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WORLD MARITIME UNIVERSITY

Dalian, China

**A Comparative Study on the Legal System of Arrest
of Ships in China**

By

LIN HAIFENG

China

**A dissertation submitted to the World Maritime University in partial fulfilment
of the requirements for the award of the degree of**

**MASTER OF SCIENCE
IN
MARITIME SAFETY AND ENVIRONMENTAL MANAGEMENT**

2005-2006

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DECLARATION

I certify that all the contents in the dissertation that is not my own work has been identified.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

Lin Haifeng

Date: 20th March, 2006

Supervised by:

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**Title: A Comparative Study on the Legal System of
Arrest of Ships in China**

Degree: MSc

ABSTRACT

‘Arrest’ means the detention of a ship by judicial process to secure a maritime claim. A lot of countries had adopted their legislations on this legal issue to accord with the blooming of global shipping market. But there is variation of practices and procedures in different jurisdiction. For the purpose to identify the difference and help for ameliorating relevant domestic legislation of China, the dissertation will go along with comparative analyses of such legal issue under English Law and Chinese law, which are two different legal systems.

An attempt is made to explain the origin of this issue of arrest of ships between English law and Chinese law. Historical overview and present statute will be looked into for finding the origin different between this two law systems. An overview is provided of the current scenario in light of how the functions of arrest of ships work under English law and Chinese law, such as obtaining security, invoking Jurisdiction and the crystallization of non-truly in rem claims. Furthermore, the topic of arrest of sister ships will be emphatically illustrated.

This dissertation will point out the Similarities and differences on the concept of arrest of ships between Chinese law and English law, finding the advantages and limitations of arrest of ships in Chinese law system, After that, it will try to provide

the related recommendations for the issue of ‘Sister Ship’ in Chinese legislation.

Key words: Arrest of ships, Convention, Legislation, English law, Chinese law, Action in rem, Action in personam, Sister ship, Comparative analyse

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ABBREVIATIONS

AJA 1956	Administration of Justice Act 1956
Arrest Convention 1952	International Convention on Arrest of Ships 1999
Arrest Convention 1952	International Convention Relating to the Arrest of Sea-Going Ships 1952
CJJA 1982	Civil Jurisdiction and Judgements Act 1982
CPC 1982/1986	Civil Procedure Code of The People's Republic of China 1982 (1986 as amended)
MC 1992	Maritime Code of The People's Republic of China 1992
MSA 1995	Merchant Shipping Act 1995
PRC	People's Republic of China
SCA 1981	Supreme Court Act 1981
SMPL 1999	Special Maritime Procedure Law of the The People's Republic of China

Chapter I Introduction

1.1 Importance of this Study

In china, arrest of ships is one of the most important typical forms for the preservation of maritime claim. Special Maritime Procedure Law of the PRC 1999 provides that:

Article 12: Maritime claims preservation means 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.

For giving an example to explain how it is widely used, from 1984 till 1999, in 15 years of time, nearly 1,500 ships were arrested by the maritime courts of the People's Republic of China for the purpose of obtaining security or to enforce maritime claims. Such a figure, in certain aspects, reflects the popularity and importance of such legal system. But the system of Arrest of ships has a relatively short history in China, the legislation about that still need to be consummated.

A lot of countries had adopted their legislations on this legal issue, but there is 'variation of practices and procedures in different jurisdiction' (M 2005). In China, the theory of 'arrest of ships' comes from the theory of "save from damage" in Civil Procedure Code of The People's Republic of China 1982 (1986 as amended)

(CPC 1982/1986). Legislators came into the conclusion that CPC 1982/1986 could not serve the practice of the comprehensive maritime affairs and in 1999, the Special Maritime Procedure Law of the The People's Republic of China (SMPL 1999) was adopted and came into force on July 1, 2000.

Since the English law has long history in dealing with the issue of arrest of ships, there must be some experience for reference. The dissertation will go along with comparative analyses of such legal issue under English Law and Chinese law, which are two different legal systems. This comparative study will help for:

- a) Better understanding of the legal system of arrest of ships in china;
- b) Finding out the advantages and disadvantages;
- c) Providing the suggestion for Chinese legislation.

1.2 Objective of this Dissertation

As it will be seen later, although Chinese law originates from civil law system, there are many similarities with English law, which is a common law system. It is hoped that this dissertation may assist in a better understanding of this legal issue.

Chinese law is originated from the civil law system, which admits action in personam, while disavowal action in rem. Comparing with action in rem in English Law, the advantages and disadvantages of Arrest of Ships in China will be summarized.

The arrest of sister ships is a relative new hotspot in this issue. In order to find out the problems that might need to be solved and propose the relevant recommendation for Chinese legislation, the paper will attempt to analyze it both in the law theory and in practical aspect.

1.3 Methodology

Comparative analyses

In the long developing history of maritime litigation, the countries from common law system are usually setting the pace. The U.K. is the most representative country of them. For the better understanding about the legal issue of arrest of ships, comparing the similarity and difference between English law and China law will be the way for achieving the objective of this dissertation.

Case study

Since the cases play a metal role in common law system, looking into those typical cases will help to understand such issues.

1.4 The Order of Presentation

Firstly, the definition of ship will be compared. And then, the origin of the arrest of ships under English law and Chinese law is provided for overview. The following part will be the functions of arrest of ships. In this part, maritime liens will referred to. Obtaining security, invoking Jurisdiction and the crystallization of non-truly in rem claims are three of the basic functions of Arrest of ship for non-truly in rem claims in the English law, the relevant provisions in the two law system will be pointed out and interpreted. Furthermore, the practical issues of arrest of sister ships in China is analyzed. The final part will be the conclusions and recommendations.

In each part, the presentation will be separated into two parts, one of which is the content under English law, the other of which is the content under Chinese law, the similarities and differences will be summarized afterwards in related certain chapter.

Chapter II The Definition of ‘Ship’

Before going to the detailed analysis of the laws of arrest of ships, one problem has to be solved, that is, ‘what is a ship’? Without understanding this, there will be no basis to discuss this particular field of laws, as almost every legal relationship of maritime laws concerns with a ship.

It is of crucial importance in many areas of maritime law when determining whether the specific statutes will be applied to a substantial issue involved in certain disputes. For example, under English law, if a collision happens between a floating structure and a ship, there will be no issue of apportionment of liability and the common law principle will apply. Similarly, under Chinese law, since a small ship which does not reach a certain tonnage is not a ship, supposing she causes a personal injury, the owner of this small ship is not entitled to limit his liability according to the provisions of Chapter XI of Maritime Code of The People’s Republic of China 1992 (MC 1992). Instead, the provisions of General Principles of CPC 1982/1986 will apply which stipulates that the indemnity to an injured party shall be the same as the damage done by the blamable party, accordingly, the owner of the ship could not limit his liability.

In addition to the above, the fact whether the subject matter involved in a claim is a ship is also crucial for the procedural issues. Under English law, for a matter to be referred to the jurisdiction of the Admiralty Court, it will depend on whether a ship was involved in the incident, which gave rise to the cause of action. Similarly, under

Chinese law, certain procedures especially applicable to maritime litigation, such as the auction of the ship after arrest, will not be applied to a subject matter, which is not a ship by virtue of maritime law.

2.1 A Ship under English Law

Although it seems that according to Scrutton LJ there is no need to define a ship, English Law has certain definitions in statutes and decided cases.

The definitions in statutes are mainly seen in the Merchant Shipping Act 1995 (MSA 1995) and the Supreme Court Act 1981 (SCA 1981).

Section 313(1) of MSA 1995 provides:

..."ship" includes every description of vessel used in navigation;

Section 24 (3) of SCA 1981 provides:

... "ship" includes any description of vessel used in navigation and includes, subject to section 2(3) of the Hovercraft Act 1968, a hovercraft;

To illustrate the above definitions, there have been a few of cases, in which the concept of vessel used in navigation has been well defined. In an early 1990's case, Sheen J. decides that the vessel shall usually be a hollow receptacle for carrying goods or people. Navigation is held in the same case to be planned or ordered movement from one place to another. It shall also be noted that the phrase of 'used in navigation' does not merely refer to the ship's movement, however, such movement has to be in navigable waters. Such a concept is well decided in the case of *the Curtis v. Wild* [1991] 4 AER 172, in which it is held that the navigable water meant waters used by vessels going from point A to B, not simple for pleasure purposes.

It can be seen from the above that the ship shall be defined as a hollow receptacle for carrying goods or people from point A to point B in navigable water. So, a jet ski is not a ship while a mobile offshore drilling unit is held to be a ship in a very recent decision. It is interesting to note that such a unit is also to be a ship under Chinese law, which would be discussed below.

2.2 A ship under Chinese Law

As mentioned earlier in this dissertation, China adopts a civil law system so the definition of the ship can be found in the relevant code only. As a principle of legal theory of civil law systems, the decided cases have no binding effect on later judgement. The code is drafted in very detailed and fixed way so as to avoid ambiguity when applying it to define a ship.

The definition of a ship is in Section 3 of MC 1992, which provides that:

“Ship” as referred to in this Code means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage.

The term “ship” as referred to in the proceeding paragraph shall also include ship’s apparel.

The inclusion of ship’s apparel in the second sub-section is for the purpose of dealing with collision cases, any contact between the ships’ apparels or between one ship and another ship’s apparel shall be deemed as the collision between the ships.

The important part is the first sub-section, from which it may be noted that a subject matter will be deemed to be a ship under Maritime Code of PRC if it is:

- i. a sea-going ship or other mobile unit,

- ii. used for civilian or commercial purpose,
- iii. above 20 gross registered tonnage.

The first key characteristic is that the ship must be sea-going. This is quite different from the definition of English law as English statutes only provide the concept of 'used in navigation'. The case law to this point has explained such a concept in a way that the navigation shall take place in navigable waters. It has been decided in the case of *the Curtis v. Wild* [1991] 4 AER 172 that navigable waters meant waters used by vessels going from point A to point B. So, it may be concluded that English law does not limit the scope of ship to the effect that it must be sea-going. Quite differently, Chinese law has a more strict provision, which regulates that the ship must be sea-going. In this connection, the passenger ship which only sails in the river will not be deemed to be a ship. Another point worth mentioning under this issue is that under Chinese law, the offshore mobile drilling unit will be deemed to be a ship as it is explicitly provided by the above-mentioned provision. This is quite similar with the decision reached by Lord Marnoch .

Secondly, the ship has to be used for civil or commercial purpose. It must be noted that the factor in relation to the owners of the ship is irrelevant. A ship owned by military forces can still be deemed to be the ship under MC 1992 if it is used for commercial purpose. Although there are no expressed stipulations in English statutes in this regard, from the decided cases, it may be seen that the ship is defined as for purpose of carriage of passengers and the goods. It is submitted that for this particular issue, Chinese law and English law are generally the same.

Thirdly, there is a strict tonnage requirement under Chinese law, which is the minimum gross tonnage shall be 20. However, English law does not have such a limitation. Provided that the ship is navigating in navigable waters for carrying passengers or goods, it will be deemed to be ship under English law regardless of its tonnage.

Chapter III Origins of Arrest of Ships

Having looked at the different concepts of a ship under English and Chinese laws, the origins of the arrest of ships with the unique features of maritime law will be discussed in this part. It will be of great interest to see when reviewing the development of this particular field, although England is a common law country, that the right to arrest a ship has, to a great extent, been granted by statute. The situation is quite similar in China although China has a typical civil law system. Of course, apart from the statute, English law has a comprehensive range of decided cases, which expand or restrict the right granted by the statute depending upon the construction of the statute. By contrast, decided cases will have no binding effects under Chinese law.

3.1 Origin of Arrest of Ships under English Law

3.1.1 Historical Overview

English law has a long history of admiralty jurisdiction to hold pleas dated back to 1360, at which time the entire fleet was entrusted to one admiral who has the full power to exercise its jurisdiction. And, the action in rem had been adopted in admiralty before the Elizabethan era. For example, during the competition between the common law judges and the admirals, in 1633, the common law judges showed respect to the suits in admiralty arising from the contracts for ship building, ship

repairs, provided that the suit was in rem. However, this kind of action only became the dominant procedure in admiralty court by nineteenth century. Academic researches show that the statutory right to arrest was established by two Admiralty Court Acts (1840 & 1861). In the case of *The Monica S* [1967] 2 Lloyd's Rep. 113, Brandon J has summarized the relevant sections of Admiralty Court Act 1840 and it is said that statutory rights by way of an action in rem were first created by such an act.

During that period of time, a case of crucial importance was decided in terms of the theory of action in rem, *The Bold Buccleugh* [1852] 7 Moo PC 267. This case is important because '...the right in rem was based on the existence of a maritime lien' and 'The existence of a maritime lien in case of claim was not definitely and judicially declared...' until this case.

The Bold Buccleugh [1852] 7 Moo PC 267

The ship, Bold Buccleugh, came into collision with the barque William in 1848, as a consequence of which William sunk. Bold Buccleugh was seized under process in an action against her owners upon that course in the Court of Session in Scotland in January 1849. Bail was put up and Bold Buccleugh was released and sold to a bona fide buyer without notice of the pending claim. She then sailed to Hull under the new ownership in August 1849 and was arrested by warrant of High Court of Admiralty. The new owners appeared before the court under protest, alleging a lis pendens. The Scottish proceedings were then abandoned and the protest was overruled. In the appeal before Privy Council, it was held that the Scottish action, being in the nature of action in personam, could not bar a action in rem in Admiralty court and the collision lien survived even a bona fide sale without notice.

While this case is the leading authority on maritime lien, the nature of action in rem was well defined. While delivering the opinion of the Judicial Committee, Sir John Jervis pointed out that ‘by virtue of the seizure of Bold Buccleugh, the process was directly against the ship and the person in the proceedings before the Scottish court is in the nature of an action in personam’. However, the Admiralty action in rem was directed in the first instance at the ship. To deal with the argument that the action in rem was a purely procedural device, he said the following:

...but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners... and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these proportion, dicta have been referred to, which are entitled to great respect, but which, upon consideration, will be found not to support the proposition for which they were cited.

So, in this case, it was firmly established that the action in rem was not a procedural device for obtaining personal jurisdiction over the owners of the ship but a unique proceedings against the ship directly.

During the following years, the in rem jurisdiction had been expanded. The first Supreme Court of Judicature Act was enacted in 1873 by Parliament and by this Act; High Court of Admiralty was consolidated into the Supreme Court of Judicature. After some amendments, an Act of 1875 came into existence. In the Schedule of this Act, a special form of writ of summons in rem was introduced. By Act 1875, the new High court had a collective jurisdiction. This has enabled the judges to transfer the cases between relevant divisions. By this time, the competition between Admiralty Court and civil court ended.

The jurisdiction of in rem action of Admiralty Court kept on developing and the list of claims subject to in rem action was expanded by Judicature (Consolidation) Act 1925. Such an Act was replaced by Administration of Justice Act 1956 (AJA 1956), extending the list of claims again. The AJA 1956, being commented as United Kingdom's 'half-hearted attempt only' to adopt the International Convention Relating to the Arrest of Sea-Going Ships 1952 (Arrest Convention 1952), has existed for about 30 years and was finally replaced by the present statute, Supreme Court Act 1981 (SCA 1981).

3.1.2 Present English Statute Governing the Arrest of Ships

SCA 1981

The relevant sections of SCA 1981 provide the statutory right to arrest a ship, namely sections 20-24. According to these sections, the in rem claims are divided into two categories, one being the truly in rem claims while the other being non-truly in rem claims. The following discussions will deal with them separately.

3.1.2.1 The Scope of Truly in Rem Claims

Section 21 (3) of SCA 1981 provides that:

In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action may be brought in the High Court against that ship, aircraft or property.

Section 21 (2) of the SCA 1981 further provides that:

In the case of any such claim as is mentioned in section 20(2)(a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action in rem may be

brought in the High Court against the ship or property in connection with which the claim in question arises.

The claims named under Section 20 (2) are:

- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein,
- (b) any question arising between the co-owners of a ship as to possession, employment or earning of that ship,
- (c) any claim in respect of a mortgage of or charge on a ship or any share therein,...

- (s)any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

It can be seen that the above named claims include maritime liens and those in nature of proprietary rights, such as ownership and mortgage. The reason of qualifying these claims as truly in rem ones is that the action in rem based on the cause of action arising from these claims 'can be brought against the ship without considering who is the owners of the ship at the time the claim form is issued, or how would be liable in personam when the cause of action arose.' (J 1985)

3.1.2.2 The Scope of Non-truly in Rem claims

Section 21 (4) of SCA 1981 provides that:

In the case of any such claim as is mentioned in section 20(2)(e) to (r), where –

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam (‘the relevant person’) was, when the cause of action arose, the owners or charterer of, or in possession or in control of, the ship

an action in rem may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owners of that ship as respects all the shares in it or the charterer of it under a charter by demise;

or

(ii) any ship of which, at the time when the action is brought, the relevant person or the beneficial owner as respects all the shares in it.

It may be concluded from the above section that for the claims listed under SCA 1981 section 20(2)(e) to (r) to be brought in rem, the in personam links must be shown.

The claims listed under SCA 1981 section 20(2)(e) to (r) are:

...

(d) any claim for damage done by a ship

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of-

- (i) the owners, charterers or persons in possession or control of a ship; or
- (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible,
being an act, neglect or default in the navigation or management of a ship, in the loading, carriage or discharge of goods on, or in from a ship, or in the embarkation of person on, in or from the ship.
- (g) any claim for loss of or damage to the goods carried in a ship,
- (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship,
- (j) any claim-
 - (i) under the salvage convention 1989;
 - (ii) under any contract for or in relation to salvage services;
 - (iii) in the nature of salvage not falling within (i) or (ii) above;or any corresponding claim in connection with the aircraft
- (k) any claim in the nature of towage in respect of a ship or an aircraft,
- (l) any claim in then nature of pilotage in respect of a ship or an aircraft,
- (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance,
- (n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues,

(o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages),

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship,

(q) any claim arising out of an act which is or is claimed to be general average act,

(r) any claim arising out of bottomry

...

Those claims form a major part of claims can be enforced by actions in rem and some of them will be discussed when comparing the same with the claims giving rise to action to arrest the ship under Chinese law elsewhere in this dissertation.

3.2 Origin of Arrest of Ships under Chinese Law

3.2.1 Historical Overview

Unlike English law, Chinese law in this particular field has got a relatively very short time to develop together with the whole legal system since CPC 1982/1986, which has formed legal ground of the action to arrest ship.

It has been commonly accepted that Chinese law follows the civil law system, in which there was no such a concept of action in rem. All claims should be brought in personam under CPC 1982/1986. This basic approach can be seen from Article 49 of CPC 1982/1986:

Article 49: Any citizen, legal person or other organization may be a party to a civil action.

However, within such code, there has been a special section in dealing with property preservation prior to litigation. Article 93 provides that:

Where, due to urgent circumstances, the lawful rights and interests of an interested person would be irreparably harmed if he did not immediately apply for preservation of property, such person may apply to the People's Court requesting measures for the preservation of property prior to the institution of an action. The applicant shall provide security. If the applicant fails to provide security, his application shall be rejected.

This seems to be similar to the concept of provisional pre-trial remedy in English law and most European legal systems, but it is different in nature from the action in rem under English law.

The above provision of law has made an arrest of ship possible before the formal procedure against liable person. CPC 1982/1986 formed a judicial basis of arrest of ships by Chinese maritime courts and after this law, which the arrest of ship in the sense of maritime law came into existence.

The implementation of the MC 1992 marked the new construction of Chinese shipping law system, by which substantive systems of maritime law have been established based on international conventions and international shipping practice including maritime liens, ship mortgage, limitation of liability and etc.. However, such code only governs the substantive rights of parties involved in shipping while CPC 1982/1986 was still in force for procedures of shipping litigation at that time. Legislators came into the conclusion that the Civil Procedure Law could not serve the practice, the SMPL 1999 was adopted and came into force on July 1, 2000.

3.2.2 Scope of Claims under Special Maritime Procedure Law of the PRC 1999

The SMPL 1999 mainly follow the line as set in International Convention on Arrest of Ships 1999 (Arrest Convention 1999) for this particular subject. Article 21 of Special Maritime Procedure Law of the PRC gives a detailed list of claims based on which an action to arrest the ship can be brought.

Following the principles of the Arrest Convention 1999, SMPL 1999 contains a distinction between the truly in rem claims and non-truly in rem claims. Article 23 of such Law provides this:

Article 23: The maritime court may arrest the ship concerned in any of the following circumstances:

- (3) a maritime claim that gives rise to ship mortgage or to rights of a similar nature;
- (4) a maritime claim related to ownership or possession of a ship; and
- (5) a maritime claim that gives rise to maritime lien.

Logically, from the above provisions, it may be concluded that in order to enforce the claims relating to of maritime liens as specified by Article 22 of MC 1992, mortgage as defined by Article 11 of MC 1992 and the claims related to ownership or possession of a ship does not need in personam link, that is to say, a claimant can apply maritime court to arrest the particular ship to enforce the above mentioned claims regardless the fact that who owns the ship. So, it can be said that under Chinese law, there is a concept of truly in rem claims, which are quite similar to that under English law, however, the scope of such claims does not include the claims under Section 20 (2) (s) of SCA 1981.

Such truly in rem claims may include the followings:

- (i) crew's wages and other moneys, including repatriation expenses and social insurance premium payable for the crew;

- (ii) loss of life or personal injury in direct connection with operation;
- (iii) pilotage;
- (iv) salvage at sea
- (v) dues or expenses for ports, canals, docks, harbours or other waterways;
- (vi) loss of or damage to property caused by ship operation;
- (vii) ship mortgage or rights of a similar nature;
- (viii) any dispute in connection with ownership or possession of a ship;
- (ix) any dispute between co-owners of a ship in connection with the employment or earning of the ship.

Except those claims listed above, Chinese law does also require an in personam link when taking an action to arrest the ship. Article 23 of SMPL 1999 also provides this:

(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 demise charterer of the ship is held responsible for a maritime claim and is the demise charterer or the owner of the ship when the arrest is executed;

....

A maritime court may arrest other ships owned by the shipowner, demise 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.

A detailed discussion on the issue of requirements of in personam links to arrest a ship will be discussed later under Part V, from which similarities and differences under the two laws will be easily seen. For the sake of completeness, the claims under Chinese law which require in personam links are summarized as follows:

- (i) damage or threat of damage caused by ship to environment, coast or relevant interested persons; measures adopted to prevent, diminish or eliminate such damage; compensation paid for such damage; expenses for reasonable measures actually adopted or to be adopted to restore environment; losses caused by such damage to or likely to a third party; and damage, expenses or losses of a similar nature as those specified in this subparagraph;
- (ii) expenses related to re-floating, removal, reclamation or destroying of a sunken ship, wreck, aground ship, abandoned ship or to making them harmless, including the expenses related to re-floating, removal, reclamation or destroying of the things which have or no longer remained on board the ship or to making them harmless and expenses related to maintaining of an abandoned ship and her crew;
- (iii) agreement in respect of employment or chartering of a ship;
- (iv) agreement in respect of carriage of goods or passengers;
- (v) cargo (including luggage) carried by a ship or loss or damage relating thereto;
- (vi) general average;
- (vii) towage;
- (viii) providing of supplies or rendering of services in respect of ship operation, management, maintenance or repair;
- (ix) construction, re-construction, repair, refurbishment or equipment of a ship;
- (x) expenses paid for a ship or a ship-owner;
- (xi) insurance premium for a ship (including protection and indemnity calls) payable by or paid for a ship-owner or demise charterer;
- (xii) commission, brokerage or agency fee related to ships payable by or paid for a ship-owner or demise charterer;

(xiii) a dispute arising out of a ship sale contract.

Chapter IV Functions of Arrest of Ships

Academic opinion shows that the in rem action under English law has triple functions, namely it may enable the claimant to ‘(a) obtain security for the claim, (b) to invoke the jurisdiction of the English Court on the merits of the claim, (c) to create a substantive right for his non-truly in rem claims from the time of the issue of in rem claim form.’ (M, 2006) The above points of view are supported by decided cases which will be discussed later in this part. It will also be seen from later discussion that under Chinese law, while the functions of an arrest of ship action have some similarities with those under English law, they do differ from each other to great extents.

As mentioned earlier, due to the nature of maritime liens, they may be enforced directly against the ship on which they are created regardless of the ownership of the ship. Again, there is no need to have such claims crystallized by an action in rem. It may be said that the function of arrest ships to enforce truly in rem claims is for enforcing the claim solely. So, it will be discussed first before going to more complicated non-truly in rem claims.

4.1 Maritime Liens

4.1.1 English Law- Definition, Scope and Features

The classic definition was given by Sir John Jervis in *The Bold Buccleuch* [1852] 7 Moo PC 267 :

‘Having its origin in the rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process.... This claim or privilege travels with the thing into whosoever’s possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached.’

From the above classic speech, it may be concluded that maritime lien under English law has the following general features:

- (i) it attaches to the ship when the cause of action arose,
- (ii) it can be enforced directly against the ship regardless who is the owner of the ship when the action is taken,
- (iii) it has retrospective effect,
- (iv) it shall be brought into effect by legal process
- (v) it is a privileged claim.

The last feature mentioned above is further illustrated in *The Tolten* [1946] P.135

‘The charge goes with the ship everywhere, even in the hands of a purchaser for value without notice, and has a certain ranking with other maritime liens, all of which take precedence over mortgage.’

Thus, the claims in the nature of maritime liens under English law have priority over all other statutory rights, including mortgage.

The scope of maritime liens has since developed from the case of *The Bold Buccleuch* [1852] 7 Moo PC 267 and nowadays, can include those as decided by cases and stipulated by statutes which include the followings

- (i) damage done by a ship,
- (ii) salvage,
- (iii) seaman's wages,
- (iv) master's wages and disbursements,
- (v) bottomary bond

4.1.2 Chinese Law- Nature, Scope and Comparative Analysis with English Law

As a civil law system, Chinese law has codified rules governing the nature and the scope of maritime liens. The provision is in Chapter II, Section 3 of MC 1992:

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, barefoot charterers or ship operators with respect to the ship which gave rise to the said claim.

Article 22: states those 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.

Article 25: A maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over ship mortgage.

Article 26: Maritime liens shall not be extinguished by virtue of the transfer of the ownership of the ship,...

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.

From the provisions, the nature of maritime liens under Chinese law may be summarized as follows:

(i) According to Article 21, Maritime liens can only be created according to the specific provisions of MC 1992 and are restricted to the items under Article 22 of MC 1992, which means no claim is regarded as maritime claim unless it falls into the categories specified by MC 1992.

(ii) Maritime liens travel with the ship and can be enforced against the ship regardless the ownership of it at the time of action taken. This is quite similar with the English law as discussed above.

(iii) Maritime liens shall be enforced by the court by arresting the ship from which the maritime lien arose, which is exactly the same as English law.

(iv) Maritime liens have priority over all other rights under MC 1992. Similarly, English law has the same principle.

Having looked at the nature of maritime lien under Chinese law, the scope of the claims giving rise to maritime lien is compared as follows with that under English law:

(i) Article 22 (1) can be generally described as the claim by master or crew of ship for wages. It should be first noted that such claim arises from laws, administrative rules, regulations and the labour contract. Similarly, under English law, such a lien arises independently of the contract of service (The Ever Success) English law also recognizes wide range of payment to be included in wages, including the contribution to pension fund, wages in lieu of notice, when a seaman is wrongfully dismissed and emoluments. From the literary meaning of Article 22 (1), those payments recognized by decided case under English law can well fall into this article of law provided that the claims of such payments arise from the relevant law, rules and labour contract.

(ii) For the personal injury claim under Article 22 (2), the provision is relatively simple. It has been submitted that the claim in the similar nature under Section 20 (2) (f) of SCA 1981 shall attract maritime lien as it shall be regarded as the extension of Section 20 (2)(e), namely, 'damage done by a ship'.

(iii) Pilotage dues under Article 22 (3) was dealt in English law by Section 20 2 (1) of SCA 1981 but unlike Chinese law, such claims do not give rise to a maritime lien.

(iv) English law also recognizes that the claim for salvage payment under Article 22 (4) of MC 1992 is a maritime lien.

(v) The scope of compensation claims for loss of or damage to property resulting from tortious act in the course of operation of the ship under Article 22 (5) of Maritime Code is rather wide. From the point of views of practice, under Chinese

law, the claims arising from collision, contact with floating or fixed object, oil polluting done by the ship and other tortious act in similar nature shall fall into this category. This may well cover the claim for damage done by a ship under Section 20 (2) (e) of SCA 1981. English law has a even wider scope under this heading and in ‘The Eschersheim’ , the claims by the owners of the cargo on the ship under salvage against the negligent salvors is held to fall under the scope of damage done by a ship. So, it can give rise to a maritime lien. It is submitted that the claim in this nature can also give rise to a maritime lien under Chinese law because the claim against the salvors by the cargo owners of the salved ship may sue the salvors in tort. Furthermore, according to Section 20 (5) (a) (b) of SCA 1981, the oil pollution claim fall under this heading and Chinese law also regards such a claim gives rise maritime lien because it is tortious nature.

4.2 Function of Arrest of Ship for Non-truly in Rem Claims under English Law and Chinese Law

As mentioned at the very beginning of Part IV, there are three functions of taking arrest actions (‘action in rem’) under English law. These functions will be examined in this sub-heading while comparing with Chinese law.

4.2.1 Obtaining Security

4.2.1.1 Under English Law

It has long been established by case law that the claimants, by taking an action in rem, will secure its claim, as the arrest of a ship by the court constitutes the ship as security. In case of *The Cella* [1989] 13 PD. 82, a ship was arrested in respect of a claim of repairs. Lord Esher said, ‘the moment that the arrest takes place, the ship is held by the court as security for whatever may be adjudged by it to be due to the claimants.’ Fry LJ said, ‘The arrest enables the court to keep the property as security to answer the judgement,...’ Lopes LJ said:

From the moment of the arrest, the ship is held by the court to abide the result in the action, and the rights of the parties must be determined by the state of things at the time of the institution of the action and can not be altered by anything which takes place subsequently.

From the above judgement, it may be well concluded that once the ship is under arrest of the court, the ship itself has become a security of the maritime claim from which the cause of arrest arises. The ship will be held by the court until the security is provided or be released from arrest under other circumstances under relevant statutes or Rules of Court are met.

4.2.1.2 Under Chinese Law

To enable a claimant to obtain security is one of the key functions of arrest of ship action under Chinese law. This can be seen in many articles of SMPL 1999. In particulars, when application to arrest a ship is filed with the maritime court under whose jurisdiction the ship subject to an arrest action is located, the claimant has to state expressly the demand of security. And, one of the two conditions of the release of the ship under arrest is the provision of security. Another condition is that when the claimant applies the court to release the ship, he has to justify the reason fro such application. It seems at the first glance that such a condition has nothing to do with the security, however, in reality, a claimant will not apply the release unless he is provided with a satisfactory security or there has been an immediate settlement of the claim after the ship is under arrest.

It is noted that the principle of the case of *The Cella* [1989] 13 PD. 82 under English law is quite the same as Chinese law although there is no explicit provision in Special Maritime Procedure Law of the PRC. Nonetheless, from three articles inside it governing the procedure to arrest the ship, it will be seen that once the ship is under arrest, it is under the control of the ship as the security to meet the claims.

Article 26 of the Law provides that when the arrest is undertaken, the court may, send officers on board to for the purpose of supervision. Article 30 gives a right to the maritime court, which undertakes the action to rule, the juridical sale of the ship if the security is not provided. It may be correct to say that the claimant will have limited right to deal with the ship once the ship is under arrest.

4.2.2 Invoking Jurisdiction

4.2.2.1 Under English Law

Arrest Convention 1952 was ratified by UK in 1959, so, Article 7 of Arrest Convention 1952 has formed a ground for English court to invoke jurisdiction on such a basis, which provides:

- (1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits:
- (2)- if the domestic law of the country in which the arrest is made gives jurisdiction to such courts...

The above article has been followed by English judges ever since and it is quite clear from the decided cases that the jurisdiction of English court is invoked when an arrest action is taken. For example, in the case of *The Banco* [1970] 2 Lloyd's Rep.230, [1971] 1 Lloyd's Rep.49, CA, Lord Denning M.R. held that 'When a plaintiff brings an action in rem, the jurisdiction is invoked,...

4.2.2.2 Under Chinese law

As SMPL 1999 was drafted in line with Arrest Convention 1999, Chinese law for the function to obtain security is quite similar to that under Arrest Convention 1999 which again adopts the principles of Arrest Convention 1952.

The specific provision of SMPL 1999 is as follows:

Article 19: Where legal proceedings or arbitral proceedings are not commenced in respect of a maritime dispute after execution of the preservation of a maritime claim, any party may bring an action in respect of the maritime claim in the maritime court that adopts measures for preservation of the maritime claim or another maritime court that has jurisdiction, unless a jurisdiction agreement or arbitration agreement has been reached between the parties.

Although it may be noted that the wording of the above provision is different from the one used either in Arrest Convention 1952 or in 1999, the real meaning is obviously the same as the two Conventions. It is clear that by arresting the ship which is one of the 'maritime claim preservation', Chinese maritime courts may exercise jurisdiction to hear merits of the claim, that is the real meaning of the wording used in the above provision which is 'any party may bring an action in respect of the maritime claim in the maritime court that adopts measures for preservation of the maritime claim'.

4.2.3 The Crystallization of Non-truly in Rem Claims

4.2.3.1 Under English law

Through a long history of case law on action in rem, a very powerful judicial statement was given by Brandon J in the case of *The Monica S* [1967] 2 Lloyd's Rep. 113 summarizing the function of crystallizing a non-truly in rem claim if an in rem claim is brought.

In that case, the cargo owners sought to recover damages to their cargo and issued a writ in rem. When the writ was issued, the ship was named 'Monica

Smith' which was owned by S. The ship was transferred to T before the writ was served and was re-named 'Monica S'. The writ served on the ship 'Monica S' was an amended one which named the defendant as "the owners of the ship formerly called 'Monica Smith' and now known as 'Monica S'. The new owner, T challenged such an action that the plaintiff's statutory right of action in rem was created against the ship if the ship was arrested while still owned by the person liable in personam or the writ has been served before change of the ownership of the ship.

After reviewing all previous authorities referred to him, Brandon J reached the conclusion that by issuing the writ in rem, a contingent right of security is crystallized on the ship and such a right will be effected by the arrest of the ship, even if the ship was subsequently transferred to new owner. The relevant original statements are quoted as follows:

T was the owner of the vessel at the time of service of writ and had an interest in deferring it. As a matter of principle, if creation of a substantive right could occur on arrest then it could occur at the date of the action brought. There was a preponderance of authority to show that the defendants' contention (that under the pre-1956 law a change of ownership after issue of writ, but before service or arrest, defeated a statutory right of action in rem) was wrong. There was no reason why, once the plaintiff had properly invoked jurisdiction under the 1956 Act by bringing an action in rem, he should not, despite a subsequent change of ownership of the res, be bale to prosecute it through all its stages, up to judgement against the res and payment out of the proceeds.

It seems to me that it would be strange if a statutory right of action in rem only became effective, as against a subsequent change of ownership of the res, upon arrest of the res, and yet, by the same statute, as conferred the right of action, arrest was in many cases prohibited.

Based on such principle, it has been concluded that by issuing a writ in rem against a ship, a statutory right in rem attaches on the ship and can be enforced against the ship regardless the change of the ownership of the ship. Secondly, if the defendant does not acknowledge service of the writ or submit to jurisdiction of the court before which the in rem action is proceeding, the action remains to be an action in rem against the ship.

However, there has been discussions on whether such principle or even the traditional features of in rem action will be undermined by the House of Lords' decision on *The Indian Grace* [1992] Lloyds Rep. 124. The case and relevant comments will be examined now.

In *The Indian Grace* [1992] Lloyds Rep. 124, the plaintiff, Indian Government (IG), succeeded in an action in personam in India for a short delivery of cargo against the defendant shipowner, ISC, who jettisoned the cargo following the fire on board. Before the judgement in India was handed down, IG brought an action in rem in England for a claim of loss of cargo arising from the same accident. After the judgement in India was handed down, a sister ship of the carrying ship was arrested by IG and ISC submitted to English jurisdiction and provided security. The issue before House of Lords is that whether an action in personam and an action in rem shall be treated as actions between different parties when they arise from the same cause of action for the purpose of Civil Jurisdiction and Judgements Act 1982 (CJJA 1982) Section 34 with regard to res judicata.

It has been held that for purpose of Article 34 of CJA, an action in rem was an action against the owners from the moment the English court was seized with jurisdiction, when the writ is served or is deemed to be served. From that time, the owners were parties to the proceedings in rem.

There have been discussions on whether the judgement of such case will undermine *The Monica S* [1967] 2 Lloyd's Rep. 113. This may be two folds: (i) whether the arrest of the ship in hands of bona fide purchaser should be barred by Section 34 of CJA if a foreign judgement in personam has been given but no security has been obtained, and, (ii) if the owner is personally liable from service, there is potential risk of a possible arrest of any other ship owned by bona fide purchaser. Since in *The Indian Grace* [1992] Lloyds Rep. 124, the ship which was arrested was not transferred to any bona fide buyer after the issue of the writ and based on the fact that the plaintiff's motion was to retry the same issues against the same party, i.e., the owners of the ship before and after the writ of action in rem is issued, the principle laid down by 'The Monica S' is not undermined. Such arguments are undoubtedly right in light of the different facts of the two cases and the real purpose of the decision of *The Indian Grace* [1992] Lloyds Rep. 124 with regard to res judicata.

However, the decision of *The Indian Grace* [1992] Lloyds Rep. 124 may influence the nature of in rem action. Because it is held that the in rem action is against the owners of the ship from the moment of service of the writ, there will be a serious consequence, that is, once the writ is served or deemed to be served, the jurisdiction will be extended to the owners of the ship even if they do not appear before English court and since the action has become an action in personam, the ship is no longer the limit of liability.

Such a decision seems to have diverted from the principle established by various pervious cases. The arrest of ship is held to be a means of enforcing claims against the owners if they appear before the court. Such a line was followed by various later

cases. Thus, *The Indian Grace* [1992] Lloyds Rep. 124 was criticized on this aspect by English admiralty law scholars.

In order to solve the possible difficulties, various academic suggestions have been made. One of them is to interpret the decision by applying the nature of ‘quasi in rem’ (M 2005) claims, which is that such a claim ‘is in form a claim against the ship, but in truth it is a claim against the owners of the ship at the time the claim is commenced’. Another is that first, for a truly in rem claim, ‘service of the in rem claim does not create a personal jurisdiction...’ secondly, ‘the service of the in rem claim creates a personal jurisdiction against the person who is interested to defend the claim...’ and thirdly, ‘The point of service of in rem proceedings is only relevant to res judicata issue.’ It seems that the later suggestion is more acceptable because it is in accordance with the nature of maritime lien which attaches on the ship once it is created and is in line with various authorities relied upon by *The Indian Grace* [1992] Lloyds Rep. 124.

4.2.3.2 Under Chinese Law?

Unlike the situation under English law, there is not a concept of ‘in rem’ action under Chinese law. As a basic law of any civil and commercial litigation, CPC 1982/1986 provides that:

Article 49: Any citizen, legal person and any other organization may become a party to a civil action.

The above provision may be interpreted in the way that a legal action can only be taken, in English legal phraseology, in personam, and any property cannot be a party to an action. However, the action to arrest ship is classified as a property preservation measures (in French, *saisie conservatoire*) as provided by Article 93 of CPC 1982/1986:

Where, due to urgent circumstances, the lawful rights and interests of an interested person would be irreparably harmed if he did not immediately apply for preservation of property, such person may apply to the People's Court requesting measures for the preservation of property prior to the institution of an action...

If the applicant fails to institute an action within 15 days after the People's Court has adopted preservation measures, the People's Court shall cancel the order of arrest of ships, since it can't counterwork the third party.

According to the above provision, the real party against whom the action of preservation of property is taken shall be deemed to be the party liable for the claim based on which the action is taken since the claimant is obliged to commence a legal proceedings against the defendant liable for the claim in personam within the specific limit of time.

Following the above general principle, SMPL 1999 provides the following rules in the context of arrest of ship:

Article 18: Where a person against whom a claim is made provides security or a party applies for discharge of preservation of the maritime claim on justified grounds, the maritime court shall discharge the preservation promptly.

If within the time limit prescribed by this Law a maritime claimant fails to bring an action or apply for arbitration in accordance with an arbitration agreement, the maritime court shall discharge the preservation or return the security promptly.

Article 28: 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 the 30 days, or where a maritime claimant applies for arrest of a ship in the process of a legal action or arbitration, arrest of the ship is not subject to the time limit prescribed in the preceding paragraph.

The principles behind the above provisions may be summarized as that being in the nature of property preservation, the arrest of a ship is for the purpose of forcing the defendant liable for the claim to put up security and to defend the claim. The real person aimed at is the person interested in the ship. This is quite similar to one of the academic views under English law in regard to who is the defendant in the in rem proceedings, which is called ‘procedural theory’ as referred to *The Indian Grace* [1992] Lloyds Rep. 124. The above Article is drafted in the way to follow the traditional Chinese law theory that the nature of a court proceedings is against the liable person rather than the property itself. One point worthy mentioning here is that unlike English law, there is not such a procedure to issue a claim form under Chinese law, thus, the claimant cannot crystallize his claim as he can do under English law. The action against the ship can only be taken when the ship in question is physically within the jurisdiction of a certain Chinese maritime court.

Although there is not an action in rem in real sense as under English law, being influenced by the concept of action in rem, there are certain provisions in SMPL 1999 which are similar with characteristics of action in rem under English law, such as:

Article 25: A maritime claimant who wishes to apply for arrest of the ship concerned but cannot promptly ascertain the name of the person against whom the claim is made may still apply for its arrest.

Strictly speaking, this is a provision outside the general framework of civil procedure theory because any action taken by the claimant shall be against certain person being either natural person or corporate person as provided by Article 49 of CPC 1982/1986. The reason why such a restriction is not applicable when taking the action to arrest a ship may be that under certain circumstances, a claimant, for example, a consignee under owners' bill of lading, may not have a chance to get the details of the owners of the carrying ship and such claimant shall not be deprived of taking an immediate action to arrest the ship. Whatsoever the consideration of the legislators is, such a provision is new breakthrough of the traditional procedure theory of Chinese law.

Another provision with a distinct feature of action in rem in SMPL 1999 is Article 76 governing the provision of security, which is:

The amount of the security requested for preservation of a maritime claim by a maritime claimant from a person against whom the claim is made shall be equal to the amount of his credit, but shall not exceed the value of the property preserved.

This provision has, by its real meaning, set a limit of the security demanded by the claimant shall not exceed the value of the ship regardless how excessive the claim is to the value of the ship. The theory behind this quite clear, that is, once the ship is under arrest, the value of the ship itself will be the security to meet the possible judgement in the claimant's favour. As this provision is a restriction to the claimant's right, logically, if the person liable does not appear to provide security, the highest

indemnity that the claimant can get under the law through a court sale will be limited to the value of the ship. It is of great interest to note that such a provision is so in line with the judgement of *The Cella* [1989] 13 PD. 82, which has been discussed under 4.2.1.1. However, if the person liable appears before the court and it is subsequently decided by the court that the claim is in excess of the value of the ship, the claimant can still enforce the balance of the claim against other ships or property of the person liable by taking another proceedings, which is called 'Execution' in CPC 1982/1986.

Chapter V Arrest of Relevant Ship & Sister Ship in China

Thus far, the basic features of the action of arrest of ships under the two legal systems have been viewed and in this part, the important practical aspect which is the arrest of relevant ships and sister ships will be looked into.

5.1 English Law- How to establish ‘in personam’ link and the piercing the corporate veil

As the truly in rem claim is concerned, according to Section 21 (2) & (3) of SCA 1981, there is no requirement to establish an in personam link between the person who would be liable in personam when the cause of action arose and who is the owner of the ship when the claim form is issued.

However, when a non-truly in rem claim is brought, the in personam link has to be determined according to Section 21 (4) of SCA, which provides that:

In the case of any such claim as is mentioned in section 20(2)(e) to (r), where –

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action in personam (‘the relevant person’) was, when the cause of action arose, the owners or charterer of, or in possession or in control of, the ship

an action in rem may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owners of that ship as respects all the shares in it or the charterer of it under a charter by demise;

or

(ii) any ship of which, at the time when the action is brought, the relevant person or the beneficial owner as respect all the shares in it.

From the above statute, the in personam link shall be established by steps.

The first step is that should a claimant wish to take an action in rem, he has to determine that when the cause of action arose, the person liable in personam must have been the owner or charterer or person in possession or in control of the ship.

As decided in the case of *The Evpo Agnic*[1988] 2 Lloyds Rep. 411,CA, the owner in the above the provision refers to registered owners only. It is also held by Lord Donaldson in the same case that the charterer is limited to demise charterer. However, other decided cases did extend such a scope. In *The Span Terza*[1982] 1 Lloyds Rep. 225, the Court of Appeal held that charterer must include time charterer. A very recent case, *The Tychy*[1999] 2 Lloyd's Rep. 11, has reached a conclusion that the voyage charterer is under this category.

After identifying the person who would be liable in personam when the cause of action arose, the claimant then has to make sure that the ship, against which the action in rem is to be taken shall be beneficially owned or demise chartered by the person liable in personam.

It is relatively simple to identify the charterer by demise for a claimant but the difficulty always arises in relation to qualifying the 'beneficial owner'.

Before the current SCA 1981 came into force, English court had decided the meaning of beneficial owner under Administration of Justice Act 1956 in the case of *The Andrea Ursula* [1971] 1 Lloyd's Rep. 145 . Brandon J. held that 'a ship would be beneficially owned by a person who, whether he was the legal or equitable owner or not, lawfully had full possession and control of her, and, by virtue of such possession and control, had all benefit and use of her which a legal owner would ordinarily have'. Since the issue was whether a demise charterer was the beneficial owner of the ship, following the above reasoning, the demise charterer was held to be a beneficial owner.

However, in a later case, *The I Congreso Del Partido* [1977] 1 Lloyd's Rep. 536; [1980] 1 Lloyd's Rep. 23, Robert Goff J. declined to follow 'The Andrea Ursula' and held that the beneficial owner only refers to legal or equitable owner. The reasoning given by Robert Goff is "the intention of Parliament in adding the word 'beneficially' before the word 'owned'...was simply to take account of the institution of the trust, thus ensuring that if the ship were operating under the cloak of a trust, those interested in the ship should not thereby be able to avoid the ship." So, the operator and manager of the ship, in this sense, shall not be deemed to be the beneficial owner.

The above decision was followed in the case of *The Father Thames* [1979] 2 Lloyd's Rep. 364, in which the court had to decide again whether the demise charterer should be regarded as the 'beneficial owner'. Sheen J. held that the beneficial owner as in AJA 1956 does not apply to a demise charterer.

Since SCA 1981 has clearly included charterer by demise, this has solved a part of the difficulty in prior cases. Thus, under SCA 1981, if the ship sought to be arrested is the ship in connection of which the claim arose, the ship should be beneficially owned, which means equitably owned as decided in *The I Congreso Del Partido*

[1977] 1 Lloyd's Rep. 536; [1980] 1 Lloyd's Rep. 23 (not operated or managed) or chartered by demise, according to SCA 21 (4), by the person liable in personam. However, should the claimants seek to arrest alternative ships rather than the one from which the claim arose (normally referred to as 'other or associated ship', or, 'sister ship'), it is virtually clear that according to SCA 21 (4) (ii), when the action is brought, the ship must be owned by the person who would be liable in personam.

It has to be admitted that due to the long established practice in the shipping industry that the several ships financed by the same source to be registered in the names of different companies, it is always to difficult to arrest alternative ships because from the available documents, the ship operated or managed in the same fleet are normally owned by different registered owners.

One of the remedies given by English law to the claimant is that cooperate veil can be pierced in certain circumstances. Decided cases involving arrest of ship have established that the corporate veil can be pierced if there has been a sham transfer of the ship in order to avoid liability. The word 'sham' was defined by Lord Diplock in *The Snock v. London and West Riding Investment Ltd.* [1967] 1 All ER 518 as follows:

...it means acts done or documents executed by the parties to the "sham " which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* (1882), 21. CH.D.309 and *Stoneleigh Finance Ltd. v. Phillips*, [1965] 1 All E.R. 513; [1967] Q.R.537), that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents

are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.

In the case of *The Saudi Prince* [1982] 2 Lloyd's Law Report 255, the cargo claimants arrested the vessel 'Saudi Prince' which was deemed to be the sister ship of the ship carrying the cargo suffering damage to enforce their claims. Mr. Orri, the owner of the carrying vessel sought to set aside the arrest as he alleged that before the writ was issued, the 'Saudi Prince' had been transferred to another new company. Evidence showed that the new ship owning company had not properly been incorporated, as the shareholders had not paid the money of shares under the circumstances that the ship is transferred for value. So, the cooperate veil was pierced and Mr. Orri was the true beneficial owner.

Nevertheless, the one ship company structure used by the ship owners to limit liability are fully legitimate as held in the case of *The Maritime Trader* [1981] 2 Lloyd's Rep. 153 and such a structure shall not be deemed as an fraud to justify the lifting of corporate veil. So, it is not always the case that if there is a transfer of the ship in order to corporate different registered owning companies, the court shall go to lift the cooperate veil. The general line which may be drawn from *The Saudi Prince* [1982] 2 Lloyd's Law Report 255 and *The Avemticum* [1978] 1 Lloyd's Rep. 184 is that the court may decide to lift the cooperate veil if there has been a transfer after the claim arose but before the arrest of the ship. If evidence shows that the transfer is a sham one following the test given by Lord Diplock in *The Snock v. London and West Riding Investment Ltd.* The [1967] 1 All ER 518, the cooperate veil may be pierced.

The general position of the arrest of relevant ship and sister under SCA 1981 has been well summarized by Lord Donalson in the case of *The Evpo Agnic* [1988] 2 Lloyds Rep. 411,CA:

The truth of the matter, as I see it, is that s. 21 does not go, and is not intended to go, nearly far enough to give the plaintiffs a right of arresting a ship which is not 'the particular ship' or a sister ship, but the ship of a sister company of the owners of 'the particular ship'. The purpose of s. 21(4) is to give rights of arrest in respect of 'the particular ship', ships in the ownership of the owners of 'the particular ship' and those who have been spirited into different legal, i.e. registered, ownership, the owners of 'the particular ship' retaining beneficial ownership of the shares in that ship. This was the situation in *The Saudi Prince* and was alleged to be the situation in *The Aventicum*.

5.2 Chinese Law- the provisions regarding the 'relevant ship and sister ship'

Except the claims truly in rem discussed in 2.2.2, Chinese law does require an in personam link to arrest a ship for those non-truly in rem claims. Article 23 of SMPL 1999 provides that:

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

(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 demise charterer of the ship is held responsible for a maritime claim and is the demise charterer or the owner of the ship when the arrest is executed;

A maritime court may arrest other ships owned by the shipowner, demise 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.

So, the in personam link required by Chinese law can be summarized as

1) For the purpose of arresting the particular ship, the person who is liable in personam should be the owner, or demise charterer of that ship when the cause of action arose and should be the owner or demise charterer of that ship when the arrest action is brought,

2) For the purpose of arresting any other ship a) the person who would be liable in personam should be the owner, demise charterer, time charterer or voyage charterer of the ship; b) when the cause of action arose and should be owners of the other ship; c) when the arrest action is brought.

5.3 Some Particular Discussions about this Category in China.

5.3.1 The Strict Definition about ‘ship-owner’ in Chinese Law

The concepts behind the above provision are quite similar to those behind Section 21 (4) of SCA 1981 but there is an obvious difference, that is, Article 23 of SMPL 1999 never mentions the words ‘beneficial owner’, in stead, it only contains ‘ship-owner’. The question then arises; does ‘ship-owner’ under Chinese law have the same meaning of ‘beneficial owner’ under English law?

Article 9 of MC1992 has the following provisions:

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.

Article 7 of MC1992 has the following provisions:

The ownership of a ship means the shipowner's rights to lawfully possess, utilize, profit from and dispose of the ship in his ownership.

Under the above provision, the legal "shipowner" is inclined to mean the one who has the ownership of the ship, who are a) lawfully possess; b) utilize; c) profit from which; d) have the dispose of the ship. The concept of The 'beneficial owner' doesn't existed in the Chinese law. But in the practice, a lot of juridical persons can get profit from the certain ship while is not the shipowner. whereas under English law, the beneficial owners refer to the equitable owners of trust, regardless whether is accompanied with legal ownership. The ship may be legally owned by A but equitably owned by B but under Chinese law, the ship can only be owned by the legal owner who has the ownership of the ship.

Following the concept under Chinese law, it is further submitted that the remedy of the claimant to pierce the cooperate veil is hardly workable under Chinese law because it is not based on the concept of equitable ownership. As Chinese law has strict provision in relation to the requirement of ownership to consider the in personam link when taking the arrest action, once the ship is lawfully transferred according to statutory requirement of the registry, the claimant will be quite unlikely to apply to the court to look behind the transfer since the registry will be the conclusive evidence of the ownership. By saying the above, it is submitted that the only chance for a claimant to apply to a Chinese court to lift the cooperate veil is that he has to first produce evidence that there is a sham transfer of the ownership of the ship according to the law of the flag state of that ship, under which circumstance the

court may, at its discretion, order a disclosure of all the documents in relation to the transfer.

5.3.2 The Current Scopes of ‘relevant ship and sister ship’ in China

Actually, there have been no legal definition for the concept of ‘sister ship’. The so called ‘sister ship’ in China is refer to all the other ships except for the ‘particular ship’ which has the same ownership by who may be assumed liable in personam to the maritime claim. Due to the special characteristic of shipping market, transferring some functions of the ownership of a ship is widely applied to the practice, such as charter. From the law theory about the creditor’s right, the object of measures of ‘save from damage’ is not always the object which is directed fell on by the creditor’s right. According to Article 23 of SMPL 1999, just mentions above, there are two situations that can arrest the relevant ships:

(a) As far as the shipowner and demise charterer for consideration, when they are assumed to hold responsible for a maritime claim and is the owner of the ship when the arrest is executed, the court can arrest not only the particular ship but also the other ships which has the same ownership.

(b) As far as the time charterer or voyage charterer for consideration, when they are assumed to hold responsible for a maritime claim, if the owner of the particular ship is not liable for such a maritime claim, the particular ship can’t be arrested, but the court can arrest the other ships owned by that time charterer or voyage charterer when carrying the arrest into execution. The reason is that the purpose of the plaintiff might go by the broad because the liability person can easy abandon the ship if it’s just under the charter. On the other hand, arrest of ships brings a lot expense, the shipowner usually assume the loss. If the shipowner is not the liable party, and at the same time the charterer who is liable has bad credit standing or low compensation ability, when the shipowner had assumed the compensation, he would be difficult to seek the compensation from the charterer. So the law restricts the scope of ships

which can be arrested when the liability party has the ownership. In the voyage charter, the payment is the freight, when the voyage is ended; the contract between the charterer and shipowner is no longer existed. So the ship under this kind of charter cannot be arrested when the charterer is held responsibility for such claim. In common reason, the time charterer limit it's right about the ship of usufruct the ship, the payment is the rent, the particular ship can't be arrested to discharge the liability of the time charterer when the time charterer is held responsibility.

5.3.3 The Limitation of the Scope

Article 23 of Special Maritime Procedure Law of the PRC only mentions some forms of 'sister ship', But there are far more forms of 'sister ship', not only in the theory but also in the practice. Nowadays, because of the competition and specialization of shipping market, more and more shipowners entrust their ships to a large ship operating company. Under the current Chinese law, when a relative ship is under the control of an ship operator, the legal shipowner can easily gainsay the connection to avoid liability; from the other side, even if the ship operator has the liability for the maritime claim, he can easily declare that he has no ownership of the ship, so that there is no personam link to assume the liability on the other ships under its operation. To solve the practical problem, it's suggested to introduce the concept of 'beneficial owner' under English law into Chinese law. If the ship operator can be defined as 'beneficial owner', in case of its liability for the maritime claim, it's ship can be arrested and also arrested under the name of 'sister ship'. Obviously, it can protect the rights and interests of the claimants and also benefit the favourable order of maritime market.

In the Arrest Convention 1952, Article 3(4) provide 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 ship or any other ship in the ownership of the charterer by demise...

The scope of arrest sister ship is limited to the shipowner and demise charterer.

The Article 23 of SMPL 1999 is quite similar to Article 3(2) of the Arrest Convention 1999. The time charterer and voyage charterer are involved in this category. It's an important improvement to accord with the practice, but never the least.

Just as mentioned before, in the English law system, the person liable in personam must have been the owner or charterer or person in possession or in control of the ship. With the development of case jurisdiction, new type of charters can be involved. In case of *The Tychy* [1999] 2 Lloyd's Rep. 11, the slot charterer is involved. It's more sensitive adopt itself to the new development of shipping market.

In the current Chinese law, it seems a little more strict about the scope for arrest sister ships. Just three kinds of charterers are definitude in the law statute. From the other point of view, the shipowner in China doesn't have the relating right if chartering its ship under a slot charter, obviously it's unfair.

5.3.4 The Register of Maritime Claims relating to a Sister Ship

Article 111 of SMPL 1999 provide that:

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 maritime claims 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.

The question then arises, if the auctioned ship is a sister ship, does it mean that maritime claims relating to the sister ship shall also be registered to be satisfied from the proceeds of ship auction?

As far as I know, the “maritime claims” shall include but not be limited to the 22 types of maritime claims enumerated in article 21 of SMPL 1999. At present, in judicial practice, maritime court of PRC adopted that all the claims secured by maritime lien, possessory lien over a ship, ship mortgage and other common maritime claims relating to the ship to be auctioned may be registered to be satisfied from the proceeds of ship auction.

Since the maritime claimant may apply for arresting the sister ship or ships for the claims relating to another sister ship, the claims relating to another sister ship shall be permitted to be satisfied from the proceeds of the sister ship arrested and auctioned, otherwise, the stipulation of permitting arrest of sister ship will become impractical, even seem ridiculous.

5.3.5 Maritime Claims Secured by Maritime Lien to Arrest a Sister Ship

Article 23 of SMPL 1999 provides that:

If any of the following circumstances exists, a maritime court may arrest the involved ship:

(5) where a maritime claim is entitled to a maritime lien.

...with the exception of the claims related to ownership or possession of the ship.

It's obviously that the sister ship can be arrested when a maritime claim is entitled to a maritime lien because of no exception. But Article 28 of MC 1992 has the following provisions:

A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.

It seems that to arrest a sister ship when a maritime claim is entitled to a maritime lien has been excluded by this provision. Because maritime lien adhere himself to the certain ship. The maritime lien can't transfer from the certain ship to its sister ship. But the host creditor's right, which is secured by the maritime lien, is not adhering to the certain ship; it can be dissociated from the certain ship. In order to protect the creditor's right, the relating sister ship still can be arrested. It's noted that at this time, the maritime claim brings the creditor's right, but without the maritime lien, so it can't take priority in compensation. Seen that relating provision in Article 21 of MC 1992:

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, demise charterers or ship operators with respect to the ship which gave rise to the said claim.

Such exposition seems to accord with logic, but might contort the intention of the legislator. Seen that in the relating provision in Article 27 of MC 1992:

In case the maritime claims provided for in Article 22 of this Code are transferred, the maritime liens attached thereto shall be transferred accordingly.

The intent of protection of the maritime lien is obviously to see from this provision. Then, the conflict of this two law statutes emerges. When A maritime lien is enforced by the court by arresting the relating sister ship, is the maritime claim which is entitled to a maritime lien still taking priority in compensation? From the current provisions, we can't put the maritime liens at the priority in such compensation from the auction of relevant sister ships. From the personal point of view, that is the violation of permitting the arrest of relevant sister ships "in where a maritime claim is entitled to a maritime lien". At least, when arresting sister ships, the right of maritime liens can't be protected as equally as when arresting the particular ship.

In a certain extent, the MC 1992 should be amended, because the special laws are prior to common law in Chinese law system. The suggestions are the following:

- (1) Amend the Article 28 of MC 1992 as "A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien, or arresting the 'relevant sister ships' for the security of compensation"
- (2) Add an Article to state the order of compensation under the situation of arrest of 'relevant sister ships'.

Chapter VI Conclusions and Recommendations

6.1 Conclusions

6.1.1 The Similarities and Differences between Chinese Law and English Law – the concept of “Arrest of ships”

Although there is no uniform worldwide acceptable definition about ‘arrest of ships’, and there is also no specific definition in the Chinese law, but commonly speaking, ‘arrest of ships’ means the force measure which carried by the courts to resort the given ship or forbid it to sail away according to the application of maritime claimant.

The traditional litigation theory of Chinese law admits action in personam, but disavowal action in rem. But, in a certain extent, the Special Maritime Procedure Law of the PRC accepts the action in rem. At least, it brings the similar function as action in rem. In other aspect, it can be found that the action in rem is the litigation which is dead against the ownerships and the interest parties of the certain rem. The real purpose of action in rem is to against the liability personam.

In the legal system of arrest of ship, the differences under the two laws shall be attributed to the different legal concept, such as the crystallization of non-truly in rem and maritime liens. However, it is quite obvious that there are so many similarities in English and Chinese laws. The reason may well be that the current English statute,

namely SCA 1981 is drafted on the basis of Arrest Convention 1952 and Chinese law is in line with the Arrest Convention 1999 developed from Arrest Convention 1952. It can be anticipated that, with the economic globalization, Chinese law and English law will become more similar, more harmonious, especially on the list of claims and provision of security by the claimants.

6.1.2 The Advantages and Disadvantages Of Arrest of ships in Chinese Law System

Just as discussed above, the arrest of ships in Chinese law system is a tool as ‘maritime claim preservation’, it admits action in personam. Comparing with action in rem in English Law, the advantages of ‘maritime claim preservation’ can be summarized as the following:

(1) Larger scope of the protection of creditor’s right.

The liability is not limited to the ship arrested itself, if the maritime claim can’t be fulfilled in compensation arose from such ship, the claimant can still enforce the balance of the claim against other ships or property of the person liable by taking another proceedings. Action in rem in English Law has its limitation of compensation; the claim can’t in excess of the value of the ship.

(2) More consideration about protecting the right of the third party.

The China maritime courts will consider whether the measure of arrest of ships would bring damage to the legal right of the third party, if thus, would not arrest the ship. Action in rem will not consider that.

(3) The measure of arrest of ships can be adopted before or after the litigation.

The function of arrest of ships in China does not involve solving the dispute but

purpose to obtain the security. Action in rem has another purpose of find the liability party to appear before the court. Action in rem also solves the dispute so that the arrest of ships must before the litigation.

(4)The ‘maritime claim preservation’ can be applied to arbitration. It’s more flexible to solve the practical problem.

It’s no doubt that every legal system has its limitation; it’s also the objective of this paper to find those disadvantages, such as summarized as the following:

(1) Lack of convenience

The court can’t refuse to arrest of the ship if the action in rem is in accordance with the legal procedure. The simpleness of requirement will bring convenience to those maritime claimants. In the Chinese law, the claimants should hand over the script application, stating the reason and providing evidence, the judge will be given by the maritime court after he approve that.

(2) Restriction of the right of maritime claimants

The advantage of more consideration about protecting the right of the third party is also the disadvantage for the protecting the right of the maritime claimants. It also brings the risk that vicious transfer of the property might happen before the judge. Moreover, Action in rem doesn’t have time limit until the security in exchange of the release of the ship under arrest is provided or ship is auctioned by the court. The ‘maritime claim preservation’ has the time limit of 30 days, and the claimants should appeal in this period of time.

6.2 Recommendations about Amendment of Chinese Legislation in the issue of ‘Sister Ship’

Generally speaking, the action in rem has its advantage of piercing the corporate veil.

Regard this, for the better protection of maritime claimants, China law should go further to absorb the pith of action in rem, such as the concept of ‘beneficial owner’ in the case of arrest of relevant ship & sister ship. In the other aspect, because of the different background of law tradition, some concept of arrest of ships should be further illuminated for the better understanding, replacing simplified following.

Different countries has it’s own policy, but the shipping market is global. In The System of ‘associated ship’ in Republic of South Africa and ‘theories des apparences’ in France, they give a relative loose interpretation about requirement of arrest the ships.

In China, the ‘single ship company’ is not so popular and a great deal of ‘sister ships’ existed. With the development of charter market, to maintain the justice and equitableness, there is a need to amend the current law in this issue. For the purpose of protection of the right of maritime claimants and the creditor’s right, there are recommendations as the following:

(1) Suggest that the Article 23 of the SMPL 1999 should be amended, the general term of “charterer” should be used to replace the current words of demise charterer, time charterer and voyage charterer, given the relating illustration the scope of ‘the charterer’ which is assumed in this issue by the form of judicatory interpretation of Supreme People’s Court.

(2) Suggest that The MC 1992 should be amended. Since the maritime lien adhere to the particular ship, and the arrest is a measure for the preservation of the maritime claim to give security to the remedy in China, when it’s enforced by the arrest of relating sister ship, it still takes priority in compensation comparing with other maritime claims, but might stand back comparing with the maritime lien adhered to the certain sister ship.

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