

SHIP ARREST IN CHINA (QUESTIONS 1 TO 9)

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(QUESTIONS 10 TO 26)

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1. Please give an overview of ship arrest practice in your country.

China is one of the major maritime jurisdictions in the world. It is certainly not a ship arrest haven, but it is a convenient place to arrest a ship at reasonable costs and relatively rapid speed.

A ship can be arrested either for the enforcement of a judgment or arbitral award, or far more frequently, for obtaining security for a maritime claim. The application can be made either before an action on merits has been commenced or thereafter. A Chinese maritime court has jurisdiction to arrest a ship which is located within its jurisdiction even if the parties have agreed to refer the substantive claim to a foreign court or arbitral tribunal.

The law governing the arrest of ships is mainly the Maritime Procedure Law, 2000 (“MPL”). According to the MPL, to obtain an arrest order, the claimant shall file with the relevant maritime court a written application together with supporting documents and a prima facie maritime claim has to be made out. More importantly, counter security will usually be required. It can be in the form of cash deposit or guarantees issued by local banks or insurance companies. The amount of the counter security is at the discretion of the court and may vary from court to court: it can be 30 days hire of the ship to be arrested or a certain percentage of the claim amount, up to the full amount, or under very rare circumstances, the market value of the arrest to be arrested.

The courts will immediately release the ship when security is posted by the respondent which can likewise be in the form of cash deposit or guarantees issued by local banks or insurance companies or in other forms acceptable to the claimant.

2. Which International Convention applies to arrest of ships in your country?

China is not a party to the 1952 or 1999 Arrest Convention. However, Chinese law on the ship arrests is generally in line with the provisions of the 1999 Arrest Convention.

3. Is there any other way to arrest a ship in your jurisdiction?

A ship may also be arrested for a non-maritime claim. Nevertheless, such an arrest will be granted only during enforcement proceeding after the claimant has obtained a final and enforceable judgment or arbitral award. Furthermore, although the application for arrest may be filed with an ordinary court, the arrest shall normally be executed through a maritime court (or its superior court in appropriate cases).

4. Are there alternatives e.g. saisie conservatoire or freezing order?

Arrest of a ship is a special type of property preservation measures. Other measures include the attachment of other properties (tangible or intangible) and the freezing of bank accounts etc. These measures can be applied for alternatively or in addition to the arrest of a ship if the value of the ship to be arrested is insufficient to secure the claim.

5. For which types of claims can you arrest a ship?

The MPL lists 22 types of maritime claims which are qualified for arrest of a ship. These 22 types of claims correspond almost identically to the 22 categories of maritime claims defined in Article 1.1 of the 1999 Arrest Convention as to which arrest of ship is permissible. This list has probably included almost all kinds of maritime claims that may be encountered in real life.

6. Can you arrest a ship irrespective of her flag?

Yes. What flag a ship flies does not matter and a ship can be arrested as long as the relevant conditions for arrest are met.

7. Can you arrest a ship irrespective of the debtor?

Basically, a ship can only be arrested if her owner is the debtor of a maritime claim. There are essentially two exceptions:

The first is related to the arrest of a ship under a bareboat charter — such a ship can be arrested if the bareboat charterer of the ship is liable for the maritime claim and is the bareboat charterer of the ship when the arrest is effected.

The second exception is related to maritime liens. In respect of claims which enjoy maritime liens, e.g. claims for crew wages, port charges, salvage, loss of life or personal injury or other claims in tort (e.g. loss of or damage to property arising from a ship collision), the ship which gave rise to the maritime liens can be arrested even if she has changed hands at the time of the arrest.

8. What is the position as regards sister ships and ships in associated ownership?

Sister ships can be arrested. A “sister ship” means any ship (other than the particular ship giving rise to the maritime claim) which is owned by the ship-owner, bareboat charterer, time charterer or voyage charterer who is liable for the maritime claim. However, the arrest of sister ships is not available to claims with respect to ownership or possession of a ship.

The arrest of associated ships is not allowed, unless in the very extraordinary cases where the court is prepared to pierce the corporate veil and to find that the relevant companies have lost their separate corporate personalities (i.e. they are in effect one entity).

9. What is the position as regards Bareboat and Time-Chartered vessels?

As to ships under bareboat charters, please see the comments under Question 7. Time chartered ships are normally not subject to arrest.

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Mr. Lee is an arbitrator of both China Maritime Arbitration Commission (CMAC) and Chinese International Economic and Trade Commission Committee (CITEAC).

10. Do your Courts require counter-security in order to arrest a ship?

In general, YES. According to Article 4 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law to the Arrest and Auction of Vessels* effective as of 1st March 2015 (hereinafter referred to as the *Supreme Court Judicial Note on the Arrest and Auction of Vessels*), where a maritime claimant applies for arrest of a vessel, the relevant maritime court shall order the maritime claimant to provide guarantee. However, where a maritime claimant applies for arrest of a ship in relation to disputes over crew labor, employment, and service contracts or disputes over compensation for personal injuries suffered at sea or in waters connecting the sea, and the facts are clear and the relationship of rights and obligations are definite, the court may NOT request the maritime claimant to provide guarantee /counter-security.

According to the *Supreme Court Judicial Note on the Arrest and Auction of Vessels*, the specific amount of guarantee/counter-security to be provided by a maritime claimant shall be equal to the various maintenance costs and expenses that may arise during the arrest of the vessel in question, the losses of sailing schedule due to the arrest, and the expenses incurred by the respondent concerned for the guarantee provided in order to release the vessel.

Since 2015, many insurance companies in mainland China launched a new type of insurance cover named "Property Preservation Liability Insurance". Under this type of cover, the insurer has to issue a Letter of Guarantee as counter-security for the insured (claimant) in order to apply for preservation of property during proceedings or prior to proceedings, including but not limited to applying for ship arrest, attachment of bank account, etc.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

Yes. Maritime liens shall NOT be extinguished by virtue of the transfer of the ownership of the ship, except for those liens that have NOT been enforced within 60 days from the date of a public notice on the transfer of ownership of the ship made by a court at the request of the transferee when the transfer was effected. For a maritime lien, arrest can only be enforced by arresting the particular ship that gave rise to the maritime lien. For a maritime claim, as far as the owner or bareboat charterer of a ship is the liable party, the ship can be arrested, but at the time of arrest, the ship must be owned by the owner or be under a bareboat charter.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes. Under Article 22 of *China Maritime Code*, the following five types of maritime claims give rise to a maritime lien:

- (1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew and other members on board;
- (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, harbor dues and other port charges;
- (4) Payment claims for salvage remuneration;
- (5) Compensation claims for loss of or damage to property resulting from tortious act in the course of operation of a ship.

China is not a party to any conventions on maritime liens.

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

The time /days required to prepare an arrest application varies on a case-by-case basis.

The key elements are the Counter-Security, the original notarized and legalized POA/COI, and Certificate of Incorporation (or Good Standing) from a foreign party. It is a good practice to consider and prepare these documents well in advance to avoid delays.

The lawyer acting for foreign applicant (arresting party) should submit an original POA, certificate of incorporation and a certificate of identification of legal representative of the applicant (COI). Both

documents have to be notarized by a notary public in the country where the applicant is registered, and legalized by the Chinese embassy or consulate in that country. The Apostille Convention is applicable in the special administrative regions of Hong Kong and Macau, but not in mainland China. While lawyers can prepare the arrest documents quickly, it takes time for a court to examine the arrest application and supporting documentation, to decide on the format and amount of counter-security of the arresting party, and to prepare the arrest order. According to Article 17 of the *Special Maritime Procedure Law*, once a maritime court has accepted an application for ship arrest, it shall make an order within 48 hours. Where the order involves ship arrest as preservation measure for securing the maritime claim, it shall be executed forthwith. In practice, an arrest may be ordered and executed within 48 hours in case of urgency, even during non-working hours.

14. Do you need to provide a POA, or any other documents of the claim to the Court?

Yes, POA needs to be provided. In addition, Certificate of Identification of Legal Representative, and Certificate of Incorporation or Certificate of Good-standing of the applicant are also requested in practice in order to prove that the applicant remains active. In addition, the following documents should be submitted to the maritime court:

- (1) A written Ship Arrest Application signed and stamped by the applicant or its agent *ad litem*;
- (2) Preliminary and basic evidence in support of the maritime claim;
- (3) Original Counter-Security acceptable to the court.

15. What original documents are required, what documents can be filed electronically, what documents require notarization and/or apostille, and when are they needed?

In general, Application for Ship Arrest, notarized and legalized POA and Certificate of Identification of Legal Representative, and sometimes Certificate of Good Standing should be submitted in original at the time when the arrest application is submitted to court. But for urgent matters, the maritime court may consider accepting a faxed copy of the arrest application and a faxed or scanned copy of the signed/stamped POA/COI, provided that the original, notarized, and legalized POA, Certificate of Identification of Legal Representative, Certificate of Incorporation or Good Standing will be submitted to the court by authorized PRC lawyers/agent *ad litem*, within the timeframe specified by the court, usually within one-month from issuance date of the ship arrest order. An original Counter-Security must be presented by the applicant.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Yes. According to Article 19 of the *Special Maritime Procedure Law 1999*, after execution of ship arrest, any party may bring action over the substantive claims to the maritime court that effected the ship arrest, unless a jurisdiction agreement or arbitration agreement has been reached between the parties. According to the *Supreme Court Judicial Note on the Arrest and Auction of Vessels*, when a party brings a lawsuit to another competent court, the maritime court that arrested the vessel may continue to enforce the preservation measure/ship arrest.

“Forum Non Convenience” Doctrine

PRC maritime court could seize jurisdiction by pre-proceeding arrest of vessel, however, if all the conditions for applying the “forum-non-convenience” doctrine are met, and if the defendant have raised objection on jurisdiction, the maritime court can order to dismiss the case filed by plaintiff, notifying plaintiff to file the case in more convenient foreign court. These conditions are provided by **Art. 532 of the PRC Supreme Court Juridical Opinions on Application of Civil Procedure Law**, as follows:

- a) *The defendant requested the case should be tried by more convenient foreign court or have raised Objection on Jurisdiction;*
- b) *There is no jurisdiction agreement between the parties;*
- c) *This case is not subject to the exclusive jurisdiction of PR China court;*
- d) *This case does NOT involve any interests of the state of China, any Chinese citizen, company or organization;*

- e) *The main facts in disputes were NOT incurred within the territory of China, and Chinese law does not apply to this case; it would be of great difficulty for PRC court to find out facts and to apply governing law;*
- f) *Foreign court has Jurisdiction to entertain this case, and is more convenient to handle this case.*

17. What is the procedure to release a ship from arrest?

The ship under arrest will be released for the following reasons:

1. The applicant withdraws his application for arrest;
2. The respondent provides security satisfactory to the court;
3. Where the respondent constituted the liability limitation fund for maritime claims, the court shall order without delay the release of the ship from arrest; or
4. The ship under arrest should also be released or the security provided should be returned to the respondent if the arresting party has not commenced legal proceedings or arbitration proceedings within 30 days from the arresting date.

18. What type of security needs to be placed for the release?

Parties in disputes can negotiate the type and amount of security at any stage. The court will intervene only when the parties concerned fail to reach agreement on the type or amount of security. In addition to cash deposit, a letter of guarantee issued by a bank, an insurance company or another financial institution registered within the territory of PR China are also acceptable. A Letter of Undertaking issued by a member of the International Group of P&I Clubs may also be acceptable to the party concerned.

19. Does security need to cover interest and costs?

Yes. In general, the security amount specified in a court order corresponds to the arresting party's requested amount, which includes bank interest and costs.

20. Are P&I Club LOUs accepted as sufficient to lift the arrest?

Unless agreed by the applicant, PRC courts usually do not accept a letter of undertaking issued by a foreign P&I Club. It is however encouraging that more claimants' lawyers in China advise their clients to accept IG P&I Club's LOU, based on the claims amount, the credibility of the Club and PRC lawyers involved in the matter.

21. How long does it take to release the ship?

Following satisfactory security is provided to court or accepted by arresting party, ship under arrest is usually lifted soon within 24 hours subject to release application is submitted to court by arresting party. Release Order has to be served by court to port authority MSA (maritime safety administration) for sailing permit.

22. Is there a procedure to contest the arrest?

Yes. If the respondents are dissatisfied with a ship arrest order, they may apply for review within 5 days after receipt of the order. The court shall announce the outcome of the review within 5 days after receipt of the review application. However, the execution of the ship arrest order shall not be suspended during the period of review. Where a ship arrest is contested by an interested party, the court shall examine the objection and lift the arrest if the reasons for the objection are justified.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

The time limit for ship arrest in preservation of a maritime claim is 30 days. Where a maritime claimant brings an action or applies for arbitration within this period, or where a maritime claimant

applies for arrest of a ship during litigation or arbitration, arrest of the ship is not subject to the 30 days' time limit.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes. However wrongful arrest is seldom established in the maritime courts' practice. There is no specific definition for wrongful arrest under Chinese law. In judicial practice, a wrongful arrest may exist where the applicant's maritime claim for ship arrest has no merit, or the owners of the ship under arrest are not liable for the maritime claim, or the amount of security demanded by the applicant is unreasonably high. If a claim fails and constitutes a wrongful arrest, the respondent can bring a claim in tort against the claimant for wrongful arrest requesting compensation for losses caused thereof, such in tort claim can be secured by the counter-security provided by the claimant for ship arrest.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Yes, piercing of the corporate veil is acknowledged by courts in China pursuant to Article 20(3) of *The Company Law of PRC*, which provides:

Where any shareholder of a company evades debts by abusing the independent legal person status of the company or by abusing the shareholder's limited liabilities, thereby seriously prejudicing the interests of the creditors of the company, the shareholder shall be jointly and severally liable for the debts of the company.

However, no judicial interpretation has been issued by the PRC Supreme Court on how to apply this provision in specific cases, and therefore the standard of its application may vary from court to court. In judicial practice, the Chinese courts are very cautious when applying this provision. The burden of proof lies with the claimant who has to show that the standard for the application of Article 20 has been met.

26. Is it possible to have a ship sold *pendente lite*; if so how long does it take?

Yes. It takes at least a couple of months for the maritime court to have a ship sold *pendente lite*, counting from the date of ship arrest. If the respondent fails to provide security within the arrest time limit of 30 days, and if it is not appropriate to keep the ship under arrest, the claimant, after having brought an action or having applied for arbitration, may file an application to the maritime court that ordered the ship arrest, for judicial sale of the ship by auction (sale of a ship *pendente lite*). The maritime court shall, after the receipt of a written application for sale of a ship, examine the application and make an order to allow or disallow the sale.

A maritime court that orders auction of a ship shall issue an announcement (public notice) in newspapers or other news media. The announcement for ship auction shall be made for a period of not less than 30 days. Where a ship needs to be auctioned off again due to the failure to reach any deal/lower than reserve price in the first auction, a re-auction announcement shall be published seven days prior to the date of auction. After two auctions have been aborted, a ship may be sold at a price of no less than 50% of its valuation.

**Ms. Zhao is the Managing Partner of HiHonor law firm, having over 27 years' experience in shipping law. She obtained her LL.B from Shanghai (ECUPL) and her LL.M from Univ. of Southampton. She had one year working experience in FD&D department with leading P&I Club in London; she had three months' working experience with prominent shipping firm in Cape Town of South Africa; and practiced with other two leading P&I clubs and top international shipping firm in London in 1998. Her major practice covers all aspects of shipping law including both dry and wet, international trade law and investment. She was selected by All China Lawyers' Association as one of "The Elite PRC Lawyers of International Practice" and attended overseas training course in Spain and Brussels in 2014 and in USA in 2016, received comprehensive training on cross-boarder transaction/investment. Ms. Zhao is a Supporting Member of London Maritime Arbitrators' Association (LMAA); and an Arbitrator of Korean Commercial Arbitration Board.*