "means the detention of a ship by judicial process".

In the course of preparation for the Arrest Convention of 1999, it was pointed out by some delegations that the above wording did not contribute to the clarity of the provision and in the final version the wording was replaced by "under the authority of a court", with the "under the authority of the appropriate judicial authority" being deleted, but with "court" being defined as "means any competent

²⁴⁴ The jurisdiction over wrong arrest of ship cases is a collateral aspect of jurisdiction and shall be discussed in the Chapter concerning the effects of wrong arrest of ships.

²⁴⁵ In different countries, the judicial systems are different and the names for the judicial authorities in different countries may also be different. Therefore, in order to adapt to this situation, the Arrest Convention of 1952 gives a broad explanation to the judicial authority.

judicial authority of a State”. In view of above change, I think there are no substantial differences between the two provisions.

According to both Arrest Convention of 1952 and Arrest Convention of 1999, the court having jurisdiction for the arrest of ships is a court of the State where the arrest is made. This provision indicates that the competent court for arrest of ships is subject to the applicable national rules. In some countries such as in China, the judicial right of arrest of ships is vested upon a special system of courts. According to the Chinese Special Maritime Procedure Law of 1999, only Chinese Maritime Courts²⁴⁶ can arrest ship as a preservative measure. The Supreme Court of China also emphasized on 28 of October 2000 “ no common courts are permitted to arrest ships as a preservative measure”²⁴⁷. But in most countries like the Republic of Korea, the power of arrest of ships is vested upon common courts²⁴⁸. In the Republic of Korea, if the arrest is a pre-litigation arrest, the court that can exercise jurisdiction over the arrest is the district court within whose jurisdiction the ship is staying; if the arrest is an arrest in the course of litigation, the court that can exercise jurisdiction over the arrest is the court that has exercised jurisdiction over the merits of the case.

4.1.1.2 Principles of Determining Jurisdiction over Arrest of Ships

²⁴⁶ In China, the court system is as follows: one supreme court, many high courts (for every province and province-level city such as Beijing, Shanghai, Tianjin, Chongqing, there is one high court), many intermediate level courts (for every large district within a province, there is an intermediate court), district courts (for every county or a sub-district within a large city, there is a district court). There is common court system. In addition to the common court system, there are several special court systems, such as military court system, railway court system, forest court system, maritime court system. The judicial level of maritime court is the same as the intermediate court in the common court system. Maritime court is the court of first stance for maritime case. Any party that does not accept the maritime court judgment can only appeal to the direct higher court which is the high court for the province in which the maritime court is located. Nowadays there are 10 maritime courts in China, which are called respectively Dalian Maritime Court located in Dalian city, Liaoning province, Tianjin Maritime Court located in Tianjin city, Qingdao Maritime Court located in Qingdao city, Shandong Province, Shanghai Maritime Court located in Shanghai, Xiamen Maritime Court located in Xiamen city, Fujian province, Ningbo Maritime Court located in Ningbo city, Zhejiang province, Guangzhou Maritime Court located in Guangzhou city, Guangzhou province, Beihai Maritime Court located in Beihai city, Guangxi Zhuang-nationality Autonomy Zone, Haikou Maritime Court located in Haikou city, Hainan province, Wuhan Maritime Court located in Wuhan city, Hubei province.

²⁴⁷ Please refer to the Speech by Vice Chief Justice Mr. Li Guo-guang of Supreme Court of China at the National Conference on Courts Trial Work.

²⁴⁸ According to the Korean law, common courts of different levels exercise jurisdiction over the arrest of ship as a provisional conservative measure. Refer to: Cheong Hai-deok: A Study on Enforcement against Ships, Ph. D. paper of graduate school of Korean Keong-hi University, 2000, p.24.

In determining jurisdiction over arrest of ships, there are two important principles that should be emphasized. The two principles are: one is principle of territorial jurisdiction; another is principle of jurisdiction irrespective of agreement on jurisdiction or arbitration. In the following part these two principles shall be analyzed in details.

4.1.1.2.1 Principle of Territorial Jurisdiction

Principle of territorial jurisdiction means that a ship should be and may only be arrested by the court in whose jurisdiction the ship to be arrested is staying.

This principle is adopted in arrest conventions. Arrest Convention of 1952 and Arrest Convention of 1999 both emphasize that a ship may only be arrested by a court of the Contracting State in which the arrest is made. Even though this doesn't seem to mean it is necessary for the ship to be within the jurisdictional territory of the State at the time when the arrest is applied for²⁴⁹, this, however, does require that the order of arrest of a ship can be effectively executed only if the ship enters the territorial waters of that State.

This principle is also adopted in most of national laws, even though according to a different theory and practice. In common law countries, arrest of ship is traditionally deemed as an inherent part of action in rem, once a ship enters or stays within the jurisdiction of the court to which arrest of the ship is applied for, it can be arrested by the court and then the court establishes jurisdiction on the merits of the case. In civil law countries, arrest of ship is deemed as an independent procedure and is not inherently connected with the jurisdiction over the merits of the case. The jurisdiction over arrest of ship is individually dealt with in civil law procedural laws. For example, in Germany, arrest of ship is deemed as a provisional measure²⁵⁰. Jurisdiction over arrest of ship is vested on court of the place where the ship to be arrested enters or stays and the court that has correctly exercised jurisdiction over the merits of the case in which the ship is involved.

²⁴⁹ It should be noted that, in some countries, the national law requires that arrest of a ship can be applied for only if that ship has entered or is staying in the territory of this country. It cannot be denied that, in some countries, arrest of ship can be applied for before the ship enters the territory of the country but can only be enforced upon the ship's entering into or staying in the territorial waters of the very country. The possibility of an arrest of ship enforced within a State but issued by a court of another State has not been discussed in the course of the two arrest conventions, but it seems that it is not prevented that the court of the State in the jurisdictional territory of which the arrest may be made recognizes and enforces a foreign order of arrest.

²⁵⁰ Jin Zheng-jia: Research on German Maritime Procedures, Maritime Trials, 4th issue of 1994, p.26.

Therefore, an applicant can apply to any one of the above two courts for arrest of the ship involved in the case in question.

Under Chinese legal system, just like the civil law system, arrest of ship is deemed as a preservative measure, but unlike the civil law system, arrest of ship is classified into two categories---pre-litigation arrest and arrest in the course of litigation, and correspondingly different rules are laid down. For pre-litigation arrest of ship, only the maritime court in whose jurisdiction the ship enters or is staying can order and enforce the arrest of the ship²⁵¹; for arrest of ship in the course of litigation, only the court that has exercised jurisdiction over the merits of case can order and enforce the arrest of the ship²⁵². This provision can cause arrest-related forum shopping problem in practice. For example, when the ship enters or stays within the jurisdiction of maritime court A, the claimant can apply to maritime court A for pre-litigation arrest of the ship, but if he doesn't want this maritime court A to exercise jurisdiction over the arrest, he can take action in maritime court B that has jurisdiction over the merits of the case and then applies to this maritime court B to arrest the ship. The arrest of a ship by a maritime court other than the court within whose jurisdiction the ship is staying can cause loss of time and loss of litigation resources. Therefore, I suggest, for the reform of Chinese national law, jurisdiction over arrest of ships should be unified irrespective of pre-litigation arrest and arrest in the course of litigation. I mean that the maritime court within whose territory the ship is staying should exercise exclusive jurisdiction over arrest of the ship. This can effectively avoid the forum shopping, can effectively reduce the loss of time and litigation resources and can sufficiently protect the interests of claimants. In addition, taking into consideration of the principle to be discussed in next part that jurisdiction over arrest of ship is not affected by agreement on jurisdiction or arbitration, I am more convinced that the jurisdiction over arrest of ship by the maritime court within

²⁵¹ Please refer to Article 13 of the Chinese Special Maritime Procedure Law of 1999. The wording of this Article is "litigant should apply to the Maritime Court where the property (including ships---added by the author) to be arrested is located for the pre-litigation maritime preservative measure".

²⁵² There is no such express provision in the Chinese Special Maritime Procedure Law of 1999. According to the legal principle that whenever there lack no special provisions in special laws common law rules should be applied, the common civil procedural law of China provides that preservative measure in the course of litigation should be applied to and ordered by the court having exercised jurisdiction over the merits of the case. This means that in a maritime case in the course of litigation the arrest of ship as a preservative measure can only be ordered and enforced by the maritime court which has already exercised jurisdiction over the merits of the case.

whose jurisdiction the ship stays should not be affected by the fact that another maritime court has exercised jurisdiction over the merits of the case.

4.1.1.2.2 Principle of Jurisdiction Irrespective of Agreement on Jurisdiction or Arbitration

This principle means that the jurisdiction over arrest of a ship by the court within whose jurisdictional territory the ship stays at the time when the order of arrest is made exists irrespective of whether such a court has jurisdiction to decide on the merits of the case. According to this principle, if there is an effective agreement between the parties to the dispute on the jurisdiction over merits or on arbitration, this agreement can legally bind the parties and they can only submit the dispute to the court or arbitration tribunal mutually agreed, but, to arrest a ship for obtaining security for the claim, the claimant can apply to the court within whose jurisdiction the ship stays even though this court may not be the court mutually agreed by the parties.

This principle is not expressly provided in Arrest Convention of 1952, but sections (2), (3) and (4) ²⁵³ of the Article 7 of this Convention imply that a court which has jurisdiction over arrest of ship may not have jurisdiction over the merits of the case, in other words, a court within whose jurisdiction the ship stays can arrest the ship even though another court has jurisdiction over the merits of the case.

This principle was clearly and expressly provided in Arrest Convention of 1999. Section (3) of Article 2 of this Convention which regulates the powers of arrest is worded as follows: A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is

²⁵³ Section (2) reads as “if the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits of the case, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specially provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by the Court having jurisdiction so to decide and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction.

Section (3) reads as “if the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

Section (4) reads as “if , in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State. This wording makes clear that the lack of jurisdiction over the merits of the case doesn't deprive the court within whose jurisdictional territory the ship stays of jurisdiction to authorize the arrest of such a ship.

Principle of jurisdiction irrespective of agreement between the parties on jurisdiction or arbitration is also reflected in the Chinese legal system. The Arrest Provisions of 1994 provides that arrest of ships is not affected by agreement between maritime litigation parties on jurisdiction over merits of the case, on arbitration, or on applicable law²⁵⁴. The Chinese Special Maritime Procedure Law of 1999 provides that maritime preservative measure (including arrest of ship as a preservative measure—added by author) is not subject to the agreement between maritime litigation parties on jurisdiction over merits of the case or on arbitration.²⁵⁵ Judged from these provisions, it is safe to say that, in regard to this principle, the Chinese law is in line with the relevant international conventions.

4.1.2 Jurisdiction over Merits of the Cases

It is generally recognized that the court that made the arrest of ship has jurisdiction over the merits of the case in which the arrested ship is involved. But the relevant underlying theories in different national laws and international conventions are different, and, in addition, there are some special issues that deserve special attention in jurisdiction over merits of the case.

4.1.2.1 Related Theory and Practice

In common law countries, the practice that the court that made the arrest of ship has jurisdiction over the merits of the case is based on the theory of action in rem. According to theory of action in rem, arrest of ship is a means of obtaining jurisdiction over merits of the case. In the United Kingdom the action in rem can only be taken against a ship or other property in connection with which the claim arises, and the establishment of this action is subject to the successful arrest of the ship or the property²⁵⁶. In the United States jurisdiction in rem against a ship is dependent either on seizure of the ship or on ability to seizure the ship²⁵⁷.

²⁵⁴ Refer to Section 9 of Article 4 of the Arrest Provisions of 1994.

²⁵⁵ Refer to Article 14 of the Chinese Special Maritime Procedure Law of 1999.

²⁵⁶ Refer to s. 21 of the Supreme Court Act of 1981 of the United Kingdom.

²⁵⁷ See Benedict on Admiralty, 7th edition, Volume 2A, p.6.

In civil law countries, arrest of ship is also ruled by some countries as can empower the court that made the arrest the jurisdiction over the merits of the case. This is based on the principle that jurisdiction in personam also exists where his/her property is located²⁵⁸. What should be noticed is that, under civil law system, the court that made the arrest of the ship obtains jurisdiction in personam. More important, in some civil law countries, only in some particular situations, arrest of ship can create jurisdiction over the merits of the case; and in some other civil law countries, arrest of ship is ruled as can't bring jurisdiction over the merits of the case to the court that made the arrest, and, therefore, judgment on merits of the case by a foreign court that obtained the jurisdiction over the merits of case by arrest of the ship sometimes can't get recognized and enforced in these countries.

4.1.2.2 Relevant Provisions in Arrest Convention of 1952 and Arrest Convention of 1999

Because of above differences in theory and practice, in the Arrest Convention of 1952, jurisdiction over the merits of the case by the court that made the arrest was not accepted as a general principle; instead, two parallel rules were adopted as a compromise in this regard. One rule is that:

“The courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such courts”²⁵⁹.

This rule lets the question be subject to the domestic law of the country where the ship is arrested. The other rule is that, irrespective of the national law provisions on this question,

“the courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits in any of the following cases namely: (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made; (b) if the claim arose in the country in which the arrest was made; (c) if the claim concerns the voyage of the ship during which the arrest was made; (d) if the claim arose

²⁵⁸ In the civil law countries, the place of the stay of the ship is deemed as a connecting point in determining the jurisdiction by courts. The action is taken against the owner of the ship, not against the ship itself. In addition, the enforcement of the claim is not confined to the ship which has been arrested, all other properties owned by the defendant can also be enforced; in contrast, in common law countries, in an action in rem against a ship, the action is directly against the ship itself and the enforcement of the claim shall confine to the ship arrested.

²⁵⁹ Refer to section (1) of article 7 of the Arrest Convention of 1952.

out of a collision or in the circumstances covered by Article 13 of the International Convention for the Unification of Certain Rules of Law with Respect to Collision between Vessels signed at Brussels on 23rd September 1910; (e) if the claim is for salvage; (f) if the claim is upon a mortgage or hypothecation of the ship arrested.”²⁶⁰

This rule is independent from the one firstly introduced. The essence of this rule is that the court of the country in which the arrest was made can exercise jurisdiction over the merits of the case based on two facts: the fact that the ship is arrested by the court and at the same time the fact that there exists one of connecting points stipulated above. The connecting points listed in the Convention, such as habitual residence, principal place of business, place of torts etc., are recognized by international private law (rules of conflict of laws) as connecting points for exercising jurisdiction. This rule is particularly useful when the national law of the country where the arrest was made doesn't give jurisdiction over the merits of the case to the court that has authorized the arrest.

In the course of preparation for the Arrest Convention of 1999, it was agreed to simplify and perfect the rules concerning jurisdiction over the merits of the case. Following long discussion, the Arrest Convention of 1999 finally adopted the principle that the courts of the State in which an arrest is effected or security is given shall have jurisdiction over the merits of the case. Section 1 of Article 7 of Arrest Convention of 1999 expressly stipulates that:

“The courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits”.

Compared with the related provision of Arrest Convention of 1952, above provision is progressive, because, on the one hand, it confirmed the above principle and unified the rules in this regard, and on the other hand, it made reference not only to arrest of ship but also to security provided for the release of

²⁶⁰ Refer to section (1) of article 7 of the Arrest Convention of 1952. It should be noticed that in some countries, particularly in civil law countries, the jurisdictional links are expressly stated by statutory laws and place of arrest of ship is not such a link therefore the arrest of ship could not have the effect of attributing jurisdiction to a court that did not have jurisdiction over the merits of the case. Thus in these countries, in addition to the fact the ship is arrested by the court, another statutory link is needed to establish jurisdiction by the court over the merits of the case, usually and commonly, the connecting points listed here in the Convention are included in the scope of statutory jurisdictional links in most countries notwithstanding it is a common law country or a civil law country. Item (e) and item (f) are also listed here in the Convention because it is considered that the jurisdiction over the merits of the case should be recognized in respect of these two particular maritime claims because the claimants thereof deserve special protection.

the arrested ship. The new provision at the same time emphasizes the function of arrest of ship and grants to the court of the State in which security has been provided for the release of the ship the jurisdiction over the merits of the case²⁶¹. Generally speaking, security is usually provided to the court that has effected the arrest, and in this case the court that has effected the arrest and the court to which security has been provided are same and no problem can arise in regard of the application of the above principle. Because the Convention doesn't prohibit the security from being provided to a court of another State other than the State where the arrest has been effected, if the security has been such provided to a court of another State, there may be a conflict of jurisdiction over the merits of the case between the courts of the two States, and the ship-owner may make use of this conflict. Therefore, in my opinion, the Convention should either clearly provide that security for release of the arrested ship can only be provided to the court that has effected the arrest of the ship or, as a remedy, provide rules solving the possible conflict of jurisdiction over merits of the case between the courts.

The Arrest Convention of 1999 provides two exceptions to the general rule that the courts of the State where the arrest is made or security is given have jurisdiction over the merits of the case. One exception is where the parties agree to submit the dispute to another court or to arbitration. As maritime claim is of commercial nature, it's a long-established practice that the parties can reach agreement to submit the case to a particular court or arbitration tribunal. According to freedom of contract and the autonomy of will of parties, most

²⁶¹ In the course of making the Arrest Convention of 1999 there appeared two drafts: Lisbon Draft and JIGE Draft. In both Drafts jurisdiction over merits of the case was provided in three situations: when arrest is effected, when security is provided for the release of the ship and when security is given to prevent arrest of the ship. In all these situations jurisdiction over the merits of the case was granted to the court of the State where the arrest has been granted or security has been given. In the discussion, the covering of the third situation was strongly opposed by some delegations on the ground that such covering would provide convenience for ship-owner's choice of forum because the ship-owner can make use of this rule through providing security to a court of a State to prevent the ship from being arrested in other States and thus makes the court to which security has been provided exercise jurisdiction over the merits of the case. This practice can seriously affect the interests of the claimant who wants to ensure that the courts of the State in which the arrest may be made have jurisdiction over the merits of the case. So the claimants can't accept this provision. As a result, reference to the security given to prevent the arrest of ship was therefore deleted in the final version. It is implied that the ship owner cannot avoid the jurisdiction by the court of a State where the ship can be arrested through offering security in a court of another State to try to prevent such arrest. It is also thought that under this situation the claimant is entitled to refuse such a security or accept such a security subject to a condition that the ship owner agrees to submit the case to the court where arrest of the ship would have been made.

countries recognize and give force to such agreement²⁶². So the Arrest Convention of 1999 noticed this practice and provided the above exception to the general rule. Section 1 of Article 7 of Arrest Convention of 1999, after confirming the general rule, continued to provide that the general rule prevails “unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration”.

But it should be emphasized that, in order to preclude the jurisdiction on merits of the case by the court that made arrest or received security, the agreement between the parties on the jurisdiction or arbitration must be valid and the court chosen by the parties accepts the jurisdiction. According to Article 7 of Arrest Convention of 1999, the agreement can be reached after the dispute occurs and can also be reached before the dispute occurs. In the later situation, the agreement is usually in the form of jurisdiction clause or arbitration clause in the original contract. Even though the above article only mentions that the court chosen accepts the jurisdiction, in my view, this condition also applies to the case of arbitration agreement because it is possible that the arbitrators would not like to accept the appointment and may refuse to determine the merits of the case and in this case the agreement is unenforceable²⁶³. In one word, if the agreement on jurisdiction or arbitration is invalid or unenforceable, the court of the State where the arrest has been made or security has been provided to obtain the release of the ship can still exercise jurisdiction over the merits of the case.

Another exception is that the courts of the State where the arrest is made or security given refuse to exercise jurisdiction²⁶⁴. Section 2 of article 7 of the Arrest Convention of 1999 reads as follows:

²⁶² Regime of agreement on jurisdiction or arbitration dates back to Roman law era. Most countries accept this rule. For example, according to article 25 of the Japanese Civil Procedure Law, limited to the first stance, the parties to a dispute can choose a court to exercise jurisdiction over the dispute. In some international conventions, this rule is also accepted, for example, in the Brussels Convention on Jurisdiction and Enforcement of the Judgment in Civil and Commercial Matters of 1968. Refer to: Chief editor Zhao Xiang-lin: International Private Law, Beijing: China Politics and Law Science University Publishing House, 1999, pp.397-398.

²⁶³ For every arbitration center, there is a series of arbitration procedure which lays down rules as regard to what kinds of dispute can be submitted to arbitration in this center through the arbitration agreement. If the matter to be arbitrated falls out of the scope of the list of the disputes that can be arbitrated by the center, the center probably refuses to arbitrate on the matter.

²⁶⁴ In some countries, the arresting court may utilize the legal doctrine of “non-convenient court” to refuse exercising jurisdiction over the merits of the case. The reasons for use of this doctrine may be: (1) another court may be more convenient to exercise jurisdiction over the merits of the case in order to save money and keep efficient; (2) the case has more contacts with another court; (3) another appropriate court has exercised jurisdiction over the case, for the mutual respect, the arresting court gives up jurisdiction. Please also refer to:

“Notwithstanding the provisions of paragraph 1 of this article, the courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and Court of another State accepts jurisdiction”.

This provision is made to meet the need of those countries such as civil law countries where jurisdiction over merits of the case is not always granted to the court that made arrest or obtained security and where jurisdiction over merits of the case is based on statutory connecting points. This provision authorizes these countries to enact national laws to refuse to exercise such jurisdiction. But, if the court of the State where the arrest was made or security was given refuses to exercise the jurisdiction over the merits of the case, at the same time no courts of other countries would like to accept the jurisdiction over the merits of the case, the rights of the claimant may have no way to be protected and this would be extremely unfair to the claimant, therefore, in order to avoid the occurrence of this situation, the Arrest Convention of 1999 restricts the above refusal of jurisdiction over merits of the case with two conditions. One is that the refusal must be permitted by the law of the State, for example for reasons of non-convenient forum²⁶⁵ or other particular reasons as the case may be; the other is that there should be a court of another State that accepts jurisdiction.

In respect of jurisdiction over merits of the case, there exists another issue: if the court of the State where the arrest of the ship was made or security given has no jurisdiction over the merits of the case or refuses to exercise jurisdiction over the merits of the case according its national law, what should be done to the ship arrested or security given? Whether should the court continue to arrest the ship or to keep the security, or should release the ship or security? In this situation, if the court orders the release of the ship or security, this can make the aim of arrest fail and can cause waste of time and money and further make it necessary for the

Tan Yue-qi: On the Jurisdiction over Merits of the Ship-arrest-related Case and over Non-merits-affairs, *China Maritime Trials Yearbook*, 2000, pp.331-332.

It is reported that many countries such as the United Kingdom, the United States, and Australia etc. have applied this “non-convenient court” doctrine in their judicial practice. Please refer to:

Lin Xin, Li Qiong-ying: *Study on Several Issues in International Private Law Theory*, Beijing: The People’s University Publishing House, 1996, p.92.

²⁶⁵ Non-convenient forum has been a more and more important reason for a court to refuse or suspend the jurisdiction over the merits of a case, especially in the situation where the final judgment by this court is necessary but difficult to be recognized or enforced in another country.

claimant to arrest the ship again, and this is evidently in contradiction with the purpose of the conventions. But if the court continues to arrest the ship or continue to keep the security, at the same time the claimant doesn't within a reasonable period of time submit the case to a court or arbitration center which has jurisdiction over the merits of the case, this can also damage the interests of the ship owners and cause waste of judicial resources. In order to balance the interests of claimants and ship owners, and to keep efficient and fair, section (2) of article 7 of Arrest Convention of 1952 provides that "if the Court within whose jurisdiction the ship was arrested has no jurisdiction to decide upon the merits of the case, the bail or other security given in accordance with Article 5 to procure the release of the ship shall specially provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by the Court having jurisdiction so to decide and the Court or other appropriate judicial authority of the country in which the arrest is made shall fix the time within which the claimant shall bring an action before a Court having such jurisdiction". Section (3) of the same article continues to provide that "if the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings". As a logical consequence of above two sections, section (4) of the same article provides that "if, in any of the cases mentioned in the two preceding paragraphs, the action or proceedings are not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security".

In respect of above issue, on the basis of the relevant provisions of Arrest Convention of 1952, the Arrest Convention of 1999 makes some improvements. Section 3 of article 7 of the Arrest Convention of 1999 provides that "in cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship: (a) doesn't have jurisdiction to determine the case upon its merits; or (b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal". If the claimant doesn't submit the case to a competent Court or arbitral tribunal within the time ordered by the Court, then "the ship arrested or the security provided shall, upon request, be ordered to be

released”²⁶⁶. This provision effectively lays down right and obligation for the court in above situation and fairly balances the interests of the claimants and the ship owners and is quite reasonable.

As for the issue how to facilitate the recognition and enforcement of judgment or award made by a court or arbitral tribunal that has jurisdiction over the merits of the case in the country where the arrest was made or security was given, the Arrest Convention of 1952 only simply provides that bail or security such provided is given as security for the satisfaction of any judgment which may be eventually made by a Court having jurisdiction over merits of the case, but, unfortunately the Convention fails to make reference to award eventually made by an arbitral tribunal that has jurisdiction over the merits of the case and it also fails to make reference to the ship which has been arrested. In the Arrest Convention of 1999, above shortcomings are readdressed. According to section 5 of article 7 of Arrest Convention of 1999, “if proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decisions including court judgment or arbitral award resulting therefrom shall be recognized and give effect with respect to the arrested ship or to the security provided in order to obtain its release, on conditions that: (a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defense²⁶⁷; and (b) such recognition is not against public polity”²⁶⁸. This provision is wonderful. It makes

²⁶⁶ Here “upon request” and “shall” means that if the defendant raises such a request the court must release the ship or security. If no such request has been raised, it indicates that the court can exercise discretion to release the ship/security.

²⁶⁷ The service of notice to the defendant is one basic requirement of “due process”. If the defendant has not been duly noticed of the proceedings or given chance to present his defense, the arbitral award or judgment cannot get recognized or enforced by other countries. This requirement is also incorporated in the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958. In item 2(2) of the article 10 of the International Convention on Civil Liability for Oil Pollution Damage of 1969, it is also provided that if the defendant is not duly served of the notice and has not been given due chance to present his defense, the judgment made by a court of the Contracting State who has jurisdiction over the case can not be recognized or/and enforced in another Contracting State. The Chinese Civil Procedure Law also provides that if this requirement is not satisfied a foreign judgment or arbitral award cannot be recognized and enforced by a Chinese court.

²⁶⁸ “Public policy” is a term often used in international private law. Other terms with the same meaning which also are frequently used are “public order”, “common interests”, “order of law” etc. But with the development of society and economy, there is a tendency that some countries misuse the “public policy” as a means of precluding the application of a foreign law or recognition or enforcement of a foreign judgment or arbitral award. Refer to:

Chief editor Yu Xian-yu: Conflicts of Laws, Beijing: Law Publishing House, 1988, p.115-117.

reference not only to court judgment but also to arbitral award, not only to security provided but also to ship arrested. Most importantly, it solves, among the Contracting States to the Convention, the problem of recognition and enforcement by the court of the State where the arrest was made or security was given of the judgment and arbitral award made by a competent court or arbitral tribunal of another State. It provides an international regime for the judicial assistance between Contracting States in respect of the recognition and enforcement of judgment and arbitral award made in regard to an arrested ship, this regime can greatly facilitate such recognition and enforcement, can efficiently save judicial resources and can sufficiently protect the interests of the claimants. Additionally, in section 6 of the same article, it is provided that “nothing contained in the provision of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release”, so it can be said that the Convention doesn’t affect the national law of a Contracting State that gives more effect to or provides more convenience for the recognition and enforcement of foreign judgment and arbitral award.

From above analysis, it can be concluded that the provisions of Arrest Convention of 1952 and Arrest Convention of 1999 both try to solve the problem of jurisdiction on merits of the case. There are also some similarities between the two conventions in this regard. But it can be seen that the relevant provisions of Arrest Convention of 1999 are simpler and more reasonable than those of Arrest Convention of 1952. Compared with the Arrest Convention of 1952, the Arrest Convention of 1999 even goes farther to provide an international regime for the mutual recognition and enforcement of the judgment or arbitral award made by the competent court or arbitral tribunal.

4.1.2.3 Relevant Chinese law and Practice

The Chinese law and practice in this regard is not same for different eras. The earliest relevant provisions appeared in the Arrest Provisions of 1986. The Arrest Provisions of 1986 used the Arrest Convention of 1952 as blueprint and adopted the principle that arrest of ship can bring jurisdiction on the merits of the case to

Noticing the above tendency, some countries have realized the side effects of “public policy”, and begin to restrict the use of “public policy”. For this, please refer to:
Si Yu-zuo: Study on Chinese Maritime Legislation Trends and Policies, Beijing: Law Publishing House, 2001, pp.651-652.

the court that made arrest of the ship. In the Chinese Civil Procedure Law of 1991, it is provided that “ if the defendant has property in the territory of China that can be arrested, the court within whose jurisdiction the property is located can exercise jurisdiction over the merits of the case”²⁶⁹. According to the explanation of the Supreme Court of China on the Chinese Civil Procedure Law of 1991, application for pre-litigation measure should be made to the court within whose jurisdiction the property is located, and, after the court takes such pre-litigation measure, the applicant can take action either in the court that has taken the pre-litigation measure or in other courts that have jurisdiction over the merits of the case²⁷⁰. These provisions establish the rule that the court having arrested the ship as a pre-litigation measure can exercise jurisdiction over the merits of the case.

The Chinese Special Maritime Procedure Law of 1999 was influenced by the Arrest Convention of 1999. The Article 19 of Chinese Special Maritime Procedure Law of 1999 grants to the ship arrest maritime court the jurisdiction over the merits of the case unless there is an effective agreement between the parties on the jurisdiction or arbitration. It can be seen from this provision that the Chinese Special Maritime Procedure Law of 1999 respects the will of the parties and recognizes the priority of an effective agreement between the parties on the jurisdiction or arbitration²⁷¹. By contrast, in this regard, the relevant provisions in the Supreme Court of China’s Arrest Provisions 1994 are not perfect, because they only recognized the priority of the agreement of arbitration and didn’t grant priority to the agreement on jurisdiction by a court²⁷².

²⁶⁹ Refer to article 243 of Chinese Civil Procedure Law of 1991.

²⁷⁰ Refer to article 31 of the Supreme Court of China’s Opinions about Issues of Civil Procedure Law.

²⁷¹ In this regard there is a long history of evolution of the principle of autonomy of the parties on the jurisdiction. At the beginning the court’s jurisdiction was deemed to connect with the power of a state. Therefore the parties of a case were not allowed to reach agreement on the jurisdiction over the merits of the case. With the acceptance of market principle, the agreement of arbitration was first recognized and then the agreement over the jurisdiction by a particular court was also recognized under some conditions. Now according to Chinese Civil Procedure Law, the agreement between the parties on the jurisdiction by a particular court must satisfy the following conditions: (1) the case must be of nature of contract; (2) the agreement must be made in written form; (3) the particular court chosen must be one of the following courts: court where the plaintiff lives or is located, court where the defendant lives or is located, court of place of performance of the contract, court of place of signing the contract, court of place where the property is located; (4) the choice of the particular court doesn’t violate the compulsory jurisdiction rules and doesn’t violate the rules in relation of distribution of jurisdiction among different levels of court.

²⁷² Refer to section 2 of article 6 of this legal document.

As for the issue of maintenance or release the ship arrested or security provided when the claimant didn't take action within a reasonable period of time, section 5 of article 6 of the Arrest Provisions of 1994 provided that "if the applicant failed to commence the litigation proceedings within the ship's arrest period provided by the legal rule, the maritime court that made the arrest should release the arrested ship after the arrest period expired". This provision is not perfect because of the following reasons: (1) it didn't make reference to arbitration agreement. If there is an effective agreement between the parties on arbitration, the arbitration proceedings should be employed. If arbitration proceedings have been used, according to above provision, because the applicant didn't start the litigation proceedings as so required, the ship must be released. This result is against the purpose of the arrest of ship as a preservative measure and is against the will of the parties and is also unfair²⁷³; (2) it didn't make reference to the security provided for the release of the ship. There was no relevant provision as to whether such security should be released if action was not taken within arrest period laid down by legal rule. In view of above defects, the Chinese Special Maritime Procedure Law of 1999 makes some improvements. The section 2 of article 18 of this law provides that "if the maritime claimant fails to bring an action or apply for arbitration according to the arbitration agreement within the time limit specified by this Law, the people's court shall cancel the property reservation or return the guaranty promptly." This provision is quite reasonable and complete.

4.1.3 Jurisdiction under the Korean Legal System

Under the current Korean legal system, there are two kinds of courts that can exercise jurisdiction over the arrest of ship.

Firstly, according to the Korean Civil Enforcement Law²⁷⁴, the Korean district court within whose jurisdictional territory the ship is staying can exercise jurisdiction over the arrest of the ship. Because the ship does not always stay in its registered port, the standard in determining the court that has jurisdiction over the arrest of ship is not based on port of ship registration. To empower the district

²⁷³ This can also put the arrestor into an awkward situation: because of the existence of an effective arbitration agreement, he must submit the dispute to the arbitral tribunal mutually agreed by both of the parties; but if he does so, then because he has not commenced litigation proceedings within the arrest period as required by this provision, the ship shall be released. We can find that there exists a bad coordination between the provisions of this legal document.

²⁷⁴ Refer to articles 173 and 278 of the Korean Civil Enforcement Law.

court within whose jurisdictional territory the ship to be arrested has entered into is very reasonable because this court can reach the ship and the arrest of ship can save litigation resources and can create good effects. In Korean judicial practice, the place where the ship stays can be a port or an anchoring place outside a port or a dock inside which the ship is being repaired or even a river²⁷⁵. No matter what the case is, the district court that has jurisdiction over the place can exercise jurisdiction over the arrest of the ship.

Secondly, according to the Korean Civil Enforcement Law²⁷⁶, in addition to the above district court, the claimant can also apply to the district court that has exercised jurisdiction over the merits of the case to arrest the ship. This means that the court that has exercised jurisdiction over the merits of the case can also exercise jurisdiction over the arrest of ship.

Thirdly, according to the basic principle of the Korean Civil Procedure Law²⁷⁷, if the ship is a foreign ship and if this ship stays in a Korean port or enters Korean territory, the Korean court within whose jurisdictional territory the ship is staying can exercise jurisdiction over the arrest of the ship. In this respect, the Korean law keeps line with relevant international rules and is not different from the Chinese law.

Fourthly, in respect of whether the Korean court's jurisdiction over the arrest of ship can lead to jurisdiction over the merits of the case in which the arrested ship is involved, the Korean law gives a negative answer to the question. This means that the Korean court cannot establish jurisdiction over the merits of the case only basing on the fact that it has arrested the ship. This rule is completely different from rules of common law countries, and this rule is also different from international conventions and from Chinese legal rules. Because most national laws and international ship arrest conventions have recognized that arrest of ship by a court can lead to jurisdiction over the merits of the case by that court, the above Korean rule is not in conformity with this international trend. It can only restrict the jurisdiction power of Korean courts, and is not helpful in making Korean courts into an international maritime litigation center. Therefore, in my view this rule should be revised in order to keep pace with international trend.

²⁷⁵ Prof. Cheong Yeong-seok: Law of International Carriage of Goods by Sea, Beop-han Book Publishing House, 2004, pp.407-408.

²⁷⁶ Refer to article 278 of the Korean Civil Enforcement Law.

²⁷⁷ Cheong Hai-deok: A Study on Enforcement against Ships, ph.d. paper of graduate school of Korean Keong-hi University, 2000, p.24.

4.2 Application for Arrest of Ships

The application for arrest of ship is a necessary step for the maritime court to arrest the ship²⁷⁸.

It is globally accepted that the law of the country where the arrest is made or applied for should govern the matters of procedural nature in arrest of ships.

The Arrest Convention of 1952 provides that “the rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and all matters of procedure which the arrest may entail, shall be governed by the law of Contracting State in which the arrest was made or applied for”²⁷⁹.

The Arrest Convention of 1999 also provides that “subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.”²⁸⁰

Seen from above provisions, it can be said that the two arrest conventions both acknowledge and confirm the rule that the procedures relating to arrest of ship should be subject to the *lex fori*. Therefore, the following discussion shall focus on the relevant national laws, especially the laws of China and Korea.

4.2.1 Chinese Law:

According to article 15 of the Chinese Special Maritime Procedure Law of 1999, the maritime claimant should hand a written application to the maritime court if he wants to arrest a ship.

It is a compulsory rule that the arrest application must be handed to a court that has jurisdiction over the arrest of such ship. In common civil proceedings, according to Chinese Civil procedure Law of 1991, in situations where the court believes it is necessary to take measure to ensure the enforcement of the future judgment, the measure can be taken by the court without such an application. Now the Chinese Special Maritime Procedure Law of 1999 combines the rules

²⁷⁸ Because private interests are involved in a maritime case, so whether to arrest the ship is left to be discretion of the plaintiff under most national legal systems. A court usually refuses to automatically and actively order to arrest a ship.

²⁷⁹ Refer to paragraph 2 of article 6 of the Arrest Convention of 1952.

²⁸⁰ Refer to paragraph 4 of article 2 of the Arrest Convention of 1952.

relating to pre-litigation arrest and arrest in the course of the litigation and lays down a uniform rule that written application is necessary in both cases.

As to the written form of the application, the Chinese Special Maritime Procedure Law of 1999 doesn't give concrete requirements. In judicial practice, a uniform application is usually used by the applicant and is signed by the applicant before delivery to the maritime court. In emergent situations, there is not enough time for the applicant to prepare and deliver a formal written application, and therefore, in order to protect the interests of the claimant and facilitate the arrest of ship, the Chinese maritime court also accepts application in the form of fax²⁸¹. If this is the case, an original written application must follow afterwards because it is difficult to keep the contents of the fax. With the development of science and technology, maybe application in other new forms can also be accepted in the future.

As to the contents of the application, according to article 15 of the Chinese Special Maritime Procedure Law of 1999, the written application must include the following items: the maritime claim; the reasons for the arrest of the ship; the ship/ships to be arrested; the amount of security required; and relevant evidence. The item of maritime claim is required because it can show the nature and category of the maritime claim which is to be secured; the item of reasons for the application can show the maritime court the basic facts of the dispute, the liability of the defendant and the law on which the application is based; the item of ship/ships to be arrested can identify the particular ship/ships and facilitate the arrest of the ship/ship by the maritime court, and the information about the ship usually includes the name, location, technical particulars of the ship; the item of amount of security required is necessary because the arrest of ship itself is not a final purpose. The purpose is to get sufficient security, and the maritime court shall require the defendant to provide a specific amount of security; necessary evidence should be attached to the application because the maritime court must be satisfied that there is preliminary evidence showing the existence of claim and necessity of arrest of ship.

In judicial practice, there are some points of the application that deserve special and flexible treatment. One is about the name of the defendant. It is required to list the name of the defendant on the application. In maritime cases, due to the complexity of the legal relations involved, sometimes it is difficult for the

²⁸¹ According to the Chinese Contract Law, fax is also one of effective forms of commercial contract.

applicant to know exactly the name of the defendant and, in emergent situations, the applicant can not wait to arrest the ship until the name of the defendant is correctly identified. Dealing with this special situation, in judicial practice, the Chinese maritime courts invent a flexible method, i.e. permitting the applicant to just list the “the owner of vessel x” as the name of the defendant. An example of this practice appears in the case of Guangzhou Ocean Transport (group) Corporation versus the owner of motor vessel “Bellus”²⁸². In this case, the motor vessel “Qingyunling” owned by the Guangzhou Ocean Transport (group) Corporation collided with “Bullus” flying a foreign flag in the port of Huangpu. As a result of the collision, the “Qingyunling” was severely damaged. Then the Guangzhou Ocean Transport (group) Corporation decided to apply to the Guangzhou Maritime Court of China for arrest of the motor vessel “Bellus”. Due to lack of information about the name of the owner of the “Bellus”, the Guangzhou Maritime Court of China finally permitted the application of arrest of the vessel with the defendant being listed just as “the owner of the motor vessel ‘Bellus’”. After the arrest of the vessel, the insurance company of the “Bellus” appeared before the maritime court and provided sufficient security for the release of the vessel. Now the Chinese Special Maritime Procedure Law of 1999 has absorbed this practice and clearly provides that “for a maritime claimant applying to arrest the involved ship, if the name of the party who opposes the claim cannot be ascertained at once, the filing of his application shall not be affected”²⁸³. What should be paid special attention is that this practice only applies to arrest of ship in respect of which the maritime claim arose and doesn’t apply to arrest of a sister ship.

Another point is whether and to what extent the claimant must prove his claim when he applies for the arrest of a ship. As to this issue, during the preparation of the Arrest Convention of 1952, a proposal was suggested that the judge should authorize the arrest on simple verification of the claim being likely to exist²⁸⁴. But this proposal was not accepted and the similar wording had never appeared in the subsequent draft and never reintroduced. In the context of the Arrest Convention

²⁸² For a detailed introduction to and comment on this case, please refer to the book:
Chief editor Jin Zheng-jia: *Maritime Procedural Law*, Dalian: Dalian Maritime University Publishing House, 2001, p. 108-109.

²⁸³ Refer to the article 25 of the Chinese Special Maritime Procedure Law of 1999.

²⁸⁴ The proposal existed in the first draft of the convention prepared by Leopold Dor in 1933. Please refer to:
Francesco Berlingieri: *Arrest of Ships*, 3rd edition, London, LLP, 2000, p.156.

of 1952, “claim” is not used in the sense of an established substantial right. On the contrary, it is very clear that the existence of “claim” shall be determined by the competent court that exercises jurisdiction on the merits of the case. Therefore, when considering an application for the arrest of a ship, the court should not determine the merits of the case, but merely conduct a preliminary investigation in order to find whether the contention that a particular claim exists is reasonable. During the preparation of the Arrest Convention of 1999, the question whether the definition of “claimant” has the effect to dispense the claimant from the burden of proving his claim has not been discussed. Even though there is a slight change in the wording, the Arrest Convention of 1999 doesn’t intend to modify the substance of the relevant provision in the Arrest Convention of 1952. As a result, it appears that the lack of uniformity in regard to the interpretation of the “claimant”²⁸⁵ in the Arrest Convention of 1952 shall continue to exist in regard to the interpretation of “claimant”²⁸⁶ in the Arrest Convention of 1999. Due to above lack of uniformity, in different countries the requirements as to the burden of proof in the stage of application for the arrest of a ship are quite different. In some countries it has been decided that the claimant is wholly dispensed from any burden of proof, while in other countries, the applicant must at least provide prima facie evidence to show that he has a claim.

Irrespective of whether the claimant must prove his claim or not, it is thought, in any maritime case, that he must show he has a maritime claim and must identify a ship that can be arrested. This means that the claimant at least should provide prima facie evidence as to the maritime claim and as to the connection of the ship to be arrested with the maritime claim asserted.

4.2.2 The Korean Law:

According to the Korean Civil Enforcement Law, the arrest of ships must be started by the application of the claimant. This means that the Korean Court doesn’t start the procedure by exercising discretion of court power.

According to the above law, the ship arrest application must be made in written form and must cover the following items:

(1) Identification of the creditor and debtor;

²⁸⁵ According to the section 4 of article 1 of the Arrest Convention 1952, “claimant” used in this convention means a person who alleges that a maritime claim exist in his favor.

²⁸⁶ According to section 4 of article 1 of the Arrest Convention 1999, the term “claimant” for the purpose of this convention means any person asserting a maritime claim.

- (2) Identification of the ship to be arrested, including the particulars of the ship such as name of the ship, kind of the ship, nationality of the ship, tonnage of the ship, engines of the ship, year of construction of the ship, etc;
- (3) Reasons for arrest of ship and relating basic facts;
- (4) Berthing port or anchoring place of the ship;
- (5) Name of the captain;
- (6) Name and residence of application agent if any.

In addition, the following documents must be attached to the application:

- (1) A copy of the registration of the ship. This document is necessary because the ownership and other conditions of the ship such as the existence of mortgage and legal relationships can be seen easily from the registration of the ship. If the ship is a ship that has not got registered or can't be registered or is a foreign ship, it is impossible or difficult to provide registration of the ship, therefore in this situation alternative document such as copy of certificate of nationality of the ship or other document that can show the ship is owned by the debtor may be provided.
- (2) Document showing that the ship is not ready for sailing and is not in navigation. Because the Korean law doesn't permit the arrest of ship that is ready for sailing or is in navigation, this kind of document is necessary.
- (3) Ship anchoring certificate. This document is necessary because it is needed to determine whether the court can exercise jurisdiction over the arrest of the ship.
- (4) Ship value certificate. This document is needed to ascertain the amount of the security. In reality, it is very difficult to certify the value of the ship at the time and place of the ship arrest, consequently in judicial practice Korean courts often do not require the ship value certificate.
- (5) Document showing the place of the captain of the ship. This document is needed for the purpose of the service of the notice. According to the international usage, the captain is an of-course agent of the ship owner. Therefore, serving the notice on the captain has the same effect of serving the notice on the ship owner.

Compared with the application procedure for arrest of ships in Chinese law, the above documents required under the Korean legal system are more detailed. In addition, there are obvious differences in the required documents for ship arrest application. One difference is that document showing the ship is not ready for sailing is required by the Korean law but not by the Chinese law. Another difference is that Chinese law accepts application in form of fax in emergent situations but the Korean law refuses such application. The Chinese law permits

the name of the ship owner being listed as “owner of ship x” on the application, but the Korean law does not. In conclusion, these differences in application procedure are due to different basic rules of these two countries, for example it is because the Korean law doesn’t recognize action in rem that the Korean law doesn’t accept the Chinese maritime court practice that allows the applicant to apply arrest of a ship before the identification of the name of the ship owner. It can also be seen that the Chinese rules in this regard are more flexible and practical. In my opinion, in order to arrest ships more efficiently and economically, it looks like that the Korean application procedures should be simplified.

4.3 Review over and Decision on the Application by the Court

4.3.1 Chinese Law and Practice

After the claimant has delivered the application of arrest of ship to the maritime court, the court must review the application and see whether the necessary conditions are met, and then decide whether to approve the application or not²⁸⁷.

In regard to the review by the court of the application, there is an opinion²⁸⁸ that it is not necessary for the court to scrutinize the application. The reasons for this opinion are as follows: first, the application is raised by the claimant and the losses incurred by the ship owner or other interested party are usually guaranteed by the counter-security provided by the claimant, so the court doesn’t need to scrutinize the application; secondly, if the court scrutinized the application and then arrested the ship, but finally the arrest was proved wrong, if this happens, the court should burden liability for its careless review, therefore for the benefit of the court, the court should not scrutinize the application. I think above opinion is wrong. We can’t imagine a court approving a ship arrest application without review; review over the application is a judicial power of the court and an obligation of the court too. The review by the court can reduce the chance of

²⁸⁷ For the processing and carrying out of a decision to arrest a ship, the applicant is required to provide an application fee to the maritime court in China. The fee is collected at a following rate: if the amount claimed by the applicant is below 100,000 RMB Yuan, the fee is 1,000 RMB Yuan; if the amount is between 100,000 and 200,000 RMB Yuan, the fee is 2,000 RMB Yuan; if the amount is between 200,000 and 300,000 RMB Yuan, the fee is 3,000 RMB Yuan; if the amount is between 300,000 and 400,000 RMB Yuan, the fee is 4,000 RMB Yuan; and if the amount is over 400,000 RMB Yuan, the fee is 5,000 RMB Yuan. Refer to: Dai Yao-nan and others: *Ship-related Maritime Disputes Arbitration and Litigation Practice*, Dalian: Dalian Maritime University Publishing House, 2003, p.330.

²⁸⁸ This opinion is clearly expressed in: Jin Zheng-jia and Weng Zi-ming: *Maritime Claims Preservative Measures*, Dalian: Dalian Maritime University Publishing House, 1996, pp.86-87.

wrong application and is very important to protect the interests of the ship owner and other parties involved. In addition, the review over the application by the court is conducted under a condition that the legal relationship between the parties is not very clear and is often conducted in an urgent situation. Even though the arrest is finally proved wrong, it is unreasonable for the court to burden liability for the wrong arrest.

Then what should be covered by the review of the court? How should the court conduct the review? As previously mentioned, the claimant merely has the responsibility to provide prima facie evidence for his application, and the court should be responsible for the application of law, so the court should merely conduct a procedural review over the application. In judicial practice, the review by the Chinese maritime court over the application generally covers following points: whether the court has jurisdiction over this particular arrest of ship; whether the names of the claimant and defendant and other information are complete and clear; whether the claim is on the list of maritime claims in respect of which a ship can be arrested²⁸⁹; whether the ship has been identified, whether the ship has prima facie connection with the claim; What security is required by the claimant; if counter-security is necessary, whether the claimant has provided suitable counter-security; and others.

According to the law, the maritime court to which the application is made should make decision on the application after the review. As to the time within which the decision should be made, the Chinese Special Maritime Procedure Law of 1999 clearly provides that the court should make the decision within 48 hours after it received the application for arrest of ship irrespective of pre-litigation arrest application or arrest application in the course of litigation²⁹⁰. The decision made by the court may be one of the two categories: (1) decide that the ship be arrested; (2) decide not to support the application for arrest of the ship. If the first is the case, the order of arrest of ship should be enforced immediately; if the second is the case, the claimant cannot appeal to a higher court but can request the court that made the decision to review the decision once more if he thinks the decision is wrong. There are two time limits that deserve special attention in this respect. One is that the claimant should make the request within 5 days after he

²⁸⁹ As aforesaid, according to the Chinese Special Maritime Procedure Law of 1999, only in respect of one of the listed 22 maritime claims a ship can be arrested. Therefore one of the conditions for ship arrest application is that the claim must be one of the 22 maritime claims.

²⁹⁰ Refer to article 17 of the Chinese Special Maritime Procedure Law of 1999.

received the decision. Another is that the maritime court should make a decision on such request within 5 days after it received the request²⁹¹.

4.3.2 Korean Law and Practice

Because arrest of ship can result in the impossibility of use of the ship, the Korean courts are careful in permitting the arrest of ship.

In deciding whether to grant the application of arrest of ship, Korean courts usually compare the amount of claim and the value of the ship and consider the necessity to arrest the ship. According to the Korean law, the arrest of ship can be ordered when the Korean court believes that the enforcement of final judgment might become impossible or difficult if the arrest were not permitted²⁹².

After the review of the ship arrest application and attached documents by the Korean court, if the court thinks it is necessary to arrest ship, the court can order the applicant to provide counter-security to cover the losses that may be incurred by the ship owner due to the wrong arrest of ship. In Korean judicial practice, it is common for the court to order the applicant to provide about 1/10 of the amount of claim as counter-security. Even though counter-security in cash is preferred, effective guarantee letter issued by capable insurance company or bank is also acceptable.

According to the concrete situation, the Korean court can make one of following three orders in respect of arrest of ships: order the ship to be arrested; order the ship to anchor; order the nationality certificate of the ship and/or other navigational documents to be collected from the ship.

For the convenience of release of the arrested ship against security provided by the ship owner, the arresting court usually at the same time determines the amount and form of such security and writes them on the order²⁹³.

4.4 Enforcement of Arrest of Ships

4.4.1 Chinese Law and Practice:

If the court has decided to arrest the ship, then there comes a question how to enforce the arrest.

²⁹¹ Refer to article 17 of the Chinese Special Maritime Procedure Law of 1999.

²⁹² Refer to article 277 of the Korean Civil Enforcement Law.

²⁹³ Refer to article 702 of the Korean Civil Enforcement Law.

According to the Chinese Special Maritime Procedure Law of 1999, the court should enforce the decision immediately after it has decided to arrest the ship. According to the same law, the defendant is entitled to request, within 5 days after he received the decision, the maritime court that has made the decision to arrest the ship to review its decision once more.²⁹⁴ The maritime court should make decision on such request within 5 days after it received the request. During the period of review and decision on such request, the enforcement of the decision to arrest the ship should not stop²⁹⁵. Interested parties other than the defendant are also entitled to oppose to the decision to arrest the ship²⁹⁶, if the court believes the opposition is correct after conducting review, the arrested ship shall be released.

In Chinese judicial practice, ship arrest order can be enforced in one of two forms: dead arrest or alive arrest.

If the ship is “dead” arrested, it means that the court attaches order of arrest to the ship. The ship cannot be put into business operation, cannot leave the place where it is arrested, and can not be sold or mortgaged. In this situation, the ship arrested has no choice but lies “dead” at the place where it is arrested to wait for the final judgment. This form of arrest is a traditional form and is employed in most cases. Generally speaking, this form of arrest has advantages such as: (1) the ship is supervised and can not escape, so it is relatively safer, and the possibility of its destruction, loss or damage is lower; (2) the ship owner or bare-boat charterer is deprived of the right to dispose the ship and put the ship into commercial operation, so he is pressed to provide security for the release of the ship as soon as possible. It cannot be denied that this form has disadvantages. For example, during the period of dead arrest, the ship cannot be put into commercial operation. In addition, the ship owner had to pay fees such as crew’s salary, ship’s supply for the daily maintaining of the ship. As the ship is under supervision, he may incur a large amount of supervision fee²⁹⁷, especially when the ship is under “dead” arrest for a long time.

²⁹⁴ Refer to article 17 of the Chinese Special Maritime Procedure Law of 1999.

²⁹⁵ Refer to article 17 of the Chinese Special Maritime Procedure Law of 1999.

²⁹⁶ The most probably happening situation is that the claimant arrested a ship not owned by the defendant and thus the true owner of the arrested ship opposes to the arrest and requests the arresting court to review the decision of arrest of the ship.

²⁹⁷ In Chinese maritime judicial practice, if the ship “dead” arrested is a ship flying a foreign flag, it should be guarded and supervised by armed policemen. The guard and supervision fee is US \$ 400-500 one day.

Due to above reasons, with the ship arrest practice becoming richer and richer, in some special situations, the form of “alive” arrest is invented by Chinese maritime court and finally gets recognized by law.

Compared with “dead” arrest, the “alive” arrest has following characteristics. During the period of “alive” arrest, the ship owner or bare-boat charterer can use the ship and put it into commercial operation. During the period of “alive” arrest, the ship cannot be disposed, and the ship owner can neither sell the ship nor establish mortgage on the ship. If accident occurs during the period, the ship owner cannot take away insurance compensation from the insurance company. In this way, on the one hand, the claim is secured and interests of the claimant are guaranteed; on the other hand, the ship owner or bare-boat charterer can make use of the ship and make money and prevent such losses and supervision fees as may happen in the “dead” arrest. Once the arrest is finally proved wrong, this “alive” form can also reduce the risks for the claimant.

In China, the “alive” arrest has a relatively long history. But in different eras, its legal basis is different. Before the enacting of Chinese Special Maritime Procedure Law of 1999, the Civil Procedure Law was used as the legal basis for this practice. According to explanations²⁹⁸ of the Supreme Court of China about the application of Civil Procedure Law, when the court takes preservative measure on real property or some personal property such as automobile²⁹⁹, the measure can be taken by keeping the document of ownership in the property and informing the property registration agencies not to effect the transfer of the property. This explanation was used to be the legal basis for the “alive” arrest of ship in that era. After the enacting of the Chinese Special Maritime Procedure Law of 1999, there is a special rule in regard to the “alive” arrest of ship which provides that “after a maritime court orders to impose preservation upon a ship, with consent of the maritime claimant, it may allow the ship to continue the operation by ways of restraining the disposition or mortgage of the ship”³⁰⁰. Here I would like to emphasize that, according to this special rule, the use of the form of the “alive” arrest of ship must get the consent of the applicant, otherwise the maritime court can only effect “dead” arrest of the ship. I think this rule is correct and reasonable,

²⁹⁸ Refer to article 101 of the Supreme Court of China’s Opinions on Several Issues in Application of the Civil Procedure Law.

²⁹⁹ This explanation indicates that a ship is treated the same way other real property such as land, building is treated because a ship shares some characteristics of real property.

³⁰⁰ Refer to article 27 of the Chinese Special Maritime Procedure Law of 1999.

because the applicant himself can know whether it is suitable to “alive” arrest of the ship and. Once he consents to the “alive” arrest, he must himself take the risks thereof.

In the international arrest conventions, we can also find the trace of “alive” arrest, even though in a very limited sense. Both of the Arrest Convention of 1952 and the Arrest Convention of 1999 provide³⁰¹ that, as to the arrest of ship in disputes of ownership, possession, operation and earnings of the ship, the court can arrest the ship, but at the same time, permits the possessor of the ship to continue the commercial operation of the ship upon such possessor having provided sufficient security or may otherwise deal with the operation of the ship during the period of the arrest. From this provision, we can find that the two conventions accept the “alive” arrest of ship very prudently. Here there are two conditions for the use of “alive” arrest: (1) the dispute must be one of the two disputes particularly pointed out; (2) sufficient security must have been provided. Therefore the conditions in the two arrest conventions are stricter than those under Chinese legal system. Under the Chinese legal system, the condition is the consent of the applicant, there is no restriction on the scope of cases, and additionally the sufficient security is not compulsorily required.

In conclusion, the “alive” arrest in the arrest conventions is only a special treatment of the arrested ship in some special cases for the benefits of both the applicant and the defendant. By contrast, under the Chinese legal system, the “alive” arrest is a supplementary form of arrest of ship. In the Chinese judicial practice, for the use of this form of arrest, there are still some issues that deserve special study. These special issues are:

(1) Scope of Application of “Alive” Arrest

Because of the characteristics of the “alive” arrest of ship, it is accepted that the scope of its application should be restricted for the protection of the benefits of the claimant. In other words, the scope of the use of this form should be limited and not be open.

For a foreign ship, the “alive” arrest should not be used. The reason is that the foreign ship is not registered in China, a Chinese maritime court can not require a foreign ship registry to make remarks on the record of the ship and to forbid the transfer of and mortgage establishment on the ship, and can not effectively control

³⁰¹ Refer to section 1 of article 4 of the Arrest Convention of 1999 and section 1 of article 5 of the Arrest Convention of 1952.

the ship, so in order to protect the interests of the claimant, in this situation the “alive” arrest can not be used.

For a ship registered in China but whose navigation area is not confined to waters under Chinese jurisdiction, the use of “alive” arrest should be very careful. The reason is that the ship is difficult to be supervised and controlled due to its broad navigation area part of which may cover waters under jurisdiction of a foreign country. When the time comes to enforce final adjudication against it, the ship may be operating at sea area under jurisdiction of a foreign country³⁰². In addition, due to the large sphere of activity, the ship can face more natural risks compared with ship navigating in inland waters or along coast. Therefore, to use “alive” arrest on a Chinese far ocean going ship must be very careful.

For a Chinese ship whose navigation area is confined to the waters under Chinese jurisdiction, the “alive” arrest can be used. The reasons are as follows: the ship is a domestic ship and is registered in China. The Chinese maritime court can “alive” arrest the ship and order the Chinese ship registry not to permit the transfer of and mortgage establishment on the ship; the ship’s operation area is confined to areas under Chinese jurisdiction and, as a result, it is easy to supervise and control the ship, and the final judgment or arbitral award can be enforced against the ship easily; usually the ship owner of a domestic ship has, in addition to the ship, other properties located in China, so the risk of impossibility to enforce the final judgment or arbitral award against the ship owner is lower, even in the situation of the ship being “alive” arrested. The advantages and functions of “alive” arrest can best be seen in the situation where a domestic ship is involved.

(2) Conversion between “Alive” Arrest and “Dead” Arrest

The “alive” arrest can be flexibly used. One condition for the use of “dead” arrest is that the ship can be found and controlled. In emergent situations, this condition is not satisfied and the claimant doesn’t know where the ship is and the court cannot control the ship, but there does exist a possibility of the transaction of or mortgage establishment on the ship. In this emergent situation the alternative choice is to “alive” arrest the ship first, and if necessary, then “dead” arrest the ship after the ship is discovered and can be controlled.

³⁰² According to international law, a sovereign country cannot exercise right of arrest of a ship once the ship enters into the territorial waters of another sovereign country. Please refer to: Michael Akehurst: *A Modern Introduction to International Law*, London: George Allen & Unwin Ltd., 1978, the translated version by Chinese scholars and published by the Chinese Social Science publishing House in 1981. pp.209-210.

Sometimes, after the “alive” arrest is adopted with the consent of the claimant, it is found that the conditions for the use of “alive” arrest don’t exist or risks increase due to the operation of the ship, and in this situation the claimant can apply to convert the “alive” arrest to “dead” arrest. Following the same rule, the “dead” arrest can also be converted into “alive” arrest if conditions have changed and the consent of the claimant is obtained.

(3) After a ship has been successfully “alive” arrested by one maritime court according to the application of one applicant, whether can another applicant apply to another maritime court to “dead” arrest the same ship?

This is a troubling question often occurring in judicial practice. In this regard, the relevant international conventions and the Chinese national law have not dealt with this question. Among law scholars, there are opposing opinions in this respect. The scholars answering “yes” to the question argue that the same ship can at the same time be “alive” arrested and “dead” arrested because the claimants are different and in this situation the ship owner is obliged to provide security respectively, otherwise it is unfair to the latter claimant. The scholars answering “no” to the question argue that it is not necessary to “dead” arrest the ship because the ship has been “alive” arrested and is under control of a maritime court. I agree with the first opinion. The reasons are as follows: (a) In judicial practice it often happens that a ship under “alive” arrest is afterward “dead” arrested by other maritime court following the application of other claimant because the ship having been “alive” arrested can be put into commercial operation as a normal ship and other persons can not at once find that the ship is under “alive” arrest. If the subsequent “dead” arrest is not allowed and is illegal, then whether the latter claimant and the maritime court effecting the “dead” arrest should be responsible for the “dead” arrest? (b) If the “dead” arrest is not allowed, then during the period of “alive” arrest, the latter claimant other than the claimant who has consented to the “alive” arrest cannot press the ship owner to provide security through arrest of the ship, and this is unfair to the latter claimant. In addition, if the “dead” arrest is not allowed, the latter claimant may not know timely when the ship under “alive” arrest can be released after the former dispute being settled. As a result, the latter claimant cannot exercise the right to arrest the ship timely. Once the ship is released, no immediate application for arrest follows. The ship can be sold or mortgage can be established on it, and if this happens, the interests of the latter claimants can be greatly damaged. (c) The “alive” arrest is agreed by only

one claimant, and other claimants may think the “alive” arrest cannot ensure their interests. In this case, if the ship under “alive” arrest can’t be “dead” arrested by other claimants, this is a discrimination against the latter claimants. In conclusion, other claimants should be permitted to “dead” arrest the ship already under “alive” arrest.

(4) Whether should the applicant who has consented to the “alive” arrest of the ship be required to provide counter-security?

In Chinese judicial practice, the applicant is still required by maritime court to provide counter-security³⁰³. In my opinion, this practice is unreasonable. According to the counter-security theory, the purpose of counter-security is to cover the losses due to the wrong arrest of ship. If there is no loss, there is no necessity to require counter-security. One main advantage of “alive” arrest is that it can permit the commercial operation of the ship under “alive” arrest, so, in the case of “alive” arrest, there is no loss on the part of the ship owner. As a logical result, there is no need to require counter-security if the ship is “alive” arrested. Somebody may argue that the ship owner can incur loss of chance of selling the ship or establishing mortgage on the ship. I admit this may be true, but the possibility of the real occurrence of this kind of loss is quite low, and if it occurs, the loss is very different from the loss due to the cease of operation of the ship. Furthermore, it is very difficult to determine in advance the amount of this special loss. In conclusion, I strongly oppose the provision of counter-security under the “alive” arrest.

(5) How to reduce the risks in respect of the ship that has been “alive” arrested?

Once a ship is “alive” arrested and is permitted to continue to operate, there accompanies the risks of destruction or loss of the ship or creation of maritime lien on the ship. If the ship is not insured and is destroyed or severely damaged, the “alive” arrest shall be useless; and if maritime liens are created during the operation of the ship under “alive” arrest, the common claimant’ interests can be heavily affected. Therefore, reducing the above risks accompanying with the “alive” arrested ship is an urgent issue. In my opinion, the risks can be reduced through the following ways: (a) One way is to order the ship owner to maintain effective and sufficient insurance on the ship. If the ship owner refuses or fails to do so, the “alive” arrest should not be granted or should be revoked. One point

³⁰³ Jin Zheng-jia, Weng Zi-ming: A Special Study on Maritime Claims Preservative Measures, Dalian: Dalian Maritime University Publishing House, 1996, p.65.

that should be noticed is that, if the insurance of the ship has been made and maintained, the maritime court should send a notice to the insurance company to the effect that the insurance compensation shall be paid to the account of the maritime court. In one maritime case that I have dealt with, due to the lack of contact between the maritime court that has ordered the “alive” arrest and the insurance company that has issued insurance policy covering the ship, after the sinking of the ship, the ship owner successfully carried the insurance compensation away from the insurance company. (b) Another way is to set down conditions on the operation of the ship, the conditions may be, as the particular case may show necessary, the limitation on the area of operation of the ship, the regular inspection and survey on the ship, or due notice to the maritime court of the operation of the ship etc.

The method of enforcement of “alive” arrest is relatively simple. According to the Chinese maritime judicial practice, the maritime court, after making the decision of “alive” arrest of the ship, shall notice the Chinese ship registry and require that change of registration of the ship, transaction of the ship and establishment of mortgage on the ship should not be allowed. Then the ship registry shall make due remarks on the registration records.

Compared with the enforcement of “alive” method, the enforcement of “dead” arrest is much complicated. The common procedure for the enforcement of “dead” arrest is as follows: the maritime court shall issue arrest order the same time when it makes decision to arrest a ship. Then maritime court judges in uniforms shall get on board the ship, show the captain the document of their identification, announce to the captain the decision of the maritime court and ship arrest order, and serve the decision and order to the captain. In addition, the arrest order shall be attached to the obvious place of the ship. At the same time, the maritime court shall make document of assistance requiring the relevant government or non-government agencies to assist in the enforcement of the arrest of the ship. The agencies and entities involved in the assistance of enforcement of arrest of ship are usually as follows: the maritime bureau³⁰⁴, the frontier inspection bureau³⁰⁵, the Customs, the ship agent etc. In the enforcement of arrest of a foreign ship, the frontier inspection bureau is always involved to supervise the ship in order to

³⁰⁴ In China, the government agency responsible for the supervision and registration of ship is the China Maritime Bureau and its district bureaus.

³⁰⁵ In China, the frontier inspection bureau is of quasi-military nature. Its main function is to guard the frontier and prevent the acts harmful to national security.

prevent the evasion of the arrested ship. The ship shall also be charged with supervision fees according to a fixed rate. If necessary, the maritime court shall send judges on board the ship to effect the supervision. As a common measure, the maritime court usually takes away the document of certification of registration of the ship and some other ship documents. According to the Chinese law³⁰⁶, when a foreign ship is arrested, the Chinese maritime court should serve written notice to the embassy or consular of the country whose flag the arrested ship is flying. In emergent cases, if it is impossible to serve such notice at the same time the ship is arrested, such notice must be served immediately after the implementation of such arrest. If the embassy or consular requests further information about such arrest of the ship, the relevant maritime court should provide the required information promptly. The common route of the service of the notice is as follows: the maritime court enforcing the arrest of the ship reports to the high court of the province or city where the maritime court is located. After the review by the high court, the notice shall be passed to the Consular Division of Chinese Ministry of Foreign Affairs, and then the Consular Division of Chinese Ministry of Foreign Affairs shall pass the notice to the embassy or consular of the country whose flag the arrested ship is flying.

4.4.2 The Korean Law and Practice:

Under the Korean law, the enforcement method of arrest of ship changes with the form of the court's arrest order.

According to the Korean Civil Enforcement Law³⁰⁷, the following two methods can be jointly or individually used: registration of the arrest of ship; collection by the arresting court of ship nationality certificate and relating ship documents.

(1) The method of registration of arrest of ship. The court ordering the arrest of ship shall service the notice of arrest of ship to the ship owner and get the arrest of ship duly registered. The arrest of ship comes into effect when the above notice

³⁰⁶ According to section 3 of article 4 of the Arrest Provisions of 1994, the arrest of a ship flying the flag of a country with which China has signed Consular Treaty or has signed bilateral Navigation Agreement must be enforced according to the provisions of such treaty or agreement. As a general provision of such treaty or agreement, once such a ship is arrested, the court of ship arrest must inform the embassy or consular of the country whose flag the arrested ship is flying. According to the notice issued by the Supreme Court of China, the Chinese maritime court must, upon issuing ship arrest order, give written notice of such arrest to the embassy or consular of the country whose flag the arrested ship is flying. China has signed consular treaty with most countries in the world. Some of the countries are the United States, Italy, Russia, Turkey, Mexico, Iraq, Romania, India, Poland, the North Korea, the South Korea, Laos, Cuba, Argentina, Tunis etc.

³⁰⁷ Refer to article 295 of the Korean Civil Enforcement Law.

and registration have been made. In addition, before the registration of the arrest of ship, if arresting official has collected the ship nationality certificate from the ship, the arrest of ship can also come into effect³⁰⁸.

(2) The method of collection by the arresting court of ship nationality certificate and relating ship documents. The arresting court shall collect the ship documents that are necessary for the navigation of the ship. Without these documents, the ship can't navigate and move. The relating ship documents may be ship inspection certificate, log book etc.

In Korean judicial practice, for the convenience and benefits of the creditor, alternative methods of arrest of ship are also frequently used. These alternative methods are court's order to anchor the ship and court's order to supervise and preserve the ship.

In addition, in special situations, the arrested ship can be permitted to be provisionally released from arrest and to navigate³⁰⁹. But only strict conditions are satisfied can the arresting court permit the arrested ship to be provisionally released from arrest and to navigate. The conditions that should be satisfied can be listed as follows:

(1) The debtor applies for such release. Without the application from the debtor, the arresting court cannot exercise discretion to release the ship. It should also be mentioned that only the debtor and no other interested parties can apply for such release.

(2) There must have sufficient reasons for such application. One of the reasons can be that if the ship is not permitted to complete the voyage, there shall result in very large losses. Without good reasons, the arresting court cannot permit the application.

(3) There must have consent from the main interested parties such as creditor, ship purchaser etc. Because the provisional release from arrest and the continued operation of the ship can lead to great risks to the interested parties, the consent of these interested parties must be got. In judicial practice, because the above conditions are very strict, especially the third condition is very difficult to be satisfied, the chance of employing this mechanism is very little. Compared with the mechanism of alive arrest of ship in Chinese law, the above Korean mechanism has the same purpose to soften the hard effects to ship owners or ship

³⁰⁸ Refer to article 174, 291 of the Korean Civil Enforcement Law.

³⁰⁹ Refer to article 176 of the Korean Civil Enforcement Law.

operators. Seen from practice, the Chinese mechanism is relatively better operated than the Korean mechanism.

4.5 Release of the Arrested Ship

According to the international arrest conventions and relevant national laws, the arrested ship should be released in some situations if certain conditions are satisfied.

According to the Arrest Convention of 1952³¹⁰, the release of an arrested ship can be made in one of the following situations: (1) when security has been provided; (2) when the ship or a sister ship has been previously arrested in respect of the same maritime claim; (3) when proceedings for the merits of the case have not been commenced within the time fixed by the court that effected the arrest. The above situations of (1) and (3) are also regulated by the Arrest Convention of 1999 while the situation of (2) is not regulated but release of the ship in such situation is also implied in the Arrest Convention of 1999³¹¹. Another situation in which an arrested ship must be released is considered by liability limitation conventions such as Limitation Convention of 1957, Civil Liability Convention of 1969 and Convention on Limitation of Liability for Maritime Claims (London) of 1976. The above four situations are all regulated or implied in Chinese national laws, and besides these four situation, the Chinese national law also provides other situations where an arrested ship can be released from the arrest.

4.5.1 Release against Provision of Security

This is the commonest situation where an arrested ship is released from arrest. According to the article 5 of the Arrest Convention of 1952, the general rule is that “the Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being provided”. In view of the fact that the court or other appropriate judicial authority that authorized or ordered the arrest of the ship may be not the court or other judicial authority that carried out the arrest, here it should be noticed that the court or other appropriate authority that can order the release of the arrested ship can only be the former court that has authorized the arrest of the

³¹⁰ Refer to section 3 of article 3 of the Arrest Convention of 1952.

³¹¹ Refer to article 4 (release from arrest) and article 7 (release of ship if proceedings are not duly brought) and article 5 (release of arrest in case of unlawfully rearrest and multiple arrest).

ship. Without consent of the former court or other judicial authority, the latter court or other judicial authority cannot order the release of the ship from arrest³¹².

As to the provision of security, three questions require special consideration. They are: (1) the nature and form of the security; (2) the amount of security; (3) the conditions of the enforcement of the security. As previously introduced, according to the Arrest Convention of 1952, the form of security can be bail or “other security” such as bank guarantee, letter of undertaking of P&I Club, and the amount of the security must be sufficient, and whether the amount of the security is sufficient shall be subject to *lex fori* and the court authorizing the arrest, and the security must be enforceable.

In the Arrest Convention of 1999, section 1 of the article 4 of the convention provides that “a ship which has been arrested shall be released when sufficient security has been furnished in a satisfactory form”. Unlike the Arrest Convention of 1952, the Arrest Convention of 1999 doesn’t identify the authority that must release the ship from arrest. The reason for this reform is that the release obligation lies not only on the competent court but also sometimes on the claimant who has applied for the arrest. According to the national law of some maritime countries, the security provided by the ship owner or bare boat charterer can also be provided to the claimant, and in some countries the release of an arrested ship can be done without a release order of the court but with the consent of the claimant. Therefore, pursuant to the above provision, the claimant who has applied for the arrest must consent to the release and take necessary measure to this effect if the sufficient security has been provided in a satisfactory form. According to the same provision, the conditions that must be met when the ship is released from arrest against security are: (1) the security must be sufficient in amount; (2) the security must be in a satisfactory form. According to the section 2 of the article 4 of this convention, the amount and the form of the security can be negotiated and decided by the parties. Failing to reach agreement by the parties, the court shall determine the amount and the form of the security, but in any case the amount shall not exceed the value of the arrested ship. The ceiling amount of

³¹² For example in Chinese law, the maritime court that has ordered the arrest of a ship in the course of litigation can ask another maritime court that is nearer to the place of the ship to be arrested to effect the arrest if the situation is urgent. In this case, only the former maritime court can exercise jurisdiction over the merits of the case and only this court can order the release of the ship from arrest and the latter maritime court cannot. Similar to the Chinese law, the Italian law also provides that the court competent to authorize the arrest is that which is competent to decide on the merits of the case and the ship can then be arrested in the district of another Italian court.

the security not exceeding the value of the ship is a new qualification that cannot be found in the Arrest Convention of 1952³¹³.

In Chinese law, the arrested ship can also be released against security. According to article 18 of the Chinese Special Maritime Procedure Law of 1999, the maritime court that has ordered the arrest of the ship should timely release the ship upon the security being provided. As to the conditions of the security, the articles of 74, 75, 76 and 77 of the same law provide a regime similar to that of the Arrest Convention of 1999³¹⁴. In this respect, the Chinese law keeps pace with the new international trend. But if analyzing into the roots, it can be found that some minor differences exist between the two regimes³¹⁵.

4.5.2 Release from Subsequent Arrest

This situation is clearly regulated in the Arrest Convention of 1952 but is implied in the Arrest Convention of 1999.

In the Arrest Convention of 1952, the section 3 of the article 3 of the convention provides that:

“A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claimant and, if a ship has been arrested in any one of such jurisdiction, or bail or security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the same maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the

³¹³ For a detailed analysis of the conditions of security under the Arrest Convention of 1999, please refer to the section of this paper devoted to the study on the security.

³¹⁴ Article 74 provides that the security can be provided to the maritime court or the claimant; Article 75 provides that the amount and the form of the security shall be negotiated and decided by the parties, and, failing to reach an agreement, the maritime court shall decide on the amount and form of the security.

Article 76 provides that the amount of the security should not exceed the value of the ship that has been arrested.

Article 77 provides that the provider of the security can ask the maritime court to reduce, alter or cancel the security that has been provided if there are reasonable grounds.

³¹⁵ For the minor differences, please refer to the section of this paper devoted to the study on the Chinese security.

subsequent arrest or that there is other good cause for maintaining that arrest”.

Even though this provision is very long and the wording is awkward, it is evident that its aim is to effectively prevent rearrest and multiple arrest of ship. In order to invoke the protection of this provision and get the ship released from the rearrest or multiple arrest, the ship owner should shoulder the burden of proving that, prior to the arrest of the ship, the particular ship in respect of which the maritime claim arose or another ship owned by him had been arrested or security had been provided in respect of the same maritime claim by the same claimant. In order to prevent the release of the ship, the claimant should shoulder the burden of proving that the given security had been released or that there is good reason to maintain the arrest. If the court is satisfied with the argument and evidence given by the ship owner, the ship shall be released from arrest, otherwise the arrest of the ship shall be maintained.

The Arrest Convention of 1999 deals with the same situation in a very different manner. Unlike the provision in Arrest Convention of 1952, the Arrest Convention of 1999 in its article 5 sets down concrete and clear rules concerning the conditions for exercising right of rearrest and multiple arrest. Consequently, any subsequent arrest of ship in breach of these rules is not permitted and therefore the ship so arrested should be released from arrest.

This situation of release of ship from arrest is also implied in Chinese law. The Arrest Provisions of 1994 learned from the Draft of Arrest Convention prepared by CMI in 1985 and provided that rearrest of the ship and multiple arrest of a sister ship are all prohibited except in special situations³¹⁶. In respect of this situation of release of ship from arrest, the Chinese Special Maritime Procedure Law of 1999 was heavily influenced by the Arrest Convention of 1999 and provided a similar regime, but I have to point out that unfortunately the Chinese law failed to regulate the multiple arrest of a sister ship³¹⁷. But in Chinese judicial practice, multiple arrest of a sister ship is in fact prohibited save in some special cases.

³¹⁶ Refer to section 10 of article 4 of the Arrest Provisions of 1994.

³¹⁷ According to the article 24 of the Chinese Special Maritime Procedure Law of 1999, it is only pointed out that a maritime claimant should not be allowed to arrest a ship which has been previously arrested for the same maritime claim. In my view, it should also be pointed out that once a ship has been previously arrested, any arrest of her sister ship should also be prohibited if the conditions laid down for the permissible rearrest of a ship are not satisfied.

4.5.3 Release due to Failure to Bring Proceedings

This is a situation of release of ship from arrest that sometimes happens. The Arrest Convention of 1952 and the Arrest Convention of 1999 both provide rules for this kind of release.

The Arrest Convention of 1952 provides in section 2 of its article 7 that, if the court within whose jurisdiction the ship has been arrested has no jurisdiction to decide upon the merits of the case, such court shall fix the time within which the claimant must bring an action before a court having jurisdiction. It continues to provide in section 3 of the article 7 that, if the parties have agreed to submit the dispute to the jurisdiction of a particular court other than that within whose jurisdiction the arrest was made or to arbitration, the court within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings. If actions or proceedings are not taken within the time so fixed, the defendant can require the court to release the ship from arrest or release of security having been given. From above introduction, it can be found that, even though a distinction is made between the situation where the court within whose jurisdiction the ship is arrested has no jurisdiction over the merits of the case and the situation where such jurisdiction is excluded by an agreement on jurisdiction or arbitration between the parties, the consequence of failure to bring action or proceeding within a time fixed by the court that has arrested the ship is same. Therefore, the defendant is entitled to require the release of the ship from arrest or release of the security having been given. However, Special attention should be paid to the difference between the two situations. The difference exists in that, while in the first case the court must fix the time within which the action has to be brought, in the second situation the court may do so and here “may” means that the decision to fix the time is subject to the discretion of the court. The reason for this difference is that in the second situation when the parties negotiate the agreement on the jurisdiction or arbitration, the parties can and particularly the ship owner may require that the judicial or arbitral proceedings be commenced without delay within a specified period as one of the terms of the agreement. If this is the case, there is no need for the court, in order to protect the ship owner, to decide on the time to commence the proceedings. The cases that the court may need to intervene are cases in which there is no such time in the agreement and cases in which such time in the agreement is unreasonable (for example too long).

In respect of implementation of above rules of the Arrest Convention of 1952, it is understood that the court competent to fix the time to commence the proceedings is the court that has authorized the arrest of the ship. As to the question of when the time should be fixed, the answer depends on case by case. When a claimant applies to the court to arrest the ship, the court should make a preliminary assessment on whether it has jurisdiction over the merits of the case, and if it finds that it has no such jurisdiction, it must, when authorizing the arrest, immediately fix the time within which the claimant should bring an action on the merits of the case before a competent court; if it finds that the parties have agreed to submit the dispute to the jurisdiction of another court or arbitration, it can let the claimant bring an action on the merits of the case within the time the parties have mutually agreed or it can fix the time upon demand of any parties at any time after the order of arrest is issued if they failed to reach an agreement on the time within which to bring proceedings on the merits.

The article dealing with this situation of release of ship in the Arrest Convention of 1999 is article 7. The section 3 of article 7 of the convention provides that in cases where the court that has authorized the arrest does not have jurisdiction to determine the case on its merits or has refused to exercise jurisdiction in accordance with the provisions of the convention such court “may”, and upon request “shall”, order a period of time within which the claimant shall bring proceedings before a competent court or arbitral tribunal. Section 4 of the same article continues to regulate the consequence of the failure to bring such proceedings within the time fixed by the court. The consequence is that the ship arrested or the security provided shall be released. Compared with the Arrest Convention of 1952, the Arrest Convention of 1999 adds the refusal of exercising jurisdiction by the court that has authorized the arrest to the situations where the court may or shall fix such time within which to bring proceedings for the merits of the case³¹⁸. Moreover the Arrest Convention of 1999 is more logical in use of “may” and “shall upon request” respectively for different situations. As far as I understand, “shall upon request” means that the defendant can request the court to

³¹⁸ The reason for this addition is that, in some countries, written law sets clear rules for jurisdiction on the merits of a case, and the law doesn't give the arresting court the jurisdiction over the merits of the case on the basis of exercise of jurisdiction over arrest of the ship. In these countries, the court that has arrested the ship may refuse to exercise jurisdiction over the merits of the case. If the court refuses to exercise jurisdiction on the merits of the case, it should fix the time within which the parties should bring proceedings before a competent court.

fix the time, and the court must fix the time once requested to do so. By contrast, if the parties have agreement on the commencement of the proceedings, the parties shall bring the proceedings according to their agreement, and in this case the court may fix the time if it thinks necessary. As to the consequence of failure to bring proceedings within the time fixed by the court, the 1999 convention only provides that the ship arrested or security provided shall “upon request” be ordered to be released, but I can not help wondering that if there is no such request, how the court shall do with the ship arrested or security provided. Regretfully there is no relevant provision in this respect in the Arrest Convention of 1999. In my opinion, the court has fixed the time to bring proceedings, but if the claimant fails to bring the proceedings within the fixed time, the logical explanation is to release the ship arrested or the security provided. Otherwise the fixing of time might be meaningless and the court’s decision shall be deemed not serious³¹⁹.

In Chinese Special Maritime Procedure Law of 1999, there is also relevant provision about release of the arrested ship because of failure to bring proceedings. The article 18 of the law provides that, if the claimant fails to take an action before a competent court or fails to bring arbitral proceedings according to the arbitration agreement within the time fixed by this law, the maritime court that has authorized the arrest of the ship should timely release the ship arrested or security provided. The article 38 of this law fixes the time as 30 days. According to above provisions, under Chinese legal system, the release of arrested ship due to failure to bring proceedings has following characteristics: (1) the time within which the claimant must bring proceedings is directly fixed by law and this means that the maritime court that has authorized the arrest can not exercise discretion to fix the time. This approach is quite different from those of some other countries³²⁰. (2) The law fixes the time as 30 days³²¹. (3) The law doesn’t make distinction

³¹⁹ What I want to express is that I think the phrase “upon request” here is not necessary.

³²⁰ In some countries the time is subject to the discretion of the court that has authorized the arrest of ship. For example, in Germany pursuant to its Civil Procedure Law the time within which the proceedings on the merits of the case must be brought is fixed by the court competent for the arrest at its discretion; in the Netherlands pursuant to its Code of Civil Procedure, proceedings on the merits of the case must be brought within the period fixed by the court, such period being at least 8 days from the date of the arrest. In some other countries such as Nigeria and England, the court that authorized the arrest is empowered to impose any conditions as are just and reasonable on the arrestor including fixing the time limit within which legal proceedings on the merits of the case ought to commence.

³²¹ This period of time is the same as the one in Finland, Greece, Italy, Sweden, but is different from the one in Croatia, Slovenia (the time limit is 15 days), the one in Denmark (the time limit is one week if the

between the situation where the proceedings must be brought in China and the situation where the proceedings must be brought in a foreign country. By contrast, the old Chinese rule is that the time limit is 15 days for the former situation and 30 days for the latter situation. The law of Denmark also makes different rules for the two situations. That is to say, proceedings on the merits of the case must be instituted within one week of the arrest if the proceedings can be brought in Denmark or within two weeks if the proceedings must be brought abroad. (4) Once such proceedings have not been brought within the time limit, the maritime court shall order the release of the ship arrested or security provided even though there is no such request from interested parties. This is different from the rule of the Arrest Convention of 1999 that provides that the court shall upon request release the ship arrested or security provided.

4.5.4 Release against Constitution of Limitation Fund

The Arrest Convention of 1952 doesn't cover the issue of release of arrested ship against constitution of limitation fund. The Arrest Convention of 1999 only provides that nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.³²² This provision implies that the Arrest Convention of 1999 actually recognize the release of ship from arrest against constitution of limitation fund if relevant international liability limitation conventions provide such a release.

Some international liability limitation conventions have considered the release of ship against liability limitation fund. Under the Chinese legal system the release of ship against constitution of limitation fund has been dealt with.

The 1957 Limitation Convention³²³ provides that after the limitation fund has been constituted, no claimant against the fund can be entitled to exercise any right against any other assets of the ship owner in respect of his claim against the fund if the limitation fund is actually available for the benefit of the claimant. This means that once the fund is constituted and is available to the claimant, no other assets including any ships of the ship owner can be arrested, which further implies that once such other assets are arrested, they must be released immediately.

proceedings can be brought in Denmark and is two weeks if the proceedings have to be brought in a foreign country other than Denmark).

³²² Refer to section 5 of article 8 of the Arrest Convention of 1999.

³²³ Refer to article 2(4) of this Convention.

The 1957 Limitation Convention³²⁴ continues to provide that whenever a ship owner is entitled to limit his liability under this convention and the ship or a sister ship has been arrested within the jurisdiction of a Contracting State or security has been given to avoid such arrest the court of such State “may” order the release of the ship or of the security if it is found that the ship owner has already given a satisfactory security for a sum equal to the full amount of his liability under this convention. Unlike the constitution of limitation fund, just as this passage indicates, if a satisfactory security is given, the release of the ship is not compulsory but left to the discretion of the court because in the convention the word “may” instead of “shall” is used³²⁵.

The 1969 Civil Liability Convention (CLC)³²⁶ provides that whenever the ship owner, after an incident, has constituted a fund in accordance with the provisions of this convention, no person having a claim for pollution damage shall be entitled to exercise any right against any other assets of the ship owner in respect of such claim and the court of any Contracting State shall order the release of any ship or other property owned by the ship owner which has been arrested in respect of a claim for pollution damage and shall release any security furnished to avoid such arrest. Here as the word “shall” is used, once the fund is constituted in accordance with this convention the release of the ship arrested or security provided is not discretionary but compulsory.

The 1976 Convention on Limitation of Liability for Maritime Claims (LLMC)³²⁷ provides that after the limitation fund has been constituted, any ship or other property which is owned by a person on behalf of whom the fund has been constituted and which has been arrested or attached within the jurisdiction of a Contracting State for a claim which may be raised against the fund “may” be released by order of the court of such State, however such release “shall” always be ordered if the limitation fund has been constituted (a) at the port where the occurrence took place or, if it took place out of port, at the first port of call thereafter; or (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or (c) at the port of discharge in respect of damage to cargo; or

³²⁴ Refer to article 5(1) of this Convention.

³²⁵ As far as I understand, the reason why “may” is used in this case is that the security may in different forms and sometimes it is difficult for the arresting court to determine the value or enforceability of the security, while the limitation fund is in the form of money and is enforceable.

³²⁶ Refer to article 6 of this Convention.

³²⁷ Refer to article 13(2) of this Convention.

(d) in the State where the arrest is made. Therefore, under this convention the release of the ship arrested is only compulsory in situations listed as (a), (b), (c), (d) above, and in other situations the release is subject to the discretion of the court of the Contracting State where the arrest has been effected and it may happen that the ship is not released even though the fund has been constituted³²⁸.

The 1996 HNS Convention³²⁹ provides a regime similar to that of the CLC with some imperfections of the CLC having been cured. While article 5 of the CLC prevents the constitution of the limitation fund prior to an action being brought, the article 9(3) of the 1996 HNS Convention provides that if no action is brought, the fund shall be constituted with a court in any one of the Contracting States where an action can be brought according to article 38. The article 38 provides that an action can be taken in the courts of a Contracting State where the ship is registered, in the courts of a Contracting State where the owner has his habitual residence or his principal place of business, or in the courts of a Contracting State where the fund has been constituted in accordance with article 9(3).

In Chinese law, there is a perfect legal regime on release of ship against constitution of limitation fund. The whole chapter 11 (from article 204 to article 215) of the Chinese Maritime Commercial Law of 1992 is devoted to the provision of substantial conditions for constitution of maritime liability limitation fund. The article 214 of this Law provides that “after the person who is liable has constituted the limitation fund, any claimant who has raised or may raise claim against the person who is liable is not allowed to exercise any right against any other assets of the person who is liable; if ships or any other assets of such person have been arrested, the court shall release in time the ships or assets arrested”. This provision lays down a rule similar to those of the conventions introduced above. Correspondingly, the whole chapter 9 (from article 101 to article 110) of the Chinese Special Maritime Procedure Law of 1999 is devoted to the procedural aspects of the constitution of liability limitation fund. According to article 101 of this Law, the limitation fund can be constituted either prior to or after an action being brought. According to the article 102 of this law, if the person who is liable

³²⁸ An example of this is that a ship of the ship owner is arrested by a court of a Contracting State, and the fund is established at a court other than the courts in the list of (a),(b),(c),(d), and in this situation the arresting court can exercise discretion to release the ship or not.

³²⁹ The official full name of this convention is the 1996 Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

but is protected by the liability limitation regime applies to constitute such limitation fund prior to an action being brought, he should make such application to the maritime court where the accident occurred or the maritime court where the contract is performed or the maritime court where the ship has been arrested. This provision has some differences from that of 1996 HNS Convention as introduced above. The article 103 of this law continues to provide that the constitution of the limitation fund is not affected by agreement between the parties on the jurisdiction or arbitration of the case, but article 109 of this law provides that after the constitution of limitation fund any dispute between the parties in respect of the relevant accident should be filed with the maritime court where the fund has been constituted unless there exists an effective agreement between the parties on the jurisdiction or arbitration of the case. Therefore, it can be said that, under the Chinese legal regime the constitution of limitation fund and the release of the arrested ship or other assets due to the constitution of such fund are well coordinated.

4.5.5 Release of Ship from Arrest under the Korean Legal System

There are three basic situations in which the arrested ship can be released from arrest under the Korean legal system.

(1) Release due to Successful Appeal by the Debtor or Successful Action by an Innocent Third Party.

According to the Korean Civil Enforcement Law³³⁰, the debtor whose ship has been arrested can appeal to higher court for the overturn of the arresting court's decision to arrest the ship. One reason for the appeal can be that the claimant has no substantial right against the debtor. If the arrested ship is not owned by the debtor but by an innocent third party, this third party can take action against the arrestor. If the appeal or legal action is successful, the arrested ship shall be released.

Under the Chinese legal regime, there is a similar mechanism. The difference between the Korean legal regime and the Chinese legal regime is that the debtor or the innocent third party can only turn to the arresting court to express opposing opinion against the decision of arrest of the ship and try to get the ship released from arrest under the Chinese legal regime.

(2) Release due to Provision of Security

³³⁰ Refer to article 281 of the Korean Civil Enforcement Law

According to the Korean Civil Enforcement law, the arrested ship can be released against security provided by debtor³³¹. But it should be noticed that under the current Korean law, the security should be in form of cash. Other forms such as ship mortgage, P & O letter of undertaking are not accepted. By contrast, under the Chinese legal regime, Chinese maritime courts accept security either in form of cash, in form of ship mortgage or in form of P & O letter of undertaking.

Therefore, in respect of the release of the arrested ship against security, there is some similarity between the Chinese law and Korean law. Compared with the Korean law, the Chinese law is more detained in this respect because it not only provides that the security provided by the debtor must be sufficient but also provides that the form of the security must be effective. In addition, the Chinese law permits the debtor and creditor to negotiate on the amount and form of the security, if they fail to reach an agreement, the arresting court shall intervene and decide on the amount and form of the security.

(3) The Provisional Release from Arrest by the Debtor's Application and the Creditor's Consent. As already introduced, this provisional release is very difficult to get.

Finally, it must be mentioned that the Korean law, unlike the Chinese law, doesn't provide that the ship can be released from arrest due to the constitution of limitation fund. Considering that the release of arrested ship against the constitution of limitation fund has been incorporated in several international liability limitation conventions and the Arrest Convention of 1999, the Korean law should also accept this rule.

4.6 Judicial Sale of Arrested Ships

Judicial sale of arrested ships is closely connected with the arrest of ships. Without arrest of ships, there will no judicial sale of the ships arrested. Judicial sale of arrested ships is a natural and logical development of arrest of ship in some cases. Therefore it is necessary to devote some time to the study of judicial sale of arrested ships.

The main issues in regard to judicial sale of arrested ships are: What is a judicial sale of arrested ships? How can judicial sale of arrested ships be classified? Under what conditions can a judicial sale of arrested ship be conducted? What

³³¹ Refer to article 282 of the Korean Civil Enforcement Law.

procedures must the judicial sale of arrested ship follow? Finally, how to distribute the proceeds of the judicial sale of the arrested ship?

4.6.1 Concept of Judicial Sale of Arrested Ships

Judicial sale of arrested ships can be defined as follows: the court, after the ship was arrested, in order to better serve the purpose of ship arrest or in order to enforce a confirmed right against the arrested ship according to a final judgment or arbitral award or other legal documents, authorizes and enforces the sale of the arrested ship according to legal proceedings³³².

This definition is given after making a summary of relevant laws and judicial practice. In normal situations, the judicial sale of the arrested ship is ordered and conducted after the final judgment or arbitral award on the merits of the case has been made and the purpose of the sale is to enforce such a judgment or arbitral award against the arrested ship. This kind of judicial sale of the arrested ship is called a judicial sale of arrested ship as an enforcement measure. It is globally recognized and practiced

But in some special situations, the arrested ship cannot or is unsuitable to be maintained until to the stage of final judgment or arbitral award. The typical situations of this kind can be raised as a situation where ship-arrest maintaining costs shall accumulate to an amount beyond a reasonable and acceptable limit or a situation where the conditions of the arrested ship show that the ship is inappropriate for continuing arrest. Therefore in some countries under strict conditions arrested ship can also be sold by the court before a final judgment or arbitral award is made. The judicial sale of the arrested ship of this kind is called a judicial sale of arrested ship as a preservative measure. By nature, this kind of judicial sale is ship arrest in an alternative form, and the arrest of ship is replaced by keeping the proceeds of judicial sale of the ship. Under the Chinese legal system, this kind of judicial sale of the arrested ship was recognized by judicial practice in the past and is accepted in the law at present. As early as on 29 November 1987, the Supreme Court of China indorsed the practice of judicial sale of the arrested ship as a preservative measure. In 1999, the Chinese Special Maritime Procedure Law was made and it established a modern regime of judicial sale of arrested ships³³³. In South Africa, the South African Carriage of Goods by

³³² In this sense, the judicial sale is also called “forced sale”.

³³³ Under Chinese legal regime, the authority of documents issued by the Supreme Court of China is not as

Sea Act (hereinafter abbreviated as COGSA) which came into force on 4 July 1986 also empowered the South African Courts to order the sale of arrested ship at any time, whether before or after judgment³³⁴. Under the legal system of the United States, if some specified conditions are met, the arrested ship can also be sold prior to any adjudication on the plaintiff's claim. This kind of sale is called "interlocutory sale" in the United States³³⁵, a legal term which is used instead of the term of judicial sale as a preservative measure used in other countries.

From above analysis, it can be concluded that the judicial sale of arrested ships can be classified into two categories: the sale as a preservative measure (the "interlocutory sale" in the United States)³³⁶ and the sale as an enforcement measure. The former one is taken prior to a final adjudication over the merits of the case, the purpose of which is to preserve or secure the claim, and this kind of sale is taken in some special situations and is subject to far more strict conditions; the latter one is taken after a final adjudication over the merits of the case has been made, the purpose of which is to enforce the confirmed rights against the arrested ship according to the adjudication, and this kind of sale is taken in normal situations. Despite the above differences, there are many similarities between them in the operation procedures. In view of these similarities, the Chinese Special Maritime Procedure Law of 1999, after having given a detailed procedure for the judicial sale of arrested ship as a preservative measure, continues to provide that the judicial sale of arrested ship as an enforcement measure may be operated by making reference to the procedures for the sale as a preservative measure³³⁷. In the following part, the judicial sale of arrested ships shall refer to both the sale as a preservative measure and the sale as an enforcement measure unless otherwise specifically pointed out.

high as the authority of law made by the Chinese Congress. Made by Chinese Congress, the Chinese Special Maritime Procedure law of 1999 has a higher authority.

³³⁴ Section 9 of the COGSA granted this power. Refer to:

M. Hafizullah and others: *Arrest of Ships*—5, London, Lloyd's of London Press Ltd., 1987, p.79.

³³⁵ This judicial practice follows the United States' Admiralty Rule E (9) (b). Refer to:

Christopher Hill and others: *Arrest of Ships*, London, Lloyd's of London Press Ltd., 1985, p.91.

³³⁶ In the United Kingdom, the forced sale of an arrested ship as a preservative measure can also be conducted under some special situations. This forced sale is called "pendente lite sale" in the United Kingdom. Refer to:

Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.101.

³³⁷ Refer to article 43 of the Chinese Special Maritime Procedure Law of 1999.

In order to get a better understanding of the concept of judicial sale of arrested ships, the legal characteristics of the judicial sale of arrested ships must be analyzed. The legal characteristics can be concluded as follows:

(1) The sale is a judicial behavior. Either as a preservative measure or an enforcement measure, the sale must be authorized and carried out by a competent court even though in most cases the application for the sale by the claimant is necessary for triggering the sale procedure. The competent court has the final word in the sale. This characteristic makes the judicial sale quite different from other kinds of sale of ship such as commercial sale of ship.

(2) The conditions and procedures for the sale are strictly determined in law. Only the conditions for the sale are met can the sale be authorized and carried out by the court. All the parties involved in the sale including but not limited to the claimant, the ship owner, the ship buyer and the court itself must strictly follow the judicial sale procedures laid down by law.

(3) The sale must be a public sale. The main form of judicial sale of arrested ship is public auction. According to national laws of most countries, the sale must be made public through media; the court must inform the registry, the known maritime lien right holders, the ship mortgager and the known ship owner; any qualified person can be registered as a bidder, and the ship to be sold shall be available for inspection by any qualified bidder too. This means the judicial sale of the arrested ship must be conducted under sunshine not under a table. The public sale can at most ensure the fairness of the sale and effectively protect the interests of all participating parties including the interests of the ship owner and the claimant.

4.6.2 Conditions for the Judicial Sale

The conditions for the judicial sale of arrested ship as an enforcement measure are different from the conditions for the judicial sale of arrested ship as a preservative measure.

The conditions for the judicial sale of arrested ship as an enforcement measure can be listed as follows:

(1) The claimant must have obtained an enforceable judgment or arbitral award against the ship. If the judgment or arbitral award is a foreign one that is not made

by the court having arrested the ship, it should at first get recognized before being enforced against the ship³³⁸.

(2) The defendant is unable or refuses to pay off the debts confirmed by the enforceable judgment or arbitral award.

(3) The claimant applies for the judicial sale of the ship arrested. It must be noted that in some countries the judicial sale of the arrested ship is a natural step following the enforceable adjudication³³⁹.

The conditions for the judicial sale of the arrested ship as a preservative measure are more and stricter than the conditions for the sale as an enforceable measure. The reasons for this phenomenon can be listed as follows: (1) When the judicial sale of the arrested ship is taken as a preservative measure, the legal relationship between the parties has not been confirmed through a litigation or arbitral procedure, therefore the applicant only has a probable but not yet finally confirmed claim against the ship owner. If the judicial sale of the arrested ship as a preservative measure can be easily got and executed, once the claim is finally found to be groundless, this shall result in unrecoverable losses to the ship owner. (2) In most cases there is no necessity to sell the arrested ship before the final adjudication on the merits of the case has come out, and the continuing arrest of the ship is still a good measure for securing the claim of the plaintiff. In this sense, the judicial sale of the arrested ship as a preservative measure should be treated as an exceptional choice. In order to avoid the abuse of right of arrest of ship and to equally protect the interests of both the plaintiff and defendant, the court must be very prudent in authorizing the judicial sale of the arrested ship as a preservative measure and must strictly abide by the rules relating to the conditions of such sale³⁴⁰.

Here, using the Chinese law and practice as an example, I try to analyze the conditions for the judicial sale of the arrested ship as a preservative measure.

³³⁸ There is a complicated procedure for a foreign judgment to be recognized and enforced because of political and legal barriers existing among sovereign states. But if a foreign arbitral award is concerned, it is relatively easier for it to get recognized and enforced because of the existence of international cooperative regimes such as the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

³³⁹ In this case, the application for the sale is not necessary.

³⁴⁰ In the United Kingdom, the arresting court can exercise discretion over the judicial sale of the arrested ship prior to the final adjudication. Refer to the Rule 4, Order 29, Rules of the Supreme Court. Also refer to: Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.104.

According to the Chinese Special Maritime Procedure Law of 1999³⁴¹, if the period of arrest of ship has expired but the security has not been provided for the release of the ship from arrest, and, in addition, the arrested ship is not suitable for extended arrest, the maritime claimant can, after taking action or commencing the arbitral proceedings, apply to the maritime court that has authorized the arrest for the judicial sale of the arrested ship. Seem from above provisions, it can be found that, under the Chinese current legal system, the conditions for the judicial sale of arrested ship as a preservative measure are as follows:

(1) One condition is that the period of arrest of the ship has expired but the defendant has not provided appropriate security for the release of the ship from arrest.

We know the purpose of arrest of ship is for obtaining security for the claim. When the arrest is authorized, the court at the same time requires the defendant to provide within a specified period a security for the release of the ship. During the specified period the ship is arrested waiting for the security to be provided. If, within the period, an acceptable security is provided, the arrested ship shall be released from arrest; otherwise the ship shall continue to be arrested or in some exceptional cases shall be sold. Here, that the arrest period has expired but no security has been provided is only one of the necessary conditions for the judicial sale of the ship as a preservative measure³⁴².

In judicial practice, this condition can be met in several situations: one is the situation where the defendant has no ability or refuse to provide required security; the second is the situation where the defendant has provided security but the security is refused as it is unacceptable either in form or in amount. Irrespective of the reasons for failure to provide security, the fact that the security has not been provided itself has made this condition met.

(2) Another condition is that the arrested ship is not suitable for continuing arrest.

Just as mentioned above, even though sufficient security has not been provided within the specified time, in most cases the arrested ship should continue to be arrested waiting for the final enforceable adjudication. Only when the arrested ship is not suitable for continuing arrest, as an alternative choice, the arrested ship can be sold and the proceeds of the sale be kept waiting for the final adjudication.

³⁴¹ Refer to article 29 of this law.

³⁴² This means that this condition is necessary but not sufficient for the sale of the arrested ship as a preservative measure.

The arrested ship being not suitable for continued arrest may happen in following situations: (a) The physical condition of the ship is so poor that it is unsuitable for continuing arrest. An example of this situation is that the ship has lost engine and is at the risk of destruction and is also very dangerous to life and property. (b) Custody fees and other fees for maintaining the arrest are too expensive and if the ship continues to be arrested the fees shall be near or even more than the value of the ship. For the purpose of preserve the value of the arrested ship, in these situations the arrested ship can be sold and the proceeds can be kept as a replacement of the arrested ship.

It is very interesting to mention the rules of the United States³⁴³ in this regard and make a comparison between these rules and the Chinese rules. In the United States, it is assumed that continuing judicial custody of an arrested ship wastes an important commercial assets and that the benefits of society would be better served by the judicial sale of the ship and retention of the proceeds of the sale for satisfying any claim the arresting party is able to prove. This policy underlines the legal regime of “interlocutory sale” of the arrested ship—an American legal term for judicial sale of the arrested ship as a preservative measure. This policy shows that in the United States the interlocutory sale is out of economic reason. In the United States, the importance of prompt sale of arrested ship to the United States’ legal system has not been frequently tested because most ships get released within a reasonable period of time after their arrest. On the contrary, the judicial sale as a preservative measure is very important to China because every year there are many ships which are sold in this way by Chinese maritime courts. Comparatively, the Chinese practice is advanced in this regard because it has a perfect procedure for this kind of sale and has accumulated rich judicial experience.

(3) The third condition is that the maritime claimant has commenced the litigation or arbitral proceedings.

This condition is made for pre-litigation or pre-arbitration arrest of ship. According to the Chinese Special Maritime Procedure Law of 1999³⁴⁴, for a pre-litigation or a pre-arbitration arrest of ship, the period of arrest of ship is 30 days after the date of arrest; if the claimant has commenced the litigation or arbitral proceedings within these 30 days, the 30 days limit of arrest of ship shall

³⁴³ For a detailed glance of the American rules in this regard, please refer to the book:

Christopher Hill and others: Arrest of Ships, London: Lloyd’s of London Press Ltd., 1985, pp.91-92.

³⁴⁴ Refer to article 28 of the law.

be lifted. On the contrary, if the claimant has not commenced the proceedings within these 30 days, the maritime court shall timely release the ship from arrest or release the security having been provided³⁴⁵. Therefore commencement of the litigation or arbitral proceedings within the 30 days is a precondition for the continuing arrest of the ship, and certainly is also a necessary condition for the judicial sale of the arrested ship as a preservative measure.

(4) The last condition is that the claimant must have applied for such a judicial sale³⁴⁶.

Without this condition, the maritime court shall not exercise discretion to decide on forced sale of the arrested ship prior to the final adjudication.

In the course of making the Chinese Special Maritime Procedure Law of 1999, some scholars suggested that in some special situations the maritime court that has authorized the arrest should be empowered to exercise discretion on whether to sell the ship without the application to do so³⁴⁷. They argued that: in the situation where the defendant has refused to provide security for the release of the ship and the plaintiff has not applied for the judicial sale but the arrested ship is not suitable for continuing arrest, in order to preserve the value of the ship and better serve the purpose of arrest, the maritime court should react actively and decide to sell the ship and keep the proceeds of the sale; in some countries, such as in the United State, the arrested ship can be sold without the application of sale in some special situations³⁴⁸. At the end, this suggestion was not adopted because of its negative effects. The negative effects are: (1) the court's image as a neutral arbitrator can be damaged. The provision of security for the release of the arrested ship is a civil right of the defendant, and the application for sale of the arrested ship is also a civil right of the plaintiff, and therefore the court as a neutral entity should not interfere with the exercise of these civil rights; (2) the court may incur liability for its active decision. Because at this stage the claim of the plaintiff has not gone through a formal litigation or arbitral proceedings and has not been a confirmed claim, if the court decides to sell the arrested ship without the plaintiff's application, the court should burden the consequences of the sale once the sale is

³⁴⁵ Refer to section 2 of article 18 of the Chinese Special Maritime Procedure Law of 1999.

³⁴⁶ In some special cases, in order to reduce losses due to arrest of ship, the defendant may also apply to the arresting court for the judicial sale of his ship having been arrested. In the United Kingdom, this has happened. Refer to the case of "Westport" (1965) 1 Lloyd's Report 547.

³⁴⁷ Jin Zheng-jia: Study on Maritime Procedural Law, Dalian: Dalian Maritime University, 2001, p.165.

³⁴⁸ In the United States the Marshal may seek the sale of the arrested ship prior to any adjudication of the plaintiff's claim. For the legal basis, please refer to Admiralty Rule E(9)(b) of the United States.

proved wrong. So the majority opinion is that the court should not sell the arrested ship without the plaintiff's application. In my opinion, it is wrong to permit no exceptions to this rule, because in reality there do exist situations where the arrested ship is not suitable for continuing arrest but this rule is made to the effect that such ship can only continue to be arrested. I think the law should make exceptions to the rule³⁴⁹.

Under the current Chinese legal system, there is another method to soften the adverse effects of this rule. According to the law, as a condition for maintaining the arrest, the court having ordered the arrest can impose upon the claimant a counter security³⁵⁰. The court can make full use of this provision and impose such counter security upon the claimant. The longer the ship shall be arrested the larger the counter security shall be, and the bigger the risk the arrested ship faces the larger the counter security shall be. Through this way, the claimant can be forced either to apply for the sale of the ship or to provide sufficient counter security.

In conclusion, the judicial sale of the arrested ship as a preservative measure must be conducted under strict conditions. It must be noticed that all the four conditions must be met at the same time before such a sale can be permitted.

4.6.3 The Special Issue of Judicial Sale of an Arrested Ship Demise-chartered by the Defendant

First, as previously mentioned in this paper, the particular ship in respect of which a maritime claim is asserted can be arrested if the demise charterer of this particular ship is liable for the claim and is still the demise charterer or ship owner upon the arrest of such ship. This rule is incorporated into both the Arrest Convention of 1952 and the Arrest Convention of 1999. Under Chinese legal system, this rule is also adopted in Arrest Provisions of 1994 and the Chinese Special Maritime Procedure Law of 1999.

But problem in regard to this special kind of arrested ship is: whether it can be judicially sold either before or after the final adjudication over the merits of the case comes out.

This is a bothering problem in the history of the Chinese judicial sale of arrested ships. According to the Arrest Provisions of 1994, such a ship can be

³⁴⁹ It is suggested by some Chinese law scholars that in most situations the court should be passive in order not to intervene with the exercise of private rights of the parties, but in some extreme situations the court should be active if the refusal of exercise of private right affects public order or interests.

³⁵⁰ Refer to article 75 of the Chinese Special Maritime Procedure Law of 1999.

arrested³⁵¹; but according to the Judicial Sale Provisions of 1994, one of the conditions for the judicial sale of an arrested ship is that “the ship owner of the arrested ship must be the defendant and in addition such defendant must be responsible for the claim.”³⁵² Because in the situation in question the defendant is the demise charterer and not the ship owner, as a result of this, such an arrested ship cannot be judicially sold. Consequently, in judicial practice, the following phenomenon happens: on the one hand, such a ship can be arrested, but if no security is provided, such a ship shall continue to be arrested even though it is not suitable for continuing arrest, furthermore such a ship can not be judicially sold at the end of the proceedings even though the demise charterer is held to be responsible for the claim. The final fate of such an arrested ship is either to be released or continue to be arrested. Seen from this phenomenon, the rule that such a ship can be arrested but cannot be judicially sold is absurd and unreasonable.

Above defect is in some way cured by the Chinese Special Maritime Procedure Law of 1999. According to relevant provisions of this law³⁵³, such a ship can be arrested, and at the same time the above condition for judicial sale of arrested ship laid down by the Judicial Sale Provisions 1994 is deleted and this implies that such a ship can be judicially sold in the new law. In deed, in the current Chinese maritime judicial practice, such a ship can be judicially sold prior to the final adjudication if relevant conditions are satisfied, and such a ship can certainly be sold at the end of the proceedings if the final adjudication is against the demise charterer.

In common law countries, according to the theory and practice of action in rem, such a ship can be arrested and can also be judicially sold because it is understood that the ship itself has done wrong therefore the ship itself should be responsible for the wrong and be sold to satisfy the claims against it.

On the contrary, in civil law countries, only the person who is responsible for the claims should be condemned and only the property owned by him can be sold to satisfy the claims against him. As a result, if the demise charterer should be responsible for the claims, only his property can be sold to satisfy the claims, therefore the ship that is demise-chartered by him cannot be sold because the ship is not owned by him but by the ship owner.

³⁵¹ Refer to article 3 of the Arrest Provisions of 1994.

³⁵² Refer to the section 1 of article 1 of the Judicial Sale Provisions of 1994.

³⁵³ Refer to the item 2 of the article 23 of the Chinese Special Maritime Procedure Law of 1999.

Seen from above comparison and analysis, it can be found that the conflict of the Chinese rules which is caused by the Arrest Provisions of 1994 and Judicial Sale Provisions of 1994 roots in the incorporation of common law arrest rules into the former and the incorporation of civil law judicial sale rules into the latter. The Chinese Special Maritime Procedure Law of 1999 has solved the conflict by completely incorporating the common law rules both in arrest of ship and judicial sale of ship³⁵⁴.

In view of the different legal traditions in common law countries and civil law countries, the Arrest Convention of 1952 only provides that, when the demise charterer and not the registered ship owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship, but it doesn't continue to answer the question whether such ship can be judicially sold after being arrested. The Arrest Convention of 1999 gives an answer to this question. As a general rule, the Arrest Convention of 1999 in its paragraph 1 of article 4 provides that arrest is permissible of any ship in respect of which a maritime claim is asserted if the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected. In view of the above different legal traditions and judicial practice in common law countries and civil law countries, as a compromise, the Arrest Convention of 1999 continues to provide that, notwithstanding the provision of paragraph 1 of article 4, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the Contracting State where the arrest is applied for, a judgment in respect of such claim can be enforced against the ship by judicial or forced sale of the ship. These provisions are intended to make a following effect: if a ship can be arrested, it can be judicially sold; and if a ship cannot be judicially sold, it cannot be arrested. These provisions, in fact, let the common law rules and civil law rules go in parallel in their respective jurisdictions by leaving the issue whether such ship can be arrested and judicially sold subject to the national law of the Contracting State where the arrest is effected or applied for.

In my eyes, in the near future, the compromise treatment is practical; but in the long run, it can bring about adverse influence. I suggest that the common law

³⁵⁴ Seen from this aspect, the Chinese legal system has absorbed some reasonable rules of common law system, even though China is mainly a civil law country. Another evidence of Chinese learning from common law countries is that Chinese law permits the claimant just to list the defendant as "the owner of xx ship" in ship arrest application, which shows us the influence from action in rem in common law countries.

rules in this respect should prevail. The reasons for my supporting the arrest and sale of the demise-chartered ship are as follows: (1) The ship is under the possession and control of the demise charterer according to an agreement with the ship owner. When the ship owner charters his ship to a demise charterer, he should conduct an investigation over the ability of the demise charterer both in finance aspect and ship operation aspect. By imposing this obligation on the ship owner, the demise charterer's ability can be improved and innocent third parties can incur no or less loss due to the operation of the demise-chartered ship. If the ship owner charters his ship recklessly, he himself should take the consequence of his choice of demise charterer. (2) From another viewpoint, the ship that is demise-chartered has been a tool of the demise charterer to make profit or commit tort, therefore the ship can be arrested and sold. (3) The ship owner has earned money from the demise charter of his ship, therefore he should be made to share the risks accompanying the demise-chartered ship including the risk of being arrested and sold. (4) Another element should also be considered. The element is that in some countries the demise-chartered ship should be provisionally registered in the country where the demise charterer lives or has principal place of business and such ship should fly the flag of the country where the ship is provisionally registered³⁵⁵.

4.6.4 Procedures for the Sale

Because the judicial sale of the arrested ship concerns the interests of many parties and, in addition, a ship is a special property which involves some special rights such as maritime liens, maritime mortgages, ship possessory lien, so every maritime country lays down special proceedings for the sale. Despite of the slight differences between the sale as a preservative measure and the sale as an enforcement measure, operation procedures for the two kinds of sale are very similar. For this reason, the Chinese Special Maritime Procedure Law of 1999 provides that the judicial sale of arrested ship as an enforcement measure can be processed by referring to the procedure for the sale as a preservative measure. Here, in the following part, the procedures for the judicial sale of the arrested ship

³⁵⁵ The regime of provisional registration of demise-chartered ship dates back to year 1951 when the West Germany enacted the Law of the Flag Act. Since then Russia, Australia, Philippines and some other countries have followed this example. For this point, please refer to: Yang Liang-yi: *Ship Finance and Ship Mortgage*, Dalian: Dalian Maritime University Publishing House, 2003, p.21.

as a preservative measure are to be introduced by comparing with the relevant procedures of other countries wherever appropriate.

The procedures are as follows:

(1) Application for judicial sale of the ship

The Chinese maritime court, as mentioned previously, doesn't actively trigger the proceedings of sale. It is the arresting party who can trigger the proceedings by making an application for the sale.

The applicant can make the application when the following conditions have all been satisfied: (a) he has taken relevant action in a competent court or has started the arbitral proceedings; (b) the period of arrest of the ship has expired but no security has been provided; (c) the ship is not suitable for continuing arrest; (d) the final judgment or arbitral award has not been made. If he makes an application for the sale after the final judgment or arbitral award has been made, the sale becomes a sale for enforcement measure.

The applicant should make a formal written application with emphasis on explaining the reasons why the ship should be sold prior to the final judgment or arbitral award.

Whether can the applicant revoke his application after the application has been ratified? This is a problem sometimes occurring in the judicial sale of the arrested ship. The Chinese Special Maritime Procedure Law of 1999 has considered the problem and has given an answer. According to the law³⁵⁶, the applicant can apply to the maritime court for revocation of the application, but the maritime court has a final word on the revocation. If the application is of his own will, and at the same time the ratification of such an application doesn't do damages to interests of others, the maritime court has no reasons not to approve the application; but if the maritime court has started the process of the sale, sale notice has been announced, then at this moment the application for revocation of the sale is made, what the maritime court may do is to say no to such an application and to continue the sale proceedings because the maritime court may think it is too late to make such an application and that the termination of the sale proceedings shall adversely affect the interests of others and adversely affect the good image of the court. According to the law³⁵⁷, if the court ratifies the application for revocation of

³⁵⁶ Refer to the article 31 of this law.

³⁵⁷ Refer to the latter part of the article 31 of this law.

the sale, the applicant shall be responsible for all costs or fees already paid for the preparation of the sale.

I also wonder whether the defendant can apply to the maritime court for the sale of his ship that has been arrested? This situation seldom occurs and the law has not covered this issue. When the ship owner has no ability or would not like to provide security for release of his ship from arrest, if he thinks the earlier the ship is sold the better his interests can be protected, in this situation he may actively make such an application. If such an application is made, in my opinion, the maritime court has no reasons to refuse, because the judicial sale by auction of the arrested ship is not against interests of anybody³⁵⁸.

(2) The court's review over and decision on the application

Whether the application of the sale can be ratified depends on the court's review and decision. The Chinese Special Maritime Procedure Law of 1999 provides that, after the receipt of the application of sale of the ship, the maritime court shall commit a review over the application and decides to approve the application or not³⁵⁹.

The court's review focuses on the conditions for judicial sale of the ship. The emphasis of the court's review is over the condition whether the ship is not suitable for continuing arrest.

It must be remembered that the court's review doesn't cover the merits of the case. In this sense, the review is by nature a procedural review.

If, after the review, it is found that all the conditions for the sale of the ship are met, the maritime court shall approve the application and decide to sell the ship.

After the court has made the decision on the application, the decision shall be served on the applicant and the defendant. According to the Chinese Special Maritime Procedure Law of 1999³⁶⁰, any party who thinks the decision is wrong is entitled to request the court to review the decision once more, but is not entitled to appeal to a higher court. According to the law, any party who objects to the court's decision may make such a request within 5 days after the receipt of the court's decision and the court shall make a decision on the request within 5 days after receipt of the request.

³⁵⁸ According to law of the United Kingdom, in some special cases the defendant can also apply to the arresting court for judicial sale of his ship having been arrested.

³⁵⁹ This means that the arresting court has final word to the sale of the ship. Refer to article 30 of the Chinese Special Maritime Procedure Law of 1999.

³⁶⁰ Refer to section 2 of article 30 of the Chinese Special Maritime Procedure Law of 1999.

Because the court's decision to sell the ship can determine the fate of the ship and heavily affect the interests of the ship owner, once the decision is enforced and the ship is sold, the ship can't be recovered by the ship owner, therefore above law provides that the court's decision to sell the ship shall be suspended during the period of the court's decision on the request. This is sharply different from the treatment of court's decision to arrest the ship.

(3) Setup of a ship auction committee

Once the court's decision to sell the ship faces no request by the defendant to review the decision or faces such a request but it is finally decided that the original decision should be maintained, the decision to sell the ship shall be enforced. According to the law, the arrested ship should be sold by auction. The first step is to set up a ship auction committee. This committee is a provisional organization that is organized by the maritime court, is responsible for the maritime court and is supervised by the maritime court. According to the article 34 of the above law, the ship auction committee is composed of judge, employed auctioneer, and employed ship surveyor. The number of the members of the committee is 3 or 5 always including one judge, one auctioneer and one ship surveyor. The committee is responsible for the auction affairs including but not restricted to the appraisal of the ship, the organization of the auction, signing the sale confirmation document with the ship buyer, transfer of the ship to the buyer.

(4) Ship auction public announcement and notice

According to the article 32 of above law, the maritime court should make a public announcement of the judicial auction of the arrested ship through newspaper or other media.

The purpose of the above announcement is that: it can make the ship auction known to the public and invite potential buyers; it can urge the creditors relating to the ship to register their rights with the auction committee. According to the article 111 of the above law, these creditors should apply for the registration of their rights relating to the ship within the period announced by the court, otherwise the creditors shall be deemed to have given up the right to be paid from the proceeds of the sale.

In addition, once the arrested ship has been successfully auctioned, the maritime liens, ship mortgages, ship possessory lien on the ship shall be destroyed, and thereafter the relevant creditors can only claim common rights which are not secured by the maritime liens, ship mortgages or ship possessory lien. In this

sense, one of the functions of the above announcement is to let these special creditors know the fact of auction and promptly claim their rights and get paid according to the order of priority in payment.

As to the form and period of the announcement, the above law only provides that the announcement should be made through newspaper or other media and that the period of the announcement should not be less than 30 days. This implies that the maritime court can exercise discretion over the kinds of newspaper or media and over the period of the announcement under the condition that the period is not less than 30 days. This provision is more flexible than the Judicial Sale Provisions of 1994 because the latter rigidly required that the ship auction public announcement should be made for 3 consecutive days on the main newspapers such as China Daily, People's Daily³⁶¹.

According to the article 32 of the Chinese Special Maritime Procedure Law of 1999, if the ship to be auctioned is a foreign ship, the auction announcement must also be announced through newspapers or other media that are issued to overseas readers³⁶².

According to the same law, the ship auction announcement should include the following items:

- a. The name and nationality of the ship to be auctioned.
- b. The reasons for the ship auction.
- c. The composition of the ship auction committee.
- d. The date and place of the ship auction.
- e. The forms and procedures that must be effected by the persons who would like to take part in the bidding.
- f. Affairs concerning the registration of rights of creditors.
- g. Other items that should be announced.

In addition to the provisions on ship auction public announcement, the Chinese Special Maritime Procedure Law of 1999³⁶³ also provides that, at least 30 days before the date of the auction, special notice should be given to the ship registrar of the country where the ship is registered, to the maritime lien right-holders, ship mortgagee and ship owner if already known. The ship registrar should be specially

³⁶¹ Jin Zheng-jia: Study on Maritime Procedural Law, Dalian: Dalian Maritime University Publishing House, 2001, pp.172-183.

³⁶² This is necessary because foreign creditors are probably involved in the auction, and in addition, foreign potential buyers can be interested in the purchase of the ship to be auctioned.

³⁶³ Refer to article 30 of this law.

noticed because such a notice can facilitate the administration of the ships by the ship registrar and can facilitate the canceling of the registration of the ship; the maritime lien right holders and ship mortgagee if known should be specially noticed because the ship auction shall affect their secured rights and such a notice can urge them to register with the court their secured rights; the ship owner should be specially noticed because the auction directly affects his rights and if having been noticed he can keep a watchful eye on the proceedings of the auction and is ready to protect his interests in the proceedings.

It must be specially noted that if the ship to be auctioned is a foreign ship, according to an order issued by the Supreme Court of China on 14 January 1994, the Chinese maritime court that shall sell the arrested ship by auction must, before issuing the ship auction public announcement, give a notice to the Embassy or Consulate in China of the country where the ship is registered. The purpose of this practice is to enforce a clause in bilateral consular relationship treaty that authorizes the embassy or consulate to provide necessary help to ships registered in its country.

(5) Survey and appraisal of the ship and decision on the bottom price of the ship.

Before the auction of the ship, the ship auction committee should employ a ship surveyor to commit a survey over the ship and give a survey report for the potential buyers' reference.

Basing on the result of the survey and making reference to the ship market, the ship auction committee shall give an appraisal of the price of the ship and the maritime court shall determine the bottom price for the auction. According to the Judicial Sale Provisions of 1994, the ship auction committee can make a suggestion to the judicial commission of the maritime court on the bottom price of the ship basing on its appraisal of the price of the ship, and the judicial commission of the maritime court shall determine the bottom price of the ship and keep it secret, and if the highest bid is below the bottom price the result of the auction is invalid. Because this method of auction is inflexible and inefficient, therefore in the Draft of the Chinese Special Maritime Procedure Law of 1999 it is proposed that the method of auction should be determined by the maritime court on a basis of case by case and can be either an auction with a bottom price or without a bottom price and the bottom price can be make public or be kept secret depending on the discretion of the maritime court³⁶⁴. But in the final version of

³⁶⁴Jin Zheng-jia: Study on Maritime Procedural Law, Dalian: Dalian Maritime University Publishing House,

the law, there are no provisions in this regard, and this means that all the related issues shall be subject to the discretion of the maritime court.

(6) Registration of bidders

According to the article 35 of the Chinese Special Maritime Procedure Law of 1999, the bidders should be registered with the ship auction committee; upon registration, evidence and certification of the identity of the bidder should be provided and reviewed, and a certain amount of deposit should be provided to the court.

According to the Judicial Sale Provisions of 1994, any person who wants to buy the ship and takes part in the ship auction must provide, before the auction, a bank certification which proves that he is capable to pay the ship price. Because the bank only certifies the paying ability at the time the certification is issued, therefore, sometimes it happens that at the time of issuance of certification the potential buyer has enough money in the bank but when the ship price paying time comes he has lost such ability. Now in the new law, an appropriate amount of deposit must be provided to the court instead of the bank certification. If the person becomes winner in the auction, the deposit can be used in paying the price of the ship; if he is not the winner, the deposit shall be refunded; if he is the winner but refuses to perform the ship purchase contract, the deposit shall be confiscated. According to the current Chinese maritime judicial practice, the amount of the deposit is approximately equal to 20% of the appraisal price of the ship.

(7) Exhibition of the ship

Because the ship is auctioned under its current conditions, once it is sold to the buyer, the maritime court shall hold no responsibility for any defects in the ship. Therefore it is very important for the potential buyers to be given a chance to inspect the ship to decide whether to buy the ship and how much his bid would be. The maritime court should explain in the ship auction announcement when, where and how the exhibition of the ship shall be available to the potential buyers. The maritime court should provide necessary convenience for the potential buyer to inspect the ship.

(8) Sale by auction

After all preparations for the auction have been finished, the sale by auction shall be held.

2001, p.174.

The ship auction committee shall control the auction and all participating parties should keep the good order of the auction.

According to the new rules, the method of the auction is subject to the decision by the court on a basis of case by case.

(9) Auction transaction and transfer of the ship.

If a sale transaction through the auction has been reached, the ship auction committee should sign a ship transaction confirmation with the buyer.

According to the article 37 of the Chinese Special Maritime Procedure Law of 1999, after the signing of the ship transaction confirmation, the buyer should immediately pay a amount of no less than 20% of the whole ship transaction price, and the remaining part of the price should be paid within 7 days since the date of the signing of the ship transaction confirmation, unless otherwise agreed by the auction committee³⁶⁵.

After the buyer has paid the whole of the ship transaction price, the original ship owner should transfer, within the period of time appointed by the ship auction committee, the ship to the new buyer at the place where the ship is being arrested. The committee should organize and supervise the ship transfer, and sign a ship transfer confirmation with the buyer after the transfer has completed. After the signing of the ship transfer confirmation, the maritime court shall issue an order to release the ship from arrest.

After the completion of the ship transfer, the maritime court should make a public announcement through newspaper or other public media that the arrested ship has been sold and has been transferred to the buyer.

After the ship has been transferred to the buyer, the buyer should provide the ship transaction confirmation and other necessary material to the vessel registration center/entity and get the ship newly registered. The original ship owner should apply to the original vessel registrar for the canceling of the registration of the ship.

4.6.5 The Distribution of the Proceeds of the Judicial Sale of the Ship

³⁶⁵ As to the legal nature of the ship transfer confirmation document, there are different opinions in China. Some claim that it is a special kind of sale contract one of the parties being the court, but others think it is not a contract but a judicial act on the part of the court. For details of the debate, refer to: Yu Xiao-han: Analysis on the Issues in the Basic Forced Sale Regime and the Forced Sale of Ships, China Maritime Trials Yearbook, 2002, pp.115-117.

This issue is closely related to the arrest of ship and the subsequent judicial sale of the ship. First, the purpose of the claimant's arrest of the ship is for getting paid from the proceeds of the judicial sale of the arrested ship, and he is especially concerned with the distribution of the proceeds of the sale. Secondly, because claims secured by maritime liens, ship mortgages, ship possessory lien and other confirmed claims can also take part in the distribution of the proceeds, the distribution of the proceeds of the sale becomes very complicated.

As to the distribution of the proceeds of the judicial sale of the arrested ship, the articles 117 and 118 of the Chinese Special Maritime Procedure Law of 1999 provide the following two methods:

(1) The maritime court, after its review and confirmation of the registered rights, shall issue a notice to all confirmed right holders to take part in a conference of all right holders, and then the maritime court shall organize such a conference. At the conference, the right holders can negotiate a program for the distribution and sign the payment agreement. The payment agreement shall become effective upon the confirmation by the court.

(2) If, at the conference, the right holders cannot reach an agreement, the maritime court shall determine the distribution according to the payment order provided by the Chinese Maritime Commercial Law of 1992 and other related laws.

Above two methods are of Chinese characteristic. This means that the Chinese maritime court fully respects the will of the claimants. Only under the condition they cannot reach an agreement, the court can determine the distribution.

The priority order of the distribution of the proceeds is the core of the related laws and international conventions. In the following part, a comparison between Chinese law and relevant international conventions shall be made.

The Chinese legal regime:

According to the article 24 of the Chinese Maritime Commercial Law of 1992 and article 119 of the Chinese Special Maritime Procedure Law of 1999, the following fees should be first paid from the proceeds of the judicial sale of the arrested ship: the litigation fees which should be burdened by the defendant; the fees arising from the preservation of the arrested ship, from the sale of the ship, and from the distribution of the proceeds of the sale of the ship; other fees incurred for protection of the common interests of all right holders.

After the payment of the above fees from the proceeds of the sale, the remaining proceeds shall be distributed according to the following order of

priority: (1) maritime lien; (2) ship possessory lien; (3) ship mortgage; (4) common claim³⁶⁶.

According to the article 22 of the Chinese Maritime Commercial Law of 1992, the maritime claims secured by maritime liens are listed in the following order: (a) Claims for wages, social insurance contributions and other sums due to the master and other crewmembers; (b) Death and personal injury caused by ship, or handling and operation of ship; (c) Claim for ship tonnage fee, pilot fee, port fee and other harbor dues and charges; (d) Claim for maritime salvage; (e) claim for damages caused by tort act of the ship in its operation but excluding the claim for oil pollution damages caused by bulk oil ship of over 2000 registered tons which possesses a certification of oil pollution insurance policy or other financial guarantee.

In general situation, the payment for the claims secured by above maritime liens should be made according to the above order, but with following exceptions: if (d) happened after (a), (b) and (c), then (d) shall be paid prior to the (a), (b) and (c); in addition, if there are two or more than two claims in (d), the one that happened earlier shall be paid later. These exceptions are made for the purpose of providing special protection for salvors. If there are two or more than two claims in (a), (b), (c), or (e), they shall be treated equally in payment.

According to the article 25 of the Chinese Maritime Commercial Law of 1992, the ship builder's claim for ship construction fee and the ship repairer's claim for ship repair fee are secured by ship possessory lien. In addition, the ship towing party's claim for ship towing fee is also secured by ship possessory lien³⁶⁷. The claims secured by ship possessory lien shall be paid after the claims secured by maritime lien but before the claims secured by ship mortgage.

³⁶⁶ By contrast, under the United Kingdom legal system, the order is as follows:

- (1) special legislative rights;
- (2) costs of arrest and custody fees;
- (3) possessory liens;
- (4) traditional maritime liens;
- (5) mortgages;
- (6) statutory right in rem.

Refer to: Maritime liens and Claims written by Mr. William Tetley.

³⁶⁷ According to the opinion of the former president of Dalian Maritime University Mr. Si Yu-zuo, the scope of maritime possessory lien should be enlarged. Please refer to:

Si Yu-zuo: Research on Special Issues of Maritime Commercial Law, Dalian: Dalian Maritime University Publishing House, 2002, p.4.

According to the relevant provisions of the Chinese Maritime Commercial Law of 1992, the claims secured by ship mortgage shall be paid after the claims secured by maritime lien and claims secured by ship possessory lien but before the common claims. But only registered ship mortgage can enjoy the priority in payment³⁶⁸. If there are two or more than two ship mortgages, they shall be paid according to the order of their registration, the earlier registered the earlier paid. .

In the distribution of proceeds, there is a special issue that deserves special analysis. The issue is: How should the ship arrestor be paid from the proceeds? In other words, whether should the ship arrestor be specially treated and be given a priority? This is an issue the ship arrestor is greatly concerned. But, unfortunately the Chinese Maritime Commercial Law of 1992 and the Chinese Special Maritime Procedure Law of 1999 both failed to address it as a special issue.

If the proceeds are enough for the payment of all the claims irrespective of secured claims or common claims, there is no problem for the payment of the ship arrestor's claim; If the proceeds are not enough, and if the ship arrestor's claim is a claim secured by a maritime lien, a ship possessory lien or a ship mortgage, the payment for his claim is not a big problem³⁶⁹; But if the proceeds are not enough, and at the same time the ship arrestor's claim is a common claim, there exists a problem for the payment of the ship arrestor's claim. This problem can be analyzed as follows:

³⁶⁸ If the ship mortgage is not registered, it is not effective to a third party other than the mortgager and mortgagee. Please refer to article 13 of the Chinese Maritime Commercial Law of 1992. In addition, under current Chinese legal system, on the ship under construction no ship mortgage can get registered. So it is suggested that mortgage should also be able to be established on the ship under construction and should also be able to be effectively registered. Please refer to:

Chief editor Si Yu-zuo: Suggested Version of Revision and Related Legislation References and Explanation of the Chinese Maritime Code, Dalian: Dalian Maritime University Publishing House, 2003, p.65.

I have compared the Chinese law with the Korean law and found that under the Korean legal system, the registration is also an condition for the effectiveness of ship mortgage.

In addition, in the Republic of Korea, for the purpose of establishment of ship mortgage, a ship under construction can also be deemed as ship and thus the established mortgage on this kind of ship can also be registered and the ship can also be sold to enforce the ship mortgage. Please refer to: Cheong Yeong-seok and others: A Comparative Study on Laws of China and Korea in Respect of Arrest of Ships and Arrest of Cargoes on Board of a Ship, Maritime Law Research of Korean Maritime Law Association, No. 2 of the 15th issue, Dec. 2003, p.43.

³⁶⁹ In fact, the problem still exists because the arrestor's claim may be secured by mortgage which can only be paid after the claims secured by maritime liens are first paid. The final result may be that the arrestor can get nothing from the proceeds of the sale though he has spent a lot of money for the arrest and sale of the ship.

(1) In the situation where the ship arrestor's claim is a common claim and the proceeds of the sale of the ship are not enough for the payment of claims secured by maritime liens, by ship possessory lien, or by ship mortgage, how should the ship arrestor's claim be paid?

According to the judicial practice, in view of the fact that the ship arrestor has faced risks and spent a lot of money for arrest and sale of the ship and his act is for his interests and interests of all the other right holders, the Chinese maritime court usually makes use of the regime of conference of all right holders and tries to persuade other right holders to appropriately consider in the distribution agreement the payment for the claim of the ship arrestor. If the maritime court is not successful in the try, it can do nothing to help the ship arrestor because there is no relevant legal provision to give the ship arrestor a statutory lien; and if this is the case, the ship arrestor shall be paid nothing. Even though it is unfair, there is no other choice under current Chinese legal system.

(2) In the situation where the ship arrestor's claim is a common claim and the proceeds of the sale of the ship are enough for the payment of all claims secured by maritime liens, by ship possessory lien, or by ship mortgage but not enough for the payment of all common claims, how should the ship arrestor's claim be paid?

Answering this question, some scholars hold the opinion that the ship arrestor's claim should be treated equally with other common claims, and should not be given any priority in payment, because the ship arrestor's claim is a common claim and all common claims are equal in payment³⁷⁰.

In my opinion, considering the specialty of the ship arrestor's claim and his contribution to the arrest and sale of the ship, the ship arrestor's claim should be treated specially and should be paid before other common claims. The reasons for my opinion are as follows:

(1) In order to apply for the arrest and sale of the ship, the ship arrestor has spent money and time, and he has at the same time face some risks pertaining to the arrest and sale; by contrast, other common claimants have spent nothing and faced no risks. In this case, if the proceeds are to be distributed equally between the ship arrestor and other common claimants, it is unfair to the ship arrestor and can adversely affect the behavior of future ship arrestors. As a result, nobody would like to spend money and time and face such risks to arrest the ship.

³⁷⁰ This is a prevailing opinion now in China. When I talked with some Chinese maritime judges, I find that majority of them also hold this opinion.

(2) According to the civil law, all the common claims are equal, but according to the civil procedural law, the common claims may be fulfilled in different periods and through different ways because of the differences in time when the legal action is taken and the differences in measures that are taken to protect the civil right.

(3) According to the procedural law, the arrest of ship is a preservative measure the purpose of which is to secure the ship arrestor's claim. In this sense, it can be said that the ship arrestor's claim is a kind of special claim that is secured by a quasi-maritime-lien.

(4) According to the Provisions on the Issues of the Enforcement Work of the People's Courts (issued by the Supreme Court of China on 11 June 1998), if there are more than two persons applying to the court for enforcement of their confirmed claims against a debtor, the court shall make payment according to the order of time when the court takes enforcement measure³⁷¹. This means that the earlier the application is made, the earlier the court's enforcement measure can be taken and the earlier the claim can be paid. I think this provision can also be applied to the distribution of the proceeds of the sale of the ship, and the result of such application is that the ship arrestor's claim shall be paid before the other common claims.

(5) In some countries such as the United States³⁷², Germany³⁷³, a "statutory lien" is created for the ship arrestor's claim and the ship arrestor's claim is given a priority in payment from the proceeds of the judicial sale of the arrested ship. The Chinese judicial practice can completely follow the example of these countries and give the ship arrestor's claim a special treatment in payment.

The distribution regimes under relevant international conventions:

In relation to the order of priority of claims in the distribution of the proceeds of the judicial sale of the arrested ship, there have appeared three international conventions. Even though there are many similarities among the three

³⁷¹ If there are claims secured by liens, mortgage etc, this rule doesn't apply. Please refer to article 88 of the Supreme Court of China's Regulations on the Issues of the People's Courts' Enforcement Work.

³⁷² Under the legal regime of the United States, the arrest of a ship can cause an effect of establishment of lien on the ship. Please refer to:

Shen Da-ming: Comparative Study on Civil Procedural Law (the second part), Beijing: the People's Publishing House, 1995, p.2.

³⁷³ Under the German legal regime, though the arrestor's claim can be preceded by claims enjoying a higher level of priority, the arrestor's claim has a priority over other claims at the same level.

conventions, there are also noticeable differences in regard to priority in distribution.

The first convention is Convention of 1926, the full name of which is the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages of 1926.

This convention was passed in Brussels, Belgium on 10 April 1926. It has been effective since 2 June 1931. There are more than 20 contracting states to this convention at present³⁷⁴.

In this convention³⁷⁵, the maritime claims secured by maritime liens are classified into 5 categories, and they are listed as follows:

(1) Law costs due to the State, and expenses incurred in the common interests of the creditors in order to preserve the ship or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbor dues, and other public taxes and chargers of the same character; port dues; the costs of watching and preservation from time of the entry of the ship into the last port;

(2) Claims arising out of the contract of engagement of the master, crew and other persons hired on board;

(3) Remuneration for assistance and salvage, and the contribution of the ship in general average;

(4) Indemnities for collision or other accident of navigation, as also for damage caused to works forming part of harbor, docks, and navigable ways; indemnities for personal injury to passengers or crew; indemnities for loss of or damage to cargo or baggage;

(5) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority away from the ship's home port, where such contracts or acts are necessary for the preservation of the ship or the continuation of its voyage, whether the master is or is not at the same time owner of the ship, and whether the claim is his own or that of the ship-chandlers, repairs, lenders, or other contractual creditors.

Then, the convention gives a following order of priority among the maritime liens listed above³⁷⁶:

³⁷⁴ This Convention has not been accepted by the United States, the United Kingdom, Japan, Germany and some other maritime countries. Refer to the CMI Yearbook 1997, pp.420-421.

³⁷⁵ Refer to article 2 of this Convention.

³⁷⁶ Refer to articles 5 and 6 of this Convention.

- (1) Claims secured by a maritime lien and relating to the same voyage rank in the order in which they are set out in above list;
- (2) Claims under any same heading share concurrently and rateably in the event of the fund available being insufficient to pay the claims in full;
- (3) The claims mentioned under (3) and (5) of above list rank, in each of the two categories, in the inverse order of the dates on which they came into existence;
- (4) Claims arising from one and same occurrence are deemed to have come into existence at the same time;
- (5) Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyage;
- (6) Claims arising on one and the same contract of engagement extending over several voyage all rank with claims attaching to the last voyage.

The convention³⁷⁷ also regulates the priority relation between the maritime liens listed above in article 2 and mortgages mentioned in article 1³⁷⁸. It provides that the mortgage and other similar charges on a ship mentioned in article 1 rank immediately after the secured claims listed in article 2 and that national laws may grant a lien in respect of claims other than those referred to in article 2 so as not to modify the ranking of claims secured by maritime liens and mortgages. This means that once a national law grants ship possessory lien, the claim secured by the ship possessory lien cannot enjoy priority over the maritime liens and mortgages. It should be mentioned that, according to the article 1 of the convention, the mortgage must be duly effected in accordance with the law of the Contracting State to which the ship belongs and must be duly registered in order to be valid.

From above introduction and analysis, we can find that the convention differs from the Chinese law in aspects such as items of secured claim, priority order of the claims. Using the priority order of maritime liens as an example, the priority order provided by the convention is: law costs, expenses for preservation and sale

³⁷⁷ Refer to article 3 of this Convention.

³⁷⁸ This article reads that “mortgage, hypothecations, and other similar charges upon vessel, duly effected in accordance with the law of the Contracting State to which the vessel belongs, and registered in a public register either at the port of the vessel’s registry or at a central office, shall be regarded as valid and respected in all the other contracting countries”. According to this article, the mortgage must be duly effected according to the law of the country whose flag she is flying and must at the same time be registered by a public register of that country in order to be valid and be recognized by other contracting states.

The proper law for ship mortgage is the law of the state where the ship is registered. This is a recognized rule of conflicts of law. The Chinese Maritime Commercial Law of 1992 also accepts this rule in its article 271.

of the ship, tonnage dues, harbor dues, pilotage dues→salary and benefits for master and crew→assistance and salvage→indemnities for loss of or damage to cargo and indemnities for personal injury→claims resulting from the contracts entered into or acts done by master as agent of the ship owner; By contrast, the priority order provided by the Chinese law is: law costs, expenses for preservation and sale of the ship→salary and benefits for master and crew→personal injury and death→ tonnage dues, harbor dues, pilotage dues→assistance and salvage→ indemnities for loss of or damage to cargo due to acts of tort.

The second convention is the Convention of 1967, the full name of which is the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages of 1967.

The Convention 1967 was made in Brussels, Belgium on 27 May 1967³⁷⁹. Compared with the Convention of 1926, the convention of 1967 makes some improvements.

As to the claims secured by maritime liens, the Convention of 1967 provides in article 4 that the following claims shall be secured by maritime liens on the ship:

- (1) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;
- (2) port, canal and other waterway dues and pilotage dues;
- (3) claims against the ship owner in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- (4) claims against the ship owner, based on tort and not on contract, in respect of loss of or damage to property, whether on land or on water, in direct connection with the operation of the ship;
- (5) claims for salvage, wreck removal and contribution in general average.

³⁷⁹ Though this Convention has made some improvements on the basis of the Convention of 1926, it only got the ratification or accession from some countries such as Syria, Morocco, Sweden, Norway, and Denmark. Please refer to the CMI Year Book 1997, p.446.

Then in article 5, the convention gives a priority order for the above maritime liens: (1) they shall rank in the order listed as above in article 4, provided however that maritime liens securing claims for salvage, wreck removal, and contribution in general average shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed. (2) the maritime liens set out in each of subparagraph (1), (2), (3) and (4) of article 4 shall rank *pari passu* (which means equally and according to the same rate) as between themselves; (3) the maritime liens set out in subparagraph (5) of article 4 shall rank in the inverse order of the time when the claims secured thereby accrued. Compared with the Convention of 1926, the Convention of 1967 emphasizes the protection of humane rights and raises the priority level of claims for wages due to master and crew and claims for death and personal injury.

In addition, in the article 5, the convention provides that the maritime liens set out in article 4 shall take priority over registered mortgages, and no other claim shall take priority over maritime liens or over registered mortgages, except as provided in article 6 (2). In article 6(2), it is provided that the possessory lien or right of retention granted to a ship builder or ship repairer to secure his claims for the building or repair of the ship shall be postponed to all maritime liens set out in article 4, but may be preferred to registered mortgages. The possessory lien or right of retention may be exercisable against the ship notwithstanding any registered mortgage on the ship, but shall be extinguished when the ship cease to be in the possession of the ship builder or ship repairer. From this provision, it can be seen that, compared with Convention of 1927, the Convention of 1967 extends to cover the possessory lien or right of retention; the priority order in the Convention of 1967 is as follows: first, the maritime liens; second, possessory liens; third, mortgages. This is an obvious progress.

The third convention is the Convention of 1993, the full name of which is the International Convention on Maritime Liens and Mortgages of 1993.

This convention was passed in Geneva, Switzerland on 6 May 1993. Up to now, it has not come into force. But, it is recognized that this convention reflects the trends of international law in this regard and it has exerted great influence on the national legislations of many countries including China³⁸⁰.

³⁸⁰ The wording of the relevant Chinese law in this regard is almost same as the wording of this Convention.

The article 4 of this convention classifies the claims secured by maritime liens into 5 following categories:

- (1) claims for wages and other sums due to the master, officers, and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf.
- (2) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- (3) claims for reward for the salvage of the ship;
- (4) claims for port, canal, and other waterway dues and pilotage dues;
- (5) claims based on tort arising from physical loss or damage caused by the operation of the ship other than loss of or damage to cargo, containers and passengers' effects carried on the ship.

Then, the convention in its article 5 arranges the priority order of the above maritime claims as follows: (1) The maritime liens shall rank in the order listed as above in article 4, provided however that maritime liens securing claims for the salvage of the ship shall take priority over all other maritime liens which have attached to the ship prior to the time when the operations giving rise to the said liens were performed. (2) The maritime liens set out in each of subparagraphs (1), (2), (3) and (4) of article 4 shall rank *pari passu* (which means equally and according to the same rate) as between themselves; (3) The maritime liens securing claims for reward for the salvage of the ship shall rank in the inverse order of the time when the claims secured thereby accrued.

Compared with the Convention of 1967, the Convention of 1993 continues to strengthen the protection of humane rights such as claims for wages and claims for death and personal injury damage, but it gives more protection for salvage claims than the Convention of 1967.

In its article 1, the Convention of 1993 provides the requirements for the recognition and enforcement of registered mortgages and provides that registered mortgages that comply with the requirements shall be given a priority in payment.

In its article 5, the Convention of 1993 provides that the maritime liens shall take priority over the registered mortgages, and no other claim shall take over priority over the maritime liens or the registered mortgages except as provided in paragraphs 3 and 4 of the article 12.

The paragraph 3 of article 12 provides that a State Party may provide in its law that, in the event of the forced sale of a stranded or sunken vessel, following its removal by a public authority in the interest of the safe navigation or the protection of the marine environment, the costs of such removal shall be paid out of the proceeds of the sale, before all other claims secured by a maritime lien on the ship. This provision gives the costs for such a removal a priority over the maritime liens.

Paragraph 4 of article 12 provides that, if at the time of forced sale the ship is in the possession of a ship builder or of a ship repairer who under the law of the State Party in which the sale takes place enjoys a right of retention³⁸¹, such ship builder or ship repairer must surrender possession of the ship to the purchaser but is entitled to obtain satisfaction of his claim out of the proceeds after the satisfaction of the claims of the holders of maritime liens mentioned in article 4. In fact, this provision gives the possessory lien a priority over registered mortgages but after maritime liens.

Article 6 of the Convention of 1993 also permits a State Party to grant in its national law other maritime liens on a ship to secure claims other than those listed in article 4, but provides that these national law maritime liens must rank after the maritime liens listed in article 4 and the registered mortgages provided in article 1.

In addition, the paragraph 2 of the article 12 of the Convention of 1993 provides that the cost and expenses arising out of the arrest or seizure and subsequent sale of the ship shall be paid first from the proceeds of the sale. The balance of the proceeds shall be distributed in accordance with the provisions of this Convention, to the extent necessary to satisfy the respective claims. Upon satisfaction of all claimants, the residue of the proceeds, if any, shall be paid to the ship owner and it shall be freely transferable.

Up to this time, basing on what is introduced above, I can make a conclusion as to the distribution of the proceeds and the priority order of the claims according to the Convention of 1993 as follows: costs and expenses for arrest, seizure and sale

of the ship → costs for compulsory removal of the ship → maritime liens →

possessory liens → ship mortgage → national law maritime liens → other claims.

³⁸¹ “Right of retention” has same meaning with the term “possessory lien”. In international conventions, these two terms are used interchangeably.

Seen from above comparison and analysis, it can be found that, among the three conventions, the Convention of 1993 is the most advanced, and its provisions are more reasonable and practical.

Comparing the Chinese legal regime with the three conventions, I can also find that the Chinese legal regime in this respect is very similar to the regime of the Convention of 1993. In this sense, it can be said that the Chinese law incorporates the main contents of Convention of 1993 and keeps pace with the modern trends.

4.6.6 The Judicial Sale of Ship under the Korean Legal System and the Comparison with the Chinese Legal System

Under the Korean legal system, the arrest of ship and judicial sale of ship are strictly distinguished. The arrest of ship is taken as a preservative measure the purpose of which is to preserve the claims for the execution of future judgment against the debtor. But the judicial sale of ship is considered as an enforcement measure to carry out the final enforceable judgment or monetary right certified by public notary or some special rights given priority in payment by law. Therefore, under the Korean legal system, a ship that is arrested for preservative purpose cannot be judicially sold before the final judgment is made. This is quite different with the Chinese legal system. Under the Chinese legal system, in some special situations and following strict procedures, the ship which is provisionally arrested for the purpose of preserving claims can be judicially sold, and in this case, the judicial sale is not for the purpose of enforcement of final judgment, but is an alternative method of arresting ship. In my opinion, the Korean rule that a ship provisionally arrested for the purpose of preservation of claims cannot be judicially sold before the final judgment should be changed to the effect that the ship can be judicially sold under strict conditions. The reasons for my opinion are those reasons for my support of the relevant Chinese rule.

Under the Korean legal system, the judicial sale of ship is classified into two categories: compulsory judicial sale of ship and voluntary judicial sale of ship. The compulsory judicial sale applies to the judicial sale of ship for the purpose of enforcement of enforceable court judgment or enforceable public-notarized document. The voluntary judicial sale of ship applies to judicial sale of ship for the fulfillment of some special claims secured by liens. This concept of judicial sale of ship is also in some way different from that of China, because as I have introduced under the Chinese legal system for a maritime claim secured by

maritime lien the related ship cannot be directly judicially sold. But in my opinion, the Korean rule that permits the direct judicial sale of ship for the fulfillment of claims secured by maritime liens is advanced and can save time and judicial resources, and in this respect, the Chinese law should learn from the Korean law.

Under the Korean legal system, the judicial sale of ship adopts the form of auction. This is similar to the current Chinese legal system. But in the past, Chinese legal system permitted other forms of judicial sale of ship other than that of auction.

Under the Korean legal system, no matter the judicial sale of ship is a compulsory sale or a voluntary sale, the usual procedures for the sale are as follows: (1) Application for judicial sale of ship. The applicant must fill in the application form and provide necessary documents. (2) The review and decision by competent court. (3) The arrest of ship; (4) The auction---the process of turning the arrested ship into money; (4) The distribution of the proceeds of the auction; (5) The transfer of ship and registration of the ship.

According to the Korean Civil Enforcement Law, the process of auction usually covers the following steps: (1) announcement of registration of rights; (2) the court enforcement officer's survey on the conditions of the ships; (3) the appraisal of value of the ship by professional experts; (4) decision on the bottom price of the ship; (5) auction and confirmation of sale of the ship³⁸².

For the process of distribution of the proceeds of the sale of ship, special attention should be paid to the order of priority under the Korean legal system.

According to the Korean Commercial Law³⁸³, the following claims are secured by maritime liens:

- (1) litigation fee which is incurred for the common interests of all the creditors, fee related to the auction of ships and associated facilities, tax levied due to the navigation activity, pilotage and towage, fee for preservation and inspection of ship after its entering the last port;
- (2) Ship crew and other servant's claims arising out of employment contract;
- (3) ship salvage fees and contributions to general average;

³⁸² Sin Hyun-ji: Civil Enforcement Law (first part---enforcement on real property), Publishing House of Literal Garden of Law, 2003, pp. 716-717.

³⁸³ Refer to article 861 of the Korean Commercial Law as revised in 31 Dec. 1991.

(4) Compensations due to ship collision; damage to navigational facilities, port facilities or navigational route caused by navigation accident; loss of life and injury due to navigational accidents.

According to the Korean Commercial Law³⁸⁴, the order of priority in distribution of the proceeds of the judicial sale of the ship among the claims is as follows:

- (1) Claims secured by maritime liens and relating to the same voyage rank in the order in which they are set out in the above list;
- (2) Claims mentioned under (3) of above list rank in each category in the inverse order of dates on which they came into existence; Claims arising from one same accident are deemed to have come into existence at the same time;
- (3) Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyage.
- (4) Claims arising on one and the same contract of engagement extending over several voyage all rank with claims attaching to the last voyage.
- (5) Claims under same heading share concurrently and ratably in the event of the fund available being sufficient to pay the claims in full.

As to the relation between the claims secured by maritime lien and the claims secured by ship mortgage, the Korean Commercial Law³⁸⁵ provides that the former claims enjoy priority over the latter claims.

As to the relation between claims secured by the maritime lien, claims secured by ship possessory lien, and claims secured by ship mortgage, the Korean Commercial Law has no relevant provisions. It can be said that this is one main defect of the Korean Commercial Law. In Korean judicial practice claim secured by the possessory lien is given a priority over claim secured by the ship mortgage or even over claim secured by maritime lien. The reason for this judicial practice is said to be that the Korean ship construction and repairing industry should be specially protected and that ship construction and ship repairing has added new value to the ship and deserves special protection.

In conclusion, from above analysis of and introduction to the relevant Korea legal system, I can find that:

- (1) The list of claims secured by maritime liens and the priority order among them under the Korean legal system are very similar to the 1926 Convention for the

³⁸⁴ Refer to articles 866, 867, 868 of the Korean Commercial Law.

³⁸⁵ Refer to article 872 of the Korean Commercial Law.

Unification of Certain Rules Relating to Maritime Liens and Mortgages. In this respect, the Korean legal system is different with the 1993 International Convention on Maritime Liens and Mortgages.

(2) The relevant Chinese legal system is different with the Korean legal system in this respect. As I have pointed out, the Chinese legal system has absorbed the provisions of the 1993 International Convention on Maritime Liens and Mortgages and is very similar to this latest international convention.

(3) The Korean legal system keeps a unique order of priority among the claims secured by maritime lien, claims secured by ship mortgage, and claims secured by ship possessory lien. The order of priority is possessory lien→maritime lien→ship mortgage. The order is different from the order under Chinese law that is maritime lien→possessory lien→ship mortgage, and is also different from the order in 1926 Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages that is Maritime Lien → ship mortgage→ship possessory lien (if recognized by national law).

Chapter 5: Two Special Issues in Arrest of Ships

There are two special issues that deserve special treatment in arrest of ships. One is the issue of wrong or unjustified arrest of ships and related liabilities, and the other is the issue of securities relating to arrest of ships. These two issues are in some degree interconnected with each other.

5.1 Wrong or Unjustified Arrest of Ships and Related Liabilities

Arrest of ship as a preservative measure irrespective of being taken prior to or after the commencement of the formal litigation or arbitration proceedings, is decided and effected when the facts of the case and the legal relationship between the parties have not been ascertained through a formal civil procedure, and therefore it is possible that the arrest of ship is proved wrong or unjustified at the end of the formal civil proceedings. In judicial practice, there does exist cases of wrong or unjustified arrest of ship. In order to make the claimant be more prudent in application for arrest of ship and to protect the ship owner or other interested parties against the wrong or unjustified arrest of ship, it is necessary to establish a remedy regime for wrong or unjustified arrest of ship. In this sense, it is valuable to study the legal regime for wrong or unjustified arrest of ship. Generally speaking, this legal regime covers the following issues that connect with each other: (1) the jurisdiction on the dispute of wrong or unjustified arrest of ships; (2) the standards for judging the wrongfulness or unjustness of arrest of ships; (3) the common situations of wrong or unjustified arrest of ships; (4) the liabilities for the wrong or unjustified arrest of ships.

5.1.1 Jurisdiction on the Cases of Wrong or Unjustified Arrest of Ships

As to the jurisdiction on the cases of wrong or unjustified arrest of ships, the Arrest Convention of 1952 gives no answer to this issue.

By contrast, the Arrest Convention of 1999 provides a clear and definite answer to this question. This Convention³⁸⁶ provides that:

“The court of the Contracting State in which an arrest has been effected shall have jurisdiction to determine the extent of liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not

³⁸⁶ Refer to article 6(2) of this Convention.

restricted to such loss or damage as may be caused in consequence of the arrest having been wrongful or unjustified or in consequence of excessive security having been demanded and provided”.

According to this provision, the court that has authorized the arrest has jurisdiction over the disputes of the wrong or unjustified arrest. I think it is correct for the Arrest Convention of 1999 to give a definite uniform international private rule on this question, and I also believe that the above private rule is right and practical³⁸⁷. The wrong or unjustified arrest of ship, judged by its nature, is a special kind of act of tort, and it is universally accepted that the court of the place of the act of tort has jurisdiction over the dispute arising out of the act of tort³⁸⁸; and when wrong or unjustified arrest of ship is concerned, it is natural and logical to empower the court that has authorized the arrest to exercise jurisdiction over the dispute of wrong or unjustified arrest of ship. But another question arises as to whether such jurisdiction as empowered upon the court that has authorized the arrest is exclusive or not. In other words, whether any courts other than the court that has authorized the arrest can also exercise jurisdiction over such a case? In the sense of strict explanation, the Arrest Convention of 1999 empowers the court that has authored the arrest to exercise jurisdiction but not, at the same time, deprives other courts of the right to exercise jurisdiction. In my opinion, the plaintiff can certainly, according to the above provision, submit the dispute of wrongful or unjustified arrest of ship to the court that has authorized the arrest, but he can also submit such dispute to any other court that has been empowered jurisdiction over such dispute according to its national law³⁸⁹.

At present, the Chinese law doesn't give a clear and definite rule in this respect. It is true that in the Draft Version of the Chinese Special Maritime Procedure Law of 1999 there is an article that provides that the maritime court that has authorized

³⁸⁷ I think it is very convenient for the arresting court to exercise jurisdiction over the case of wrong or unjustified arrest, because the counter-security is usually provided to this court and it is very easy for this court to enforce the final judgment against the claimant who is liable for the wrong or unjustified arrest.

³⁸⁸ It is held that act of tort directly damages the good order of the place where it happened and in order to restore the good order damaged by the act of tort the local court should be empowered to exercise jurisdiction over the dispute arising out of the act. It is a universally accepted rule. For example, the article 15 of the Japanese Civil Procedure Law provides that “dispute arising out of act of tort can be submitted to the court of the place of the act”. Please also refer to:

Zhao Xiang-lin: *International Private Law*, Beijing: China Politics and Law Science University Publishing House, 1999, p.397.

³⁸⁹ For example, the plaintiff can, not resorting to the arresting court, resort to the court of the place where the defendant has its principal business for the settlement of dispute arising out of the wrong arrest.

the arrest of ship shall exercise jurisdiction over the dispute of wrong or unjustified arrest of the ship³⁹⁰. This draft article is completely in conformity with the above provision of the Arrest Convention of 1999, but unfortunately in the final version this article was deleted. The reason for this deletion is that some law-makers argue that such a provision is superfluous. It is because the court that has authorized the arrest certainly can exercise such jurisdiction. Others argue that such a provision should not be added because, if the wrong or unjustified arrest of ship is identified as a kind of act of tort, then not only the court that has authorized the arrest can exercise such jurisdiction but also other courts such as the court where the arrestor has its principal place of business can. As a result of no provision in the Chinese law in this regard, in Chinese maritime judicial practice, the Chinese maritime courts have a tendency to enlarge the scope of courts that can exercise jurisdiction over the disputes relating to case of wrong or unjustified arrest of ship.³⁹¹

There is another issue that deserves analysis in this regard. The issue is that if the court that has exercised jurisdiction over the merits of the case that gives rise to the arrest of ship is the same court as the one that shall exercise jurisdiction over the case of wrong or unjustified arrest of ship, there will be no contradiction between the two judgments. The court shall probably hold the applicant to be responsible for wrongful or unjustified arrest if it holds that the applicant fails on the merits of case that gave rise to the arrest; but if the courts are different and this situation can happen both according to the international arrest conventions and national laws especially when the parties have agreed to submit the case on the merits to a court or arbitral tribunal other than the court that has effected the arrest,

³⁹⁰ Chief editor Jin Zheng-jia: Study on Maritime Procedural Law, Dalian: Dalian Maritime University Publishing House, 2001, p.125.

³⁹¹ According to the present Chinese judicial practice, both the maritime court that has effected the arrest and the maritime court of the principal place of business of the defendant can exercise jurisdiction over the disputes of wrong or unjustified arrest of ship. In addition, according to the article 243 of the Chinese Civil Procedure Law of 1991, the court of the place where the property of the defendant is located and can be arrested can also exercise jurisdiction over any foreign related dispute where right of property is related, moreover according to the article 244 of the same law, the parties to such dispute can reach an agreement on the choice of court within the specialized scope of courts.

It is said that in the Republic of Korea, influenced by international rules of conflicts of laws in regard to tort damage and jurisdiction over the tort damages, the national law of the Republic of Korea empowers the arresting court to exercise jurisdiction over the dispute of tort damages and provides that the proper law which should be applied in the case should be the law of place where the ship has been arrested. Refer to: Cheong Hai-Deok: A Study on Enforcement against Ships, Ph. D. paper of graduate school of Korean Keong-hi University, 2000, p.99.

the two judgments given by the two courts or one court and one arbitral tribunal may conflict with each other. Because of the fact that the proper laws for the two different cases may be different, if this new element is taken into consideration, the question shall become more complicated. The Arrest Convention of 1999 has noticed this possible contradiction and tried to provide a remedy. The Convention provides that if a court in another Contracting State or an arbitral tribunal is to decide on the merits of the case that has given rise to the arrest, then proceedings relating to the liability of the claimant for loss or damage caused in consequence of the wrong or unjustified arrest of ship or in consequence of the excessive security having been provided may be stayed pending that decision³⁹². This provision actually provides that the court exercising jurisdiction over the case of wrong or unjustified arrest “may” stay the proceedings pending the judgment or arbitral award and then “may” make a decision on the case of wrongful or unjustified arrest of ship according to the judgment or arbitral award on the merits of the case that has given rise to this arrest of ship. This implies that the court exercising jurisdiction over the case of wrong or unjustified arrest can also choose not to wait for the adjudication on the merits of the case which has given rise to the arrest but to directly judge on the case according to the applicable laws.

5.1.2 The Proper Law for Judging the Wrong or Unjustified Arrest of Ships

The issue whether the Arrest Convention of 1952 should contain a substantial provision on the right of the ship owner to claim for loss or damages in case of wrong or unjustified arrest of ship was hotly debated from the very beginning³⁹³. Civil law countries were in favor of such a substantial provision and the common law countries were against it. These contradicting attitudes arose out of different legal theories and judicial traditions. Under the civil laws, the arrestor of the ship is responsible for all damages arising out of such arrest when it is proved that the arrest is wrong or unjustified; under the common laws, for example under the English law, the settlement of damages arising out of the immobilization of the ship following an arrest can not get supported unless the arrestor has acted in bad faith or has been grossly negligent—the negligence being comparable with fraud. Because the opposing views of the two legal systems can not be reconciled and therefore, as a compromise, the Arrest Convention of 1952 in its final version

³⁹² Refer to section 4 of article 6 of the Arrest Convention of 1999.

³⁹³ Francesco Berlingieri: *Arrest of Ships*, London: LLP, 2000, p.192.

provides a rule of international private law to solve the problem. The first passage of the article 6 of this Convention provides that “all questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.” Judged according to this provision, the Arrest Convention of 1952 provides that the proper law for the case of liability for wrongful or unjustified arrest is the national law of the country where the arrest was made or applied for. So the Arrest Convention of 1952 in fact deems the wrongful or unjustified arrest of ship as a kind of act of tort.

In the course of making the Arrest Convention of 1999 the same issue was once again raised and debated³⁹⁴. It was found that the reasons having previously prevented the incorporation of any substantial rule into the Arrest Convention of 1952 still existed. Therefore it was decided not to regulate the substantial aspects of the issue but to provide on the private law aspects of the issue. This convention not only empowers the court that has authorized the arrest the right to assess the liability for wrongful or unjustified arrest but also provides, as the Arrest Convention of 1952 has done, that the proper law that should be applied to settle the liability, if any, of the claimant for loss or damages caused by the wrongful or unjustified arrest of ship or by the excessive security having been demanded and provided is the law of the Contracting State where the arrest was effected³⁹⁵.

Under the Chinese current legal system, the wrongful or unjustified arrest of ship is treated as a special kind of act of tort. According to the Chinese rules of conflicts of laws, the proper law that should be applied in determining the liability of the claimant for loss or damages caused by the wrong or unjustified arrest of ship should be the law of the country where such arrest has been committed³⁹⁶.

It must be noticed that, if the Chinese law is applied as the proper law for the case of wrong or unjustified arrest, the result is that the ship arrestor must be responsible for the loss or damages incurred by the ship owner due to the

³⁹⁴ Francesco Berlingieri: *Arrest of Ships*, London: LLP, 2000, p.340.

³⁹⁵ Refer to section 3 of article 6 of the Arrest Convention of 1999.

³⁹⁶ The section one of article 146 of the Chinese Civil Code provides that “ the loss or damages caused by act of tort shall be determined by application of the law of the place of the commitment of the act of tort”. Following the same international private law, the judicial opinion of the Supreme Court of China on this issue is the same as the above provision but it additionally expresses that the law of the place of act of tort includes the law of the place of commitment of the act of tort and the law of the place where the result of the act of the tort occurs and that if the two laws are not the same the court can choose one between the two.

wrongful or unjustified arrest if the wrong or unjustified arrest has been proved³⁹⁷ and that the claimant must be responsible for the loss incurred by the defendant due to an excessive security having been demanded and provided.³⁹⁸ Judged from above introduction, the Chinese national law in this respect is quite similar to the civil law system but is sharply different from common law system.

In view of the reality that the national laws in this regard may differ from country to country, it is interesting and meaningful to compare the related national laws of some typical countries.

The national law of France:

According to the French law, the arrestor can be held liable for the loss or damages caused by the arrest of ship if it is subsequently established that the arrestor has abused his right. An abuse of right by the arrestor can be found when the arrest is wrong or unjustified, when the amount of claim is proved excessive or when the security demanded and provided is excessive.

The national law of Germany:

According to the German Law, the arrestor is liable for loss and damages caused by a wrong or unjustified arrest irrespective of fault or not on the part of the arrestor.

The national law of Norway:

According to the Norwegian law, the claimant is strictly liable for all losses that are not too remote.

The national law of Denmark:

According to the Danish Administration Act, the arrestor is liable if the claim is rejected or if the arrested ship is subsequently released from arrest because the claim is not well grounded.

The national law of Belgium:

According to the Belgian law, the arrestor is only liable in case of wrong arrest. It is not sufficient to prove that the arrest is not justified in order to let the arrestor be liable. Because the claim for loss or damage is deemed as an act of tort, the claimant must shoulder the burden of proving the fault of the arrestor, the loss or damages he has suffered and the causal relationship between the arrest and the loss or damages. The arrestor shall be deemed to have fault if he has acted recklessly and knowing his action could probably cause loss or damage.

³⁹⁷ Refer to article 20 of the Chinese Special Maritime Procedure Law of 1999.

³⁹⁸ Refer to article 78 of the Chinese Special Maritime Procedure Law of 1999.

The national law of England:

According to national law of England, in the absence of proof of bad faith or malicious negligence on the part of the arrestor, the arrestor is not liable for loss or damages caused by the arrest of ship³⁹⁹. Bad faith must be taken to exist whenever the arrestor has no honest belief in its entitlement to arrest the ship. Gross negligence exists in those situations where, judged objectively, there is so little basis for the arrest of ship that it can be inferred that the arrestor did not believe he has a true right to arrest the ship or that the arrestor has acted without any serious regard to whether he has sufficient grounds to arrest the ship. In one word, it is very difficult to let the arrestor be liable for loss or damages caused by wrong or unjustified arrest of ship, as the criteria for proving the bad faith or gross negligence are too strict.

From above analysis and comparison, it can be concluded that there are different treatments in the national laws of different countries in regard to this issue. One extreme treatment is that the arrestor is almost not liable for any wrong or unjustified arrest of ship and another extreme treatment is that the arrestor must be liable for all wrong or unjustified arrest irrespective of the fault or negligence on the part of the arrestor. National laws of most countries fall between the two extremes.

5.1.3 The Common Situations of Wrong or Unjustified Arrest of Ships

It is meaningful to analyze the situations of wrong or unjustified arrest of ship. Generally speaking, the wrong or unjustified arrest of ship often happens in the following situations with more or less differences from country to country:

(1) The situation where the claimant has no maritime claim

That the claimant has a maritime claim is a necessary condition for the arrest of a ship under most legal regimes.

The Arrest Convention of 1952 lists 17 categories of maritime claim⁴⁰⁰ and provides that a ship flying the flag of one of the Contracting States may be

³⁹⁹ Therefore the famous Hong Kong maritime expert Mr. Yang Liang-yi also said that it is very difficult to make the arrestor be responsible for the wrong arrest. Hong Kong was controlled by the United Kingdom for a long time and Hong Kong's legal system is heavily influenced by the English legal system.

⁴⁰⁰ For the full list of the 17 maritime claims, please refer to article 1 of the Arrest Convention of 1952.

arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim but in respect of no other claim⁴⁰¹.

Similarly, the Arrest Convention of 1999 also lists 22 categories of maritime claim⁴⁰² and provides that a ship may only be arrested in respect of a maritime claim but in respect of no other claim⁴⁰³.

Therefore, according to the above two conventions, it is a required condition for the claimant to have a maritime claim in order to arrest a ship.

The Chinese law, heavily influenced by the international arrest conventions, also lays down a rule that if the claimant wants to arrest a ship he must have a maritime claim. The Chinese Special Maritime Procedure Law of 1999 makes a list of 22 kinds of maritime claim⁴⁰⁴ and provides that a ship can not be arrested unless in respect of the maritime claims on the above list⁴⁰⁵. So it can be said that under the Chinese maritime legal system the claimant must have a maritime claim otherwise he is not entitled to arrest a ship.

In Chinese judicial practice, because the maritime court only exercises a preliminary review over the claimant's application for arrest of ship, it may happen that even though the ship has been arrested according to the application of the claimant, the arrest is finally found wrong due to the lack of maritime claim on the part of the claimant. In this case, the claimant should be responsible for the wrong arrest. In judicial practice, the main situations of wrong arrest due to lack of maritime claim are the followings: (a) the claimant is finally proved to be not a right person to make a claim, which means the claimant has no qualified status to make a claim. A typical example of this is that a ship is arrested according to the application of a claimant who claims damage to his cargoes but it is finally found that the claimant is not the true owner of the cargoes. (b) it is finally proved that the maritime claim can not be established. An example is that a ship is arrested according to the application of the voyage charterer who claims for fast dispatch fee but it is finally proved that the lay time actually used by the voyage charterer is not less but more than the lay time mutually agreed in the voyage charter party.

(2) The situation where it is established that the defendant is not responsible for the maritime claim.

⁴⁰¹ Refer to article 2 of the Arrest Convention of 1952.

⁴⁰² For the full list of the 22 maritime claims, please refer to article 1 of the Arrest Convention of 1999.

⁴⁰³ Refer to article 2 of the Arrest Convention of 1999.

⁴⁰⁴ Refer to article 21 of the Chinese Special Maritime Procedure Law of 1999.

⁴⁰⁵ Refer to article 22 of the Chinese Special Maritime Procedure Law of 1999.

If it is finally found that the defendant is not responsible for the maritime claim, then it can be concluded that the arrest is wrong. But if the defendant is found to be partly responsible for the maritime claim, the arrest of ship is not completely wrong but it can be said that the security required for the release of the ship is too high and the claimant may be made to be responsible for such a too high security.

(3) The situation where the arrested ship cannot be arrested

In judicial practice, it may happen that, even though the claimant has a maritime claim and the defendant is also held responsible for the maritime claim, the arrest of ship is finally proved wrong because the arrested ship is not a ship that can be arrested⁴⁰⁶.

In conclusion, both the Arrest Convention of 1952 and the Arrest Convention of 1999 provide a scope of ships that can be arrested. According to these two conventions, only the particular ship in respect of which a maritime claim arose and a sister ship/ships can be arrested if relevant conditions are met. The Chinese Special Maritime Procedure Law of 1999 also provides a similar regime in this regard. As a general rule, the arrest of any other ship is not permissible and therefore is wrong if the ship is arrested.

5.1.4 Liabilities for the Wrong or Unjustified Arrest of Ships

Because of the different stances held by the delegations to the convention, the Arrest Convention of 1952 provides as a compromise that “all questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.” Therefore, according to this convention, all the questions relating to the liability for wrong or unjustified arrest of ship is subject to the national law of the Contracting State where the arrest was made or applied for.

By contrast, the Arrest Convention of 1999 provides a more detailed uniform regime for the protection of the owners and demise charterers of arrested ships and for liability of the claimant for the wrong or unjustified arrest of ships or for excessive security provided. This convention not only empowers the court that

⁴⁰⁶ The scope of ship that is permissible to be arrested is the most important part of national laws or international conventions. If the claimant applies for arrest of a ship not falling with the scope, the arrest is not permitted.

authorized the arrest of the ship to impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security for any loss which may be incurred by the defendant as a result of the arrest for which the claimant may be found liable, but also stipulates that the court of the Contracting State where the arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of the ship, and provides that such liability, if any, of the claimant shall be determined by application of the law of the Contracting State where the arrest was effected.

Under the Chinese legal system, whenever the arrest of ship is held to be wrong or unjustified, the claimant must be liable for any loss or damages incurred by the defendant due to the wrongful or unjustified arrest or due to the excessive security subsequently demanded and provided. As a legal principle, such loss or damages must be actual loss or damages directly caused by the wrong or unjustified arrest of ship or excessive security. This means that the loss or damages should have a direct causal relationship with the wrong or unjustified arrest of ship or excessive security and should not be too remote. According to the Chinese maritime judicial practice, the extent of the liability of the claimant for loss or damages caused by the wrong or unjustified arrest or excessive security is as follows:

- (1) liability for the loss caused by the non operation of the ship during the period of arrest. The loss includes the ship's maintaining costs and reasonable profits.
- (2) liability for the loss arising out of the security demanded and provided for the release of the ship or for avoiding the arrest of ship. This loss can be the loss of interest if the security is in the form of money, or can be the fees incurred by the defendant for obtaining a credit security from a third party such as a bank or insurance company, or can be loss in other forms depending on the category of the particular security provided. In the case that the security is found to be excessive, the loss is confined to the loss caused by the part of security exceeding the appropriate amount.
- (3) liability for collateral losses. An example can be given that when the ship is arrested the cargoes on board the ship are damaged due to the arrest.

5.1.5 Measures and Procedures for Preventing or Minimizing Wrong or Unjustified Arrest of Ship

Because wrong or unjustified arrest of ships can disturb the normal operation of the ship and can cause losses or damages, therefore it must be prevented or reduced. For this purpose, some measures and procedures are made.

The commonest measure is to impose a counter security on the claimant when arrest of ship is applied for. One function of the counter security is that it can provide financial basis for covering the loss or damages caused by the wrong or unjustified arrest of ship. Another important function is that it can force the claimant to take the arrest of ship as a serious affair and to think repeatedly that whether he has sufficient factual and legal basis to arrest the ship and through this way it can prevent or reduce the wrong or unjustified arrest of ship.

Under the national laws of some countries, some special procedures are made to prevent or reduce the wrong or unjustified arrest of ship.

One procedure is called arrest hearing. For example, in German law, before the making and enforcing of the arrest order, the ship owner can make a petition to the German court that has jurisdiction over the case not to arrest the ship or at least fix a hearing before the arrest is granted. It is held by German courts that, for the benefits of the both parties and for the sake of correct arrest of ship, there is no reason not to hear both the parties before the grant of arrest of ship, and therefore German courts shall sustain the petition of ship owner and decide the arrest of ship only after the hearing. This German judicial practice is based on the German law of unfair competition⁴⁰⁷.

In Japanese law, a similar pre-arrest hearing can also be required to be held⁴⁰⁸. If the arrest has been granted without such a hearing, the order of the arrest of the ship is not final. Upon a motion by the ship owner, a hearing shall be held and according to the result of the hearing the Japanese court may reverse or change the contents of the order. In this way a wrong or unjustified arrest of ship can be prevented or reduced to a level as low as possible, or can be found as soon as possible under the Japanese legal system.

In some common law countries, such as in the United States, there is also a procedure just before or immediately after the arrest of ship for preventing or reducing the wrong or unjustified arrest of ship. In the United States, its supreme court has focused on the right of the ship owner as a defendant to have an

⁴⁰⁷ Christopher Hill, Kay Soehring, Tameyuki Hosoi, and Christie Helmer: Arrest of Ships, London, Lloyd's of London Press Ltd., 1985, pp. 64-65.

⁴⁰⁸ Tameyuki Hosoi: Arrest of Ships in Japan, London: LLP, 1985, pp.77-78.

opportunity for hearing before his ship is arrested. If there is no suspicion that the ship against which arrest is sought shall try to escape, the attorney representing the claimant may notify the attorney representing the ship owner of any hearing time on the motion for arrest. Because arrest of ship is usually an urgent business, a prompt hearing before the court can ordinarily be obtained⁴⁰⁹.

Under the Chinese legal system, before arrest of ship it is mainly the duty of the maritime court to review the application of the arrest according to the conditions laid down by laws to prevent or reduce the wrong or unjustified arrest of ship. But unlike the German law, the Chinese law doesn't provide a pre-arrest hearing for the decision on the arrest of ship. Instead the Chinese law provides a post-arrest remedy procedure. According to the section 2 of article 17 of the Chinese Special Maritime Procedure Law of 1999, if the ship owner doesn't agree with the court and doesn't accept ship arrest decision by the court, he is entitled, within 5 days after receipt of the decision, to require that court to review once more such a decision, and that maritime court must make a review decision within 5 days after the receipt of the requirement⁴¹⁰. If the stance of the ship owner is found to be reasonable and should be supported, the maritime court must release the ship from arrest in time. Because sometimes a ship owned by an innocent third party may be wrongfully arrested, therefore it is reasonable to permit such a third party to raise reasons against the decision of arrest of the ship. The Chinese Special Maritime Procedure Law of 1999⁴¹¹ continues to provide that any third interested party is entitled to raise opposition to the court's decision of arrest of ship and that the maritime court shall release the ship from arrest if it is convinced, following the review of the opposition, that such opposition is well grounded. Because of the flexibility of the transaction of ships and the complication of the maritime relationships involved, the possibility of wrong arrest of a ship of an innocent third party is higher than that of wrong arrest of other assets, so the second procedure should be given enough attention. In this respect I can raise a famous case in the Chinese maritime judicial practice. The case is as follows: The Garment Import & Export Co., Ltd. of Hubei Province of China imported a cargo of steel from Russia. The bill of lading indicated that the cargo was laded on board

⁴⁰⁹ Christie Helmer: *Arrest of Ships (in the United States)*, London: LLP, 1985, p.87.

⁴¹⁰ In order to prevent the defendant from using this procedure to delay the enforcement of arrest and to prevent the ship from escape, the Chinese law provides that during the period of request and the review by the court over the request, the decision of arrest of the ship doesn't suspend.

⁴¹¹ Refer to section 3 of the article 17 of the Chinese Special Maritime Procedure Law of 1999.

the ship of “NB DEKRIN” owned by Taibei Credit Everlasting Shipping Co., Ltd. Eight months passed since the issuance of the bill of lading but the ship had not arrived at the port of destination. Then the Garment Import & Export Co., Ltd. of Hubei Province of China found that another ship “MR DEKRIN” operated by the above shipping company was berthing at the Port of Zhanjiang, Guangdong Province of China, therefore it applied to the Guangzhou Maritime Court of China for arrest of the ship “MR DEKRIN” and provided to the court the relevant Lloyd information about the ship. The Guangzhou Maritime Court of China took the ship “MR DEKRIN” as a sister ship of the ship “NB DEKRIN” and ordered the arrest of the ship “MR DEKRIN”. Soon after the arrest, a third party named Maknific Shipping Co, Ltd. raised an opposition to the court’s decision of the arrest of “MR DEKRIN” and at the same time provided to the court the evidence showing that not the Taibei Credit Everlasting Shipping Co., Ltd. but the Maknific Shipping Co, Ltd was the owner and operator of the ship “MR DEKRIN”. The evidence furnished by the Maknific Shipping Co, Ltd included the Agreement of Operation of Ship “MR DEKRIN”, Insurance Policy of Ship “MR DEKRIN”, Receipt of Payment of Insurance Premium for Ship “MR DEKRIN”⁴¹². After review by the Guangzhou Maritime Court of the opposition and the relevant evidence attached, the court was convinced that the arrest application was not well grounded and the opposition by the Maknific Shipping Co, Ltd should be supported, and therefore immediately made a decision to release the ship “MR DEKRIN” from arrest.

From above analysis, it can be concluded that wrong or unjustified arrest of ship is an important issue in the theory and practice of arrest of ship. The jurisdiction by the court that authorized the arrest over the case of wrong or unjustified arrest is recognized by relevant international arrest conventions and national laws of most countries, and according to the universally accepted rule of conflicts of laws the wrong or unjustified arrest of ship is identified as an act of tort and the proper law is the law of the country where the arrest is effected. The liability of wrong or unjustified arrest is different from country to country. But there are some common rules that can be followed.

⁴¹² For the detailed information about the case, please refer to:
Jin Zheng-jia: Special Study on Maritime Claims Preservative Measures, Dalian: Dalian Maritime University Publishing House, 1996, pp.101-102.

5.1.6 The Korean Law and Practice in Respect of Wrong or Unjustified Arrest of Ships and Related Liability

According to Korean law and judicial practice, wrong or unjustified arrest of ship is deemed as a special kind of act of tort, and therefore the common legal theory of tort law can be applied in dealing with wrong or unjustified arrest of ship⁴¹³.

As for jurisdiction over the case of wrong or unjustified arrest of ship, the Korean law also recognizes that the court that has ordered the arrest of ship has jurisdiction over the case of wrong or unjustified arrest of ship. But it doesn't provide whether other court can also exercise jurisdiction over the case of wrong or unjustified arrest of ship. In this respect it is different from Chinese judicial practice, because the Chinese judicial practice also recognizes that other court such as the court of the principal place of business of the defendant can also exercise jurisdiction over the case of wrong or unjustified arrest of ships.

As for the proper law that should be used in judging the case of wrong or unjustified arrest of ships, the Korean law and judicial practice accepts the rule that the law of the country where the ship has been arrested should be the proper law in judging the case of the wrong or unjustified arrest of ships. This rule is in line with the related international ship arrest conventions and is same as the Chinese legal rule.

Under the Korean legal theory, as for the nature of liability for wrong or unjustified arrest of ships, there are three doctrines: doctrine of absolute fault liability, doctrine of presumptive fault liability and doctrine of absolute liability. Seen from the Korean judicial practice, the doctrine of presumptive fault liability is adopted by most Korean courts⁴¹⁴. As a consequence, under the Korean law and judicial practice, if the ship arrestor fails in the final judgment on the merits of the case, he is presumed to have fault in arresting the ship. If he wants to get rid of the liability, then he must burden the proof certifying that he has no fault in the arrest of ship. But, unfortunately, the Korean law doesn't give a definition to the wrong or unjustified arrest of ships, then there occurs a question that whether the arrest

⁴¹³ Kim Hi-tai: Preservative Measures and Related Liabilities, Judicial Materials, 45th issue, Korean Court Administrative Bureau

⁴¹⁴ Please refer to cases dealt by the Korean Supreme Court. One of the cases was declared on 12 Nov. 1980 (judgment No. 80 다 730) and another two were declared on 15 February 1980 (judgment No. 79 다 2138 and judgment No. 79 다 2139).

of ship is wrong or unjustified if the ship arrestor's claim is only partly supported by court. By contrast, both of the Arrest Convention of 1999 and the Chinese Special Maritime Procedure Law of 1999 have correctly answered this question. The answer is that the arrest is partly wrong and the arrestor should be partly liable.

As for the scope of liability for wrong or unjustified arrest of ships, the Korean law provides that all the losses and/or damages that are connected with and result from the wrong or unjustified arrest of ship should be included in the scope. To speak more exactly, the following losses and/or damages can be included in the scope of liability for wrong or unjustified arrest of ships⁴¹⁵:

- (1) Destruction of the ship or damages to the ship due to the wrong or unjustified arrest ship;
- (2) The interests of the security that is provided for the release of the ship from arrest that has been proved wrong or unjustified;
- (3) The losses of operation profits that could be earned if the ship had not been arrested;
- (4) The losses of litigation fees including the lawyer's service fees.

Judged from above scope of liability, it can be concluded that, under the Korean law, the victim of the wrong or unjustified arrest of ships is fully protected. In this respect, the Korean law goes farther than the Arrest Convention of 1952 and the Arrest Convention of 1999 because the Arrest Convention of 1952 and the Arrest Convention of 1999 does not provide concrete scope of the liability for the wrong or unjustified arrest of ships. In addition, compared with the scope of liability for wrong or unjustified arrest of ships under the Chinese legal system, the scope under the Korean legal system covers more items, because the scope under Chinese legal system doesn't cover the lawyer's service fee that has paid by the victim of the wrong or unjustified arrest of ships.

5.2 Securities Relating to Arrest of Ships

5.2.1 Concept of Security in Respect of Arrest of Ships

Arrest of ships is a preservative measure. Arrest of ships itself is not an end. Its aim is to put pressure on the ship-owner to provide sufficient security for the

⁴¹⁵ Cheong Hai-deok: A Study on the Enforcement against Ships, Ph. D. paper of graduate school of Korean Keong-hi University, 2000, p.101.

claim. If the ship owner refuses to provide sufficient security, the arrested ship shall be either kept continuously or sold and the proceeds of the sale of the ship shall be kept for the satisfaction of future judgment or arbitral award against the ship owner. Once a ship is arrested, interests of many parties such as the ship owner, the cargo owner, ship charterer, ship crew, and ship insurer etc. shall be heavily affected, and the arrest costs shall become larger and larger with the passing of time, so the first choice of the ship owner is to provide, according to what is required, a sufficient security. In addition, in order to protect the ship owner against the wrong or unjustified arrest of ship, the claimant is sometimes required to provide a suitable security for the possible losses/damages possibly caused by the wrong or unjustified arrest as a pre-condition for the court's authorizing the arrest of the ship. In this sense, the security provided by the claimant is often called "counter-security"⁴¹⁶. Security is an important issue in arrest of ship not only because above two categories of security are involved but also because other questions such as method of security, amount of security, time to provide security, scope of rights secured, and period of the security etc are involved too. What makes this issue more complicated is that under different national legal systems and in different international conventions there are no uniform provisions, and therefore it is valuable to study this issue from the perspective of comparative law.

Then, the first and most important question is: what is a maritime security in arrest of ship? What legal characteristics does it possess?

Maritime security in arrest of ship is generally defined as a financial security provided by the maritime claimant or the ship owner, before or after the ship is arrested, in accordance with the law or with agreement between the parties, the purpose of which is to provide guarantee for the claim. Just as introduced above, the maritime security involved in arrest of ship can be classified into two categories: one is security provided by the ship owner for avoiding the arrest of his ship or for release of the ship having been arrested, whose purpose is to secure the maritime claim; The other is counter security provided by the claimant for protecting the ship owner against possible losses/damages caused by the wrong arrest, which is usually a condition for court authorizing arrest of the ship. There

⁴¹⁶ Security provided by the defendant is a security that is required by all national laws and international arrest conventions. But counter security is only required under some national legal systems in some situations.

are quite different conditions and requirements for the two categories of security, which shall be introduced afterwards.

Maritime security involved in arrest of ship has following characteristics, compared with common civil or commercial security: (1) the maritime security involved in arrest of ship is closely connected with and is established in the course of ship arrest procedure and has important procedural meanings in respect of jurisdiction over merits of the case.⁴¹⁷; whereas the common civil or commercial security is closely connected with or is created in the civil or commercial transaction; (2) the former is for securing a claim that needs to be confirmed through a procedure, whereas the latter is for guaranteeing a confirmed civil right; (3) the former is usually required by the court that makes the arrest of ship, and is of judicial nature, because, in some countries counter-security is required by law as a condition for the court's ordering the arrest of the ship, and in the case of security provided by the ship owner for release the ship arrested or for avoiding the arrest of the ship, the security is ordered by the court in accordance with the application of the claimant, and in both situations refusal to provide the security can bring legal consequence to the party having been required but having refused to do so⁴¹⁸; By contrast, the latter is usually established voluntarily by the civil or commercial parties in transaction; (4) for the former security, there is compulsory requirement for a sufficient and enforceable security, for example, the counter-security provided by the claimant must be sufficient to cover the losses/damages possibly caused by the arrest, and the security provided by the ship owner must be sufficient to cover the amount claimed by the applicant and must be enforceable otherwise the security shall not be accepted and the ship shall continue to be arrested or may be auctioned; as to the latter security, the terms of security are usually reached by the civil or commercial parties; (5) in regard to form, the former security is different from the latter one. Due to the specialty of the former security, according to law and judicial practice, it is restricted to several forms such as letter of guarantee, deposit of money, mortgage. As for the latter security, the forms are free and more.

⁴¹⁷ As mentioned previously, the arrest of ship can give the court that has carried out the arrest the jurisdiction over the merits of the case.

⁴¹⁸ For example, if the applicant refuses to provide a counter security, the result may be that his application for arrest of ship can be rejected by the court; and if the defendant refuses to provide security for the release of the arrested ship, the ship can be sold prior to the final adjudication on the merits of the case in some special situations.

5.2.2 Security for Application of Arrest of Ships—Counter Security

5.2.2.1 Reasons for Provision of This Kind of Security

As introduced above, under some legal systems, the claimant is required to provide suitable security for the possible damages caused by the wrong arrest of ship to the ship owner. The reasons for this rule and practice can be explained as follows: (1) the application to arrest a ship is usually raised in emergency or in a hurry. The court to which the arrest application is made has no sufficient time to weigh the correctness of the application, and therefore it is possible that the arrest of the ship is proved to be wrong or unjustified⁴¹⁹; (2) once the ship is arrested, large losses such as loss of income, maintaining fees, supervising fees etc. can occur. It is logical that if the arrest is proved wrong, the applicant should burden the above losses caused by his wrong application; (3) the security provided by the applicant is a guarantee for keeping the innocent ship owner from being harmed by wrong or unjustified arrest; (4) this kind of security can effectively protect the interests of the innocent ship owner, and can deter the misuse of the right of arrest of ship; (5) after the ship is arrested, the ship owner is required to provide a security for the enforcement of a judgment or arbitral award that is against him, based on the same theory, the claimant should be required to provide a counter-security to guarantee that he is able to compensate the ship owner for his wrong or unjustified application.

5.2.2.2 Relevant National Law and Practice

Under the national laws of most maritime countries, the provisions in regard to above counter-security provided by the applicant are, in some aspects, quite different. There are three typical formulas of law and practice in respect of the provision of counter security⁴²⁰.

The first is that the applicant is not required to provide counter-security for his application of arrest of ship. This is a rule and judicial practice mainly in common law countries such as the United Kingdom, the United States etc. For example, in

⁴¹⁹ Because of the mobility of the ship, it is very difficult to locate the position of the ship, once the position is located, the claimant must react fast otherwise the ship may escape; the arresting court is required by some national laws to arrest the ship within a limited time such as 24 hours or 48 hours after the application for the arrest.

⁴²⁰ Yin Dong-nian: *Theory and Practice of Modern Maritime Commercial Law*, Beijing: The People's Communication Publishing House, 1997, p.184.

the United States, the applicant is ordinarily required, upon his application of arrest of ship, to provide security for court fee, marshal's ship arresting fee, arrested ship's supervising fee, but is seldom required to provide counter-security for possible losses/damages caused by the wrong or unjustified arrest to the ship owner⁴²¹. In the United Kingdom, according to the legal rule, the applicant is not required to provide counter-security for possible losses/damages caused by his wrong or unjustified application. In addition, it is necessary to prove that the applicant has malicious intention or is obviously negligent in the arrest application in order to force the applicant to be responsible for the losses/damages caused by the arrest. Consequently, in judicial practice it is very difficult to let the applicant be responsible for the wrong or unjustified arrest⁴²².

The second is that the court shall exercise right of discretion to decide whether counter-security should be provided or not in a particular case. This is a rule and practice prevailing mainly in civil law countries such as Germany, France etc.

The third is that it is a compulsory condition for the applicant to provide sufficient counter-security in order to get ship arrest ratification from court. This rule means that if the applicant fails to provide above counter-security the court to which arrest application is made shall refuse the application. This rule is adopted in some Northern Europe countries such as Norway, Sweden and Finland. For example, according to legal rules of Norway, court can only approve the ship arrest application under the condition that the applicant has provided sufficient counter-security to cover any possible damages to the ship owner caused by his wrong or unjustified application. Additionally, the counter-security also covers any compensation of nature of punishment.

5.2.2.3 Relevant Provisions in International Conventions

In view of above differences in national law and judicial practice, international conventions adopt a flexible approach to this issue.

The Arrest Convention of 1952 provides that:

“The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred in Article 4, and to all matters of

⁴²¹ Christopher Hill and Christie Helmer and others: *Arrest of Ships*, London: Lloyd's of London Press Ltd., 1985, pp.87-88.

⁴²² Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.67.

procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for”⁴²³.

Judged by this provision, the counter-security issue is not expressly and clearly dealt with in the Convention, but this provision indicates that the issue of counter-security is treated as a matter of procedure relating to arrest of ship and should therefore be governed by the law of the Contracting State where the arrest was made or applied for.

In the course of making the Arrest Convention of 1999, the question whether uniform rules should be provided in respect of the obligation of the arrestor to provide security and of his liability in the event of wrongful or unjustified arrest was again raised and there was a fierce debate on this question. The common law countries such as the United States, the United Kingdom, strongly opposed to the proposal of providing in the convention that counter-security should be given compulsorily as a condition of application for arrest of ship. On the contrary, the North Europe countries strongly insisted that such a proposal be adopted in the convention⁴²⁴.

In order to respect the legal traditions of different legal systems and to keep balance in interests between the parties involved in arrest of ship, the Arrest Convention of 1999 makes the rule relating to counter-security as follows:

“The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to the such loss or damage as may be incurred by that defendant in consequence of : (a) the arrest having been wrongful or unjustified; or (b) excessive security having been demanded and provided”⁴²⁵.

This provision expresses the purpose of the counter security and states that such purpose is to cover any loss caused by the wrong or unjustified application for which the claimant is held to be liable. What should be specially noticed is that

⁴²³ Refer to the second paragraph of article 6 of the Arrest Convention of 1952.

⁴²⁴ Zhu Zeng-jie: Comments on the 1999 International Ship Arrest Convention, China Maritime Trials Yearbook, Beijing: The People’s Communication Publishing House, 1999. p.152.

⁴²⁵ Refer to section 1 of article 6 of the Arrest Convention of 1999.

this provision doesn't impose on the Court of the State where the arrest is applied for or has been effected any obligation to request a counter-security as a condition for the arrest or for the maintenance of such arrest, but only leaves any decision in this regard to the discretion of the Court. Furthermore, this provision doesn't set out binding rules regarding the kind, the amount and the terms of the security, which means that once the Court decides to impose such a counter-security on the claimant the Court itself shall determine the kind, amount and terms of the counter-security⁴²⁶.

5.2.2.4 Relevant Chinese Legal Provisions

As to the issue of counter-security, the Chinese legal provisions have undergone some changes⁴²⁷.

The Arrest Provisions of 1994 stipulated that "when he applies for arrest of the ship, the applicant should provide security to the maritime court to cover the loss and damage incurred by the counter party due to the wrong application; if the applicant does not provide the security, the maritime court should refuse the application"⁴²⁸. According to this provision, it is a pre-condition for the applicant to provide counter-security to the maritime court in order to let the court arrest the ship⁴²⁹. In some Chinese maritime courts, the applicant is sometimes required to provide a counter-security the amount of which is the same as the amount of his claim. In practice, this provision can cause serious problem to the applicant or the ship owner or bare-boat charter. For example, in some cases, the applicants are seamen who take action against the ship owner for salary or are marine farmers who take action against the ship owner for loss of sea plants or animals. Sometimes they are unable to provide the security required by the maritime courts. If due to this, their application is refused, it will be unfair to them. On the contrary, if the applicant claims a small amount of money and thus provides a counter-security of small amount, but loss incurred by the ship owner due to the wrong arrest may be large, in this case it is also unfair to the ship owner.

⁴²⁶ By contrast, plaintiff and defendant are permitted to negotiate the form and amount of security provided by the defendant for release of the arrested ship; failing to reach agreement, the court shall decide on the form, the amount and other terms of the security.

⁴²⁷ Li Shou-qin, Li Hong-ji: *China's Maritime Trials*, Beijing: Law Publishing House, 2002, p.156-157.

⁴²⁸ Refer to item 5 of article 4 of the Arrest Provisions of 1994.

⁴²⁹ This provision is quite similar to that of North Europe countries.

Therefore it is not always fair to require the applicant to provide counter-security, and it is nonsense for the court to require counter-security according to the amount of the applicant's claim. Due to the compulsory provision of counter-security, some applicants do not choose to apply the Chinese maritime court for arrest of ship in foreign related cases, so this can do damage to the jurisdiction of Chinese maritime court and affect the Chinese jurisdiction sovereignty.

In view of the adverse consequences of above rigid provision of counter-security, the Chinese Special Maritime Procedure Law of 1999 makes some improvements. The article 16 of this law provides that "a maritime court may, in accepting a maritime preservation application, order the claimant to provide a guaranty. Where the claimant fails to provide guaranty, his application shall be rejected". According to this new provision, the applicant is not always required to provide counter-security, and the discretion is in the hands of the maritime court⁴³⁰. In the judicial practice, the maritime court, after receiving the application for arrest of ship, shall determine whether to accept the application or not after considering the following elements: (1) the application is made in the stage of pre-litigation or in the course of litigation. If the application is a pre-litigation application, the maritime court usually requires the applicant to provide counter-security because the arrest is ordered under a condition that the legal relationship between the parties is not confirmed or the legal facts are not clear. Additionally, the arrest is urgent and must be carried out within a short time. The possibility of wrongful arrest in this situation is relatively higher. For the application in the course of litigation, the requirement of counter-security is not so strict because the maritime court has got enough information about the legal relations between the parties and legal facts of the case. (2) the financial situation of the applicant. If the applicant is a natural person and has limited financial ability, the maritime court shall require no counter-security or small amount of counter-security if the applicant has a good cause to apply for the arrest of the ship. A typical example of this situation is that the seamen apply for arrest of the ship on which they have worked because the ship owner has not paid them salary and other social welfare⁴³¹. In some cases, the applicant has a very sound financial

⁴³⁰ This provision is similar to the provision of the civil law countries such as France and Germany.

⁴³¹ In this case, not only counter security is not required but also that other fees such as court's fees may be reduced or not required.

status and the possibility of wrong arrest is very low, and, once the application is proved wrongful, the maritime court can control the properties of the applicant. In this situation, it is not necessary to require the applicant to provide the counter-security. The typical example of this situation is that the applicant is an insurance company or a bank; (3) facts of the case. (4) possibility of wrong arrest and subsequent result. Even though above elements are commonly considered by maritime courts upon determining whether to require a counter-security, in judicial practice, the standards for exercising the discretion are not uniform thus I suggest that the supreme court of China should conduct a thorough study on this issue and lay down uniform rules in this respect to prevent the misuse by maritime courts of this discretion.

If the applicant is required to provide counter-security, to whom should the counter-security be provided? In the course of making the Chinese Special Maritime Procedure Law of 1999, there are opposing opinions in this respect. Some argue that the counter-security should be provided to the defendant because counter-security is to cover the loss incurred by the defendant and that the security relationship is between the applicant and the defendant. Others argue that the counter-security should be provided to the maritime court that has ordered and executed the arrest, because it is required by the maritime court and, in practice, it is difficult for the applicant to provide the counter-security to the defendant. At last, the latter opinion prevails and the law lays down a rule that the counter-security should be provided to the arresting maritime court.⁴³²

As for the form of counter-security, the Chinese Special Maritime Procedure Law of 1999 provides that the counter-security can be in form of deposit of money, in form of letter of guarantee, in form of mortgage. For different forms of counter-security there are different requirements as to the method of provision of the counter-security.

As for the amount of the counter-security, the Chinese Special Maritime Procedure Law of 1999 provides that the amount of counter-security shall be determined by maritime court⁴³³. Then the same law stipulates that the amount of the counter-security provided by the applicant should be appropriately equal to the loss possibly incurred by the defendant due to the wrong arrest. This provision

⁴³² Refer to article 74 of this law. In my opinion, this provision is necessary, especially taking into consideration that in some cases when the ship is to be arrested the ship owner has not been identified and therefore it is impossible to provide the counter security to the defendant.

⁴³³ Refer to article 75 of this law.

applies not only to the case of wrongful or unjustified arrest but also to the case of excessive security required by the applicant⁴³⁴. But it should be mentioned that the same law provides that the applicant should compensate the defendant or other interested parties the losses they have incurred due to the wrong or unjustified arrest of ship.⁴³⁵ According to this provision, the counter-security should not only cover losses incurred by the defendant who may be the ship owner or bare-boat charterer but also cover losses incurred by other interested parties such as cargo owner. Therefore the provisions are not well coordinated in respect of who shall be secured by the counter-security. This problem in legislation can cause problem in judicial practice⁴³⁶.

When should the maritime court determine whether to require the counter-security? There is no clear provision in the Chinese Special Maritime Procedure Law of 1999. Because this law provides that whether to require the applicant to provide counter-security is to be decided by the maritime court that authorizes the arrest of ship, the maritime court can at any appropriate time require the applicant to provide the counter-security. In view of the provision that the maritime court after receiving the application of arrest of ship should make decision whether to arrest the ship within 48 hours, if the maritime court decides to arrest the ship and decides that a counter-security should be provided, it seems that the maritime court should require the provision of counter-security before carrying out the decision of arrest of the ship. But it cannot be inferred that, once the maritime court has ratified the application of arrest of ship without requiring the provision of counter-security, the maritime court is deprived of the power to require counter-security afterwards. In fact, the judicial practice of Chinese maritime court has showed that the maritime court can require the applicant to provide counter-security as a condition of maintaining the arrest of the ship, and can even increase the amount of counter-security if the facts of a particular case may prove the increase is necessary and reasonable. I think this judicial practice is in conformity with the relevant provision in Arrest Convention of 1999⁴³⁷. In my

⁴³⁴ If the claim of the claimant is partly supported, whether the excessive security required by him and provided by the defendant constitutes a wrong arrest is a hot debate among Chinese maritime scholars. In my view, this is also a special kind of wrong arrest and the claimant should be partly responsible for this wrong arrest.

⁴³⁵ Refer to article 20 of this law.

⁴³⁶ If a third party other than the defendant is also covered by the counter security, how he can be protected by the counter security is a problem in judicial practice.

⁴³⁷ This is expressed in section 1 of article 6 of the Arrest Convention 1999 which reads that “the court may

opinion, sometimes it is very difficult for the maritime court to determine the correct amount of counter-security within 48 hours, so I suggest that the maritime court can at first require a small amount of counter-security that can cover the possible loss due to a short period of arrest. After the ship has been arrested and facts of the case have been clear, a relatively sound judgment on the possibility of wrongful or unjustified arrest can be made. In this stage, if it is necessary to provide more or larger counter-security, the maritime court can then order the applicant to provide additional counter-security. In this way, the right of arrest of ship can be effectively protected, the interests of the defendant can also be guaranteed, and the maritime court can make a decision as reasonable as possible. Furthermore, the Chinese Special Maritime Procedure Law of 1999 also provides that “after a guaranty is provided, the person providing the guaranty may, for any justified reasons, file an application to the maritime court to reduce, modify or cancel the guaranty.”⁴³⁸ This provision also applies to the counter-security. As there are no explanations in the law as to the “good reason”, I am of the opinion that the reducing, modifying or canceling is within the discretion of the maritime court.

What is the effective term for counter-security? There is no relevant provision either in Chinese Civil Procedural Law of 1991 or in the Chinese Special Maritime Procedure Law of 1999. In the Draft Version of the Chinese Special Maritime Procedure Law of 1999 there was a provision that “the effective term for security provided by the applicant is two years since the day when the security is provided”⁴³⁹. This compulsory provision was strongly opposed by some law experts. They argued that the term should depend on the particular case, and may be shorter or longer than two years. For example, the litigation or arbitration procedure may go over two years before the final judgment comes out, in this case, two years term for the counter-security is short. I also think it is wrong to provide a compulsory two years term for counter-security. Fortunately the final version of

as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of (a) the arrest having been wrongful or unjustified; or (b) excessive security having been demanded and provided.

⁴³⁸ Refer to article 77 of the Chinese Special Maritime Procedure Law 1999.

⁴³⁹ Jin Zheng-jia: Study on Maritime Procedural Law, Dalian: Dalian Maritime University Publishing House, 2001, P.273.

the above law deleted the compulsory two years term for the counter-security. The correct and reasonable solution, in my eyes, is that the maritime court should determine the term for counter-security after taking into consideration all the facts of the particular case.

5.2.3 Security for Release of the Arrested Ship or for Avoiding Arrest of Ship

This category of security is closely connected with arrest of ship. Before or after the arrest of ship, the ship owner or bare-boat charterer or other interested party may provide security in order to avoid the arrest or release the ship already arrested. It is recognized that one of the purposes of arrest of ship is for obtaining sufficient security for the claim, and therefore not only national laws but also international conventions adopt the principle that once sufficient enforceable security is provided the ship should not be arrested or should be released if having been arrested. But there are still a lot of issues deserving study in this respect.

5.2.3.1 Principle of Release of Arrested Ship against Security and Exceptions to this Principle

The Arrest Convention of 1952 provides that “the court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1(1) (o) and (p).” Judged from this provision, the Arrest Convention of 1952 has adopted the principle of release of arrested ship against sufficient security. The only exceptions to this principle, according to the above provision, are cases in which a ship is arrested in respect of the maritime claim concerning disputes as to the title to or ownership of any ship (enumerated in Article 1(1) (o)) or in respect of the maritime claim concerning disputes between co-owners of any ship as to the ownership, possession, employment or earnings of that ship (enumerated in Article 1(1) (p)). In these two cases, the Arrest Convention of 1952 continues to stipulate that “in such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest”⁴⁴⁰. The reasons for these two exceptions are that the purpose of the

⁴⁴⁰ Refer to section 1 of article 5 of the Arrest Convention of 1952.

claims in these cases is not for money or for compensation but for ownership of a particular ship or operation of a particular ship and that the provision of security itself can't satisfy the claim of the applicant⁴⁴¹. In view of the fact that the arrest of the particular ship in these cases can also result in loss to interested parties, in order to reduce or prevent such loss, the Arrest Convention of 1952 provides above alternative treatment of the arrested ship either permitting the continuing operation of the ship by the original possessor during the period of arrest under the condition of sufficient security being provided.

The Arrest Convention of 1999 also adopts the principle of release of ship against security by providing that a ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form⁴⁴². Compared with the wording of Arrest Convention of 1952, this wording is simpler and clearer. According to the Arrest Convention of 1952, the obligation to release the arrested ship upon sufficient security being furnished is imposed on the court or other appropriate judicial authority within whose jurisdiction the arrest is effected, but under the Arrest Convention of 1999, the authority who must release the ship is not identified, and this implies that not only the court who ordered or effected the arrest but also the applicant who applied for the arrest should take proper measure to release the arrested ship, as in certain jurisdictions a release order from the court is not necessary and the ship can be released with the consent of the applicant⁴⁴³. The Arrest Convention of 1999 also provides similar exceptions to the above principle. The relevant wording for the exceptions are "save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, paragraph 1 (s) and (t)". Paragraph 1 (s) refers to any dispute as to ownership or possession of the ship, and paragraph 1 (t) refers to any dispute as to ownership between co-owners of the ship as to the employment or earnings of the ship. Not limited to this similarity, the Arrest Convention of 1999 provides similar treatment to the arrested ship in these two cases.

From above analysis, it can be seen that there are no substantial differences between the two international conventions in regard to this issue, though the Arrest Convention of 1999 makes some technical improvements in the wording.

⁴⁴¹ In these cases, the security cannot replace the arrested ship.

⁴⁴² Refer to section 1 of article 4 of the Arrest Convention of 1999.

⁴⁴³ Francesco Berlingieri: Arrest of Ships, 3rd edition, London: LLP, 2000, p.334.

Under the Chinese legal system, the principle that the arrested ship shall be released if security has been furnished is also adopted. But the Chinese Special Maritime Procedure Law of 1999 has not incorporated the above two exceptions to the principle. In view of this fact, it is a failure of the Chinese legal regime not to provide special treatment to the release of arrested ship against security in regard to disputes of ownership/ possession of the ship or to disputes between co-owners of the ship as to the employment or earnings of the ship.

5.2.3.2 The form of the Security

As to the form of the security for the release of the ship arrested or for avoiding the arrest of the ship, the Arrest Convention of 1952 gives two alternatives, i.e. bail or other security⁴⁴⁴. Bail is a deposit of a sum of money into court. Other security may be a guarantee issued by a bank or other powerful entities such as a P&I Club. Letter of undertaking issued by P&I Club is usually accepted.

The Arrest Convention of 1999 doesn't require any particular form or forms of security. Any specific reference to the type or form of security has been avoided and has been replaced by the provision that the form of the security must be satisfactory.⁴⁴⁵ Then question arises: What forms are satisfactory? Whether the criterion for the satisfactory security is subjective or objective? The form of the security should satisfy the applicant, because the form should be determined by the applicant and the debtor through negotiation, and if the applicant is not satisfied he can refuse the security⁴⁴⁶. If the parties fail to reach an agreement in the form of the security, the competent court shall decide the form, and the court should apply an objective criterion to make such a decision.

Let's analyze the relevant Chinese legal provisions. The Arrest Provisions of 1994 provided that "the maritime court shall decide on the type, form, and amount of security. If sufficient and enforceable bank guarantee has been furnished, cash security needs not be provided."⁴⁴⁷ So the Arrest Provisions of 1994 didn't

⁴⁴⁴ Refer to article 5 of the Arrest Convention of 1952.

⁴⁴⁵ The Greek delegation proposed during the Diplomatic Conference that words "such as bail, bank guarantee or security provided by a financial institution, P&I Club, or any similar institution" should be added after "satisfactory form". After discussion, it is deemed preferable to leave the acceptable form of security to the discretion of the competent court.

⁴⁴⁶ According to section 2 of article 4 of the Arrest Convention of 1999, the parties to the dispute should negotiate an agreement as to the form and amount of the security. If they cannot reach an agreement, the arresting court shall determine the form and amount of the security.

⁴⁴⁷ Refer to article 6 of the Arrest Provisions of 1994.

require compulsory form of security, and at least bank guarantee is acceptable as an effective form of security.

By contrast, the Chinese Special Maritime Procedure Law of 1999 clearly provides the forms of security. The law provides that security can be in form of cash, surety, mortgage or pledge⁴⁴⁸. In judicial practice, letter of guarantee that Chinese maritime courts accept is limited to letter of guarantee issued by Chinese financial institutions such as bank, insurance company, P&I Club. The Chinese maritime courts are reluctant to accept letter of guarantee issued by a foreign financial institution. This practice can set more financial burden on the foreign party⁴⁴⁹. In addition, there is no uniform wording as to the letter of guarantee. I strongly suggest that some reforms should be made in regard to the provision of letter of guarantee. The reform should be made to the effect that letter of guarantee issued by world famous, powerful foreign financial institutions can also be accepted, that uniform wording of letter of guarantee is adopted and that letter of guarantee in English can also be acceptable. If this kind of reform is made, it can strengthen the foreign parties' trust in Chinese maritime courts, can promote the status of Chinese maritime courts on the world stage and is helpful in making China into a maritime judicial center in Asian and Pacific Region⁴⁵⁰.

5.2.3.3 The Amount of the Security

Generally speaking, in theory, the amount of security should not exceed the amount of claim plus interest and necessary costs. In practice, to determine the amount of the security is not easy, if taking into consideration of the different kinds and forms of security.

As to this issue, the Arrest Convention of 1952 only provided that the security must be "sufficient"⁴⁵¹. How to understand the meaning of "sufficient"? Who has

⁴⁴⁸ Refer to article 73 of the Chinese Special Maritime Procedure Law of 1999.

By contrast, according to the United Kingdom's law, the security forms are: bail bond; desposit in court; bank guarantee; P & I Club guarantee. The bail bond and deposit must be provided to the court; the latter two can be provided to court or the claimant. Refer to:

Yang Liang-yi: *Maritime Law*, Dalian: Dalian Maritime University Publishing House, 1999, p.90.

⁴⁴⁹ Li Hai: *A Study on Property Rights on Ships*, Beijing: Law Publishing House, 2002, p.254.

⁴⁵⁰ According to the palm and strategy of the Supreme Court of China, China shall become a judicial center for maritime cases in the Asia and Pacific region. According to the Chinese national strategy, the large ports in China such as Shanghai Port and Qingdao Port should be built into world hub. It is estimated that with the fast development of Chinese foreign trade and ocean transportation, Chinese maritime courts shall paly a more and more important role in the settlement of maritime disputes.

⁴⁵¹ Refer to paragraph 1of article 5 of the Arrest Convention of 1952.

the power to judge on the sufficiency of the security? The Arrest Convention of 1952 didn't deal with this issue into root and in detail. It only provided that "in default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount of thereof".⁴⁵² As a result of this provision, the court or other appropriate judicial authority has a final word as to the sufficiency of the security in case of disagreement between the parties.

To the same issue, the Arrest Convention of 1999 provides a detailed and more reasonable regime. It provides that the security must be sufficient in amount and be satisfactory in form⁴⁵³. Furthermore it lays down a ceiling amount for the security. Section 2 of article 4 of this convention provides that "in the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship." Analyzing the contents of this provision, I can conclude that: (1) if the parties reach agreement as to the amount and form of the security, the amount of the security is not affected by the value of the arrested ship. In other words, in this case, if the parties agree an amount exceeding the value of the ship, the court has no reason to interfere with the agreement, and the amount of security shall be subject to the amount the parties agreed to. (2) if the parties cannot reach an agreement as to the amount and form of the security, the court should interfere, and determine a appropriate amount not exceeding the value of the ship. It indicates that security for an amount equal to the value of the ship is always deemed sufficient, even though the amount of the claim may be higher than the value of the ship⁴⁵⁴. This rule got support from a majority of scholars and delegations to the convention. They argued that: (1) the security, in fact, is provided in place of the ship arrested. If the security the amount of which is equal to the value of the ship is provided, then keeping the security has the same effect as maintaining the ship arrested. (2) Had he enforced his claim on the arrested ship and obtained payment from the proceeds of the sale in the case sufficient security had not been provided, the claimant would not have received an amount more than the value of ship. Therefore, in their eyes, it is quite reasonable and logical that the claimant should consent to the release of the ship if a security the

⁴⁵² Refer to paragraph 2 of article 5 of the Arrest Convention of 1952.

⁴⁵³ Refer to section 2 of the article 4 of the Chinese Special Maritime Procedure Law of 1999.

⁴⁵⁴ Francesco Berlingieri: Arrest of Ships, 3rd edition, London: LLP, 2000, p.334.

amount of which is equal to the value of the ship is furnished. In my eyes, this rule is heavily influenced by the judicial practice of common law countries, especially their theory of action in rem. According to theory of action in rem, the defendant is the ship, and the value of the ship is the total financial basis for securing the claim, so the ceiling security should not exceed the value of the ship arrested. But this theory is not recognized and accepted in civil law countries. According to the civil law countries' theory, the legal action is taken against a legal entity or a natural person not against a property, and the claim should not be limited to the property arrested. Therefore if the claim is higher than the value of the ship arrested, a higher security can also be required. In civil law countries, arrest of ship is not only a measure to force the defendant to appear before the court, but also a measure to force the defendant to provide a sufficient security even though the amount of the security may be higher than the value of the ship. If this is not the case, the defendant may make use of the rule of ceiling amount of security to evade his liability, and as a result, the innocent claimant has to apply to a competent court to recognize and enforce the part of his claim which is left unsatisfied by the security, and the recognition and enforcement may be difficult and complicated, and finally this will be extreme unfair to the claimant⁴⁵⁵. Another adverse effect of the ceiling amount of security is that the claimant is forced to try his best to arrest the defendant's another ship or other property to ensure the total fulfillment of his claim. In my opinion, the provision that the security cannot exceed the value of the ship is not reasonable.

Under Chinese legal system, the Arrest Provisions of 1994 only provided that the amount of security should be decided by the maritime court. The Chinese Special Maritime Procedure Law of 1999 follows the Arrest Convention of 1999 and provides that the amount of security required by the maritime claimant from the defendant should be approximately equal to the amount of the claim, but the amount of the security cannot exceed the value of the property arrested⁴⁵⁶. This

⁴⁵⁵ According to the Arrest Convention of 1999, if the claim is in the amount of US \$ 10,000,000 and the value of the arrested ship is only US \$ 1,000,000, in this case, the defendant needs only to furnish a security the amount of which is US \$ 1,000,000 for the release of the arrested ship. If the ship is released from arrest against such security, the claimant is not entitled to rearrest it. What the claimant can do in this situation is that he can either discover another ship owned by the defendant and arrest it or he can apply to a competent court to recognize and enforce the part of the claim having not been satisfied by the security. Due to the judicial barrier between sovereign states, it is very difficult and expensive to get a judgment to be recognized and enforced in another sovereign state.

⁴⁵⁶ Refer to article 76 of the Chinese Special Maritime Procedure law of 1999.

provision is slightly different from the provision of the Arrest Convention of 1999. The Arrest Convention of 1999 allows the litigant parties to first negotiate the amount and form of the security. As long as the parties agree, the amount of the security can exceed the value of the ship. Without any exceptions, the above Chinese law lays down a uniform rule that the amount of security cannot exceed the value of the ship, which means that the amount of security cannot exceed the value of the ship even in the situation of agreement between the parties. This rule unreasonably limits the negotiation ability of the parties, and is against the principle of autonomy of the civil parties. What is more unreasonable is that this provision enlarges its scope application to all property arrested. The Arrest Convention of 1999, considering the characteristics of ship and the tradition of action in rem, applies this rule only to ship and only to the situation where the courts have to decide the security due to the failure of the agreement between the parties. In view of above differences, the above Chinese law has not learned well from the Arrest Convention of 1999. Taking into consideration of the civil law system tradition of Chinese legal system, the Chinese Special Maritime Procedure Law of 1999 goes too far in this respect and it poses threat to the integrity of the Chinese legal system in regard to security. China is both a powerful maritime shipping country and a cargo interests country. Consequently, in the course of transplanting foreign or international legal regimes, China should consider its own reality and legal tradition and should not accept all without any necessary changes. Taking above issue as an example, China should soften the strict rule that the security cannot exceed the value of property, and keep a good balance between the interests of ship owners and interests of cargo owners.

5.2.3.4 To Whom should the Security be Provided?

As to this issue, the Arrest Convention of 1952 and the Arrest Convention of 1999 fail to provide any clear rules. Judged from the provision in the two conventions that the parties are permitted to negotiate the amount and form of the security, it seems acceptable for the security to be provided to the applicant. In view of the reality that different countries have different rules and practice in this respect, it is safe to say that the true intention of the conventions is to let this issue be decided according to relevant national law.

There is clear provision on this issue under Chinese legal system. The Chinese Special Maritime Procedure Law of 1999 provides that the defendant can provide

security to the maritime court or to the applicant⁴⁵⁷. I think this provision is in good coordination with the provision that the security can be decided by the parties through an agreement or by the maritime court in case the parties cannot reach agreement. By contrast, the counter-security as already introduced and analyzed in previous part must be provided to the maritime court⁴⁵⁸.

5.3.3.5 The Legal Effects of Security

Once security is provided according to agreement between the parties or to decision by the competent court, there accompanies with it some legal effects.

The first is that the ship arrested shall be released or the ship that is to be arrested shall not be arrested. This is provided both by the Arrest Convention of 1952 and the Arrest Convention of 1999. The relevant Chinese law also confirms rule.

Another legal effect is that the provision of security shall neither be construed as an acknowledgement of liability nor as a waiver of any defense or any right to limit liability. The Arrest Convention of 1952 provides that “the request to release the ship against such security shall not be construed as an acknowledgement of liability or as a waiver of the benefit of the legal limitation of liability of the owner of the ship”. The Arrest Convention of 1999 also provides that “any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defense or any right to limit liability.”⁴⁵⁹ Under the Chinese legal system, the Arrest Provisions of 1994 once provided that the provision of security by the defendant doesn’t mean his acknowledgement of liability or his waiver of any right to limit liability⁴⁶⁰. Unfortunately, there is no similar provision in Chinese Special Maritime Procedure Law of 1999, but it cannot be inferred, due to lack of the similar provision, that this legal effect is not recognized by the new Chinese law. Maybe this effect is so obvious that it is not necessary to be emphasized in the new law. This legal effect indicates that the provision of security is of procedural meaning

⁴⁵⁷ Refer to article 74 of the Chinese Special Maritime Procedure Law of 1999.

⁴⁵⁸ Refer to article 74 of the Chinese Special Maritime Procedure Law of 1999. The reason for this is that in most cases the counter security is required not by the defendant but by the court and that in some cases when the arrest is effected the ship owner has not been identified.

⁴⁵⁹ Refer to article section 3 of article 4 of the Arrest Convention of 1999.

⁴⁶⁰ Refer to section 7 of article 4 of this Arrest Provisions of 1994.

and has no substantial meaning. To say more clearly, the provision of security does not affect the substantial legal relationships between the parties.

5.2.3.6 The return of the Security

There lack systematic provisions in this regard in the two arrest conventions. According to the Arrest Convention of 1952, if the court within whose jurisdiction the ship was arrested has not jurisdiction over the merits of the case or if the parties have agreed to submit the dispute to the jurisdiction of a particular court other than that within whose jurisdiction the arrest was made or to arbitration, the court within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring the action or proceeding; if the action or proceeding is not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security⁴⁶¹.

The Arrest Convention of 1999 provides following rules in this regard:

“3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:

- (a). does not have jurisdiction to determine the case upon its merits; or
 - (b). has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this Article,
- such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

4. If the proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this Article then the ship arrested or the security provided shall, upon request, be ordered to be released.”⁴⁶²

Compared with the Convention of 1952, the Arrest Convention of 1999 adds the case where the court having made the arrest refuses to exercise jurisdiction on the merits of the case. In addition, the Arrest Convention of 1999 puts an obligation on the arresting court to order the release of the ship arrested or the security provided if the defendant requests the court to do so. So, it can be concluded that the Arrest Convention of 1999 has made some improvements on the basis of the Arrest Convention of 1952.

⁴⁶¹ Refer to sections (2), (3) and (4) of Article 7 of the Arrest Convention of 1952.

⁴⁶² Refer to sections 3 and 4 of Article 7 of the Arrest Convention of 1999.

What should be paid attention to is that the above two conventions have not provided rules as to the period of time within which the action should be brought in cases where the court has no jurisdiction over the merits of the case. Obviously, this issue is left to be subject to relevant national law of the court⁴⁶³.

The Chinese Special Maritime Procedure Law of 1999 provides that the maritime court shall timely release the ship from arrest or return the security having been provided if the maritime claimant didn't bring action or submit the case to arbitration within the period of time provided by this law.⁴⁶⁴ According to this law, the period of time for maintaining pre-litigation or pre-arbitration arrest of ship is 30 days⁴⁶⁵, so the claimant must bring the proceedings before a competent court or before an agreed arbitral tribunal within 30 days after the arrest of the ship, otherwise the maritime court shall release the ship arrested or return the security provided.

5.2.3.7 The Enforcement of the Security

This is a relatively complicated issue. For different form of security the method of enforcement may be different too.

In foreign related cases, the enforcement of security faces barrier of conflict of law. In foreign related cases, it often happens that security has been provided to a court of the state where the arrest was made, but this court has no jurisdiction over the merits of the case, and a court of another state or an arbitral tribunal of another state has jurisdiction over the merits of the case. In this situation, in order to facilitate the enforcement of a foreign judgment or a foreign arbitral award, the Arrest Convention of 1952 provides that the security shall be deemed to have been given as security for the satisfaction of any judgment or arbitral award eventually made by the foreign competent court or arbitral tribunal. In this respect, the Arrest Convention of 1999 goes farther to provide that any final decision resulting from the proceedings before a competent court or arbitral tribunal in another state shall be recognized and given effect with respect to the arrested ship or to the security on conditions that the defendant has been given reasonable

⁴⁶³ National laws of many countries give a different provision in this regard. In Denmark the proceedings on the merits must be instituted within one week of the arrest if the proceedings can be brought in Denmark. In Sweden such term is extended to one month of the order of arrest.

⁴⁶⁴ Refer to section 2 of article 18 of this law.

⁴⁶⁵ Refer to article 28 of the Chinese Special Maritime procedure Law of 1999.

notice of such proceedings, a reasonable opportunity to present the case for the defense, and such recognition is not against public order.

Even though there are above provisions in the two international arrest conventions, in foreign related maritime cases, the enforcement of security remains a serious problem. Because of the existence of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it is relatively easier for the enforcement of security in case of a foreign arbitral award involved; if a foreign judgment is involved, the related enforcement of security by the court of state where the arrest was made shall be a big problem, because the Arrest Convention of 1999 has not become effective. Even though in the future it becomes effective, how many countries shall accept it is also a question. Therefore, I am not very optimistic on the enforcement of security when a foreign judgment is involved.

In national laws, the issue is not an easy issue. For example, in the Chinese law, security can be provided to the maritime claimant or to the maritime court and the forms of security can be in cash, guarantee, mortgage or pledge. If the security is in the form of cash, it is easier to enforce the security no matter to whom the security has been provided. The applicant can get paid from the security once he obtains an enforceable judgment or arbitral award. If the security is in the form of letter of guarantee, the enforcement of the security may encounter some problems in judicial practice. If the letter of guarantee is provided to the applicant, then guarantee relationship exists between the applicant and the party who has provided the guarantee. After getting the enforceable judgment or arbitral award, the applicant can require the guarantor to fulfill his guarantee. If this requirement is refused, the applicant can enforce the guarantee through legal proceedings. If the letter of guarantee is provided to the maritime court that made the arrest, it should be deemed that the guarantee has been provided to the applicant through the maritime court as an agent. Following this theory, it can be said that it is wrong to enforce the guarantee directly against the guarantor by the maritime court. If the guarantor refuses to perform the guarantee, the applicant should take action against the guarantor, because the letter of guarantee itself is not directly enforceable. If the security is in the form of mortgage or pledge, then the security should be enforced according to the rules pertaining to mortgage or pledge. What should be pointed out is that, once mortgage or pledge is effectively established, the applicant's claim is guaranteed. In cases where security is in the form of

mortgage or pledge, the applicant can get a right of priority in payment. This special provision is a breakthrough in the traditional theory and judicial practice that all the applicants are equal in getting paid in the proceedings of enforcement of judgment or arbitral award.⁴⁶⁶

5.2.4 Provision of Security under the Korean Legal System

Under the Korean legal system, the provision of security in arrest of ship is also divided into two categories: provision of security for application of arrest of ships (counter security) and provision of security for release of the ship from arrest.

For the provision of counter-security, the Korean law provides that the arrestor (the claimant or creditor) may be ordered by Korean court to provide security for guaranteeing the payment of possible losses or damages to the defendant. In the Korean judicial practice, the Korean ship-arrest court can determine the amount and form of the counter security after it has reviewed the ship arrest application and the attached documents and has decided to arrest the ship.

As for the amount of the counter security, the Korean law doesn't provide a standard. Though some hold that the appropriate amount should be one third of the amount claimed by the ship arrestor, in the Korean judicial practice many Korean courts require one tenth of the amount claimed by the ship arrestor as the counter-security.⁴⁶⁷

As for the form of the counter-security, in the Korean judicial practice, the arresting court usually requires counter-security in cash. If the arresting court doesn't require a counter security in cash, a letter of guarantee issued by an insurance company or a bank is also acceptable. Compared with the Chinese legal regime, the Korean legal regime is conservative in the form of counter-security, because under the Chinese legal regime the form of counter-security is more flexible and form of mortgage or pledge can also be used.

⁴⁶⁶ Following its legal tradition, China adopts a principle that the plaintiff and other applicants are equal in the final proceeding of enforcement of judgment and arbitral award. This practice is in conformity with the legal practice of some countries such as France. But in some countries such as Germany, the legal tradition is that the person to whom a security having been provided by the defendant gets a statutory right of priority in the enforcement of the security.

⁴⁶⁷ Lee Yong-hyen: A Study on the Chinese Legal System for the Provisional Ship Arrest---a Comparison with Korean Laws, Ph. D. paper of graduate school of Korean Maritime University, 2005, p.119.

As for the provision of security for release of the ship from arrest, the Korean Civil Enforcement Law⁴⁶⁸ only provides that on the ship arrest order the arresting court should determine at the same time the amount of the security that should be provided by the debtor for the release of the ship from arrest. How to determine the amount of the security and what form can be adopted for the security are not provided in this law. In the Korean judicial practice, security in cash is required. By contrast, under the Chinese legal system, the Chinese Special Maritime Procedure Law of 1999 provides flexible forms for the security, for example the form of security can be in cash, can be in mortgage, can be in pledge, and can be a P & O guarantee letter. More important, under the Chinese legal system, the amount and form of the security can be negotiated by the creditor and the debtor, and only when they cannot reach such an agreement, the Chinese maritime court needs to intervene and decides the amount and form. In order to facilitate the provision of security and reduce related costs, I think the Korean law should follow the example of Chinese law to permit the negotiation by the creditor and the debtor on the amount and form of the security and permit more forms of security.

⁴⁶⁸ Refer to article 282 of the Korean Civil Enforcement Law.

Chapter 6: Conclusions and Suggestions

In this chapter, I try to summarize the main contents of the paper and give some suggestions.

6.1 Conclusions

After a review of the whole contents of this paper, the following basic conclusions can be made:

(1) There are different definitions of ship under different laws and conventions. For example, definition of ship in the Chinese Maritime Commercial Law and definition of ship in the Korean Ships Law have differences, and the definition of ship in Arrest Convention of 1952 and definition of ship in Arrest Convention of 1999 also have minor differences. In order to precisely understand the relevant rules, it is very important to first correctly grasp the definition of ship used in the rules.

(2) Concept and function of arrest of ship are also different under different legal systems. Concept of arrest of ship under common law system originates in “action in rem” and emphasizes jurisdiction-acquiring function of arrest of ship; by contrast, concept of arrest of ship under continental law system is based on the theory of preservation, emphasizes the preservative function of arrest of ship and only permits “action in personam”. Concept of arrest of ship under Chinese legal system has absorbed reasonable elements of both the common law system and continental law system; by contrast, concept of arrest of ship under the Korean legal system follows the example of continental law system and is different from the concept of common law system. The concept of arrest of ship in the Arrest Convention of 1952 is mainly influenced by the concept of common law system but the concept of arrest of ship in the Arrest Convention of 1999 tries to keep a balance between the concept of common law system and concept of continental law system.

(3) Every major maritime country has its own ship arrest legal regime. The ship arrest legal regime of one country is not fixed but keeps changing. Both of Chinese ship arrest legal regime and Korean ship arrest legal regime have undergone reforms. Comparing the Chinese ship arrest legal regime with the Korean ship arrest legal regime, I can find following main differences: in China, special characteristics of maritime cases and arrest of ships are recognized, but in

Korea are not; in China, there is a special maritime procedural law to deal with maritime cases and arrest of ships, but in Korea common civil procedural law and civil enforcement law deal with maritime cases and arrest of ships respectively; in China, there is a special maritime court system to exclusively deal with the maritime cases and arrest of ships, but in Korea there is no such special maritime court system; in China, only the listed maritime claims can lead to arrest of ship, but in Korea the claims in respect of which a ship can be arrested are not restricted to maritime claims; in China, arrest of ship can bring to the arresting maritime court the jurisdiction over the merits of the case, but in Korea it can not; there are other differences between the two regimes. These differences are due to different legal traditions, different legal theories and judicial practices of these two countries. In order to solve the conflicts caused by different national ship arrest legal regimes, the international community has made two uniform ship arrest conventions, the Arrest Convention of 1952 and the Arrest Convention of 1999. The two conventions are all result of compromise, but the Arrest Convention of 1952 is more influenced by common law system. By contrast, the Arrest Convention of 1999 tries to keep a balance between the common law system and continental law system. The current Chinese ship arrest legal regime has incorporated many rules of the Arrest Convention of 1999. It seems that the Korean ship arrest legal regime has not been heavily influenced by international ship arrest conventions.

(4) The scope of claims in respect of which a ship can be arrested differs from country to country, and from convention to convention. The Arrest Convention of 1952 lists only 17 items of maritime claim in respect of which a ship/ships can be arrested, and no other claims can lead to the arrest of ship. Trying to cure the defects of the maritime claim list of the Arrest Convention of 1952 and keeping pace with the changing reality, the Arrest Convention of 1999 makes a new list of 22 maritime claims. Before the enacting of the Chinese Special Maritime Procedure Law of 1999, the Chinese ship arrest legal regime was heavily influenced by the Arrest Convention of 1952 as to claims in respect of which a ship/ships can be arrested; after the enacting of the Chinese Special Maritime Procedure Law of 1999, the Chinese ship arrest legal regime has been heavily influenced by the Arrest Convention of 1999. Now the Chinese ship arrest legal regime only permits arrest of ships basing on maritime claims, and there is a closed list of 22 maritime claims. The Korean legal regime doesn't provide that a

ship can be arrested only in respect of maritime claim and this implies that a ship can also be arrested in respect of non-maritime claims. In this respect, the Korean legal regime is different from the Arrest Convention of 1952, the Arrest Convention of 1999, and the Chinese legal regime.

(5) Ships that may be arrested differ under different legal regimes. The similarities of the Arrest Convention of 1952 and the Arrest Convention of 1999 in this respect are that: both of them try to restrict the scope of ships that can be arrested for the benefits of international trade and maritime transportation, both of them distinguish between the arrest of ship in respect of which a maritime claim is asserted and the arrest of sister ship, both of them list conditions for arrest of each categories of ship, and both of them set down restrictions on the rearrest and multiple arrest of ship. But there are clear differences between the two conventions. Examples of these differences can be listed as follows: the provisions of the Arrest Convention of 1999 are clearer and more logic than those of the Arrest Convention of 1952; the Arrest Convention of 1999 provides more detailed situations where a particular ship can be arrested; for the benefits of claimants, the Arrest Convention of 1999 provides more exceptions to the principle of prohibition of rearrest and multiple arrest of ship; the Arrest Convention of 1952 provides that a ship can be arrested even though the ship is ready for sailing, but the Arrest Convention of 1999 doesn't address this issue and leaves this issue to be decided by relevant national laws; the Arrest Convention of 1952 allows the arrest of demise-chartered ship if the demise charterer is responsible for the claim, but the Arrest Convention of 1999 permits the arrest of such ship under the condition that relevant national law permits the judicial sale of such a ship. As for the ships that can be arrested, the Chinese legal regime once learned much from the Arrest Convention of 1952, but since the advent of the Arrest Convention of 1999 the Chinese legal regime has been greatly influenced by the Arrest Convention of 1999. The Chinese Special Maritime Procedure Law of 1999 is very similar to the Arrest Convention of 1999 in respect of this issue, but there are also some differences, and examples of the differences can be said as follows: the Chinese Special Maritime Procedure Law of 1999 enlarges the scope of arrest of ship in respect of which a claim is asserted to cover the claim secured by possessory lien, and it expressly provides that a demise-chartered ship can be arrested if the demise-charterer is responsible for the claim. It doesn't prohibit the arrest of ship which is ready for sailing. By contrast, the Korean ship arrest legal

regime doesn't distinguish between the arrest of ship in respect of which a claim is asserted and the arrest of sister ships. It allows the arrest of any ship owned by the debtor, and it also prohibits the arrest of ship which is ready for sailing. In regard to ships that can be arrested, it must be noticed that some countries such as South Africa walk farther to try to pierce the corporate veil and enlarge the scope of ships that can be arrested. Considering the vast number of ships flying convenient flag, the above law and practice of South Africa deserves a special study.

(6) It is accepted by the Arrest Convention of 1952, the Arrest Convention of 1999, the Chinese legal system and the Korean legal system that the court of a country where a ship is located has jurisdiction over the arrest of such ship irrespective of the existence of an agreement on arbitration or an agreement on jurisdiction over the merits of the case. The Arrest Convention of 1952, the Arrest Convention of 1999 and the Chinese law vest jurisdiction over the merits of the case in the court that has authorized the arrest of the ship saving in situations of the existence of effective agreement on arbitration or on jurisdiction over the merits of the case between the parties. On the contrary, the Korean law, basing on the jurisdiction principle of civil law system, doesn't vest such jurisdiction over the merits of the case in the court that has authorized the arrest of the ship.

(7) The main purpose of arrest of ship is to obtain security for the claim. Both of the Arrest Convention of 1952 and the Arrest Convention of 1999 provide that the arrested ship should be released against the provision of security and that the security provided for the release of the ship from arrest should be in satisfactory form and in appropriate amount and that the interested parties can negotiate on the form and amount of security and that the court of contracting state shall intervene and determine the form and amount of security when the negotiation fails. There are also clear differences between the two conventions. Compared with the Arrest Convention of 1952, the Arrest Convention of 1999 provides more rules in this regard. For example, it provides that amount of security should not exceed the value of the arrested ship and it also provides that security provider may ask the arresting court to reduce, modify or cancel the security. The current Chinese law provides a mechanism similar to that of the Arrest Convention of 1999 but with the following characteristics: it provides more flexible forms of security, and it provides that the security can be given to the arresting court or directly to the ship arrestor, etc. The Korean law provides a relatively simple regime in this respect,

and the rule is that the arresting court shall determine the form and amount of the security. As for the issue of the counter security provided by the claimant for the arrest of the ship, there are different rules under different legal system. In some countries, the counter security is compulsorily required, but in some countries it is not required, and in most countries it is required in specified situations. The Arrest Convention of 1952 doesn't cover the issue of counter security; the Arrest Convention of 1999 provides that the counter security may be required but should be subject to the national law of the country where the arrest is made. The Current Chinese law doesn't provide that a counter security is compulsorily required, and it leaves this issue to be decided by the arresting court. The Korean law usually requires a counter security when the reasons for arrest of ship are not so sound, but it also empowers the arresting court to require a counter security even though there are good reasons to arrest the ship, and in both cases the arresting court shall determine the form and amount of the counter security.

(8) The main procedures for arrest of ship include the application for arrest of ship, the court's review over and decision on the application, the enforcement of arrest of ship, the release of the ship, and judicial sale of arrested ship. Both of the Arrest Convention of 1952 and the Arrest Convention of 1999 leave the procedural issues of arrest of ships to be decided by relevant national laws. The Chinese law and the Korean law have many differences in regard to procedures of arrest of ship. Some examples of the differences can be listed as follows: the Korean law requires more detailed documents for application of arrest of ships, one of which is the document certifying that the ship is not ready for sailing; the Chinese law provides a more detailed and practical rules to regulate the court's review and decision on the application of arrest of ship; in respect of enforcement of arrest, the Chinese judicial practice usually applies the form of dead arrest and only in some special situations applies the form of alive arrest. By contrast, the Korean law and judicial practice recognizes three forms of enforcement: common arrest, order of anchoring the ship, supervision and preservation of the ship; for release of the ship from arrest, there is a rule in the Chinese law that once liability limitation fund is established the arrested ship should be released, but this rule is not found in Korean law; as for judicial sale of arrested ship, the differences are more. Under the Chinese legal system, the judicial sale of the arrested ship prior to the final adjudication is conditionally permitted; by contrast, under the Korean legal system, such judicial sale is not permitted. The current Chinese law and

judicial practice permits the arrest and judicial sale of a demise-chartered ship if the demise charterer other than the ship owner is responsible for the claim, but the Korean law prohibits the arrest and judicial sale of such ship. The distribution of the proceeds of the sale of the arrested ship under the Chinese legal regime is heavily influenced by and is much similar to the Maritime liens and Mortgages Convention of 1993, but the distribution under the Korean legal regime is heavily influenced by and is much similar to the Maritime liens and Mortgages Convention of 1926

(9) Under most legal systems, the ship arrestor should be responsible for the wrong or unjustified arrest of ship. But there are quite differences as to what constitutes a wrong or unjustified arrest of ship and as to what liabilities the ship arrestor should burden. Generally speaking, under the common law countries criteria for constitution of wrong or unjustified arrest are very strict and it is very difficult to let the ship arrestor be responsible; on the contrary, under continental law countries the criteria are soft and it is easier to let the ship arrestor be responsible. The Arrest Convention of 1952 doesn't provide substantial rule for the liability of ship arrestor for wrong or unjustified arrest of ships. Instead, it provides a rule of conflict law that this issue is left to be decided by competent court by applying the law of the country where the ship has been arrested. Arrest Convention of 1999 provides more protection for the ship owner against the wrong or unjustified arrest of ships. The current Chinese law and Korean law both provide that the ship arrestor should be responsible for the wrong or unjustified arrest of ship and at the same time provide the scope of liability. As for the scope of liability, the Korean law provides a larger scope than the Chinese law. Both Chinese law and Korean law accept the rule that the court that has authorized the arrest has jurisdiction over the dispute of wrong or unjustified arrest of ship, and the wrong or unjustified arrest is deemed as a tort act and therefore the proper law should be the law of the country where the arrest was made. In order to prevent or minimize the wrong or unjustified arrest of ship, Chinese law allows the ship owner or an innocent third party to ask the arresting court to review its ship arrest decision; by contrast, the Korean law allows the ship owner to appeal to a higher court against ship arrest decision and permits an innocent third party to directly take action against the ship arrestor.

(10) In the course of transplanting rules of international ship arrest conventions into its own legal regime, China has not well combined with its own legal

traditions in some points, and this results in defects in law and disorder in practice. Even though most rules of the Arrest Convention of 1999 are advanced, it cannot be denied that they are the result of compromise and some points of them are not perfect. In addition, China has its own reality and legal tradition, so I object to the opinion that China should ratify the Arrest Convention of 1999 and completely incorporate the rules of this convention into its own legal regime. In my viewpoint, China has learned enough from this convention, and what is most important now is to well absorb the rules that have already been incorporated.

6.2 Some suggestions

On the basis of the study of this paper, I would like to give some suggestions for perfection of the laws and practice of both China and Korea and for better protection of interested private parties in arrest of ships.

(1) Both of China and Korea should strength the comparative study of each other's ship arrest legal regime, the ship arrest regimes of other countries and the ship arrest regimes under international ship arrest conventions. Only in this way, common stances can be found, differences can be discovered, advantages and disadvantages can be identified. The comparison can establish sound basis for the reform of laws and practice of each country. In the course, each country should absorb the reasonable contents of laws of other countries and relevant international conventions. In transplanting the rules of another country or international convention, special attention should be paid to the systematic study of the targeted rules and enough attention should also be paid to its own legal traditions.

(2) For the perfection of Chinese ship arrest law and practice, I suggest that: a. Duly enlarge the scope of claims in respect of which a ship can be arrested; b. Consider the necessity and conditions for arrest of associated ships especially in cases where a ship flying convenient flag is involved; c. Vest the exclusive jurisdiction over the case of wrong or unjustified arrest of ship on the court that has ordered the arrest of ship; d. Make clearer the conditions for the judicial sale of ship before the final judgment; e. Provide a priority of payment for the claim which directly leads to the arrest of the ship; f. Take measures to cure the defects caused by the incorporation of international ship arrest convention rules without fully considering Chinese legal traditions.

(3) For the perfection of Korean ship arrest law and practice, I provide following unripe suggestions: a. Make a special maritime procedural law to meet the characteristics of maritime cases and arrest of ships; b. Establish a special maritime court system to exclusively deal with maritime cases and arrest of ships; c. Absorb the reasonable contents of common law system; d. Recognize the arrest of ship can lead to jurisdiction over the merits of the case by the arresting court; e. Put an end to the rule that ship ready for sailing can not be arrested; f. Reorganize the ship arrest regime mainly referring to the Arrest Convention of 1999; g. Reconstruct the regime in respect of maritime lien, ship mortgage and ship possessory lien by referring mainly to the Convention on Maritime Liens and Mortgages of 1993.

(4) For the ship owner, I suggest that: (a) He should take measures to prevent his ship from being arrested, and once his ship is arrested he should make full use of the objection or appeal procedure for the release of the ship or he can require a counter security as high as possible from the ship arrestor if he thinks the arrest is wrong or unjustified. (b) If his try to get the ship released from arrest through above procedure fails, he should provide a security as required for the release of the ship in order to prevent further losses due to the continuing arrest. (c) If possible, the ship owner should operate his business through the organization of one ship company to reduce the risks of arrest of sister ships. (d) If his ship is chartered, especially demise chartered by another person, he must conduct a thorough and complete investigation on the person's financial status and business operation ability and try to avoid the risks of arrest of the chartered ship. It is necessary to put into the demise charter a clause which stipulates that once the chartered ship is arrested due to a claim for which the charterer should be responsible the charterer should take every possible measure to get the ship released from arrest including provision of the required security for the release of the arrested ship and should be responsible for any losses incurred by the ship owner due to the arrest⁴⁶⁹.

(5) For the claimant/ship arrestor, I suggest that: (a) once he has a good and sound maritime claim against a ship owner, the first step for him is to employ an able and maritime-specialized lawyer or law expert on his behalf. The reason for

⁴⁶⁹ For a practical wording of the article, reference can be made to:
Yang Liang-yi: Ships Finance and Ship Mortgage, Dalian: Dalian Maritime University Publishing House, 2003, p.201.

this is that the arrest of ship is a very special legal affair and only an able and maritime-specialized lawyer or law expert can provide valuable advice and efficient service. (b) If he has a good and sound maritime claim against a ship owner, he should make full use of the national laws or international conventions to timely choose a suitable forum of court to arrest a ship/ships permissible for arrest and to require a sufficient security for his claim. If the arrest is a pre-litigation arrest, he must start the procedure over the merits of the case in a suitable court or commence the arbitral proceedings within a reasonable period of time. If the law of the country where the arrest is made allows judicial sale of the arrested ship prior to the final adjudication over the case, he can apply for such a sale if he is sure he can win the case and at the same time the conditions for such a sale have all been met. (c) He must be extremely careful not to make a wrong or unjustified arrest. Before the application of arrest of ship, as much as information about the debtor and the ship to be arrested should be collected and studied in order to ensure that the ship is a ship that can be arrested. (d) If he is not very sure as to his claim, he can threat to arrest a ship and force the ship owner to reach a settlement. If the alive form of arrest is allowed in the country where the arrest is made, he can consent to keep the ship under alive arrest, and this can on the one hand reduce the losses caused by dead arrest of ship and on the other hand prevent the transaction of the ship and the establishment of mortgage on the ship.

(6) At last, for a maritime law practitioner who often deals with legal affairs of arrest of ship, I would like to suggest that a wide and deep knowledge of arrest ship rules not only in national legal systems but also in international conventions is very important and rich experience is also helpful.

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Appendices

Appendix 1: The Chinese Maritime Commercial Law, 1992

(related chapters only)

Chapter II Ships

Section I Ownership of Ships

Article 7 The ownership of a ship means the shipowner's rights to lawfully possess, utilize, profit from and dispose of the ship in his ownership.

Article 8 With respect to a State-owned ship operated by an enterprise owned by the whole people having a legal person status granted by the State, the provisions of this Code regarding the shipowner shall apply to that legal person.

Article 9 The acquisition, transference or extinction of the ownership of a ship shall be registered at the ship registration authorities; no acquisition, transference or extinction of the ship's ownership shall act against a third party unless registered.

The transference of the ownership of a ship shall be made by a contract in writing.

Article 10 Where a ship is jointly owned by two or more legal persons or individuals, the joint ownership thereof shall be registered at the ship registration authorities. The joint ownership of the ship shall not act against a third party unless registered.

Section 2 Mortgage of Ships

Article 11 The right of mortgage with respect to a ship is the right of preferred compensation enjoyed by the mortgagee of that ship from the proceeds of the auction sale made in accordance with law where and when the mortgagor fails to pay his debt to the mortgagee secured by the mortgage of that ship.

Article 12 The owner of a ship or those authorized thereby may establish the mortgage of the ship.

The mortgage of a ship shall be established by a contract in writing.

Article 13 The mortgage of a ship shall be established by registering the mortgage of the ship with the ship registration authorities jointly by the mortgagee and the mortgagor. No mortgage may act against a third party unless registered.

The main items for the registration of the mortgage of a ship shall be:

- (1) Name or designation and address of the mortgagee and the name or designation and address of the mortgagor of the ship;
- (2) Name and nationality of the mortgaged ship and the authorities that issued the certificate of ownership and the certificate number thereof;
- (3) Amount of debt secured, the interest rate and the period for the repayment of the debt.

Information about the registration of mortgage of ships shall be accessible to the public for enquiry.

Article 14 Mortgage may be established on a ship under construction.

In registering the mortgage of a ship under construction, the building contract of the ship shall as well be submitted to the ship registration authorities.

Article 15 The mortgaged ship shall be insured by the mortgagor unless the contract provides otherwise. In case the ship is not insured, the mortgagee has the right to place the ship under insurance coverage and the mortgagor shall pay for the premium thereof.

Article 16 The establishment of mortgage by the joint owners of a ship shall, unless otherwise agreed upon among the joint owners, be subject to the agreement of those joint owners who have more than two-thirds of the shares thereof.

The mortgage established by the joint owners of a ship shall not be affected by virtue of the division of ownership thereof.

Article 17 Once a mortgage is established on a ship, the ownership of the mortgaged ship shall not be transferred without the consent of the mortgagee.

Article 18 In case the mortgagee has transferred all or part of his right to debt secured by the mortgaged ship to another person, the mortgage shall be transferred accordingly.

Article 19 Two or more mortgages may be established on the same ship. The ranking of the mortgages shall be determined according to the dates of their respective registrations.

In case two or more mortgages are established, the mortgagees shall be paid out of the proceeds of the auction sale of the ship in the order of registration of their respective mortgages. The mortgages registered on the same date shall rank equally for payment.

Article 20 The mortgages shall be extinguished when the mortgaged ship is lost. With respect to the compensation paid from the insurance coverage on account of

the loss of the ship, the mortgagee shall be entitled to enjoy priority in compensation over other creditors.

Section 3 Maritime Liens

Article 21 A maritime lien is the right of the claimant, subject to the provisions of Article 22 of this Code, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim.

Article 22 The following maritime claims shall be entitled to maritime liens:

- (1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;
- (2) Claims in respect of loss of life or personal injury occurred in the operation of the ship;
- (3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;
- (4) Payment claims for salvage payment;
- (5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship.

Compensation claims for oil pollution damage caused by a ship carrying more than 2,000 tons of oil in bulk as cargo that has a valid certificate attesting that the ship has oil pollution liability insurance coverage or other appropriate financial security are not within the scope of sub-paragraph (5) of the preceding paragraph.

Article 23 The maritime claims set out in paragraph 1 of Article 22 shall be satisfied in the order listed. However, any of the maritime claims set out in sub-paragraph(4) arising later than those under sub-paragraph (1) through (3) shall have priority over those under sub-paragraph (1) through (3). In case there are more than two maritime claims under sub-paragraphs (1),(2),(3) or (5) of paragraph 1 of Article 22, they shall be satisfied at the same time regardless of their respective occurrences; where they could not be paid in full, they shall be paid in proportion. Should there be more than two maritime claims under subparagraph (4), those arising later shall be satisfied first.

Article 24 The legal costs for enforcing the maritime liens, the expenses for preserving and selling the ship, the expenses for distribution of the proceeds of

sale and other expenses incurred for the common interests of the claimants, shall be deducted and paid first from the proceeds of the auction sale of the ship.

Article 25 A maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over ship mortgage.

The possessory lien referred to in the preceding paragraph means the right of the ship builder or repairer to secure the building or repairing cost of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof. The possessory lien shall be extinguished when the ship builder or repairer no longer possesses the ship he has built or repaired.

Article 26 Maritime liens shall not be extinguished by virtue of the transfer of the ownership of the ship, except those that have not been enforced within 60 days of a public notice on the transfer of the ownership of the ship made by a court at the request of the transferee when the transfer was effected.

Article 27 In case the maritime claims provided for in Article 22 of this Code are transferred, the maritime liens attached thereto shall be transferred accordingly.

Article 28 A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.

Article 29 A maritime lien shall, except as provided for in Article 26 of this Code, be extinguished under one of the following circumstances:

- (1) The maritime claim attached by a maritime lien has not been enforced within one year of the existence of such maritime lien;
- (2) The ship in question has been the subject of a forced sale by the court;
- (3) The ship has been lost.

The period of one year specified in sub-paragraph (1) of the preceding paragraph shall not be suspended or interrupted.

Article 30 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.

Appendix 2: The Chinese Special Maritime Procedure Law, 1999

Chapter I General Provisions

Article 1 This Law is formulated for the purposes of maintaining the litigation rights, ensuring the ascertaining of facts by the people's courts, distinguishing right from wrong, applying the law correctly, trying maritime cases promptly.

Article 2 Whoever engages in maritime litigation within the territory of the People's Republic of China shall apply the Civil Procedure Law of the People's Republic of China and this Law. Where otherwise provided for by this Law, such provisions shall prevail.

Article 3 If an international treaty concluded or acceded to by the People's Republic of China contains provisions that differ from provisions of the Civil Procedure Law of the People's Republic of China and this Law in respect of foreign-related maritime procedures, the provisions of the international treaty shall apply, except those on which China has made reservations.

Article 4 The maritime court shall entertain the lawsuits filed in respect of a maritime tortious dispute, maritime contract dispute and other maritime disputes brought by the parties as provided for by laws.

Article 5 In dealing with maritime litigation, the maritime courts, the high people's courts where such courts are located and the Supreme People's Court shall apply the provisions of this Law.

Chapter II Jurisdiction

Article 6 Maritime territorial jurisdiction shall be conducted in accordance with the relevant provisions of the Civil Procedure Law of the People's Republic of China.

The maritime territorial jurisdiction below shall be conducted in accordance with the following provisions:

- (1) A lawsuit brought on maritime tortious may be, in addition to the provisions of Articles 19 to 31 of the Civil Procedure Law of the People's Republic of China, under jurisdiction of the maritime court of the place of its port of registry;
- (2) A lawsuit brought on maritime transportation contract may be, in addition to the provisions of Articles 82 of the Civil Procedure Law of the People's Republic of China, under jurisdiction of the maritime court of the place of its port of re-transportation;

(3) A lawsuit brought on maritime charter parties may be under jurisdiction of the maritime court of the place of its port of ship delivery, port of ship return, port of ship registry, port where the defendant has its domicile;

(4) A lawsuit brought on a maritime protection and indemnity contract may be under jurisdiction of the maritime court of the place where the object of the action is located, the place where the accident occurred or the place where the defendant has its domicile;

(5) A lawsuit brought on a maritime contract of employment of crew may be under jurisdiction of the maritime court of the place where the plaintiff has its domicile, the place where the contract is signed, the place of the port where the crew is abroad or the port where the crew leaves the ship or the place where the defendant has its domicile;

(6) A lawsuit brought on a maritime guaranty may be under jurisdiction of the maritime court of the place where the property mortgaged is located or the place where the defendant has its domicile; a lawsuit brought on a ship mortgage may also be under jurisdiction of the maritime court in the place of registry port;

(7) a lawsuit brought on ownership, possession, and use, maritime liens of a ship, may be under jurisdiction of the maritime court of the place where the ship is located, the place of ship registry or the place where the defendant has its domicile.

Article 7 The following maritime litigation shall be under the exclusive jurisdiction of the maritime courts specified in this Article:

(1) A lawsuit brought on a dispute over harbour operations shall be under the jurisdiction of the maritime court of the place where the harbour is located;

(2) A lawsuit brought on a dispute over pollution damage for a ship's discharge, omission or dumping of oil or other harmful substances, or maritime production, operations, ship scrapping, repairing operations shall be under the jurisdiction of the maritime court of the place where oil pollution occurred, where injury result occurred or where preventive measures were taken;

(3) A lawsuit brought on a dispute over a performance of a maritime exploration and development contract within the territory of the People's Republic of China and the sea areas under its jurisdiction shall be under the jurisdiction of the maritime court of the place where the contract is performed.

Article 8 Where the parties to a maritime dispute are foreign nationals, stateless persons, foreign enterprises or organizations and the parties, through written

agreement, choose the maritime court of the People's Republic of China to exercise jurisdiction, even if the place which has practical connections with the dispute is not within the territory of the People's Republic of China, the maritime court of the People's Republic of China shall also have jurisdiction over the dispute.

Article 9 An application for determining a maritime property as ownerless shall be filed by the parties with the maritime court of the place where the property is located; an application for declaring a person as dead due to a maritime accident shall be filed with the maritime court of the place where the competent organ responsible for handling with the accident or the maritime court that accepts the relevant maritime cases.

Article 10 In the event of a jurisdictional dispute between a maritime court and a people's court, it shall be resolved by the disputing parties through consultation; if the dispute cannot be so resolved, it shall be reported to their common superior people's court for the designation of jurisdiction.

Article 11 When the parties apply for enforcement of maritime arbitral award, apply for recognition and enforcement of a judgement or written order of a foreign court and foreign maritime arbitral award, an application shall be filed with the maritime court of the place where the property subjected to execution or of the place where the person subjected to execution has its domicile. In case of no maritime court in the place where the property subjected to execution or in the place where the person subjected to execution has its domicile, an application shall be filed with the intermediate people's court of the place where the property subjected to execution or of the place where the person subjected to execution has its domicile.

Chapter III Maritime Claims Preservation

Section 1 General Principles

Article 12 Maritime claims mean maritime courts, according to applications of maritime claimants, take compulsory preservation measures against property of persons against whom the claims are brought up in order to ensure the realization of such rights.

Article 13 An application for maritime claims by the parties shall, before bring a lawsuit, be filed with the maritime court of the place where the property subjected to preservation.

Article 14 Maritime claims shall not be bound by procedure jurisdiction agreements or arbitration agreements relating to the said maritime claims between the parties.

Article 15 Where maritime claimants apply for maritime claims, written applications shall be filed with maritime courts. Maritime claims, application reasons, objects subjected to preservation and amounts for guaranty shall be stated in applications.

Article 16 A maritime court may, in accepting a maritime preservation application, order the claimant to provide a guaranty. Where the claimant fails to provide guaranty, his application shall be rejected.

Article 17 After receiving an application, the maritime court must make an order within 48 hours; if the court orders the adoption of maritime preservation measures, the execution thereof shall begin immediately. Where not conforming to the conditions for a maritime preservation, the application shall be rejected.

If the party concerned is not satisfied with the order, he may, within five days from the date of the receipt of the order, apply for reconsideration which could be granted only once. The maritime court shall make a reconsideration decision within five days from the date of the receipt of the reconsideration application. Execution of the order shall not be suspended during the time of reconsideration.

Where the interested party raises objection to the maritime preservation, the maritime court, upon examination and deeming it reasonable, shall cancel the property preservation.

Article 18 If the person against whom the application for maritime preservation is made provides guaranty, or the party has justified reasons for applying cancellation of maritime reservation, the people's court shall cancel the property reservation promptly.

If the maritime claimant fails to bring an action or apply for arbitration according to the arbitration agreement within the time limit specified by this Law, the people's court shall cancel the property reservation or return the guaranty promptly.

Article 19 Where the relevant maritime dispute enters into litigation or arbitration procedure after execution of the maritime preservation, the party may bring an action relating to the maritime claim to the maritime court which has taken maritime claim preservation or other maritime courts having jurisdiction over it,

with the exception of signing of a litigation jurisdiction agreement or an arbitration agreement between the parties.

Article 20 If an application for maritime preservation is wrongfully made by a maritime claimant, the claimant shall compensate the person against whom the application is made for any loss incurred from maritime preservation.

Section 2 Arresting or Auction Sale of Ships

Article 21 The following maritime claims may applied for arresting ships:

- (1) the destruction of or damage to the property occurred in the operation of the ship;
- (2) the loss of life or personal injury directly relating to the operation of the ship;
- (3) salvage payment;
- (4) the damage or threat of damage caused by the ship to the environment, seashore or the relevant interested parties; the measures taken for prevention, reduction and elimination of such damage; payment for compensation of such damage; the reasonable cost for the measures taken actually or preparing to take for restoring the environment; loses the third party suffered or will probably suffer due to such damage; and the damage, fees or loses which are similar in nature specified in this Item;
- (5) fees relating to floating, elimination, recycling and destruction of sunken ships, shipwreck, stranded objects, abandoned ships or making them harmless, including fees relating to floating, elimination, recycling and destruction of the objects which still are or were abroad such ships or making them harmless, and fees relating to maintenance of abandoned ships and supporting the crew members;
- (6) the agreement or use or charter parties of the ship;
- (7) an agreement for carriage of goods or passengers;
- (8) goods (including luggage) on board or loss or damage related thereto;
- (9) general average;
- (10) towage service;
- (11) pilotage service;
- (12) provision of materials or services for operation, management, maintenance and repair of ships;
- (13) ship building, rebuilding, repair, refitting or fitting;
- (14) prescribed fees or fees for ports, canals, wharves, harbors or other waterways;

- (15) wages of ship's crew or other payments, including the repatriation fee and social insurance premium payable for ship's crew;
- (16) expenses paid for a ship or shipowner;
- (17) ship's insurance premium (including mutual insurance membership fee) paid by a shipowner or bareboat charterer, or paid on his behalf;
- (18) the commission, brokerage or agency fee related to a ship paid by the shipowner or bareboat charterer, or paid on his behalf;
- (19) a dispute over ownership or possession of a ship;
- (20) a dispute over use of or profit from a ship between co-owners of the ship;
- (21) a mortgage of a ship or right of the same nature; or
- (22) a dispute arising from a contract for sale of a ship.

Article 22 No application for arrest of a ship may be filed except for the maritime claims as stipulated in Article 21 of this Law; there are exceptions, however, for executing judgments, arbitral awards or other legal documents.

Article 23 If any of the following circumstances exists, a maritime court may arrest the involved ship:

- (1) where the shipowner is held responsible for a maritime claim and is the owner of the ship when the arrest is executed;
- (2) where the bareboat charterer of the ship is held responsible for a maritime claim and is the bareboat charterer or the owner of the ship when the arrest is executed;
- (3) where a maritime claim is entitled to a mortgage of the ship or right of the same nature;
- (4) where a maritime claim relates to ownership or possession of the ship; or
- (5) where a maritime claim is entitled to a maritime lien.

A maritime court may arrest other ships owned by the shipowner, bareboat charterer, time charterer or voyage charterer who is held responsible for a maritime claim, when the arrest is executed, with the exception of the claims related to ownership or possession of the ship.

No ship engaging in military or government duties may be arrested.

Article 24 A maritime claimant may not apply to arrest a ship having been arrested for the same maritime claim, except that any of the following circumstances exists:

- (1) where the party who opposes the claim has not provided a sure guarantee;

(2) where the guarantor probably cannot perform his obligation of guarantee wholly or partly; or

(3) where the maritime claimant agrees to release the arrested ship or return the existing guarantee for justifiable reason; or cannot stop the release of the arrested ship or return of the existing guarantee by justifiable means.

Article 25 For a maritime claimant applying to arrest the involved ship, if the name of the party who opposes the claim cannot be ascertained at once, the filing of his application shall not be affected.

Article 26 A maritime court may issue the relevant departments with a notice for assistance in execution at the same time it issues or cancels an order for arrest of a ship, and the notice shall clearly set forth the scope and content of the assistance in execution and the relevant departments have the obligation to assist in execution. A maritime court may directly dispatch personnel to board the ship for supervision if it deems necessary.

Article 27 After a maritime court orders to impose preservation upon a ship, with consent of the maritime claimant, it may allow the ship to continue the operation by ways of restraining the disposition or mortgage of the ship.

Article 28 The period of arresting a ship for maritime claim preservation shall be 30 days.

If a maritime claimant brings a law suit or applies for arbitration within 30 days, and applies for arrest of a ship in the course of the litigation or arbitration, the arrest of the ship shall not be restrained by the period stipulated in the preceding paragraph.

Article 29 If, on the expiration of the period of arresting a ship, the party who opposes the claim fails to provide guarantee, and the ship is not suitable for being arrested longer, the maritime claimant may apply to the maritime court arresting the ship for auction of the ship after bringing a law suit or applying for arbitration.

Article 30 A maritime court shall conduct examination after receiving the application for auction of a ship, and make an order approving or disapproving the auction of the ship.

If a party is not satisfied with the order, he may apply for reconsideration once within five days of the date of receiving the written order. The maritime court shall make a reconsideration decision within five days of receiving the reconsideration application. Execution of the order shall be suspended during the time of reconsideration.

Article 31 Where a maritime claimant, after filing an application for auction of a ship, applies for stopping the auction, whether or not to give a permission shall be ordered by the maritime court. If the maritime court orders to stop the auction of the ship, expenses incurred for auctioning the ship shall be paid by the maritime claimant.

Article 32 A maritime court that orders to auction a ship shall issue a public notice through newspapers or other new media. If a foreign ship is to be auctioned, a public notice shall be issued through newspapers or other news media distributed abroad.

A public notice shall contain the following particulars:

- (1) name and nationality of the ship to be auctioned;
- (2) causes and basis for auction of the ship;
- (3) composition of the ship auction committee;
- (4) time and place for auction of the ship;
- (5) time and place for display of the ship to be auctioned;
- (6) procedure to be undergone for participating in the bidding;
- (7) registered items to be handled for claims; and
- (8) other particulars as required to be publicized.

The period of a public notice for auction of a ship shall not less than 30 days.

Article 33 A maritime court, 30 days prior to auction of the ship, shall issue notices to the registration authorities of the country of registry of the ship to be auctioned, and to the known lienor, mortgagee and owner of the ship.

The contents of the notice contain the name of the ship to be auctioned, time and place for auction of the ship, causes and basis for auction of the ship, and registration of claims.

The notice shall be in writing or take other appropriate forms by which receipt can be confirmed.

Article 34 Auction of a ship shall be executed by a ship auction committee. The ship auction committee shall be composed of three or five persons, that is, execution officers appointed, as well as auctioneers and surveyors engaged by the maritime court.

The ship auction committee organizes appraisal and valuation of the ship; organizes and presides over the auction; signs a letter of confirmation for conclusion of the auction with the bidder; and handles procedures for the transfer of the ship.

The ship auction committee shall be responsible to the maritime court and subject to supervision of the maritime court.

Article 35 Bidders shall register with the ship auction committee within a prescribed time limit. For registration, they shall submit for inspection the identity certificates of themselves, enterprises' legal representatives, or persons-in-charge of other organizations, as well as powers of attorney of agents, and pay a certain amount of bonds for purchase of the ship.

Article 36 A ship auction committee shall display the ship to be auctioned before the auction of the ship, and shall provide facilities for inspecting the ship to be auctioned and relevant data.

Article 37 The vendee shall pay without delay not less than 20 percent of the ship's price after he signs a letter of confirmation, and the remainder of the ship's price shall be settled within seven days of the date of concluding the auction, however, except otherwise agreed upon between the ship auction committee and the vendee.

Article 38 Once the vendee has settled the price in full, the original shipowner shall delivery the ship to the vendee on the basis of the current condition of the ship, at the place of berth of the ship, within a fixed time limit. The ship auction committee shall organize and supervise the delivery of the ship, and sign a letter of confirmation of ship's delivery with the vendee after the delivery of the ship.

After the delivery of the ship is finished, the maritime court shall issue an order releasing the arrest of the ship.

Article 39 After the delivery of the ship, the maritime court shall issue a public notice through newspapers or other news media, announcing that the ship has been auctioned openly and delivered to the vendee.

Article 40 After accepting the ship, the vendee shall undergo formalities for registration of the ship's ownership at the ship registration authorities on the basis of the letter of confirmation for conclusion of auction and relevant data. The original shipowner shall undergo formalities for cancellation of registration of the ship's ownership at the original ship registration authorities. Failure to undergo formalities for cancellation of registration of the ship's ownership by the original shipowner shall not affect the transfer of the ship's ownership.

Article 41 Malicious collusion between bidders makes the auction invalid. Any bidder involved in malicious collusion shall pay expenses for auctioning the ship and compensate losses incurred. The maritime court may impose upon the bidder

involved in malicious collusion a fine of not more than ten percent and not less than 30 percent of the highest price offered.

Article 42 In addition to the provisions in this Section, auction shall be governed by the relevant provisions of the Auction Law of the People's Republic of China.

Article 43 Auction of an arrested ship for debt payment during the procedure of execution may be referred to the relevant provisions of this Section.

Section 3 Arrest and Auction of the Goods on Board

Article 44 A maritime claimant may apply to arrest the goods on board for ensuring the fulfillment of his maritime claim.

The goods on board to be arrested on application shall be under ownership of the party who opposes the claim.

Article 45 The value of the goods on board to be arrested on application by a maritime claimant shall be equivalent to the amount of his claim.

Article 46 The period of arresting the goods on board for maritime claim preservation shall be 30 days.

If a maritime claimant brings a law suit or applies for arbitration within 15 days, and applies for arrest of the goods on board in the course of the litigation or arbitration, the arrest of the goods on board shall not be restrained by the period stipulated in the preceding paragraph.

Article 47 If, on the expiration of the period of arresting the goods on board, the party who opposes the claim fails to provide guarantee, and the goods are not suitable for being arrested longer, the maritime claimant may apply to the maritime court arresting the goods on board for auction of the goods after bringing a law suit or applying for arbitration.

For articles which cannot be stored, or are difficult to be stored, or the storage expense may exceed their value, the maritime claimant may apply for auction in advance.

Article 48 A maritime court shall conduct examination after receiving the application for auction of the goods on board, and make an order approving or disapproving the auction of the goods on board.

If a party is not satisfied with the order, he may apply for reconsideration once within five days of the date of receiving the written order. The maritime court shall make a reconsideration decision within five days of receiving the reconsideration application. Execution of the order shall be suspended during the time of reconsideration.

Article 49 Auction of the goods on board shall be executed by an auction organization composed of execution officers appointed, and auctioneers engaged by the maritime court, or executed by an agency authorized by the maritime court. Auction of the goods on board, if not covered by the provisions of this Section, shall be referred to the relevant provisions of Section 2 of this Chapter on auction of a ship.

Article 50 Application by a maritime claimant for maritime claim preservation imposed upon fuel and materials used by a ship related to the maritime claim shall be governed by the provisions of this Section.

Chapter IV Maritime Injunction

Article 51 A maritime injunction means any of compulsory measures by which a maritime court, on application by a maritime claimant, orders an act or omission by the party who opposes the claim, in order to protect the lawful rights and interests of the maritime claimant against any infringement.

Article 52 An interested party applying for a maritime injunction before bringing a law suit shall refer to the maritime court at the place where the maritime dispute occurred.

Article 53 A maritime injunction shall not be restrained by a jurisdiction agreement or an arbitration agreement relating to the maritime claim as agreed upon between the parties.

Article 54 A maritime claimant applying for a maritime injunction shall submit a written application to a maritime court. The application shall clearly set forth causes for application with relevant evidence attached thereto.

Article 55 A maritime court accepting an application for a maritime injunction may order the maritime claimant to provide guarantee. If the maritime claimant fails to provide guarantee, the application shall be rejected.

Article 56 To make a maritime injunction, the following conditions shall be fulfilled:

- (1) The claimant has a specific maritime claim;
- (2) There is a need to rectify an act committed by the party who opposes the claim, in violation of the provisions of the law or the stipulations of a contract; and
- (3) In case of emergency, failure to make a maritime injunction immediately will cause damage or expand damage.

Article 57 After accepting the application, a maritime court shall make an order within 48 hours. If an order is made for making a maritime injunction, it shall be

executed immediately; if the conditions for a maritime injunction are not fulfilled, an order shall be made to reject the application.

Article 58 If a party is not satisfied with the order, he may apply for reconsideration once within five days of the date of receiving the written order. The maritime court shall make a reconsideration decision within five days of receiving the reconsideration application. Execution of the order shall not be suspended during the time of reconsideration.

If an interested party lodges an objection to a maritime injunction, the maritime court shall order to cancel the maritime injunction if it deems the causes are tenable through investigation.

Article 59 If the party who opposes the claim refuses to obey a maritime injunction, the maritime court may impose a fine or detain him in accordance with the seriousness of the circumstances; if a crime has been constituted, criminal liability shall be investigated according to the law.

A fine on an individual shall not be less than 1,000 yuan and not more than 30,000 yuan . A fine on a unit shall not be less than 30,000 yuan and not more than 100,000 yuan.

The period of detention shall not be longer than 15 days.

Article 60 A maritime claimant wrongfully submitting an application for a maritime injunction shall compensate losses incurred by the party who opposes the claim or an interested party.

Article 61 If no litigation or arbitration procedures start for relevant maritime disputes after the execution of the maritime injunction, the parties may bring a law suit for this maritime claim to the maritime court making the maritime injunction or the other maritime court having jurisdiction, except that a jurisdiction agreement or an arbitration agreement has been concluded between the parties.

Chapter V Maritime Evidence Preservation

Article 62 Maritime evidence preservation means any of compulsory measures by which a maritime court obtains, retains or seals up evidence related to the maritime claim on application by the maritime claimant.

Article 63 An interested party applying for maritime evidence preservation before bringing a law suit shall refer to the maritime court at the place where the evidence to be preserved is located.

Article 64 Maritime evidence preservation shall not be restrained by a jurisdiction agreement or an arbitration agreement relating to the maritime claim as agreed upon between the parties.

Article 65 A maritime claimant applying for maritime evidence preservation shall submit a written application to a maritime court. The application shall clearly set forth the evidence to be preserved on application, the relation between the evidence and the maritime claim and causes for application.

Article 66 A maritime court accepting an application for maritime evidence preservation may order the maritime claimant to provide guarantee. If the maritime claimant fails to provide guarantee, the application shall be rejected.

Article 67 To impose maritime evidence preservation, the following conditions shall be fulfilled:

- (1) The claimant is the party to the maritime claim;
- (2) The evidence to be preserved on application provides proof for the maritime claim;
- (3) The party who opposes the claim is the person related to the evidence to be preserved on application; and
- (4) In case of emergency, failure to impose evidence preservation immediately will result in loss or difficulty in obtaining the evidence for the maritime claim.

Article 68 After accepting the application, a maritime court shall make an order within 48 hours. If an order is made for imposing maritime evidence preservation measures, it shall be executed immediately; if the conditions for maritime evidence preservation are not fulfilled, an order shall be made to reject the application.

Article 69 If a party is not satisfied with the order, he may apply for reconsideration once within five days of the date of receiving the written order. The maritime court shall make a reconsideration decision within five days of receiving the reconsideration application. Execution of the order shall not be suspended during the time of reconsideration. If the causes for applying for reconsideration by the party who opposes the claim are tenable, the evidence preserved shall be returned to the party who opposes the claim.

If an interested party lodges an objection to maritime evidence preservation, the maritime court shall order to cancel maritime evidence preservation if it deems the causes are tenable through investigation; if preservation has been imposed, evidence related to the interested party shall be returned to the interested party.

Article 70 A maritime court imposing maritime evidence preservation may seal up the evidence, may obtain reproductions or duplicates, or take photos, conduct tape-recording, make extracts or records of investigation. If really necessary, the original of the evidence shall be obtained.

Article 71 A maritime claimant wrongfully submitting an application for maritime evidence preservation shall compensate losses incurred by the party who opposes the claim or an interested party.

Article 72 If no litigation or arbitration procedures start for relevant maritime disputes after the imposition of maritime evidence preservation, the parties may bring a law suit for the maritime claim to the maritime court imposing maritime evidence preservation or the other maritime court having jurisdiction, except that a jurisdiction agreement or an arbitration agreement has been concluded between the parties

Chapter VI Maritime Guarantee

Article 73 Maritime guarantee includes guarantee involved in procedures provided in this Law such as maritime claim preservation, maritime injunction, maritime evidence preservation.

The guarantee shall be in form of providing cash or surety, establishing mortgage or pledge.

Article 74 A guaranty provided by a maritime claimant shall be delivered to the maritime court; a guaranty provided by the person against whom the application for maritime preservation is made may be delivered to the maritime court, or delivered to the maritime claimant.

Article 75 The modes and quantity of a guaranty provided by a maritime claimant shall be determined by the maritime court. The modes and quantity of a guaranty provided by the person against whom the application for maritime preservation is made shall be determined through consultation between the maritime claimant and the person against whom the application for maritime preservation is made; if failing such consultation, they shall be determined by a maritime court.

Article 76 Where a maritime claimant requests a person against whom the application for maritime preservation is made to provide guaranty on a maritime claim, the quantity of the guaranty shall equal to the quantity of his creditor's rights, but shall not exceed the value of the preserved property.

The quantity of a guaranty provided by a maritime claimant shall equal to the losses possibly caused to a person against whom the application for maritime

preservation is made due to his claim. The specific quantity thereof shall be determined by the maritime court.

Article 77 After a guaranty is provided, the person providing the guaranty may, for any justified reasons, file an application to the maritime court to reduce, modify or cancel the guaranty.

Article 78 Where losses are caused to a person against whom the application for maritime preservation is made due to excessive quantity of the guaranty claimed by a maritime claimant, the maritime claimant shall bear the liability for compensation.

Article 79 The guaranty involved in constituting a limitation fund for maritime claims liability and in advance execution as well as other procedures may be handled by reference to the provisions of this Chapter.

Chapter VII Service

Article 80 In serving a maritime litigation document, the relevant provisions of the Civil Procedure Law of the People's Republic of China are applicable, and the following methods may also be adopted:

- (1) to serve on an agent ad litem commissioned by the person on whom the litigation document is to be served.
- (2) to serve on a representative office or branch office established in the People's Republic of China by the person on whom the service is to be made or on his business agent;
- (3) to serve by employing other appropriate methods by which the receipt can be confirmed.

A legal paper relating to the arrest of a ship may also be served on the captain of the ship involved.

Article 81 If the person who has the obligation of receiving a legal paper refuses to sign and receive the legal paper, the person serving the paper shall record on the receipt the situations. After the person serving the paper and the witness have affixed their signatures or seals to the receipt, the legal paper shall be left at his domicile and the service shall be deemed completed.

Chapter VIII Trial Procedures

Section 1 Provisions on Trying Cases Involving Collision of Ships

Article 82 When a plaintiff brings an action and a defendant files a defence, the Investigation Form of Maritime Accident shall be truthfully completed.

Article 83 When serving a statement of complaint or a defence on any party, the maritime court shall not attach thereto any relevant evidential materials.

Article 84 The parties shall finish the provision of evidence before a court session. After having finished the provision of evidence and issued a note stating the provision of evidence to the maritime court, the parties may apply to consult evidential materials relating to the collision of ships.

Article 85 The parties shall not repudiate their statements in the Investigation Form of Maritime Accident and the evidence they have provided, except that they have new evidence and full reasons which explain that such evidence cannot be provided during the period of providing evidence.

Article 86 The inspection and evaluation of a ship shall be conducted by an institution or individual with authority granted by the State or with professional qualifications. An inspection or evaluation conclusion drawn by an institution or individual without authority granted by the State or without professional qualifications shall not be accepted by the maritime court.

Article 87 A maritime court trying a case involving collision of ships shall conclude the case within one year after placing the case on the docket. Any extension of the period necessitated by special circumstances shall be subject to the approval of the president of the court.

Section 2 Provisions on Trying Cases Involving General Average

Article 88 With respect to a dispute arising from general average, the parties may agree to commission an adjustment institution to have it adjusted, or directly bring an action in the maritime court. When entertaining a dispute arising from general average that has not been adjusted, the maritime court may commission an adjustment institution to have it adjusted.

Article 89 A report of general average adjustment made by an adjustment institution, if the parties do not raise any objections, may be regarded as the basis for contributing liabilities; if the parties raise any objections, the maritime court shall determine to accept them or not.

Article 90 Not being affected by the procedures of an action of general average brought for an identical average accident, the parties may bring an action against the person liable for any non general average losses.

Article 91 An action of non general average brought by the parties for an identical accident in a maritime court entertaining the case involving general average, as

well as an action of recourse brought for general average contribution against the person liable, may be tried in combination by the maritime court.

Article 92 The maritime court trying a case involving general average shall conclude the case within one year after placing the case on the docket. Any extension of the period necessitated by special circumstances shall be subject to the approval of the president of the court.

Section 3 Provision on Exercising the Right to Indemnity by Subrogation by a Maritime Insurer

Article 93 Where the occurrence of an insured event is caused by a third party, after having paid insurance indemnity to the insured, the insurer may exercise by subrogation the right of the insured to demand indemnity against the third party up to the limit of insurance indemnity.

Article 94 When an insurer exercises the right to indemnity by subrogation, if the insured does not bring an action against the third party causing the insured event, the insurer shall, in the name of itself, bring an action against the third party.

Article 95 When an insurer exercises the right to indemnity by subrogation, if the insured has brought an action against the third party causing the insured event, the insurer may request the court entertaining the case to change the party so as to exercise by subrogation the right of the insured to demand indemnity against the third party.

Where the insurance indemnity obtained by the insured can not make up all the losses caused by a third party, the insurer and the insured may, as joint plaintiffs, demand indemnity from the third party.

Article 96 When bring an action or applying to participate in the proceedings in accordance with the provision of Articles 94 and 95 of this Law, an insurer shall submit vouchers certifying the payment of insurance indemnity by the insurer, as well as other documents that ought to be submitted when participating in the proceedings, to the maritime court entertaining the case.

Article 97 With respect to a claim for indemnity against oil pollution damage caused by a ship, the person suffering for the damage may make the claim to the shipowner causing the oil pollution damage, or directly make the claim to the insurer bearing the liability for oil pollution damage of the shipowner or to other person providing financial suretyship.

Where the insurer bearing the liability for oil pollution damage of the shipowner or the other person providing financial suretyship against whom an action is filed,

he is entitled to require the shipowner causing the oil pollution damage to participate in the proceedings.

Section 4 Summary Procedures, Procedures for Hastening Debt Recovery and Procedures for Publicizing Public Notice for Assertion of Claims

Article 98 When trying a simple maritime case in which the facts are evident, the rights and obligations clear and the disputes trivial in character, the maritime court may apply the provisions on summary procedures in the Civil Procedure Law of the People's Republic of China.

Article 99 When requesting payment of a pecuniary debt or recovery of negotiable instruments from a debtor on the basis of any maritime causes, a creditor may, if the relevant provisions of the Civil Procedure Law of the People's Republic of China are conformed to, apply to the maritime court that has jurisdiction for an order of payment.

Where a debtor is a foreign national, stateless person, foreign enterprise or organization, but he has domicile, representative office or branch office within the territory of the People's Republic of China and an order of payment can be served, the creditor may apply to the maritime court that has jurisdiction for an order of payment.

Article 100 A holder of a voucher for taking delivery of goods such as a bill of lading may, if the voucher for taking delivery of goods is out of his control or destroyed, apply to the maritime court of the place where the goods are for publication of public notice for assertion of claims.

Chapter IX Procedures for Constituting a Limitation Fund for Maritime Claims Liability

Article 101 Where limitation of liability is applied according to law after the occurrence of a maritime accident, the shipowner, charter, operator, salvor and insurer may apply to the maritime court to constitute a limitation fund for maritime claims liability.

Where any oil pollution damage is caused by a ship, the shipowner and the insurer of liability or other persons providing financial suretyship shall, for a purpose of obtaining the right to limitation of liability stipulated by law, constitute a limitation fund for maritime claims liability of oil pollution damage with the maritime court.

An application for constituting a limitation fund for liability may be submitted before bring an action or during the proceedings, but it shall be submitted at least before the making of the judgment of first instance.

Article 102 Where an application for constituting a limitation fund for maritime claims liability is to be submitted before bring an action, the parties shall submit it to the maritime court of the place where the accident is occurred, the place where the contract is performed or the place where the ship is arrested.

Article 103 The constitution of a limitation fund for maritime claims liability shall not be restricted by an agreement between the parties on litigation jurisdiction or arbitration.

Article 104 When applying to constitute a limitation fund for maritime claims liability, the applicant shall submit a written application. The application shall specify the quantity of and the reasons for the limitation fund for maritime claims liability, as well as the names, addresses and corresponding methods of the known interested parties, and shall have relevant evidence attached.

Article 105 After entertaining an application for constituting a limitation fund for maritime claims liability, the maritime court shall, within seven days, issue a notice to the known interested parties, and publish a public announcement in newspapers or through other news media.

The notice and public announcement shall include the following contents:

- (1) name of the applicant;
- (2) facts of and reasons for the application;
- (3) matters for which the limitation fund for maritime claims liability is to be constituted;
- (4) matters concerning the undertaking of registration of the creditors' rights;
- (5) other matter that need to be made known.

Article 106 Where an interested party objects the application of an applicant for constituting a limitation fund for maritime claims liability, the party shall, within seven days from the date of the receipt of the notice or within thirty days from the date of the public announcement for those who have not received the notice, raise the objection in written form to the maritime court.

After receiving a written objection submitted by the interested party, the maritime court shall examine it and make an order within fifteen days. Where the objection is established, it shall order the application of the applicant to be rejected; if the

objection is not established, it shall order to approve the applicant to constitute a limitation fund for maritime claims liability.

Where the parties are not satisfied with an order, they may file an appeal within seven days from the date of the receipt of the order. The people's court of second instance shall make an order within fifteen days from the date of the receipt of appeal petition.

Article 107 Where the interested parties do not raise any objections within the prescribed time period, the maritime court shall order to approve the applicant to constitute a limitation fund for maritime claims liability.

Article 108 After an order approving an applicant to constitute a limitation fund for maritime claims liability takes effect, the applicant shall constitute a limitation fund for maritime claims liability with the maritime court.

In constituting a limitation fund for maritime claims liability, the applicant may provide cash, or provide guaranty approved by the maritime court.

The quantity of a limitation fund for maritime claims shall be the sum of such an amount of the limitation of liability for maritime claims, together with the interests therefrom from the date of the occurrence of the accident until the date of the constitution of the fund. Where the fund is constituted in a form of guaranty, the quantity of the guaranty shall be the quantity of the fund together with the interests therefrom during the existence of the fund.

Where the fund is constituted in a form of cash, the date on which the fund reaches the account designated by the maritime court shall be the date of the constitution of the fund. Where the fund is constituted in a form of guaranty, the date on which the guaranty is accepted by the maritime court shall be the date of the constitution of the fund.

Article 109 After the constitution of a limitation fund for maritime claims, for any maritime disputes, the parties shall bring an action in the maritime court constituting a limitation fund for maritime claims, except that the parties reach an agreement on litigation jurisdiction or arbitration.

Article 110 Where the application for constituting a limitation fund for maritime claims is wrong, the applicant shall indemnify the losses therefrom suffered by the interested parties.

Chapter X Procedures for Registering Creditors' Rights and Repayment of Debt

Article 111 After the publishing of a public announcement of the maritime court concerning the order relating to the compulsory auction of a ship, the creditors

shall apply to register the creditors' rights relating to the ship that is to be auctioned within the period of the public announcement. Where no registration is conducted by the expiration of the period of the public announcement, the right to the repayment of debt from the proceeds of the auction of the ship shall be deemed as having been waived.

Article 112 After the publishing of a public announcement concerning the entertaining of an application by the maritime court for constituting a limitation fund for maritime claims, the creditors shall, within the period of the public announcement, apply to register the creditors' rights relating to the maritime accident occurred in specific circumstances. Where no registration is conducted by the expiration of the period of the public announcement, the creditors' right shall be deemed as having been waived.

Article 113 When applying to register the creditors' rights with a maritime court, the creditors shall submit written applications, and shall provide evidence of creditors' rights.

Evidence of creditors' rights include written judgment, order in writing, conciliation statement, arbitration award and document evidencing creditors' rights, as well as other evidential materials certifying the existence of maritime claims.

Article 114 The maritime court shall examine the application of a creditor; where evidence of creditors' rights is provided, it shall order to approve the registration; where no evidence of creditors' rights is provided, it shall order to reject the application.

Article 115 With respect to the written judgment, order in writing, conciliation statement, arbitration award and document evidencing creditors' rights provided by the creditors to certify the creditors' rights, the maritime court shall, if ascertaining that the above-mentioned documents are true and lawful upon examination, make an order to have them affirmed.

Article 116 Where any other evidence for maritime claims is provided, the creditors shall, after registering the creditors' rights, bring an action for affirming rights in the maritime court entertaining the registration of creditors' rights. Where the parties conclude an arbitration agreement, that shall promptly apply for arbitration.

The judgment and order made by the maritime court on an action for affirming rights shall be legally effective, the parties shall not file an appeal.

Article 117 After trying and affirming the rights, the maritime court shall issue a notice of the creditors' meeting to the creditors, and organize to convene the creditors' meeting.

Article 118 The creditors' meeting may propose through consultation the proceeds of the ship or a plan for the distribution of the limitation fund for maritime claims, and conclude an agreement on the repayment of debt.

The agreement on the repayment of debt shall be legally effective upon the approval by an order of the maritime court.

Where the creditors' meeting fails to conclude an agreement, the maritime court shall, in accordance with the order of the repayment of debt as stipulated in the Maritime Code of the People's Republic of China and other relevant laws, make a written order to determine the proceeds of the ship or the plan for the distribution of the limitation fund for maritime claims.

Article 119 The proceeds of the auction of a ship and the interests therefrom, or the limitation fund for maritime claims and the interests therefrom, shall be distributed simultaneously.

When distributing the proceeds of a ship, the litigation costs ought to be borne by the persons liable, the expenses for preserving and auctioning the ship and distributing the proceeds of ship, and other expenses incurred for the common interests of the creditors, shall be deducted and paid first from the proceeds of the ship.

The remnant after repaying the debt shall be returned to the original shipowner or the person constituting the limitation fund for maritime claims.

Chapter XI Procedures for Publicizing Notice for Assertion of Maritime Liens

Article 120 When a ship is transferred, the transferee may apply to the maritime court for publicizing notice for assertion of maritime liens, so as to urge the persons enjoying maritime liens to promptly claim their rights and to extinguish the maritime liens attached to the ship.

Article 121 Where applying for publicizing notice for assertion of maritime liens, the transferee shall submit its application to the maritime court of the place where the transferred ship is delivered or the place where the transferee has its domicile.

Article 122 When applying for publicizing notice for assertion of maritime liens, an application, the ship transfer contract, the technical information of the ship and other documents shall be submitted to the maritime court. The application shall

specify the name of the ship, the facts of and reasons for applying for publicizing notice for assertion of maritime liens.

Article 123 After receiving the application and relevant documents, the maritime court shall examine them and make an order approving or disapproving the application within seven days.

Where the transferee is not satisfied with the order, it may apply for reconsideration which could be granted only once.

Article 124 After the order approving the application takes effect, the maritime court shall publish a public announcement in newspapers or through other news media, so as to urge the persons enjoying maritime liens to promptly claim their rights within the period of publication of the notice.

The period of publication of a notice for maritime liens shall be sixty days.

Article 125 Where a person enjoying maritime liens claims his rights within the period of publication of a notice for maritime liens, he shall undergo registration procedures with the maritime court; where no rights are claimed, the maritime liens shall be deemed as having been waived.

Article 126 Where no one claims the maritime liens by the expiration of the period of publication of a notice for maritime liens, the maritime court shall, in accordance with the application of the parties, make a judgment to declare that no maritime liens are attached to the transferred ship. The contents of the judgment shall be publicly announced.

Chapter XII Supplementary Provisions

Article 127 This Law takes effect as of July 1, 2000.

Appendix 3: The Arrest Convention of 1952 (its full name is “the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, Brussels, May 10, 1952)

The High Contracting Parties, having recognized the desirability of determining by agreement certain uniform rules of law relating to the arrest of sea-going ships, have decided to conclude a convention for this purpose and thereto have agreed as follows:

ARTICLE 1

In this Convention the following words shall have the meanings hereby assigned to them:

- (1) "Maritime Claim" means a claim arising out of one or more of the following:
 - (a) damage caused by any ship either in collision or otherwise;
 - (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;
 - (c) salvage;
 - (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
 - (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
 - (f) loss of or damage to goods including baggage carried in any ship;
 - (g) general average;
 - (h) bottomry;
 - (i) towage;
 - (J) pilotage;
 - (k) goods or materials wherever supplied to a ship for her operation or maintenance;
 - (l) construction, repair or equipment of any ship or dock charges and dues;
 - (m) wages of Masters, Officers, or crew;
 - (n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
 - (o) disputes as to the title to or ownership of any ship;

- (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- (q) the mortgage or hypothecation of any ship.

(2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

(3) "Person" includes individuals, partnerships and bodies corporate, Governments, their Departments, and Public Authorities.

(4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

ARTICLE 2

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or harbour authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

ARTICLE 3

(1) Subject to the provisions of para. (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same

claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

ARTICLE 4

A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the contracting State in which the arrest is made.

ARTICLE 5

The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, (o) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest. In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof. The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitations of liability of the owner of the ship.

ARTICLE 6

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

ARTICLE 7

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely:

- (a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;
- (b) if the claim arose in the country in which the arrest was made;
- (c) if the claim concerns the voyage of the ship during which the arrest was made;
- (d) if the claim arose out of a collision or in circumstances covered by article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910;
- (e) if the claim is for salvage;
- (f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceeding is not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17 October 1868.

ARTICLE 8

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this convention any government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or other-wise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

ARTICLE 9

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.

ARTICLE 10

The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve:

(a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o) and (p) of article 1, but to apply their domestic laws to such claims;

(b) the right not to apply the first paragraph of article 3 to the arrest of a ship within their jurisdiction for claims set out in article 1 paragraph (q).

ARTICLE 11

The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

ARTICLE 12

This Convention shall be open for signature by the States represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.

ARTICLE 13

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

ARTICLE 14

(a) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

ARTICLE 15

Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14(a).

ARTICLE 16

Any High Contracting Party may three years after coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

ARTICLE 17

Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

ARTICLE 18

(a) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

(b) A High Contracting Party which has made a declaration under paragraph (a) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

DONE in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

Appendix 4: The Arrest Convention of 1999 (its full name is “the International Convention on Arrest of Ships, 1999”)

THE STATES PARTIES TO THIS CONVENTION,
RECOGNIZING the desirability of facilitating the harmonious and orderly development of world seaborne trade,
CONVINCED of the necessity for a legal instrument establishing international uniformity in the field of arrest of ships which takes account of recent developments in related fields,
HAVE AGREED as follows:

Article 1

Definitions

For the purposes of this Convention:

1. "Maritime Claim" means a claim arising out of one or more of the following:
 - (a) loss or damage caused by the operation of the ship;
 - (b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
 - (c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
 - (d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);
 - (e) costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
 - (f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
 - (g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

- (h) loss of or damage to or in connection with goods (including luggage) carried on board the ship;
 - (i) general average;
 - (j) towage;
 - (k) pilotage;
 - (l) goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
 - (m) construction, reconstruction, repair, converting or equipping of the ship;
 - (n) port, canal, dock, harbour and other waterway dues and charges;
 - (o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
 - (p) disbursements incurred on behalf of the ship or its owners;
 - (q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
 - (r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
 - (s) any dispute as to ownership or possession of the ship;
 - (t) any dispute between co-owners of the ship as to the employment or earnings of the ship;
 - (u) a mortgage or a hypothèque or a charge of the same nature on the ship;
 - (v) any dispute arising out of a contract for the sale of the ship.
2. "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument.
 3. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
 4. "Claimant" means any person asserting a maritime claim.
 5. "Court" means any competent judicial authority of a State.

Article 2

Powers of arrest

1. A ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected.

2. A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

3. A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

4. Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

Article 3

Exercise of right of arrest

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or

(b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or

(c) the claim is based upon a mortgage or a hypothèque or a charge of the same nature on the ship; or

(d) the claim relates to the ownership or possession of the ship; or

(e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.

2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose; or

(b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a

judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4

Release from arrest

1. A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in Article 1, paragraphs 1(s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

2. In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.

3. Any request for the ship to be released upon security being provided shall not be construed as an acknowledgment of liability nor as a waiver of any defence or any right to limit liability.

4. If a ship has been arrested in a non-party State and is not released although security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the Court in the State Party.

5. If in a non-party State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:

- (a) the claim for which the ship has been arrested, or
- (b) the value of the ship,

whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.

6. Where, pursuant to paragraph 1 of this Article, security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified, or cancelled.

Article 5

Right of rearrest and multiple arrest

1. Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

(a) the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or

(b) the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or

(c) the ship arrested or the security previously provided was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release.

2. Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already provided in respect of the same claim is inadequate; or

(b) the provisions of paragraph 1(b) or (c) of this Article are applicable.

3. "Release" for the purpose of this Article shall not include any unlawful release or escape from arrest.

Article 6

Protection of owners and demise charterers of arrested ships

1. The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful or unjustified; or

(b) excessive security having been demanded and provided.

2. The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

- (a) the arrest having been wrongful or unjustified, or
 - (b) excessive security having been demanded and provided.
3. The liability, if any, of the claimant in accordance with paragraph 2 of this Article shall be determined by application of the law of the State where the arrest was effected.
4. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of Article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this Article may be stayed pending that decision.
5. Where pursuant to paragraph 1 of this Article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 7

Jurisdiction on the merits of the case

1. The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.
2. Notwithstanding the provisions of paragraph 1 of this Article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.
3. In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:
- (a) does not have jurisdiction to determine the case upon its merits; or
 - (b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this Article,
- such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.
4. If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this Article then the ship arrested or the security provided shall, upon request, be ordered to be released.
5. If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this Article, or if proceedings before a competent Court or arbitral

tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security provided in order to obtain its release, on condition that:

(a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and

(b) such recognition is not against public policy (*ordre public*).

6. Nothing contained in the provisions of paragraph 5 of this Article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.

Article 8

Application

1. This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.

2. This Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

3. This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

4. This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

5. Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.

6. Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9

Non-creation of maritime liens

Nothing in this Convention shall be construed as creating a maritime lien.

Article 10

Reservations

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following:

- (a) ships which are not seagoing;
- (b) ships not flying the flag of a State Party;
- (c) claims under Article 1, paragraph 1(s).

2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of court decisions provided for in such treaties shall prevail over the rules contained in Article 7 of this Convention.

Article 11

Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

Article 12

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the Headquarters of the United Nations, New York, from 1 September 1999 to 31 August 2000 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
- (c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

Article 13

States with more than one system of law

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this

Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has two or more systems of law with regard to arrest of ships applicable in different territorial units, references in this Convention to the Court of a State and the law of a State shall be respectively construed as referring to the Court of the relevant territorial unit within that State and the law of the relevant territorial unit of that State.

Article 14

Entry into force

1. This Convention shall enter into force six months following the date on which 10 States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect three months after the date of expression of such consent.

Article 15

Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article 16

Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by deposit of an instrument of denunciation with the depositary.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the depositary.

Article 17

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE at Geneva this twelfth day of March, one thousand nine hundred and ninety-nine.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

Appendix 5: The Convention on Maritime Liens and Mortgages

(Geneva, 6 May 1993)

THE STATES PARTIES TO THIS CONVENTION,
CONSCIOUS of the need to improve conditions for ship financing and the development of national merchant fleets,
RECOGNIZING the desirability of international uniformity in the field of maritime liens and mortgages, and therefore
CONVINCED of the necessity for an international legal instrument governing maritime liens and mortgages,
HAVE DECIDED to conclude a Convention for this purpose and have therefore agreed as follows:

Article 1

Recognition and enforcement of mortgages, "hypothèques" and charges

Mortgages, "hypothèques" and registrable charges of the same nature, which registrable charges of the same nature will be referred to hereinafter as "charges", effected on seagoing vessels shall be recognized and enforceable in States Parties provided that:

- (a) Such mortgages, "hypothèques" and charges have been effected and registered in accordance with the law of the State in which the vessel is registered;
- (b) The register and any instruments required to be deposited with the registrar in accordance with the law of the State in which the vessel is registered are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar; and
- (c) Either the register or any instruments referred to in subparagraph (b) specifies at least the name and address of the person in whose favour the mortgage, "hypothèque" or charge has been effected or that it has been issued to bearer, the maximum amount secured, if that is a requirement of the law of the State of registration or if that amount is specified in the instrument creating the mortgage, "hypothèque" or charge, and the date and other particulars which, according to the law of the State of registration, determine the ranking in relation to other registered mortgages, "hypothèques" and charges.

Article 2

Ranking and effects of mortgages, "hypothèques" and charges

The ranking of registered mortgages, "hypothèques" or charges as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.

Article 3

Change of ownership or registration

1. With the exception of the cases provided for in articles 11 and 12, in all other cases that entail the deregistration of the vessel from the register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all registered mortgages, "hypothèques" or charges are previously deleted or the written consent of all holders of such mortgages, "hypothèques" or charges is obtained. However, where the deregistration of the vessel is obligatory in accordance with the law of a State Party, otherwise than as a result of a voluntary sale, the holders of registered mortgages, "hypothèques" or charges shall be notified of the pending deregistration in order to enable such holders to take appropriate action to protect their interests; unless the holders consent, the deregistration shall not be implemented earlier than after a lapse of a reasonable period of time which shall be not less than three months after the relevant notification to such holders.

2. Without prejudice to article 12, paragraph 5, a vessel which is or has been registered in a State Party shall not be eligible for registration in another State Party unless either:

(a) A certificate has been issued by the former State to the effect that the vessel has been deregistered; or

(b) A certificate has been issued by the former State to the effect that the vessel will be deregistered with immediate effect, at such time as the new registration is effected. The date of deregistration shall be the date of the new registration of the vessel.

Article 4

Maritime liens

1. Each of the following claims against the owner, demise charterer, manager or operator of the vessel shall be secured by a maritime lien on the vessel:

- (a) Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- (b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
- (c) Claims for reward for the salvage of the vessel;
- (d) Claims for port, canal, and other waterway dues and pilotage dues;
- (e) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

2. No maritime lien shall attach to a vessel to secure claims as set out in subparagraphs (b) and (e) of paragraph 1 which arise out of or result from:

- (a) Damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or
- (b) The radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Article 5

Priority of maritime liens

1. The maritime liens set out in article 4 shall take priority over registered mortgages, "hypothèques" and charges, and no other claim shall take priority over such maritime liens or over such mortgages, "hypothèques" or charges which comply with the requirements of article 1, except as provided in paragraphs 3 and 4 of article 12.

2. The maritime liens set out in article 4 shall rank in the order listed, provided however that maritime liens securing claims for reward for the salvage of the vessel shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed.

3. The maritime liens set out in each of subparagraphs (a), (b), (d) and (e) of paragraph 1 of article 4 shall rank *pari passu* as between themselves.

4. The maritime liens securing claims for reward for the salvage of the vessel shall rank in the inverse order of the time when the claims secured thereby accrued. Such claims shall be deemed to have accrued on the date on which each salvage operation was terminated.

Article 6

Other maritime liens

Each State Party may, under its law, grant other maritime liens on a vessel to secure claims, other than those referred to in article 4, against the owner, demise charterer, manager or operator of the vessel, provided that such liens:

(a) Shall be subject to the provisions of articles 8, 10 and 12;

(b) Shall be extinguished

(i) after a period of 6 months, from the time when the claims secured thereby arose unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale; or

(ii) at the end of a period of 60 days following a sale to a bona fide purchaser of the vessel, such period to commence on the date on which the sale is registered in accordance with the law of the State in which the vessel is registered following the sale;

whichever period expires first; and

(c) Shall rank after the maritime liens set out in article 4 and also after registered mortgages, "hypothèques" or charges which comply with the provisions of article 1.

Article 7

Rights of retention

1. Each State Party may grant under its law a right of retention in respect of a vessel in the possession of either:

(a) A shipbuilder, to secure claims for the building of the vessel; or

(b) A shiprepairer, to secure claims for repair, including reconstruction of the vessel, effected during such possession.

2. Such right of retention shall be extinguished when the vessel ceases to be in the possession of the shipbuilder or shiprepairer, otherwise than in consequence of an arrest or seizure.

Article 8

Characteristics of maritime liens

Subject to the provisions of article 12, the maritime liens follow the vessel, notwithstanding any change of ownership or of registration or of flag.

Article 9

Extinction of maritime liens by lapse of time

1. The maritime liens set out in article 4 shall be extinguished after a period of one year unless, prior to the expiry of such period, the vessel has been arrested or seized, such arrest or seizure leading to a forced sale.

2. The one-year period referred to in paragraph 1 shall commence:

(a) With respect to the maritime lien set out in article 4, paragraph 1(a), upon the claimant's discharge from the vessel;

(b) With respect to the maritime liens set out in article 4, paragraph 1(b) to (e), when the claims secured thereby arise;

and shall not be subject to suspension or interruption, provided, however, that time shall not run during the period that the arrest or seizure of the vessel is not permitted by law.

Article 10

Assignment and subrogation

1. The assignment of or subrogation to a claim secured by a maritime lien entails the simultaneous assignment of or subrogation to such a maritime lien.

2. Claimants holding maritime liens may not be subrogated to the compensation payable to the owner of the vessel under an insurance contract.

Article 11

Notice of forced sale

1. Prior to the forced sale of a vessel in a State Party, the competent authority in such State Party shall ensure that notice in accordance with this article is provided to:

(a) The authority in charge of the register in the State of registration;

(b) All holders of registered mortgages, "hypothèques" or charges which have not been issued to bearer;

(c) All holders of registered mortgages, "hypothèques" or charges issued to bearer and all holders of the maritime liens set out in article 4, provided that the competent authority conducting the forced sale receives notice of their respective claims; and

(d) The registered owner of the vessel.

2. Such notice shall be provided at least 30 days prior to the forced sale and shall contain either:

(a) The time and place of the forced sale and such particulars concerning the forced sale or the proceedings leading to the forced sale as the authority in a State Party conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice; or,

(b) If the time and place of the forced sale cannot be determined with certainty, the approximate time and anticipated place of the forced sale and such particulars concerning the forced sale as the authority in a State Party conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.

If notice is provided in accordance with subparagraph (b), additional notice of the actual time and place of the forced sale shall be provided when known but, in any event, not less than seven days prior to the forced sale.

3. The notice specified in paragraph 2 of this article shall be in writing and either given by registered mail, or given by any electronic or other appropriate means which provide confirmation of receipt, to the persons interested as specified in paragraph 1, if known. In addition, the notice shall be given by press announcement in the State where the forced sale is conducted and, if deemed appropriate by the authority conducting the forced sale, in other publications.

Article 12

Effects of forced sale

1. In the event of the forced sale of the vessel in a State Party, all registered mortgages, "hypothèques" or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel, provided that:

(a) At the time of the sale, the vessel is in the area of the jurisdiction of such State; and

(b) The sale has been effected in accordance with the law of the said State and the provisions of article 11 and this article.

2. The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel shall be paid first out of the proceeds of sale. Such costs and expenses include, inter alia, the costs for the upkeep of the vessel and the crew as well as wages, other sums and costs referred to in article 4, paragraph 1(a), incurred from the time of arrest or seizure. The balance of the proceeds shall be

distributed in accordance with the provisions of this Convention, to the extent necessary to satisfy the respective claims. Upon satisfaction of all claimants, the residue of the proceeds, if any, shall be paid to the owner and it shall be freely transferable.

3. A State Party may provide in its law that, in the event of the forced sale of a stranded or sunken vessel following its removal by a public authority in the interest of safe navigation or the protection of the marine environment, the costs of such removal shall be paid out of the proceeds of the sale, before all other claims secured by a maritime lien on the vessel.

4. If at the time of the forced sale the vessel is in the possession of a shipbuilder or of a shiprepairer who under the law of the State Party in which the sale takes place enjoys a right of retention, such shipbuilder or shiprepairer must surrender possession of the vessel to the purchaser but is entitled to obtain satisfaction of his claim out of the proceeds of sale after the satisfaction of the claims of holders of maritime liens mentioned in article 4.

5. When a vessel registered in a State Party has been the object of a forced sale in any State Party, the competent authority shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all registered mortgages, "hypothèques" or charges, except those assumed by the purchaser, and of all liens and other encumbrances, provided that the requirements set out in paragraph 1 (a) and (b) have been complied with. Upon production of such certificate, the registrar shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of new registration, as the case may be.

6. States Parties shall ensure that any proceeds of a forced sale are actually available and freely transferable.

Article 13

Scope of application

1. Unless otherwise provided in this Convention, its provisions shall apply to all seagoing vessels registered in a State Party or in a State which is not a State Party, provided that the latter's vessels are subject to the jurisdiction of the State Party.

2. Nothing in this Convention shall create any rights in, or enable any rights to be enforced against, any vessel owned or operated by a State and used only on Government non-commercial service

Article 14

Communication between States Parties

For the purpose of articles 3, 11 and 12, the competent authorities of the States Parties shall be authorized to correspond directly between themselves.

Article 15

Conflict of conventions

Nothing in this Convention shall affect the application of any international convention providing for limitation of liability or of national legislation giving effect thereto.

Article 16

Temporary change of flag

If a seagoing vessel registered in one State is permitted to fly temporarily the flag of another State, the following shall apply:

- (a) For the purposes of this article, references in this Convention to the "State in which the vessel is registered" or to the "State of registration" shall be deemed to be references to the State in which the vessel was registered immediately prior to the change of flag, and references to "the authority in charge of the register" shall be deemed to be references to the authority in charge of the register in that State.
- (b) The law of the State of registration shall be determinative for the purpose of recognition of registered mortgages, "hypothèques" and charges.
- (c) The State of registration shall require a cross-reference entry in its register specifying the State whose flag the vessel is permitted to fly temporarily; likewise, the State whose flag the vessel is permitted to fly temporarily shall require that the authority in charge of the vessel's record specifies by a cross-reference in the record the State of registration.
- (d) No State Party shall permit a vessel registered in that State to fly temporarily the flag of another State unless all registered mortgages, "hypothèques" or charges on that vessel have been previously satisfied or the written consent of the holders of all such mortgages, "hypothèques" or charges has been obtained.
- (e) The notice referred to in article 11 shall be given also to the competent authority in charge of the vessel's record in the State whose flag the vessel is permitted to fly temporarily.
- (f) Upon production of the certificate of deregistration referred to in article 12, paragraph 5, the competent authority in charge of the vessel's record in the State whose flag the vessel is permitted to fly temporarily shall, at the request of the

purchaser, issue a certificate to the effect that the right to fly the flag of that State is revoked

(g) Nothing in this Convention is to be understood to impose any obligation on States Parties to permit foreign vessels to fly temporarily their flag or national vessels to fly temporarily a foreign flag.

Article 17

Depositary

This Convention shall be deposited with the Secretary-General of the United Nations.

Article 18

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at the Headquarters of the United Nations, New York, from 1 September 1993 to 31 August 1994 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

- (a) Signature without reservation as to ratification, acceptance or approval; or
- (b) Signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
- (c) Accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the depositary.

Article 19

Entry into force

1. This Convention shall enter into force 6 months following the date on which 10 States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect 3 months after the date of expression of such consent.

Article 20

Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by the Secretary-General of the United Nations at the request of one third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article 21

Denunciation

1. This Convention may be denounced by any State Party at any time after the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by the deposit of an instrument of denunciation with the depositary.

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by the depositary.

Article 22

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT Geneva this sixth day of May, one thousand nine hundred and ninety-three.

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.

Postscript

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