

SHIP ARREST IN CHINA

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The main legal basis for the maritime claimant to apply for ship arrest before a Chinese Court is stipulated in Chapter 3 of the Special Maritime Procedure Law of the People's Republic of China (the "**Maritime Procedure Law**"). The application for arrest of a ship tantamounts to a property preservation measure, the purpose of which is to ensure satisfaction of the claimant's maritime claim. Article 12 of the Maritime Procedure Law provides that "*preservation of maritime claims means the compulsory measures taken by a maritime Court upon application by a maritime claimant against the property of the respondent, for the purpose of ensuring fulfillment of the claim of the maritime claimant*". Successful arrest of a ship is powerful guarantee for the fulfillment of the claim and raises the bargaining power of a creditor to protect his legal rights and interests. Therefore, the application for arrest of a ship before the Court is a common measure for protection of creditors' rights in maritime disputes.

1. Jurisdiction

In People's Republic of China ("**PRC**"), disputes relating to maritime transportation and ship operation will be subject to the exclusive jurisdiction of Maritime Courts. A District Court does not have the power to arrest ship. Where a District Court needs to arrest a ship for the purpose of enforcing judgments or other effective legal documents, arrest of the ship has to be enforced by a Maritime Court. Under Article 13 of the Maritime Procedure Law, where any party applies for arrest of a ship prior to instituting an action, the application will be subject to the jurisdiction of the Maritime Court of the place where the ship to be arrested is located notwithstanding the fact that the parties may have reached a jurisdiction agreement or an arbitration agreement in respect of the maritime dispute. However, if the parties

have already instituted a lawsuit with regard to a maritime dispute, the application for arrest of a ship during such proceedings shall be filed with the Maritime Court hearing the maritime dispute. It is irrelevant whether the dispute is arising from tort or breach of contract.

Currently, there are Maritime Courts in ten cities in the PRC including Guangzhou, Xiamen, Shanghai, Qingdao, Tianjin.

2. Application

Under Article 15 of the Maritime Procedure Law, a maritime claimant who intends to apply for arrest of a ship has to file an application in writing with a Maritime Court. The particulars of the maritime claim, reasons for application, subject-matter to be preserved and the amount of security required shall be specified in the application documents together with relevant evidence annexed. The course of action for application means the basic facts, the responsibility of the respondent and the applicable laws governing the property preservation. In addition, evidence required to be annexed to the application refers to *prima facie* evidence that substantiates the maritime claim, the responsibility of the respondent and the conditions of the ship to be arrested. The Court's requirements for evidence from the claimant to apply for ship arrest are lower than his burden of proof in the resolution of the dispute.

3. Examination

Where an application for arrest of a ship is made, the Maritime Court will examine the supporting documents submitted by the claimant. The key points that have to be verified include but not limited to the following:

3.1 The claim for a ship arrest has to be considered a maritime claim in accordance with the law.

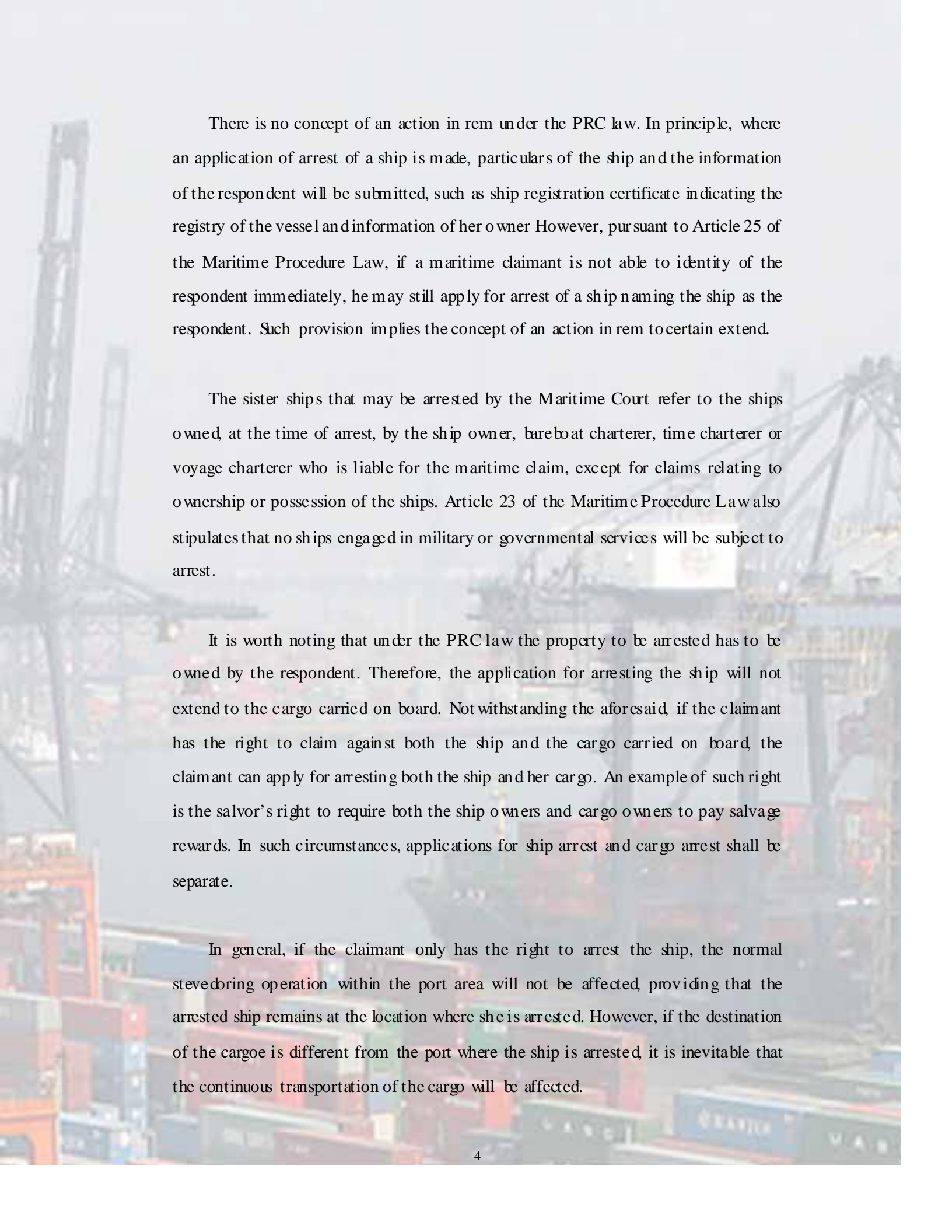
With reference to the International Convention on Arrest of Ships 1999, Article 21 of the Maritime Procedure Law provides 22 maritime claims with respect to which an application may be made for arrest of a ship. Such maritime claims include, *inter alia*, loss of life or personal injury and loss of or damage to property caused by ship operation, chartering of a ship, salvage at sea, general average, ship mortgage, sale and purchase of a ship sale. Article 22 further stipulates that no application may be made for arrest of a ship on account of maritime claims other than the ones specified in this Article 22, except for enforcement of a judgment, an arbitration award or other legal documents.

3.2 The ship to be arrested shall be a ship that may be arrested pursuant to the relevant laws.

In accordance with Article 23 of the Maritime Procedure Law, the ships may be arrested can be the ship concerned or her sister ships.

The Maritime Court can arrest the ship concerned in any of the following circumstances:

- 1) the owner of the ship is liable for the maritime claim and is the owner of the ship at the time of the arrest;
- 2) the bareboat charterer of the ship is liable for the maritime claim and is the bareboat charterer or owner of the ship at the time of arrest;
- 3) a maritime claim arising from mortgagees' rights or rights of a similar nature;
- 4) a maritime claim related to ownership or possession of a ship; and
- 5) a maritime claim arising from maritime lien.

The background of the page is a faded, high-angle photograph of a busy port. Several large gantry cranes are visible, along with stacks of colorful shipping containers in shades of blue, red, and yellow. The overall scene is industrial and somewhat hazy, suggesting a distant or elevated perspective.

There is no concept of an action in rem under the PRC law. In principle, where an application of arrest of a ship is made, particulars of the ship and the information of the respondent will be submitted, such as ship registration certificate indicating the registry of the vessel and information of her owner. However, pursuant to Article 25 of the Maritime Procedure Law, if a maritime claimant is not able to identify the respondent immediately, he may still apply for arrest of a ship naming the ship as the respondent. Such provision implies the concept of an action in rem to certain extent.

The sister ships that may be arrested by the Maritime Court refer to the ships owned, at the time of arrest, by the ship owner, bareboat charterer, time charterer or voyage charterer who is liable for the maritime claim, except for claims relating to ownership or possession of the ships. Article 23 of the Maritime Procedure Law also stipulates that no ships engaged in military or governmental services will be subject to arrest.

It is worth noting that under the PRC law the property to be arrested has to be owned by the respondent. Therefore, the application for arresting the ship will not extend to the cargo carried on board. Notwithstanding the aforesaid, if the claimant has the right to claim against both the ship and the cargo carried on board, the claimant can apply for arresting both the ship and her cargo. An example of such right is the salvor's right to require both the ship owners and cargo owners to pay salvage rewards. In such circumstances, applications for ship arrest and cargo arrest shall be separate.

In general, if the claimant only has the right to arrest the ship, the normal stevedoring operation within the port area will not be affected, providing that the arrested ship remains at the location where she is arrested. However, if the destination of the cargo is different from the port where the ship is arrested, it is inevitable that the continuous transportation of the cargo will be affected.

3.3 Proper security shall be provided for application for ship arrest.

Although Article 16 of the Maritime Procedure Law provides that the Maritime Court, having entertained an application for preservation of a maritime claim, may (which is stipulated as “may” rather than “shall”) order the maritime claimant to provide security. It is a usual practice for Maritime Courts to order claimants to provide security in a ship arrest. As provided in Article 75 of the Maritime Procedure Law, the type and amount of the security provided by a maritime claimant will be determined by the Maritime Court. Under Article 73 of the Maritime Procedure Law, the types of security include cash, guarantee, mortgage or pledge. In practice, the Maritime Courts accept either cash deposit or a letter of guarantee issued by a domestic bank or a domestic insurance company. The specific amount to be determined by the Court will usually be capped at an amount equivalent to the loss that may be sustained by the respondent arising from the ship arrest. In certain cases, the Court may require the security amount to be no less than the amount of 30-day hire loss of the ship to be arrested or certain percentage of the security required to be provided by the respondent.

In order to facilitate early release of the ship, the respondent may provide security requested by the claimant as a substitute for the ship to ensure realization of the maritime claim. In accordance with Article 75 of the Maritime Procedure Law, the type and amount of the security provided by the respondent may be determined through negotiation between the parties. If such negotiation fails, the Maritime Court will have the power to make a decision. The ship arrest will be lifted by the Maritime Court upon provision of security pursuant to Article 18 of the Maritime Procedure Law. Under Article 29 of the Maritime Procedure Law, if no such security is provided, the claimant can request the Maritime Court to auction the arrested ship in order to recover his claims post commencement of a law suit or an arbitral proceeding. A law suit or an arbitral proceeding must be instituted within 30 days upon the ship arrest failing which the ship will be released.

4. Order

Under Article 17 of the Maritime Procedure Law, the Maritime Court, having accepted an application for ship arrest will make an order within 48 hours. If the legal conditions for ship arrest have been satisfied, the Maritime Court will make an order to arrest the ship. Otherwise, the application for ship arrest will be rejected by the Maritime Court. The order to arrest the ship issued by the Maritime Court will be executed with immediate effect. Any party who disagrees with an order made by the Maritime Court may, within 5 days upon receipt of it, apply for review once. The Maritime Court will give the result of the review within 5 days upon receipt of such application. Execution of the order will not be suspended during the review.

5. Enforcement

When the application for ship arrest is approved, the Maritime Court will issue an order to arrest the ship and send the operational staff to serve the said order to the master of the ship. Meanwhile, the Maritime Court will send a notice to the bureau of maritime affairs for assistance in the execution, requiring the bureau of maritime affairs not to handle formalities for the ship's departure from the port during the period of the arrest. Where the Maritime Court arrests a foreign flagged ship, it will notify the relevant government departments such as the Frontier Inspection Station and the Customs and require the Frontier Inspection Station to send its officers onboard to supervise the ship. The Frontier Inspection Station will charge certain fees for supervising the ship on a daily basis.

6. Prevention of ship arrest

As ship arrest will render the ship owner in an adverse situation, how to avoid ship arrest is of great concern to the ship owner. Under the English law, ship owner may engage his lawyers to apply for advance notice registration with the Admiralty Registrar at the port of call. For such application, the ship owner will submit a written guarantee that he will accept any summons for ship arrest and make timely payment for the bail so as to resist any application for ship arrest. As there is no such system in the PRC, the ship owners have no other resort except provision of security to the claimant in case of ship arrest.

7. Wrongful arrest of ships

China's system on arrest of ships is designed in the spirit of equal importance of the interest of the claimant and the interest of the respondent. The claimant is required to provide security for potential losses that may arise from wrongful arrest. Article 20 of the Maritime Procedure Law provides that a maritime claimant shall indemnify the respondent or any interested person for losses incurred by his wrongful application for preservation of maritime claims. There is no clear legal position as to whether subjective malice or gross negligence is constitutive element for wrongful application for ship arrest. In practice, whether the application for ship arrest is legitimate usually depends on whether the claimant's maritime claim will be supported in the litigation or arbitral process. If the claimant loses the law suit or arbitration, the Court will usually decide that the application for ship arrest is wrongful and order the claimant to indemnify the respondent or the interested person for any losses incurred. Such losses include all maintenance expenses and disbursements incurred when the ships are berthed due to arrest, hire losses due to the arrest and the expenses arising from provision of security by the respondent for release of the ship.